



New Mexico Department of Transportation
Office of Equal Opportunity Programs

CIVIL RIGHTS EQUAL EMPLOYMENT OPPORTUNITY

Field Procedures Manual

**Americans with Disabilities Act (ADA) Program
Disadvantaged Business Enterprise (DBE) Program
Equal Employment Opportunity (EEO) Program
Labor Compliance (LC) Program
On-the-Job Training (OJT) Program**

Supplement to the NMDOT Construction Office Procedures Manual
Supplement to the NMDOT Construction Manual
Supplement to the Tribal/Local Government Handbook

August 2017

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Foreword

This Field Procedures Manual is intended as a guide for District field personnel and Tribal/Local Public Agencies (T/LPA) in performance of routine American's with Disabilities Act (ADA), Disadvantaged Business Enterprise (DBE), Equal Employment Opportunities (EEO), Labor Compliance (LC), On-the-Job Training (OJT) and overall contract compliance review, oversight and acceptance functions. This manual is a living document and was created for mandatory use and reference by field personnel. Any suggested changes or modifications to this manual should be sent to the New Mexico Department of Transportation's (NMDOT) Construction and Civil Rights Bureau (CCRB).

This manual is a subset of the NMDOT Civil Rights/EEO Compliance Program and the NMDOT DBE Program. This manual has been developed and prepared by the Department's CCRB under the guidance of the State Construction Engineer (SCE) and six District Engineers.

The Cabinet Secretary of the NMDOT has delegated primary responsibility to the SCE for compliance with federal regulations in accordance with Title 23 USC 140, Federal Highway Administration (FHWA) Required Contract Provision 1273, Executive Order 11246, 49 CFR 26 and other pertinent regulations and rules. The SCE, in consultation with the District Engineers, shall recommend and advance policy and procedure with regard to the ADA, DBE, EEO, Labor and OJT programs to ensure NMDOT compliance with federal and state regulations.

I would like to thank the many District Staff members, the FHWA staff, and the CCRB staff members who provided input and guidance in development and review of this document. Their dedication to excellence and their contributions to the development of this document will serve to institutionalize and preserve the processes and procedures for administration of the Civil Rights/EEO program now and for many years to come.

Sally Reeves

Sally Reeves, Acting State Construction Engineer
Construction and Civil Rights Bureau
August 2017

NMDOT Civil Rights / EEO Program Introduction and Background

1. Introduction

The NMDOT has established a Civil Rights/EEO Program that includes an EEO Program, LC Program, and DBE Program in accordance with requirements and regulations of the United States Department of Transportation (USDOT), United States Department of Labor (USDOL), FHWA, and the State of New Mexico. The NMDOT administers these Programs through its CCRB, District Engineers (DE) Assistant District Engineers (ADE), Project Managers (PM), Office Managers (OM), Field Technicians, Local Government Support Staff and Audit Staff. The FHWA supports and guides the NMDOT in the administration of these Programs.

The NMDOT is an Equal Opportunity Employer and is responsible for and committed to ensuring equal employment opportunity on its federal and state funded projects regardless of race, disability, age, color, religion, sex, sexual orientation, gender identity, or national origin.

The NMDOT, as a recipient of federal funds, has a responsibility to ensure subrecipients (prime contractors, subcontractors, T/LPA) of state and federal funding comply with all pertinent EEO, LC, and DBE requirements.

This manual must be used by District field personnel and T/LPAs in administration and oversight of contractor compliance with the Civil Rights/EEO Programs. This manual will document procedures and provide guidance in fulfilling the various responsibilities each program entails.

The use of the term "Project Manager" shall be taken to mean either the NMDOT or T/LPA Project Manager unless otherwise noted in the procedures.

Contact the CCRB for any support or guidance needed in administration of these Programs.

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2. Background

The Civil Rights/EEO Program has its background or "roots" in the Civil Rights Act of 1964. The Civil Rights Act was landmark legislation in the United States that basically outlawed racial segregation and mandated non-discrimination in the workplace.

The Civil Rights Act is composed of 10 Titles or what are commonly referred to as “Chapters”. Title VI of the Civil Rights Act of 1964 and its subsequent amendments and supportive legislation prohibit discrimination on the basis of race, disability, age, color, religion, sex, sexual orientation, gender identity, and national origin on federally assisted programs and activities.

Title VI makes it a Policy of the United States that discrimination will not occur in programs and activities receiving federal funds. Title VI also authorizes appropriate federal agencies to take action to carry out this policy.

The NMDOT works with two primary federal agencies in the transportation industry charged with promulgating nondiscrimination regulations. The first is the USDOT and its primary agencies, the FHWA, the Federal Aviation Administration (FAA), and the Federal Transit Administration (FTA). The second is the USDOL and its Office of Federal Contract Compliance Programs (OFCCP).

The NMDOT assures compliance with federal nondiscrimination laws through mandated programs established under the Department’s CCRB as a requirement to the NMDOT’s continued receipt of federal funds.

Prime contractors awarded NMDOT and T/LPA federal-aid construction contracts become “Subrecipients” of federal funds under FHWA regulation and thus are mandated to abide by all Civil Rights and EEO obligations under the law. As Subrecipients and as a condition of contract award, prime contractors and their subcontractors affirm that they will carry out all Civil Rights and EEO obligations and will work with the NMDOT and the Federal Government in their review of its activities under the contract.

The NMDOT and T/ LPAs (as the contracting agency) have primary responsibility to ensure compliance by its contractors and subcontractors with all Civil Rights/EEO Program requirements and regulations contained in federal-aid construction contracts. The NMDOT accomplishes this responsibility through contract oversight, program administration, and contractor compliance at the General Office OEOP, District Office and Project Office levels. The NMDOT and LPAs are also responsible to the FHWA and other federal agencies for ensuring that all federal-aid contract requirements are met.

Chapter I –Americans with Disabilities Act (ADA) Program Oversight and Procedures

1. Overview

The primary purpose of the NMDOT ADA program is to ensure that people with disabilities have the opportunity to use the transportation system in an accessible and safe manner. As a recipient of Federal aid, NMDOT and T/LPAs must not discriminate on the basis of disability in any highway transportation program, activity, service or benefit provided to the general public; and must ensure that people with disabilities have equitable opportunities to use the public rights-of-way system.

The ADA 42 U.S.C. §§ 12131-12134 (2012) is a broad civil rights statute that prohibits discrimination against people with disabilities in all areas of public life. State and local government services, activities and policy-making are specifically addressed under Title II of the ADA; and Title II, Subpart A, covers public rights-of-way. The Title II implementing regulations are found at 28 C.F.R. § 35.101 (a) (2016). The United States Department of Justice has rulemaking authority and enforcement responsibility for Title II, while the USDOT is legally obligated to implement compliance procedures relating to transportation, including those for highways, streets, and traffic management. FHWA Office of Civil Rights oversees the USDOT requirements in these areas.

Section 504 of the Rehabilitation Act of 1973 (29 USC 794) prohibits discrimination on the basis of disability in federally assisted programs, except as it is preempted by the ATSA to security screeners (see *Joren v. Napolitano*, 633 F.3d 1144, (7th Cir. 2011)). Section 504 requirements for recipients of USDOT federal aid are covered under 49 C.F.R. § 27.3 (2015) (, *Nondiscrimination on the Basis of Disability in Programs and Activities Receiving or Benefiting from Financial Assistance*).

The aforementioned laws and regulations require accessible planning, design, and construction to integrate people with disabilities into mainstream society. NMDOT and T/LPAs are required to properly and actively consider ADA requirements in all phases of their federal-aid projects.

2. Procedures

- A. Project Scoping:** Each NMDOT Regional Design Center Assistant Manager is required to determine that ADA considerations and appropriate decisions were made during the Preliminary Field Review and Project Scoping processes before a Final Scoping Report is signed by the Regional Design Center Manager, Project Development Engineer and District Engineer. The determination will encompass whether the work to be performed is an alteration, and what level of survey needs to be provided. Guidance concerning work that

is considered an alteration is located at XXXXXXXX. Regardless of whether the project is an NMDOT lead or T/LPA lead project, Districts will have to seek CCRB review concerning whether ADA facilities are properly addressed for the project before the project can proceed to design.

- B. Project Design:** Projects with pedestrian access facilities must be designed in accordance with the NMDOT Standard Drawings, which meet or, in some cases, are more restrictive than the Pedestrian Right-of-Way Accessibility Guidelines (PROWAG) standards.
- C. Construction:** NMDOT and T/LPA Project Managers must utilize the NMDOT construction inspection procedure for curb ramps in the Notices to Contractors concerning the same that require pre-pour measurements and documentation and post-pour measurements and documentation from a qualified inspector. The construction inspection forms have typical measurements for each type of ramp, so the inspector and the contractor have the requirements readily available.

3. Compliance

Compliance with the ADA, the PROWAG Standards, and the NMDOT Standard Drawings is required to obtain federal financial participation on a project with pedestrian access facilities. Failure to design and construct a project in compliance with ADA, the PROWAG Standards and the NMDOT Standard Drawings will require remedial efforts to meet standards, up to and including facility tear-out and reconstruction-. The federal government may refuse to reimburse the NMDOT or T/LPA for the funds expended on a non-compliant project.

Chapter II - DBE (DBE) Program Oversight and Procedures

1. Introduction

- A. The NMDOT has established a DBE Program in accordance with regulations of the USDOT, 49 C.F.R. § 26.1-§26.109 (2012) "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs" (DBE regulations) and under the guidance of the FHWA. The NMDOT DBE Program applies to both NMDOT federal-aid projects and T/T/LPA federal-aid projects that receive federal funding through the NMDOT.

Objective - The objective of the DBE Program is to ensure that small businesses owned and controlled by minorities, women, and other socially and economically disadvantaged persons have the opportunity to grow and become self-sufficient so that they are able to compete, on an equal basis, with non-disadvantaged businesses for contracts and subcontracts in the transportation industry. Ultimately, through these opportunities, DBE firms may advance to compete for contracts and subcontracts without DBE Program assistance.

The NMDOT will strive to meet the overall State Goal for DBE participation in the federal-aid construction program. In this effort, the NMDOT has adopted a policy of using Race-Conscious and Race-Neutral measures to achieve DBE participation. The primary Race-Conscious measure employed by the NMDOT is identifying and assigning specific DBE project Goals on a project by project basis. To the extent that the NMDOT exceeds its Race-Conscious measures, the NMDOT may implement Race-Neutral measures to maintain a narrowly tailored DBE Program. District staff should become familiar with DBE Program and Goal requirements on its construction projects in order to verify and enforce contractor DBE program compliance. Oversight by the NMDOT or T/LPA Project Manager and its staff of contractor's efforts to meet DBE goal requirements on projects will ensure effective and meaningful DBE participation in the program and ultimately will aid the NMDOT in meeting its overall State DBE participation goal on federal-aid construction projects.

DBE Program Established as a Condition of Federal Funding - The NMDOT receives federal funding for its Highway Construction, Aviation, and Transit Programs from the USDOT through programs of the FHWA, FAA, and FTA. As such, NMDOT becomes a recipient of federal funds and is responsible for administering its DBE program and is legally accountable for expenditure of USDOT financial assistance in accordance with federal requirements. As a condition of receiving this assistance, the NMDOT Cabinet Secretary (or designee) signs an assurance that it will comply with the DBE regulations in the establishment and administration of a DBE Program. Contractors, subcontractors, suppliers, manufacturers, consultants and Local Public Agencies all become subrecipients of USDOT federal funds when they enter into federally assisted contracts, subcontracts, or Local Government Agreements with the NMDOT. As subrecipients of USDOT federal funds through programs of the FHWA, FAA, or FTA, the NMDOT requires they comply

with the requirements of the DBE regulations, the NMDOT DBE Program, and DBE contract provisions.

As subrecipients of federal funds and as a condition of contract award, prime contractors, subcontractors, suppliers, manufacturers, consultants, and T/LPAs affirm that they will carry out DBE obligations and will work with the NMDOT and the Federal Government in their review of its activities under the contract.

The DBE Program is mandated by the USDOT and is established under the NMDOT's CCRB) as a requirement for the NMDOT's continued receipt of federal funds for its transportation projects.

2. DBE Program Objectives

The primary NMDOT DBE Program objectives are:

- A. To ensure nondiscrimination in the award and administration of federal-aid projects.
- B. To create a level playing field on which DBEs can compete fairly for federal-aid contracts.
- C. To ensure that only firms that fully meet the eligibility standards specified in DBE regulations are permitted to participate as DBEs in federal-aid contracts.
- D. To help remove barriers to the participation of DBEs in federal-aid contracts.
- E. To assist the development of firms so they can ultimately compete successfully in the marketplace outside of the DBE Program.
- F. To provide appropriate flexibility to recipients of federal funds in establishing and providing opportunities for DBEs.
- G. To ensure contractors, subcontractors, and all subrecipients of federal funding fulfill their DBE obligations under the contract.
- H. To ensure NMDOT fulfills its responsibility for administration and enforcement of the required DBE contract provisions on a contract by contract basis in accordance with DBE regulations.

3. Definitions

- A. B2GNow – is a web-based software program used to collect, verify and manage payment information for prime contractors, subcontractors, and DBE suppliers and manufacturers working on federal-aid projects. Additionally, the software is used to collect and report DBE participation and utilization on federal-aid projects and to ensure all subcontractors are paid promptly.
- B. Commercially Useful Function (CUF) – a DBE performs a CUF when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a CUF, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material and installing (where applicable) and paying for the material itself.

- A. Local Public Agency (T/LPA) - T/LPAs, as subrecipients of USDOT federal funding through the NMDOT must abide by all NMDOT DBE requirements. The NMDOT through the CCRB and District Offices provides oversight of these T/LPA federal-aid projects.
- B. New Mexico Unified Certification Program (NMUCP) – a program administered by the NMDOT that provides a one-stop shopping service to applicants seeking DBE certification. DBE certifications of firms under this program are recognized by the USDOT as meeting all requirements for use of DBEs by all public and private entities in New Mexico.
- C. Race Neutral Measures – or Program is one that or can be used to assist all small businesses. For the purpose of this part includes gender neutrality. Race Neutral means measures taken to meet DBE Program objectives that are tailored to assist all small businesses including DBEs and do not single out a specific minority group. In the construction program, if only race neutral measures are employed to meet the DBE state goal, then DBE participation is measured based on a contractor’s routine subcontracting practices with DBE firms. No DBE goal is specifically established for the federal-aid project. Race neutral measures may include programs that encourage small business participation, provide assistance in obtaining bonding and financing, provide technical assistance, distribute information on contract opportunities and available small business firms, and implement programs to enhance small business management, provide assistance to start-up firms, and assist DBEs in utilizing emerging technology.
- D. Race Conscious Measures – or Program is one that is focused specifically on assisting only DBEs including women owned DBEs. The principal race conscious measure employed by the NMDOT is setting individual contract DBE goals on select federal-aid projects. The NMDOT uses both race conscious and race neutral measures in its effort to meet its overall State DBE goal.
- E. Recipient – any entity, public or private, to which USDOT financial assistance is extended through programs of the FHWA, FAA, or FTA whether directly or through another recipient.
- F. Subrecipient – any entity, public or private, to which USDOT financial assistance is extended through a recipient, through programs of the FHWA, FAA, or FTA whether directly or through another recipient.
- G. USDOT Assisted Contract – means any contract between a recipient and a contractor (at any tier) funded in whole or in part with USDOT financial assistance. USDOT assisted, federally assisted, and federal-aid are terms used interchangeably.

2. DBE Program Responsibility

- A. **General** - The NMDOT, as the primary recipient of federal funding, is responsible for ensuring compliance by subrecipients (prime contractors, subcontractors, T/LPAs) with all DBE Program requirements and regulations. The NMDOT accomplishes this responsibility through a tiered approach of contract oversight, program administration, and verification of contractor compliance at the General Office CCRB, District Office and Project Office levels. The NMDOT is also responsible to the USDOT for ensuring that the NMDOT’s DBE Program is implemented and

maintains sufficient oversight to ensure contractor compliance with and enforcement of all DBE provisions.

T/LPAs who receive and use federal funding from the NMDOT on its highway infrastructure projects also have a primary responsibility to ensure compliance with all DBE program provisions by its contractors and subcontractors. The T/LPA must ensure that it establishes procedures to administer DBE Program requirements and assigns qualified personnel to provide oversight and enforcement of contractor compliance with DBE Program obligations under the contract. The T/LPA shall be responsible for providing the same level of oversight of DBE Program requirements on its federal-aid construction projects as provided by the NMDOT.

- B. **CCRB** – the Construction and Civil Rights Bureau through its CCRB State Construction Engineer and Staff is responsible for:
- 1) Implementation and Oversight of the NMDOT’s DBE Program
 - 2) Certification of DBE Firms. Maintenance of the DBE Firm Certified Directory. Access to the Certified DBE Firm Directory on-line.
 - 3) Recommending and establishing Policy and Procedure in administration of the DBE Program.
 - 4) Coordination of DBE Program requirements with the Districts, FHWA, and all subrecipients including contractors, subcontractors, and T/LPAs.
 - 5) Overall DBE State Goal - Setting the tri-annual Overall State DBE Participation Goal.
 - 6) DBE Project or Contract Goal – setting a project specific DBE goal utilizing the Engineers Estimate and taking into account the size of project, location, type of work and availability of DBEs to perform components of the work.
 - 7) Reports - Required reporting to the NMDOT Secretary, FHWA, Federal Transit Administration (FTA) and Federal Aviation Administration (FAA).
 - 8) Training – providing training on DBE Program requirements, processes, and procedures.
 - 9) Support – providing support and guidance to the Districts and all subrecipients in DBE Program requirements, oversight, and enforcement.
 - 10) Audits – Conducting periodic audits of contractor compliance with DBE program provisions.
 - 11) Certification – Oversight and administration of the New Mexico Unified Certification Program.
 - 12) B2GNow – Oversight and administration of the B2GNow contractor payment and DBE utilization software program.
- C. **District Engineer** - The District Engineer is responsible for ensuring contractor compliance with all DBE provisions contained in federal-aid contracts both on NMDOT lead projects and T/LPA projects with an NMDOT oversight responsibility. The District Engineer will generally carry out this responsibility by assigning staff responsibility and authority to act on his or her behalf to ensure contractor compliance with DBE provisions. The District Engineer will routinely delegate areas of DBE oversight, verification, and compliance monitoring responsibility to his or her ADEs, Audit Supervisor, Local Government Coordinators, and Project Engineers/Managers.
- D. **NMDOT or T/LPA Project Engineer/Manager** - The NMDOT or T/LPA Project Manager with the support from his or her staff serves as the front line in DBE oversight responsibility and coordination with the contractor to adequately meet all program obligations. The NMDOT or

T/LPA Project Manager and his or her staff receive support in DBE Program administration from the CCRB. Primary DBE Program responsibilities include:

- 1) Know and understand federal-aid contract DBE provisions included in the contract.
- 2) Notify the CCRB of any contractor DBE non-compliance that cannot be adequately addressed at the project level.
- 3) Seek direction and guidance from CCRB staff for questions or issues arising out of the DBE program compliance process.
- 4) Coordinate and interact with the contractor on a frequent basis to ensure all DBE obligations are met under the contract.
- 5) Obtain and process all required DBE Compliance documentation to be submitted by the contractor on federally funded highway construction contracts.
- 6) Verify DBE payments can be counted towards the DBE goal. If materials or supplies are purchased from a DBE supplier, 60% of the cost of the materials or supplies may be counted towards meeting the goal. If materials are purchases directly from a DBE Manufacturer, 100% of the cost of the materials may be counted towards meeting the goal. The B2GNow program will automatically calculate the applicable percentage provided subcontracts and material supplier agreements are properly set up within the system. (See all criteria in the section titled, "Counting DBE Participation Towards Goal" in the *Selected DBE Program Provisions* of the Contract.)
- 7) Ensure DBE subcontractors perform a CUF on the project.
- 8) Approval of subcontract set up in B2GNow.
- 9) Monitor monthly progress towards achieving the project DBE goal.
- 10) Use the B2GNow software program on a regular basis to monitor contractor, subcontractor, and DBE payments during the course of the project to ensure the DBE goal is being attained and Prompt Payment provisions of the contract are being complied with.

E. **Contractor** – The contractor and its subcontractors are responsible for compliance with all DBE Program requirements. Primary DBE Program responsibilities include:

- 1) Project DBE Goal – must make a good faith effort to meet or exceed the project DBE goal.
- 2) Shall utilize those DBE firms indicated on the A-585 form to meet the project DBE goal. Terminations, substitutions, deletions of DBE firms are allowed provided procedures are followed as detailed in the *Notice to Contractors, Federal Requirements*.
- 3) Shall make prompt payment to its DBE and non-DBE subcontractors as required by the NMDOT DBE Program Prompt Payment Clause and Section 108.1 of the Standard Specifications. (See Section 10 of this Chapter for Prompt Payment requirements)
- 4) Shall set up subcontracts in B2GNow in accordance with Section 7.C. of this Chapter.
- 5) Shall utilize the B2GNow software to report its monthly payments to all subcontractors including DBE subcontractors, suppliers, and professional service providers. Subcontractors are responsible for reporting monthly payments to all second-tier subcontractors.
- 6) Shall maintain sufficient records of its DBE activities to comply with DBE program requirements.
- 7) Shall ensure each of its DBE subcontractors performs a CUF on the project.

3. DBE Goals

- A. **Setting Overall State DBE Goal** - The NMDOT, as a recipient of USDOT federal funds, is mandated by USDOT to establish an overall state goal for the utilization of DBEs on USDOT-assisted contracts (federal-aid Projects). The state goal is expressed as a percentage of funds paid to DBEs versus all funds paid out on federal-aid projects.
- 1) The CCRB State Construction Engineer has the primary responsibility for establishing and obtaining FHWA approval of the state DBE goal.
 - 2) The state DBE goal is established on a tri-annual basis and sets the overall DBE goal for the next three years.
- B. **Means to Meet Overall State Goal** – The Overall State DBE Goal will be met by using both race-neutral and race-conscious measures. The principal race-conscious measure employed by the NMDOT is setting individual contract DBE goals on select federal-aid projects.
- C. **Project Goal Setting** - If the NMDOT deems that race-conscious measures are feasible for a particular federal-aid contract, the NMDOT will establish a DBE goal for that contract. Contract (or project) DBE goals will only be used and established for contracts that have substantial subcontracting opportunities for DBEs. Items considered in establishing the DBE contract goal will include, but are not limited to, the size of the project, type of work involved, location of the work and the availability of DBEs to perform that particular work.

To be responsive, prime contractors bidding on an NMDOT federal-aid project for which a DBE contract goal has been established, must either meet or exceed the goal or show good faith efforts to meet the goal. A prime contractor will indicate how it will meet the established DBE goal on a particular federal-aid project by listing the DBE subcontractors it will use on Form A-585A DBE A-1. This form is submitted with the Bid and can be found in the contract documents. The prime contractor must also ensure its DBE subcontractors and suppliers submit Form A-644 to the NMDOT within the time stipulated in the Notice To Contractors in order to verify DBE participation in the contract.

4. DBE Contract Regulations

- A. **Ensure Contractor Compliance** - The following is a list of DBE contract regulations that the contractor must comply with. The NMDOT or T/LPA must ensure contractor compliance with these regulations.
- 1) USDOT DBE regulations 49 CFR 26 included in the contract document by reference.
 - 2) The NMDOT *Notice to Contractors, Federal Requirements* found in the contract document.
 - 3) Nondiscrimination – Selection of Subcontractors, Procurement of Materials and Leasing of Equipment (FHWA-1273 II.9)

- a. Obligations towards DBEs – DBEs shall have equal opportunity to compete for and perform subcontracts that the contractor enters into under the contract. The contractor will use its best effort to solicit bids from and to utilize DBE firms or subcontractors with meaningful minority group and female representation among their employees.
- B. DBE Records and Reports (FHWA-1273 II.11.)**
- 1) Contractor’s records shall document progress and effort being made in securing the services of DBE firms or subcontractors with meaningful minority and female representation among their employees.
 - 2) Contractor DBE records shall be maintained for a period of three years from project completion.
- C. B2GNow – Mandatory Use of Certified Payment and DBE Monitoring and Compliance Software**
- 1) As per the *Notice to Contractors, Federal Requirements* the prime contractor, all subcontractors, and DBE Firms working on federal-aid projects shall use the B2GNow Software Program to report and confirm payment information as required by the contract and as specified by the CCRB.
 - 2) B2GNow shall be used on all NMDOT federal-aid projects.
 - 3) T/LPA –shall ensure a provision is included in the T/LPA contract requiring the use of B2GNow on T/LPA federal-aid projects utilizing federal funds administered by the NMDOT.

5. DBE Program Process and Procedures

- A. DBE Files** - The NMDOT or T/LPA Project Manager shall be responsible for maintaining the project DBE files. This responsibility is often delegated to the Office Manager. The project DBE files shall be kept up-to-date. The project DBE files shall be made a permanent part of the Project Files and shall be placed in Section 9 of the Project Files or as indicated in the latest edition of the NMDOT Office Procedures Manual maintained by the Construction Bureau.
- B. Review the Contract for DBE Requirements** – The NMDOT or T/LPA Project Manager and staff shall review the project contract for DBE requirements. DBE requirements included in a contract will vary depending on funding type and construction scope.
- 1) Federal-aid projects with an established DBE goal in the contract
 - a. Will contain a specific DBE goal for the project.
 - b. Will contain a copy of Form A-585A DBE A-1 *Race Conscious Measure Project, Contract Goal for DBE Program in Highway Construction*. This form will list the DBE goal and the DBE firms and dollar volumes the prime contractor intends to use on the project to

meet the goal. Verify that the total of each of the proposed amounts on Form A-585A meet or exceed the contract DBE goal.

- c. Will contain a contract provision entitled, *Notice to Contractors, Federal Requirements*. These provisions detail specific NMDOT DBE program requirements. Review these provisions.
- 2) Federal-aid projects without an established DBE goal in the contract – (Only race neutral measures will be used and counted towards meeting the State DBE goal, as no race conscious measure established.)
 - a. Federal-aid projects that are generally small in scope or that have minimal subcontracting opportunities for DBEs will not include an established DBE goal for the project.
 - b. The contract will contain a provision entitled, *Notice to Contractors, Federal Requirements*. These provisions detail specific NMDOT DBE program requirements. This provision is included in the contract for race neutral DBE participation requirements. Review these provisions.
 - 3) 100% State Projects – will have no DBE requirements

C. B2GNow – New Project Set Up and Usage Procedures – The following summarizes general B2GNow project set up responsibilities and procedures for use by NMDOT District Staff and Local Public Agency (T/LPA) Staff.

1) NMDOT Responsibility for Project Set Up and Use of B2GNow –

- a. NMDOT Project Set Up Responsibilities - Each District is responsible for setting up its assigned federal-aid projects in B2GNow. This responsibility will generally be delegated to the District Audit Section Supervisor and staff. The District Audit Section Supervisor shall set up the federal-aid project in B2GNow and make it ready for use by the NMDOT Project Manager and contractor. The District Audit Supervisor shall use the *B2GNow Staff User Manual* and procedures established by the CCRB for logging into and setting up new projects in B2GNow. The CCRB will provide support in new project set up .
- b. NMDOT B2GNow Usage Responsibilities -
 - i. The CCRB is responsible for approving all subcontractors set up by the prime contractor in B2GNow. Subcontractor approval in B2GNow is required prior to contractor reporting of subcontractor and DBE subcontractor payments in B2GNow. The Prime Contractor is responsible for uploading approved subcontracts in B2GNow per *Notice to Contractor, Federal Requirements*. .
 - ii. The NMDOT Project Manager is responsible for monitoring contractor payments reported in B2GNow to subcontractors and DBE Firms on a monthly basis to ensure

compliance with the Prompt Payment Provisions of the Contract. (See Prompt Payment Provisions below)

- iii. The NMDOT Project Manager is responsible for monitoring contractor payments reported in B2GNow to DBE Firms on a monthly basis to verify satisfactory progress towards meeting the established project DBE goal, when applicable.

2) T/LPA Responsibility for Project Set Up and Use of B2GNow

- a. T/LPA Project Set Up Responsibilities – The T/LPA Project Manager is responsible for setting up its NMDOT oversight federal-aid projects in B2GNow. The T/LPA should obtain support for new project set up and use of B2GNow by contacting the CCRB.
 - b. T/LPA B2GNow Usage Responsibilities -
 - i. The T/LPA is responsible for reporting monthly progress payments to the prime contractor in B2GNow. **Payments shall be reported without Gross Receipts Tax.**
 - ii. The T/LPA is responsible for approval of all subcontractors set up by the prime contractor in B2GNow. Subcontractor approval in B2GNow is required prior to contractor reporting of subcontractor and DBE payments in B2GNow.
 - iii. The T/LPA is responsible for monitoring subcontractor payment information entered by the prime contractor in B2GNow to ensure Prompt Payment requirements of the DBE Program are met.
 - iv. The T/LPA is responsible for monitoring DBE payment information entered by the prime contractor in B2GNow to ensure satisfactory progress is being made towards meeting the DBE goal established for the project, if applicable.
- 3) **Timeline for Project Set Up in B2GNow** – The project shall be set up in B2GNow after project award and prior to the preconstruction conference.
- 4) **Documents needed for Project Set Up in B2GNow** - Documents required to set up a new project in B2GNow include the Notice of Award, Notice to Proceed, Executed Contract, and specific contractor contact and vendor information. These documents shall be attached electronically to the project in B2GNow. For assistance contact the CCRB.
- 5) **Notifications Required Upon Project Set Up in B2GNow** –
- a. NMDOT - The District Audit Supervisor shall notify the contractor, the NMDOT Project Manager and CCRB when the new project has been set up in B2GNow. This notification shall be accomplished through the Award Letter Template in B2GNow.
 - b. T/LPA – The T/LPA Project Manager shall notify the contractor, NMDOT District Local Government Coordinator, and the NMDOT CCRB when the new project has been set up in B2GNow. This notification shall be accomplished through the Award Letter Template in B2GNow.

- 6) **Contractor Set Up Responsibilities in B2GNow –**
- a. The prime contractor is responsible for setting up all of its subcontractors and DBE Firms in B2GNow. All subcontractors must be set up in B2GNow. This includes both DBE and non-DBE subcontractors. All DBE firms used by the contractor must be set up in B2GNow. This includes DBE material handlers, haulers, and professional service providers such as surveyors. They must all be set up in B2GNow in order to record and monitor contractor payments to these companies, firms, and individuals to ensure the prompt payment requirements of the contract are being complied with and all payments to DBE Firms are counted towards meeting the DBE goal.
 - b. Subcontractors are responsible for setting up all second-tier subcontractors in B2GNow.
 - c. The contractor and subcontractors shall reference the *B2GNow User Manual* and procedures established by the CCRB in subcontract set up. The contractor shall seek support and guidance from CCRB staff in subcontract set up and general usage of B2GNow.
 - d. The prime contractor shall attach a scanned copy of each subcontract and second-tier subcontract in B2GNow.
 - e. After the NMDOT or T/LPA Project Manager's approval, the prime contractor shall notify all its subcontractors and DBE Firms of subcontract set up, monthly reporting, and payment approval responsibilities that they must perform in B2GNow.
 - f. The prime contractor is responsible for reporting of all payments to its subcontractors and DBE Firms in B2GNow. **All Payments shall be reported in B2GNow without GRT.**
 - g. All subcontractors and DBE Firms are responsible for verification and confirmation of payment data received from the prime contractor in B2GNow.

D. DBE Preconstruction Conference Requirements

- 1) The NMDOT or T/LPA Project Manager and CCRB representative will discuss DBE requirements of the contract at the Preconstruction Conference to ensure that the contractor is aware of its DBE obligations and is informed of the administrative and reporting procedures that will be utilized by the NMDOT or T/LPA.
- 2) The NMDOT or T/LPA Project Manager will at a minimum discuss the following at the Preconstruction Conference:
 - a. The DBE goal established for the project.
 - b. The DBE subcontractors and firms that will be participating in the project.
 - c. The contractor requirement to make a good faith effort to meet or exceed the established DBE goal for the project.
 - d. Project Staff will monitor DBE work activities to ensure a CUF is being performed by the DBE.
 - e. Project Staff will monitor contractor payment information to ensure Prompt Payment requirements are being met.
 - f. Non-compliance procedures and notification.
 - g. B2GNow – It is mandatory that B2GNow be used by the contractor, subcontractors and all DBE Firms. The prime contractor should be informed that it is responsible for setting up all subcontracts and DBE Firms in B2GNow. The prime contractor or any of its

subcontractors or DBE firms may obtain help in the use of B2GNow by contacting the CCRB.

- 3) The NMDOT or T/LPA Project Manager may choose other DBE topics to cover at the Preconstruction Conference from among those listed on Form A-1244 *Civil Rights/EEO Pre-Construction Conference Outline*. See Chapter VIII, Civil Rights/EEO Pre-Construction Conference Procedures of this manual for specific requirements and procedures to follow at the Preconstruction Conference in discussion of DBE requirements.

E. Subcontract Verification of DBE Requirements

- 1) All DBE contract requirements imposed on the prime contractor are in turn imposed on each subcontractor or lower tier subcontractor as per FHWA-1273, Section I., Paragraph 2.
- 2) The NMDOT or T/LPA Project Manager shall review all subcontracts submitted by the prime contractor for approval. The prime contractor shall use Form A-1086 *Permission to Subcontract Request* in submittal of its subcontracts for approval.
 - a. The NMDOT or T/LPA Project Manager will verify Form A-585A *DBE-A1 Race Conscious Measure Project Contract Goal for DBE Program In Highway Construction* is included in each subcontract for those projects containing a project specific DBE goal.
 - b. The NMDOT or T/LPA Project Manager will verify the contractor has identified DBE subcontractors by marking the DBE check box on the *Permission to Subcontract Request* Form.
 - c. The NMDOT or T/LPA Project Manager will compare DBE subcontractors identified on Form A-585A against the DBE subcontracts being reviewed for approval to verify the DBE status of the subcontractor and amounts subcontracted. The CCRB maintains an on-line DBE Directory of Certified Firms located at <https://nmdot.dbesystem.com/FrontEnd/VendorSearchPublic.asp?TN=nmdot&XID=4599>
- 3) See Chapter VII – Subcontracts, Section 4 for detailed procedures in verifying subcontract EEO, labor, and DBE requirements.

F. Monitoring of DBE Goal Attainment

- 1) **Process** - Progress towards meeting the established DBE goal shall be monitored in B2GNow by the NMDOT or T/LPA Project Manager or staff on a monthly basis during the course of the project. The intent is to discern if the contractor is making satisfactory progress towards meeting the goal. It is important that the Project Manager be made aware of any concerns in meeting the goal as soon as possible during the course of the project so sufficient time remains for the contractor to take corrective action. This may occur through a contractor's notification that it will not meet a DBE Goal and provide justification through a Good Faith Effort. Contractor's submittal concerning its Good Faith Efforts should be provided to the DBE Liaison by the P.M..

The monitoring of DBE goal attainment becomes even more important as the project progresses since most DBE subcontract work is scheduled towards the latter end of the project and quick action is needed to first determine if a concern exists and second to take action on that concern. Although it is the contractor's responsibility to monitor its own progress towards meeting the goal, the Project Manager has an oversight responsibility to ensure compliance with this DBE requirement.

T/LPA Projects – Local Public Agencies are responsible for monitoring contractor progress towards meeting the established DBE goal. Use the same procedures as outlined in this section. Should a concern exist that the contractor will not meet the DBE goal, notify the contractor to take corrective action, and also notify the District T/LPA Coordinator who in turn will notify the CCRB so that options may be discussed to support both the contractor and T/LPA in meeting the goal.

- 2) Enter All Approved Change Orders into B2GNow** – Enter both changes in contract amount and changes in contract time. The contract amount as well as contract time must be kept up to date in B2GNow so that the program will accurately compute percent DBE goal attainment.

3) Procedure to Monitor DBE Goal Attainment.

The procedure for monitoring DBE goal attainment involves verifying current status of DBE payments, assessing likelihood that remaining DBE work will be performed, and determining if any changes to DBE quantities of work have been or will be made by Change Order. The B2GNow software will provide all necessary information in addition to the A-585 and the A-1086 Permission to Subcontract form B2GNow records all payments to DBE subcontractors, provides payments to date, DBE subcontract amounts and modifications to 'Original Contract Amount' by Change Order.

- a. Go to the "Subcontractors" tab in B2GNow. Verify that the percentage shown in the Subs Towards Goal column in the Subcontractor Award Totals section is equal to or greater than the contract DBE goal percentage as shown in the upper right hand portion of the screen.
 - i. If the Subs Towards Goal percentage is equal to or greater than the contract DBE goal, then this indicates that the contractor has approved DBE subcontracts in place that will meet or exceed the goal. Monitor monthly payments to ensure all DBE subcontractors are paid for work performed.
 - ii. If the Subs Towards Goal percentage is less than the contract DBE goal, then contact the contractor to determine corrective action needed. Be aware that early on in the project all DBE subcontracts may not yet be submitted or approved. Refer to Form A-585 in the contract for a listing of DBEs the contractor intends to subcontract with.

- b. Go to the “Compliance Audit Summary” tab in B2GNow. This will provide a visual bar graph of DBE goal attainment to date labeled For Credit Progress. The bar graph will be red if current DBE goal attainment is less than the contract DBE goal. The bar will turn green if the current DBE goal attainment has met or exceeded the contract DBE goal.
 - i. Compare the For Credit Progress bar graph to the Contract Progress bar graph. When the Contract Progress bar graph passes 75%, you know the project is nearing completion. Assess the DBE work remaining to verify that it is work that will be completed in the final 25% of the project and that it is anticipated the contract DBE goal will be met.
 - ii. In the Subcontractors –Total Contract section, compare the Actual Percentage paid to the Contracted Percentage. The difference will indicate the percentage yet to be paid to each DBE firm. This difference when added to the current DBE goal percentage achieved should meet or exceed the goal.
- c. The contractor should meet the DBE goal if all DBE participation is completed as scheduled.
- d. Closely monitor Change Orders to verify if adjusted items or work will negatively impact DBE subcontracted items. If DBE subcontracted items are deleted or reduced in quantity, verify that the contractor is aware of this and has taken measures to ensure it will meet the DBE goal and contact CCRB DBE Liaison for further direction and action, if necessary
- e. Through the monthly monitoring of DBE payments, should a concern arise that the contractor will not meet the contract DBE goal based on your monitoring of payments, projected payments and Change Order impacts, the NMDOT or T/LPA Project Manager shall notify the contractor in writing.. The Project Manager must contact CCRB to notify them of the concern and to discuss options available to the contractor to meet the goal and direction to be provided to the contractor.
- f. The contractor’s failure to meet the DBE goal is a reason to withhold payment and assess liquidated damages. The NMDOT or T/LPA Project Manager must inform and seek guidance from the CCRB in cases where a contractor fails to meet a DBE goal.

6. Termination/Substitution/Replacement of DBE Firms Procedures

(See Selected DBE Program Provisions, Disadvantaged Business Participation in USDOT Assisted Contracts for DBE program requirements.)

- A. **Project DBE Subcontractors** - Form A-585 is included in the contract and will indicate the project DBE goal and the DBE Firms the prime contractor intends to utilize on the project to meet that goal. The NMDOT or T/LPA Project Manager and staff should become familiar with the contents of this form and especially the DBE firms that will be utilized on the project.

B. Restriction Against DBE Termination for Convenience –

- 1) The prime contractor shall not terminate for convenience a DBE subcontractor listed on Form A-585 (or an approved substitute DBE firm) without the written concurrence of the NMDOT or T/LPA Project Manager. This includes but is not limited to instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, or with a non-DBE firm, or with a substitute DBE firm, or reducing the amount of work committed to a DBE firm listed on the A-585.

C. Request for Termination or Substitution Procedures

- 1) The prime contractor shall not self-perform or reassign work originally committed to a listed DBE before obtaining written approval from the NMDOT.
- 2) The prime contractor shall submit a request and justification for DBE termination/substitution to the NMDOT or T/LPA Project Manager.
 - a. The prime contractor, prior to submitting its request to terminate/substitute to the NMDOT or T/LPA Project Manager, shall first give notice in writing to the DBE of its intent to terminate/substitute and the reason for the termination/substitution.
 - b. The prime contractor shall copy the NMDOT or T/LPA Project Manager on the Notice of Intent to Terminate/Substitute given to the DBE firm by the prime contractor.
 - c. The DBE has 5 calendar days to respond to the prime contractor's notice and shall advise the prime contractor and the NMDOT or T/LPA Project Manager of the reasons, if any, why it objects to the proposed termination of its subcontract and why the Project Manager should not approve the prime contractor's request for termination.
- 3) The NMDOT or T/LPA Project Manager shall submit a copy of the termination/substitution request as well as the DBE response to the CCRB and shall contact the CCRB for further guidance.
- 4) The CCRB shall review the termination/substitution request and related information and shall make a recommendation to the NMDOT or T/LPA Project Manager within three working days of receipt of information.
- 5) The NMDOT DBE Liaison shall provide a written response to the prime contractor's request. The DBE Liaison may seek additional information as necessary to formulate its response.
- 6) The NMDOT DBE Liaison will provide written consent to the termination request based on the reasons stated in its concurrence document, that the prime contractor has good cause to terminate the DBE firm.

D. If Termination Does Not Result in DBE Shortfall –

- 1) If termination of a DBE does not result in a DBE contract goal shortfall, the prime contractor is not required to find a substitute or replacement DBE firm. The NMDOT or T/LPA Project Manager will strongly encourage the prime contractor do so as to maximize use of DBE opportunities on the project.

E. If Termination Results in a DBE Shortfall –

- 1) If termination of a DBE firm results in a DBE contract goal shortfall, the prime contractor shall make good faith efforts to find a substitute or replacement DBE to meet the goal.
- 2) If the contractor is unable to secure a replacement DBE then the prime contractor shall document its good faith efforts and attempt to find and secure a substitute or replacement DBE.

- a. If the contractor's good faith efforts are rejected by the CCRB, the NMDOT or T/LPA Project Manager shall assess construction contract liquidated damages as provided in Section 11(a) below.
 - 3) The prime contractor shall request, in writing, approval from the NMDOT or T/LPA Project Manager to utilize a substitute or replacement DBE to meet the contract goal. The contractor shall detail the work items to be performed and the estimated dollar amount to be subcontracted.
 - 4) The NMDOT DBE Liaison shall respond in writing to the contractor's request to use a substitute or replacement DBE.
- F. **Good Cause** for termination, substitution or replacement of a DBE includes, but is not limited to, the following circumstances:
- 1) The listed DBE fails or refuses to execute a written contract;
 - 2) The listed DBE subcontractor fails or refuses to perform its subcontract work;
 - 3) The listed DBE subcontractor fails to perform its work on the subcontract in an acceptable way;
 - 4) The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable bond requirements;
 - 5) The listed DBE becomes bankrupt, insolvent, or exhibits credit unworthiness;
 - 6) The listed DBE is ineligible to work on public works projects because of suspension or debarment proceedings pursuant to 2 CFR Parts 180, 215 or 1200 or applicable state law;
 - 7) The listed DBE voluntarily withdraws from the project and provides written notice of its withdrawal;
 - 8) The listed DBE subcontractor is ineligible to receive DBE credit for the type of work required;
 - 9) A DBE owner dies or becomes disabled with the result that the listed DBE subcontractor is unable to complete its work on the project;
 - 10) Other good cause that NMDOT determines compels the termination of the DBE subcontractor or firm, with the concurrence of FHWA.

7. DBE Commercially Useful Function (CUF)

- A. As per 49 CFR 26.55, A DBE subcontractor performs a Commercially Useful Function when it is responsible for execution of the work or a distinct element of the work of a contract or subcontract and carries out its responsibilities by actually performing, managing and supervising the work involved. (CUF definition repeated here for convenience, see also Section 3. Definitions)
- B. **Monitor DBE Work for Commercially Useful Function (CUF)** – The NMDOT or T/LPA Project Manager through its assigned field inspectors shall monitor DBE subcontractor work to verify that the DBE subcontractor is performing a commercially useful function on the project. The NMDOT or T/LPA Project Manager shall assess DBE subcontractor performance, management, and supervision of the work to make a determination of Commercially Useful Function using Form A-1239 *DBE Commercially Useful Function Interview and Assessment*.

The intent is to verify that the DBE subcontractor is actually performing, managing, and supervising the work it is subcontracted to do on the project. Federal regulations prohibit a prime contractor from hiring a DBE subcontractor in name only to broker the work solely for the

purpose of obtaining DBE credit toward the project DBE goal. The DBE subcontractor must actually be in charge of and performing its subcontracted work, hence, performing a Commercially Useful Function.

It is the prime contractor's responsibility to comply with federal and state regulations (49 C.F.R. §26.55 (c) (2014) and the NMDOT DBE Program) requiring a DBE firm to perform a Commercially Useful Function on the project. It is the NMDOT's or T/LPA's responsibility to verify that the prime contractor is complying with DBE CUF requirements and to take enforcement action if it is not.

C. Routine Daily Monitoring for CUF Field Documentation

NMDOT or T/LPA field inspectors should note on their daily work reports work performed by DBEs. Clearly identify the subcontractor as a DBE. Identify work performed and equipment used. Identify ownership of equipment if possible. Note if labor is working for the DBE. Note if the DBE is supervising and managing the daily work.

NMDOT or T/LPA field inspectors should note on their daily work reports the following information when DBE subcontractors are working on the project:

- The names of DBE subcontractors working on the project
- Does the DBE have a foreman supervising the work or is the prime contractor supervising the work? Note the name of the foreman and who he works for.
- Is the DBE using its own equipment or that of the prime contractor? Note the company name on the equipment being used by the DBE.
- Is the DBE performing the work it was subcontracted to do or is the prime contractor performing the work? Note the general description of the work the DBE subcontractor is performing or note if the prime contractor is performing work that the DBE should be performing.
- If the field inspector has reason to believe the DBE subcontractor is not performing a Commercially Useful Function, document any observations and bring them to the attention of the NMDOT or T/LPA Project Manager for further investigation and action.

D. Procedure for Determining DBE Commercially Useful Function (CUF)

- 1) The NMDOT or T/LPA Project Manager or designee shall use Form A-1239 *DBE Commercially Useful Function Interview and Assessment* to verify that a DBE subcontractor is performing a Commercially Useful Function on the project.
- 2) Form A-1239 shall be filled out at least once for every DBE subcontractor on the project.
- 3) The NMDOT or T/LPA Project Manager shall determine when the CUF interview and assessment using Form A-1239 is to be conducted during the course of the project. It is suggested the interview be conducted during DBE peak activity on the project.
- 4) The NMDOT or T/LPA Project Manager may assign field staff to conduct the CUF interview with the DBE foreman and complete the field portion of Form A-1239 using the instructions as provided on the Form.
- 5) Field staff shall submit the completed field portions of the form to the project office staff to fill out the remaining administrative portions of the form using payrolls, subcontracts or any

- other documentation needed. Office staff shall submit the form to the NMDOT or T/LPA Project Manager for evaluation and determination.
- 6) The NMDOT or T/LPA Project Manager shall review the completed Form A-1239 and shall determine if the DBE subcontractor is performing a commercially useful function.
 - 7) The NMDOT or T/LPA Project Manager shall contact the CCRB for further guidance should there be reason to believe the DBE subcontractor is not performing a commercially useful function.
 - 8) The NMDOT or T/LPA Project Manager shall scan the CUF Checklist and attach the file to the appropriate project in B2GNow.
 - 9) File the original CUF checklist in the project DBE file.

E. **Definition, Commercially Useful Function (CUF) –**

The CCRB will supplement monitoring of DBE work for Commercially Useful Function through its DBE Program oversight responsibilities that include periodic audits of Contractor Compliance with DBE program requirements.

- F. **Forms for Determining Commercially Useful Function –** Form A-1239 *DBE CUF Interview and Assessment* is used by the NMDOT or T/LPA Project Manager to field verify that a DBE is performing a Commercially Useful Function on the project.

NMDOT Projects -The NMDOT Project Manager shall ensure that Form A-1239 is completed at least once for each DBE working on an NMDOT federal-aid highway construction project.

T/LPA Projects - The T/LPA Project Manager shall ensure that Form A-1239 is completed at least once for each DBE working on an T/LPA federal-aid highway construction project with NMDOT oversight.

G. **CUF Noncompliance**

- 1) NMDOT Projects - Should the NMDOT Project Manager become concerned that a DBE subcontractor is not performing a commercially useful function based on findings of Form A-1239 or field observation, the Project Manager shall document the basis of those concerns and notify the ADE for Construction and CCRB. CCRB will provide support to the District in determination of commercially useful functions and will make recommendations to resolve the issue in accordance with DBE Program requirements and federal requirements under 49 CFR 26. Credit to a DBE contractor will be counted only if the DBE is performing a Commercially Useful Function on the contract.
- 2) T/LPA Projects - Should the T/LPA Project Manager become concerned that a DBE subcontractor is not performing a commercially useful function based on findings of Form A-1239 or field observation, the T/LPA shall document the basis of those concerns and notify the District Local Government Coordinator. The District Local Government Coordinator should notify the CCRB for support in resolving the issue in accordance with DBE Program

requirements and federal requirements under 49 CFR 26. Credit to a DBE contractor will be counted only if the DBE is performing a Commercially Useful Function on the contract.

8. Prompt Payment and Retainage Requirements

- A. **Requirements** - The NMDOT or T/LPA requires prime contractors to pay all subcontractors including DBE subcontractors for undisputed acceptable work no later than seven calendar days from receipt of each payment the NMDOT or T/LPA makes to the prime contractor. This is commonly referred to as the Prompt Payment Clause. The Prompt Payment Clause is referenced in Section 108.1 *Subcontracting* in the *NMDOT Standard Specifications for Highway and Bridge Construction*, and Section 5 *Prompt Payment and Retainage* section in the *Selected DBE Program Provisions*.

T/LPAs are required to ensure its contractors comply with the Prompt Payment provisions of the DBE Program.

- B. **Verification** - The NMDOT or T/LPA Project Manager shall verify that the contractor complies with the Prompt Payment clause by reviewing the payment date reported in B2GNow against the date each subcontractor reported it received payment from the prime contractor in B2GNow.

C. Procedure to verify payment dates in B2GNow

- 1) Click on the Compliance Audit List tab in B2GNow. This will list the Audits performed on each payment by month.
- 2) Select View Audit in the Actions column on the line corresponding to the payment month you wish to view.
- 3) Note the Payment to Prime date shown in the Audit Information box.
- 4) Scroll down to the Subcontractors box.
- 5) Select the View link in the Confirmed by Sub column for each subcontractor paid this period.
- 6) In the Data Reported box, note the date next to Payment Date (Sub Reported) and compare it to the Payment to Prime date. These should be within seven calendar days of each other.
- 7) Review the Prompt Payment Response and verify whether “Yes”, “No”, or “N/A” has been selected.
 - a. “N/A” is not acceptable. If “N/A” has been selected, the NMDOT or T/LPA Project Manager shall contact the CCRB to initiate resolution of the issue.
 - b. If “No” has been selected, the NMDOT or T/LPA Project Manager or designee shall review payment dates to verify whether the Prompt Payment requirement has actually been violated.
 - i. If the review indicates that payment was actually made timely, the NMDOT or T/LPA Project Manager shall get written confirmation of this fact from the subcontractor and shall change the selection to “Yes” in B2GNow.
 - ii. If the review indicates that payment was not made timely, the NMDOT or T/LPA Project Manager shall require the prime contractor to either prove compliance with the Prompt Payment requirements or assert that a claim exists between the prime contractor and the subcontractor and submit a verifiable written explanation thereof. The CCRB shall make the final determination regarding whether the prime contractor has good cause to delay payment to the subcontractor. Accordingly, the

NMDOT or T/LPA Project Manager shall contact the CCRB immediately upon discovery of a Prompt Payment issue as described above.

- 8) Continued non-compliance may result in withholding of progress payments, termination of the contract, and/or suspension or debarment of the contractor.

- D. **Prompt Payment of Retainage Requirement** – A prime contractor shall promptly release all retainage to its subcontractors within thirty calendar days after the subcontractor's work is satisfactorily completed and payment for the accepted work is made by the NMDOT or the T/LPA.

For purposes of this section, a subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by NMDOT or the T/LPA. When the NMDOT or T/LPA has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed.

9. Compliance Procedures

- A. **Failure to meet the Contract DBE Goal, Liquidated Damages** – If at the completion of the project, the prime contractor has failed to meet the established DBE goal, or has not demonstrated good faith efforts, the prime contractor shall be assessed liquidated damages for the difference between the established DBE goal and the actual DBE participation achieved as per Section 9 of the *Selected DBE Program Provisions, Disadvantaged Business Participation in USDOT Assisted Contracts*. The NMDOT or T/LPA Project Manager shall compute and assess liquidated damages on the final payment to the contractor.
- B. **Failure or Refusal to Correct DBE Program Deficiencies** – Should the contractor or subcontractor fail or refuse to correct noted DBE Program deficiencies, the NMDOT or T/LPA Project Manager shall follow the process and procedure as detailed in Section 10 *Compliance Procedures* of the *Selected DBE Program Provisions, Disadvantaged Business Participation in USDOT Assisted Contracts*. If the deficiencies are not corrected, the Project Manager shall initiate administrative action against the contractor that may include but are not limited to:
- 1) Withholding all or a percentage of monthly partial payments as per section 109.8 of the Standard Specifications for Road and Bridge Construction until the contractor comes into compliance with the requirements of the DBE Program. The NMDOT or T/LPA Project Manager shall notify the CCRB for guidance prior to withholding of partial payments.
 - 2) Initiation of appropriate suspension or debarment or decertification proceedings.
 - 3) Termination of the contract.
 - 4) Referral of any unlawful actions to the appropriate enforcement agencies.
 - 5) Other actions as appropriate, at the discretion of the District Engineer.

Chapter III – Construction and Civil Rights Program Oversight and Procedures

1. EEO Contractor Compliance Program Objectives

The primary NMDOT EEO Program objectives are:

- A. To ensure contractors do not discriminate in employment and contracting on the basis of race, disability, age, color, religion, sex, sexual orientation, gender identity or national origin.
- B. To ensure contractors and subcontractors fulfill their EEO obligations under the contract.
- C. To ensure NMDOT fulfills its responsibility for administration and enforcement of the required EEO contract provisions on a contract by contract basis in accordance with Title 23 U.S.C §140, FHWA-1273 and Executive Order 11246.

2. EEO Program General Responsibilities

A. **CCRB EEO Program Responsibilities** – The CCRB is responsible for:

- 1) Development and implementation of a program to ensure contractors comply with all equal opportunity requirements as required by FHWA-1273, 23 U.S.C. § 140(a) and 23 CFR 230 Subpart C&D.
- 2) Providing support, guidance, and training of NMDOT or T/LPA Project Managers and other District personnel in EEO program oversight and contractor compliance monitoring, verification, and enforcement.
- 3) Providing support, guidance, and training of Local Public Agencies in EEO program oversight and contractor compliance monitoring, verification, and enforcement.
- 4) Ensuring that required contract provisions are in all federal-aid contracts of \$10,000 or more (FHWA-1273).
- 5) Conducting contract compliance reviews of prime contractor and subcontractor EEO programs.
- 6) Preparation and submittal of annual updates and reports required by the FHWA and other governmental bodies.
- 7) Participation and support in conducting Civil Rights/EEO Pre-Construction Conferences.
- 8) Support of Local Public Agency efforts in ensuring contractor compliance with EEO requirements on federal-aid projects.

Maintenance and oversight of the CCRB Civil Rights/EEO website. The website will contain procedures, forms, bulletin board information, and documentation pertinent to the Civil Rights/EEO, Labor Compliance, and Disadvantaged Business Enterprise Programs. The website can be accessed at <http://dot.state.nm.us/content/nmdot/en/CCRB.html>

B. **District Engineer EEO Program Responsibilities** - Each NMDOT District Engineer is responsible for ensuring sufficient monitoring, oversight, and enforcement is performed by

District personnel on federal-aid projects to ensure contractor compliance with EEO contract requirements in his or her respective District. District Engineers will routinely delegate this responsibility to their Assistant District Engineers for Construction, District Audit Supervisors, and Project Managers.

C. NMDOT or T/LPA Project Manager EEO Program Responsibilities

- 1) The NMDOT or T/LPA Project Manager with the support of staff serves as the front line in contractor EEO oversight and verification responsibilities. The Project Manager, through daily coordination and communication with the contractor, ensures contractor compliance with all EEO program obligations.
 - a. The NMDOT Project Manager and staff are supported in EEO oversight responsibilities by the Assistant District Engineer for Construction, District Audit Section, and the CCRB staff.
 - b. The T/LPA Project Manager is supported in EEO oversight responsibilities by NMDOT District Operations personnel such as the ADE for Construction, ADE for Technical Support, District Local Governments Coordinator, and the District Audit Section. Support is also provided to T/LPAs from the CCRB staff in Santa Fe.

The NMDOT or T/LPA Project Manager EEO responsibilities include the following:

- Know and understand federal-aid contract EEO requirements.
- Observe the prime contractors and subcontractors daily work activities for any indication of noncompliance with EEO requirements. The NMDOT or T/LPA Project Manager and staff shall take note of and act on any discriminatory employment practices observed on the part of the contractor or subcontractors. Employment practices include hiring, firing, training, promotion, utilization of employees, recruitment, etc.
- NMDOT - The NMDOT Project Manager shall promptly notify the ADE for Construction and the CCRB of any contractor EEO non-compliance issues considered significant by the Project Manager or that cannot be adequately addressed at the project level.
- T/LPA - The T/LPA Project Manager shall promptly notify the NMDOT District Local Governments Coordinator or Technical Support ADE and the CCRB of any contractor EEO non-compliance issue.
- Seek guidance from the CCRB for questions or issues regarding the EEO program or contractor compliance requirements.
- Coordinate and interact with the contractor on a frequent basis to ensure all EEO obligations are met under the contract.

- Obtain and process all required EEO compliance documentation from contractors ten calendar days before the Pre-Construction Conference on federally funded highway construction contracts.
 - Company EEO Policy Statement and Affirmative Action Plan
 - Letter Designating Company EEO Officer
 - Group/Contact Referral Letters
 - Documentation of indoctrination of the contractor's employees who have an active role in the hiring, supervision, advancement or termination of employees.
 - Contractor EEO meeting agenda and minutes

- Take appropriate action on instances of non-compliance with EEO specifications.
 - Always notify the contractor in writing of instances of EEO non-compliance. Specify the corrective action required and time frame for the contractor to comply.
 - Continued and repetitive non-compliance with EEO Specifications may be considered a breach of contract for which payment may be withheld or the contract terminated.

- Seek training for staff in EEO requirements. Contact the CCRB for training opportunities.

3. General EEO Contract Requirements (FHWA-1273)

- A. **Contract Documents** - Each federal-aid contract book contains various EEO contract documents. The NMDOT or T/LPA Project Manager, Office Managers, and field inspectors should review these documents prior to the start of a new project.

- B. **FHWA-1273, Required Contract Provisions, Federal-Aid Construction Requirements and Special Provision Specific Equal Employment Opportunity Responsibilities** - These contract documents specify EEO, on-the-job training (OJT), labor compliance, and other contract requirements of the FHWA and the U.S. Department of Labor (DOL). These contract provisions are included in each contract book for all federal-aid contracts and must be reviewed by the NMDOT or T/LPA Project Manager and staff prior to the start of a new project.

- C. **FHWA-1273 Applicability** - FHWA-1273 Contract Provisions apply to all work performed on the contract by the contractor's own organization or by its subcontractors.

- D. **Failure to Comply with EEO Requirements** – Failure of the contractor to comply with FHWA-1273 provisions may be considered sufficient grounds for contract termination. (FHWA-1273 I. 3.) The NMDOT or T/LPA Project Manager shall invoke this clause of the contract provisions at the direction of the District Engineer with input and guidance from the CCRB.

- E. **Use of Convict Labor** (Ref. 23 U.S.C. 114(b), 23 C.F.R. § 635.117)

- 1) **Requirements** - The contractor shall not employ convict labor for any purpose within the limits of the federal-aid project unless it is labor performed by convicts who are on parole, supervised release, or probation.
- 2) **Guidance** – The principle behind the prohibition of convict labor is that use of convict labor restricts competition, because convict labor can be furnished at rates well below market labor costs or force account rates.
- 3) **Compliance Procedure**
 - a. NMDOT - The NMDOT Project Manager shall immediately notify his or her supervisor and the CCRB should the Project Manager be made aware of the use of convict labor by the contractor or subcontractor on a federal-aid project.
 - b. T/LPA - The T/LPA Project Manager shall notify the District Local Government Coordinator and the CCRB should he or she be made aware of the use of convict labor on the project by the contractor.
 - c. The NMDOT or T/LPA Project Manager shall notify the contractor in writing of the restricted use of convict labor on the project as per FHWA-1273 I.4. and the Sections referenced above, and shall direct the contractor to refrain from further use. The NMDOT or T/LPA Project Manager shall seek guidance from the CCRB on any further action that may be recommended based on project by project circumstances.

4. Nondiscrimination and Affirmative Action Requirements

[See FHWA-1273 Section II, Special Provision – Specific EEO Responsibilities (23 USC 140), Standard Federal EEO Construction Contract Specifications (EO11246), and Notice of Requirement for Affirmative Action to Ensure EEO (EO11246) all of which are contained in the Contract Book]

A. Applicability

The EEO nondiscrimination contract requirements are applicable to all federal-aid construction contracts and subcontracts of \$10,000 or more.

B. EEO Policy Statement (FHWA-1273 II.1.)

- 1) **Contract Requirements** – The contractor is required to comply with the following contract requirements regarding EEO Policy:
 - a. The contractor shall not discriminate and shall take affirmative action to assure equal opportunity as set forth under laws, executive orders, rules, regulations and orders of the Secretary of Labor as provided or referred to in the contract. These provisions shall constitute the EEO and specific affirmative action standards for the contractor’s project activities under the contract.
 - b. The contractor will work with the contracting agency (NMDOT or T/LPA) and Federal Government to ensure that it has made every good faith effort to provide equal opportunity with respect to all of its terms and conditions of employment and in their review of activities under the contract. (FHWA-1273 II.1.a)

- c. The contractor will work with the NMDOT and Federal Government in their review of the contractor's EEO and labor compliance activities under the contract. (FHWA-1273 II.1.a)
- d. The contractor will accept as its operating policy the following statement as per FHWA-1273 II.1.b.
 - i. **"It is the policy of this Company to assure that applicants are employed, and that employees are treated during employment, without regard to their race, religion, sex, sexual orientation, gender identity, color, national origin, age or disability. Such action shall include: employment, upgrading, demotion, or transfer; recruitment or advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship, pre-apprenticeship, and/or on-the-job training."**

2) Guidance

- a. The contractor is required to adopt an EEO Policy that prohibits discrimination and provides for affirmative action in employment practices. Affirmative action is defined as a good faith effort to eliminate past and present discrimination and to ensure that future discriminatory practices do not occur. (See Attachment O of the "EEO / Affirmative Action Contractor Compliance Package" under Chapter VI, Preconstruction Conference, Contractor Package, for a sample copy of an EEO Policy Statement.)
- b. The goal of EEO is increased participation of minorities and women in the work force, and extends to contractor practices in recruitment, hiring, pay, training, promotion, and retention.
- c. No person is to be subjected to discrimination because of race, color, religion, sex, sexual orientation, gender identity, national origin, age, or disability.
- d. The nondiscrimination provisions extend to the contractor's employment practices, solicitations for employment, selection of subcontractors and suppliers, and procurement of materials.

3) Procedures

- a. The contractor shall provide a copy of the company EEO Policy Statement to the NMDOT or T/LPA Project Manager at a minimum of 10 days prior to the Pre-Construction Conference. (See Attachments I and O of the "EEO / Affirmative Action Contractor Compliance Package" under Chapter VI, Preconstruction Conference, Contractor Package, for a sample copy of an EEO Policy Statement)
- b. The NMDOT or T/LPA Project Manager or designee shall review the contractor's EEO policy statement to verify that it contains the required EEO policy language as stated in B.1.d. of this Chapter and in FHWA-1273 II.1.b.
- c. The EEO Policy Statement must be on the contractor's company letterhead and signed by a company official.

- d. NMDOT - The Project Manager shall refer any questions regarding the acceptability of the contractor's EEO policy statement to the CCRB. The Project Manager shall ensure the contractor places a copy of his or her EEO Policy on the Project Bulletin Board. The Project Manager shall place the original contractor's EEO policy statement in the project EEO files.
- e. T/LPA – The T/LPA Project Manager shall refer any questions regarding the acceptability of the contractor's EEO Policy Statement to the District Local Governments Coordinator or the CCRB. The Project Manager shall ensure the contractor places a copy of his or her EEO Policy on the Project Bulletin Board. The Project Manager shall place the original contractor's EEO Policy Statement in the project EEO files and shall forward a copy to the District Local Governments Coordinator.

c. Designated EEO Officer (FHWA-1273 II.2.)

1) Requirements

The contractor will designate and make known to the NMDOT or T/LPA Project Manager an EEO Officer who will have the responsibility for and must be capable of effectively administering and promoting an active contractor program of EEO and who must be assigned adequate authority and responsibility to do so. (FHWA-1273 II.2.)

2) Guidance

- a. The contractor is required to designate an EEO Officer for the project. The EEO Officer shall have sufficient responsibility and authority to fully implement the contractor's EEO program.
- b. The contractor's designated EEO Officer is the primary contact regarding any issues related to EEO.

3) Procedures

- a. The contractor will notify the NMDOT or T/LPA Project Manager in writing of the company's designated EEO Officer. The contractor is required to designate a Project EEO Officer and in many instances will designate both a Company and Project EEO Officer depending on the size of the company. The written notification of Project EEO Officer shall be provided to the Project Manager at the Preconstruction Conference. (See Attachment O-1 of the "EEO / Affirmative Action Contractor Compliance Package" under Chapter VI, Preconstruction Conference, Contractor Package, for sample letter Designating Company EEO Officer)
- b. In the EEO Officer Notification Letter, the contractor shall include a statement that details the EEO Officer's responsibilities and authority for administering and promoting an active contractor program of EEO.

- c. The NMDOT or T/LPA Project Manager shall review the contractor's submittal to ensure that it contains sufficient information regarding responsibility and authority for administering and promoting the contractor's EEO program. The EEO Officer Notification Letter shall be on company letterhead and signed by an authorized company representative.
- d. The NMDOT or T/LPA Project Manager shall ensure staff is aware of who has been designated as the contractor's EEO Officer for the project and/or company.
- e. The NMDOT or T/LPA Project Manager shall ensure the contractor places a copy of the company EEO Officer Designation letter on the Project Bulletin Board. The Project Manager shall file the submittal in the project EEO files.
- f. The NMDOT or T/LPA Project Manager shall notify the contractor's designated EEO Officer regarding any EEO compliance issues or questions pertaining to the contractor's EEO program.
- g. The contractor's EEO Officer and the NMDOT or T/LPA Project Manager shall be notified should a formal EEO compliance field review be scheduled by the CCRB as part of the NMDOT's contractor compliance program.

D. Dissemination of EEO Policy (FHWA-1273 II.3.)

1) Requirements

- a. **Indoctrination of Contractor hiring personnel** - All of the contractor's employees who have an active role in the hiring, supervision, or advancement of employees are required to be aware of and to implement the contractor's EEO policy and contract provisions.
- b. **Periodic Meetings** – Contractor's supervisory and personnel office employees will meet periodically or once every six months during the course of the project to review the contractor's EEO policy and implementation of the policy. The contractor shall invite the NMDOT or T/LPA Project Manager to the initial meeting. The company EEO Officer will conduct the meetings.
- c. **Indoctrination of new contractor supervisory personnel** – The contractor's EEO Officer will indoctrinate new supervisory or personnel office employees in all major aspects of the contractor's EEO obligations under the contract within 30 days of their reporting for duty.
- d. **Indoctrination of Contractor recruitment personnel** – The company EEO Officer will instruct all personnel engaged in direct recruitment for the project of the contractor's procedures for locating and hiring women and minorities.

- e. **Notices and Posters** – Notices and Posters setting forth the contractor’s EEO policy will be placed on the Project Bulletin Board and/or in areas readily accessible to employees, applicants for employment and potential employees.
- f. **Indoctrination of Employees** – The contractor’s EEO policy and procedures to implement such policy will be brought to the attention of the contractor’s employees by means of meetings, employee handbooks, or other appropriate means.

2) **Guidance**

- a. It is the responsibility of the contractor to conduct periodic EEO meetings to review the contractor EEO policy and implementation of the policy with supervisory and personnel office employees. It is also the responsibility of the contractor to indoctrinate new supervisory personnel, recruitment personnel and employees in the company’s EEO policy and implementation of that policy.
- b. The NMDOT or T/LPA Project Manager must be cognizant of the contractual requirements regarding dissemination of the contractor’s EEO policy and observe the contractor for compliance. The Project Manager must ensure the contractor is making a good faith effort to disseminate its EEO Policy to those who have an active role in the hiring, supervision, or advancement of employees.
- c. The contractor is responsible for providing a bulletin board capable of displaying all the required EEO posters, OSHA posters, Minimum Wage Rates, Company EEO Policy Statement and Emergency Phone Numbers (See Section E. of this Chapter, See Form A-1245 Bulletin Board Checklist Federal-Aid Projects, A-1246 Bulletin Board Checklist on 100% State Funded Contracts)

3) **Procedures**

- a. The NMDOT or T/LPA Project Manager shall request the contractor submit evidence of dissemination of its EEO Policy at the Preconstruction Conference and thereafter during the course of the project when EEO dissemination activities take place. Evidence of dissemination of EEO Policy shall include but is not limited to:
 - i. Contractor EEO meetings, shall be periodically at six month intervals during the course of the project. The contractor shall submit a copy of the EEO Meeting agenda and attendance roster to the NMDOT or T/LPA Project Manager.
 - ii. Documentation of the contractor’s indoctrination of new supervisory personnel in the Company EEO Policy and Procedures. The contractor must provide this documentation to the NMDOT or T/LPA Project Manager each time the contractor hires a new supervisor for the project.
 - iii. Documentation of the contractor’s indoctrination of recruitment personnel in the Company EEO Policy and Procedures. The contractor must provide this documentation to the NMDOT or T/LPA Project Manager each time the contractor hires new recruitment personnel.

- iv. Documentation of the contractor's indoctrination of employees in the company EEO Policy and Procedures.
- b. The NMDOT or T/LPA Project Manager or designee should attend the contractor's project EEO meetings and document items discussed.
- c. The NMDOT or T/LPA Project Manager or field staff must document in the Project Manager Diary or the Inspector's Daily Work Report any site visits made by the contractor's EEO Officer.
- d. The NMDOT or T/LPA Project Manager or CCRB staff may conduct a periodic review of the contractor's project EEO files to ensure compliance with contract EEO Policy dissemination requirements including:
 - i. Periodic Meetings
 - ii. Indoctrination of contractor new supervisory personnel
 - iii. Indoctrination of contractor recruitment personnel
 - iv. Indoctrination of employees

The NMDOT or T/LPA Project Manager or CCRB shall notify the contractor and the contractor's EEO Officer of any deficiencies based on the review and shall request corrective action. A copy of the notice shall be sent to the CCRB and a copy shall be placed in the project EEO files.

E. Bulletin Boards, EEO Posters, Notices

- 1) **Erect and Maintain Bulletin Board** - The contractor is required to erect and maintain a project bulletin board. The Bulletin Board shall be erected and shall include all required documents prior to the start of construction. The Bulletin Board shall be maintained in a presentable manner for the life of the project.

In some instances, it may not be feasible to erect a project bulletin board (mobile operation with no established project office on site). The NMDOT or T/LPA Project Manager will determine when a project bulletin board does or does not make sense. In those instances when an on-site project bulletin board is not feasible, the contractor shall create a project bulletin board notebook containing all required documents. This notebook shall be readily accessible to all employees and shall be available on site and kept in a company vehicle for use by the contractor's employees.

- 2) **Location of Bulletin Board** – The contractor shall locate the Project Bulletin Board in a conspicuous location on the project or in close proximity to the project, readily accessible to employees, applicants for employment, or potential employees. The NMDOT or T/LPA Project Manager shall ask the contractor at the Preconstruction Conference where the project bulletin board will be located and document its location on the *Civil Rights-EEO Preconstruction Conference Outline* Form A-1244. The contractor, as good practice, may also post a second set of posters in the contractor's project field office.

- 3) **Required Posters and Notices** - The contractor is required to post certain Notices, Posters and Company EEO Documents on its Project Bulletin Board as indicated on Form A-1245 *Bulletin Board Checklist Federal-Aid Projects* or Form A-1246 *Bulletin Board Checklist 100% State Projects*. The contractor shall maintain these Notices and Posters in a presentable manner for the life of the project.
- 4) **Bulletin Board Package** – The contractor is responsible for obtaining and posting all required notices and posters. The contractor is also responsible for ensuring the required notices and posters are the current versions. The contractor may obtain the initial required posters and bulletin board checklists at the Pre-Construction Conference from the NMDOT, additional required posters and bulletin board checklists can be obtained online from the NMDOT CCRB Website located at <http://dot.state.nm.us/en/CCRB.html>.
- 5) **Inspection of Bulletin Board** - The NMDOT or T/LPA Project Manager shall routinely inspect the Project Bulletin Board during the course of a project to verify that all required EEO and labor compliance notices and posters are present. The Bulletin Board should be inspected within two weeks of the start of construction then periodically thereafter at the Project Manager’s discretion. The Project Manager shall document the bulletin board inspections using Form A-1245 *Bulletin Board Checklist Federal-Aid Projects* or Form A-1246 *Bulletin Board Checklist 100% State Projects*.
 - a. The Project Manager shall file the Bulletin Board checklist in the project EEO files and upload the same into B2Gnow.
 - b. The Project Manager shall notify the contractor superintendent and EEO Officer, in writing, of any bulletin board deficiencies and requirements for corrective action. This written notification shall be placed in the project EEO file.
- 6) **Inform Employees** - The contractor shall notify all of its employees of the location and information contained on the Bulletin Board. The prime contractor is responsible to ensure all personnel, including subcontractors, know where the bulletin board is located, and know their job classification(s) and wage rate(s) for the project.

F. Nondiscrimination in Recruitment Practices (FHWA-1273 II.4.)

1) Contractor Requirements

- a. When advertising for employees, the contractor will include in all advertisements the words, “An Equal Opportunity Employer.”
- b. Advertisements for employment will be placed in publications having a large circulation among minorities and women in the area from which the project work force would normally be derived.

- c. **Recruitment Process** – The contractor will conduct systematic and direct recruitment through public and private employee referral sources likely to yield qualified minorities and women applicants. To meet this requirement, the contractor will identify sources of potential minorities and women employees and establish procedures whereby minority group and women applicants may be referred to the contractor for employment consideration.
- d. **If a Union Contract Exists** – If the contractor has a valid bargaining agreement providing for exclusive hiring hall referrals, the contractor is expected to observe provisions of that agreement to the extent the system permits compliance with EEO contract provisions. Where implementation of such an agreement has the effect of discriminating against minorities or women, or obligates the contractor to do the same, such implementation violates Federal nondiscrimination provisions.
- e. **Referral of Minority Group Applicants** – The contractor will encourage present employees to refer minorities and women applicants for employment.

2) Guidance

- a. The contractor shall not discriminate in recruitment practices and shall make every effort to identify sources of potential minority and women employees.
- b. The Associated Contractors of New Mexico’s Heavy Highway Affirmative Action Plan (ACNM Plan) is recognized by the Office of Federal Contract Compliance Programs (OFCCP) as meeting the “Standard Federal EEO Construction Contract Specifications (EO11246)” and the “Notice of Requirements for Affirmative Action to Ensure EEO (EO11246).” With this recognition, those contractors signatory to the “ACNM Plan” have been waived from individual review of OFCCP. Contractors signatory to the “ACNM Plan” are still subject to review by FHWA and NMDOT. All contractors non-signatory to the “ACNM Plan” are subject to OFCCP, FHWA and NMDOT review.
- c. The NMDOT or T/LPA Project Manager must be cognizant of the contractual requirements and observe the contractor for compliance. The Project Manager should ensure the contractor is making a good faith effort to recruit minority and women applicants.

3) Procedures

- a. The contractor shall submit to the NMDOT or T/LPA Project Manager, a minimum of 10 days prior to the Preconstruction Conference, copies of its recruitment letters sent to organizations likely to yield qualified minority and women applicants such as, but not limited to:
 - i. Veterans organizations
 - ii. Organizations representing the interests of minority persons
 - iii. Local Division of Vocational Rehab/handicap organizations
 - iv. NM Department of Workforce Solutions
 - v. Local Tribal Employment Office

- vi. Public and private referral sources
- b. The NMDOT or T/LPA Project Manager or the CCRB may conduct periodic reviews of the contractor's project EEO files and will check for contract compliance as follows:
 - i. Verify that all advertisements for recruitment contain the words, "An Equal Opportunity Employer."
 - ii. Verify advertisements for employment are placed in publications having a large circulation among minorities and women in the project area.
 - iii. Verify the contractor has identified sources of potential minority and women employees and has established procedures whereby minorities and women applicants may be referred for employment consideration.
 - iv. Verify the contractor has documented procedures by which it encourages present employees to refer minority and women applicants for employment.

G. Nondiscrimination in Personnel Actions (FHWA-1273 II.5.)

1) Contractor Requirements

- a. The contractor shall establish and administer wages, working conditions, and employee benefits without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, age, or disability.
- b. **Personnel Actions** - Contractor personnel actions of every type including hiring, upgrading, promotions, transfers, demotions, layoffs, and terminations shall be taken without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, age, or disability.
- c. **Periodic Inspections** - The contractor shall conduct periodic inspections of project sites to ensure working conditions and employee facilities do not indicate discriminatory treatment of project site personnel.
- d. **Wage Evaluations** - The contractor will periodically evaluate the spread of wages paid within each classification to determine any evidence of discriminatory wage practices.
- e. **Review of Personnel Actions** – The contractor will periodically review selected personnel actions to determine whether there is evidence of discrimination and shall take appropriate action as warranted.
- f. **Complaints of Discrimination** – The contractor will promptly investigate all complaints of alleged discrimination in connection with its obligations under the contract. (See additional requirements under FHWA-1273 II.5.d.)

2) **Guidance**

- a. The contractor is required to periodically review project sites, wages, personnel actions, etc., for evidence of discriminatory treatment. The contractor is to promptly investigate all alleged discrimination complaints.
- b. Nondiscrimination enforcement responsibilities have been vested with the NMDOT and the T/LPA. The NMDOT or T/LPA Project Manager must be cognizant of the contractual requirements and observe the contractor for compliance. The Project Manager must ensure the contractor does not discriminate in their employment practices, particularly in the hiring, firing, training, promotion, and utilization of employees.

3) **Procedures**

- a. The NMDOT or T/LPA Project Manager or CCRB Staff may conduct periodic field reviews of the contractor's personnel actions to ensure compliance with contract EEO obligations.
- b. The NMDOT or T/LPA Project Manager may request copies of the contractor's periodic EEO Job Site Inspection Reports, Wage Evaluation Reports, Personnel Action Reviews, or Discrimination Complaint Reports should the need arise.
- c. **Discrimination Complaint Procedures**
 - i. The NMDOT or T/LPA Project Manager shall promptly refer any EEO complaints made by the contractor's employees, subcontractors, or subcontractor employees on the job to the CCRB and shall act on subsequent guidance and direction from the CCRB.
 - ii. The NMDOT or T/LPA Project Manager shall promptly notify their immediate supervisor of the discrimination complaint.
 - iii. The NMDOT or T/LPA Project Manager shall document initial contact with the complainant identifying the nature of the complaint, pertinent facts, and complainant contact information. The Project Manager shall forward this information to the CCRB.
 - iv. T/LPA – Local Public Agencies shall follow these same general discrimination complaint procedures as those followed by the NMDOT. The T/LPA Project Manager shall promptly notify the District Local Governments Coordinator and the NMDOT CCRB of any discrimination complaints received. The T/LPA Project Manager shall investigate and document the nature of the complaint and shall require corrective action on the part of the contractor as appropriate. The T/LPA Project Manager shall submit a copy of all documentation to the District Office and the CCRB and shall seek guidance from the NMDOT as needed to ensure compliance with contract provisions.

H. Nondiscrimination in Training and Promotion (FHWA-1273 II.6.)

1) Contractor Requirements

- a.** Contractor assistance towards minority and women employees – The contractor will assist in locating, qualifying and increasing the skills of minorities and women who are applicants for employment or current employees. Such efforts should be aimed at developing full journey level status employees in the type of trade or job classification involved.
- b.** Contractor's Use of Training Programs – The contractor shall make full use of training programs, apprenticeships and on-the-job training for the geographical area of contract performance. Use of training programs shall be consistent with the contractor's workforce requirements and as permissible under federal and state regulations.
- c.** Advisement of Training Programs – The contractor will advise employees and applicants for employment of available training programs and requirements.
- d.** Contractor Review – The contractor will periodically review the training and promotion potential of minority and women employees. The contractor will encourage eligible employees to apply for such training and promotion opportunities.

2) Guidance

The contractor is required to advise employees and applicants of training programs available and to assist in the improvement of the skills of minority and women employees and applicants through such programs.

3) Procedures

The NMDOT or T/LPA Project Manager or CCRB Staff may conduct periodic field reviews of contractor records pertaining to contractor training programs and employee promotion records to ensure compliance with contract EEO obligations.

I. Reasonable Accommodation for Applicants/Employees with Disabilities (FHWA-1273 II.8.)

- 1)** The contractor must be familiar with the requirements of and comply with the Americans with Disabilities Act and all rules and regulations established thereunder.

- 2) Employers must provide reasonable accommodations in all employment activities unless to do so would cause an undue hardship.

3) Procedures

a. Employment Related ADA Complaint Procedures

- i. The NMDOT or T/LPA Program Manager shall promptly refer any employment related ADA complaints made by subcontractors or subcontractor employees on the job to the CCRB Director and shall act on subsequent direction from the CCRB.
- ii. The NMDOT or T/LPA Project Manager shall promptly notify his or her immediate supervisor of the employment related ADA complaint.
- iii. The NMDOT or T/LPA Project Manager shall document initial contact with the complainant identifying the nature of the complaint, pertinent facts, and complainant contact information. The Project Manager shall forward this information to the CCRB.
- iv. T/LPA – Local Public Agencies shall follow these same general employment related ADA complaint procedures as those followed by the NMDOT. The T/LPA Project Manager shall promptly notify the District Local Governments Coordinator and the NMDOT CCRB of any employment related ADA complaints received. The T/LPA Project Manager shall investigate and document the nature of the complaint and shall require corrective action on the part of the contractor as appropriate. The T/LPA Project Manager shall submit a copy of all documentation to the District Office and the CCRB and shall seek guidance from the NMDOT as needed to ensure compliance with contract provisions.

J. Nondiscrimination in Selection of Subcontractors, Procurement of Materials and Leasing Equipment (FHWA-1273 II.9.)

1) Contractor Requirements

- a. Nondiscrimination - The contractor shall not discriminate on the grounds of race, color, religion, sex, sexual orientation, gender identity, national origin, age, or disability in the selection and retention of subcontractors including procurement of materials and leases of equipment.
- b. Notification of EEO Contract Obligations – The contractor shall notify all potential subcontractors and suppliers of required EEO obligations under the contract.
- c. The contractor shall notify all potential subcontractors and suppliers and lessors of their EEO obligations under this contract.

- d. The contractor will use good faith efforts to ensure subcontractor compliance with their EEO obligations.

2) **Guidance**

- a. The contractor's EEO policy also pertains to contractor selection of subcontractors, including material suppliers and equipment leasing companies.
- b. Contractors are encouraged to use DBEs or other subcontractors that employ minorities and women. Furthermore, contractors are required to exercise their best efforts to ensure that subcontractors comply with the EEO requirements.

3) **Procedures**

a. **Discrimination Complaint Procedures**

- i. The NMDOT or T/LPA Program Manager shall promptly refer any discrimination complaints made by subcontractors or subcontractor employees on the job to the CCRB Director and shall act on subsequent direction from the CCRB.
- ii. The NMDOT or T/LPA Project Manager shall promptly notify his or her immediate supervisor of the discrimination complaint.
- iii. The NMDOT or T/LPA Project Manager shall document initial contact with the complainant identifying the nature of the complaint, pertinent facts, and complainant contact information. The Project Manager shall forward this information to the CCRB.
- iv. T/LPA – Local Public Agencies shall follow these same general discrimination complaint procedures as those followed by the NMDOT. The T/LPA Project Manager shall promptly notify the District Local Governments Coordinator and the NMDOT CCRB of any discrimination complaints received. The T/LPA Project Manager shall investigate and document the nature of the complaint and shall require corrective action on the part of the contractor as appropriate. The T/LPA Project Manager shall submit a copy of all documentation to the District Office and the CCRB and shall seek guidance from the NMDOT as needed to ensure compliance with contract provisions.

K. Assurance Required by 49 C.F.R. §26.13(b) (FHWA-1273 II.10.)

- 1) The requirements of 49 CFR Part 26 and the NMDOT's U.S. DOT-approved DBE program are incorporated by reference.

- 2) The contractor or subcontractor shall not discriminate on the basis of race, color, national origin, sex, sexual orientation or gender identity in the performance of the contract. The contractor shall carry out applicable requirements of 49 C.F.R. Part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the NMDOT deems appropriate.

L. EEO Records and Reports (FHWA-1273 II.11.)

1) Requirements

a. Records Retention

- i. The contractor shall keep and maintain required records as necessary to document compliance with EEO non-discrimination and affirmative action requirements.
- ii. Such records shall be retained for a period of **3 years** following the date of the final payment to the contractor for all contract work.
- iii. Such records shall be available at reasonable times and places for inspection by authorized representatives of the NMDOT, FHWA, DOL, DWS, or contracting agency.

b. Contractor Records Documentation Requirements

- i. **Number of Minorities Employed** – The contractor’s records shall document the number of minorities and non-minorities and women employed in each work classification on the project.
- ii. **Progress and Effort Being Made to Increase Employment** – The contractor’s records shall document progress and effort being made to increase employment opportunities for minorities and women.
- iii. **Progress and Effort Being Made in Advancement of Minority and Female Employees** – The contractor shall document progress and effort being made in locating, hiring, training, qualifying, and upgrading minorities and women.

c. PR-1391 - Annual Report (FHWA-1273 II.11.b.)(Notice to Contractors, Standard Federal EEO Construction Contract Specifications)

- i. The prime contractor and all subcontractors shall submit to the NMDOT CCRB an annual PR-1391 report if the contractor or subcontractor performed any work on a federal-aid contract of \$10,000 or more during all or any part of the last payroll period preceding the end of the month of July. (e.g., if the end of the month is Saturday, July 31 then the data reported would be for the payroll period of Saturday, July 24 through Friday, July 30).

2) Guidance and Procedures

- a. The CCRB will provide instructions for preparing and submitting the annual PR-1391.
- b. LCPtracker and PR-1391s – LCPtracker is capable of generating the completed PR-1391 form. The contractor and subcontractor shall use the LCPtracker generated form to prepare and submit its required annual PR-1391 data to the NMDOT's CCRB Contractor Compliance Officer.

5. Nonsegregated Facilities (FHWA-1273 III.) (23 C.F.R. § 633.101 (A))

A. Requirements

- 1) Applies to contractors, subcontractors and material suppliers on all federal-aid construction contracts of \$10,000 or more.
- 2) The contractor must ensure that it does not maintain or provide for its employees any segregated facilities.
- 3) Segregated facilities means waiting rooms, work areas, restrooms, eating areas, locker rooms, transportation, etc. that are segregated by explicit directive or segregated on the basis of race, color, religion, national origin, age or disability.
- 4) The contractor shall provide separate or single-user restrooms and necessary dressing or sleeping areas to assure privacy between sexes.
- 5) The contractor agrees it will obtain identical assurance from its subcontractors and suppliers prior to the award of a subcontract in excess of \$10,000.

B. Guidance

- 1) The intent of this provision is to ensure that discriminatory practices of providing separate facilities or prohibiting minority access to facilities are eliminated.
- 2) By entering into the contract, the contractor certifies that it maintains nonsegregated facilities that conform to requirements of the applicable federal regulations. The prime contractor is required to obtain a similar certification from each subcontractor and supplier, as applicable.

C. Procedures

- 1) The NMDOT or T/LPA Project Manager shall monitor contractor and subcontractor project activities on a daily basis and in so doing shall be cognizant of the requirement of nonsegregated facilities.
- 2) The NMDOT or T/LPA Project Manager shall notify the contractor in writing if segregated facilities are noted on the project. The Project Manager shall direct the contractor to take corrective action to eliminate any condition of segregated facilities. The Project Manager shall notify his or her immediate supervisor and the CCRB should any condition of segregated facilities be noted on the project.

Chapter IV - Labor Compliance (LC) Program Oversight and Procedures (FHWA-1273 IV.,V.)

1. Labor Compliance Program Objectives

The NMDOT Labor Compliance (LC) Program is established under the guidance and direction of the CCRB and is a requirement for the NMDOT's continued receipt of federal-aid. The LC Program provides the policy and procedures by which the NMDOT and Local Public Agencies (T/LPAs) will administer any contract with labor compliance provisions in compliance with federal and state law.

The LC Program's primary objective is to ensure NMDOT and T/LPA contractors and subcontractors do not discriminate with regards to pay or pay opportunities of its covered employees on federal-aid and state projects. The NMDOT and T/LPAs achieve this primary objective by ensuring its contractors and subcontractors, as subrecipients of federal and state funding, comply with all labor provisions as set forth in the Davis-Bacon and Related Acts (DBRA), FHWA-1273, NM Public Works Minimum Wage Act, and other federal and state contract provisions.

Federal and state labor provisions require primarily that:

- Contractors and subcontractors pay its covered employees at least the minimum prevailing wage by classification based on either the federal or state wage decision, whichever is greater.
- Contractors and subcontractors are prohibited from requiring any of its covered employees to give up or "kickback" any part of the compensation to which that person is entitled under the contract.

NMDOT and T/LPA Project Managers and supporting staff ensure contractor compliance with federal and state labor provisions of the contract. The following labor compliance oversight responsibilities and procedures will provide guidance to NMDOT and T/LPA Project Managers in carrying out labor compliance oversight responsibilities.

2. Labor Compliance Program General Responsibilities

A. NMDOT Federal-aid and State Projects

- 1) **NMDOT Responsibility** - It is the responsibility of the NMDOT acting through its Project Manager and staff at the project level to verify contractor compliance with contract labor provisions and enforce those provisions when instances of non-compliance arise. This responsibility is also shared with District Support Staff and the Construction and Civil Rights Bureau (CCRB).

- 2) **Contractor Responsibility** – Each prime contractor and all tiers of subcontractors shall comply with all labor compliance provisions in the contract and as specified in the current written NMDOT Contractor Compliance Program Manual. The prime contractor is responsible for subcontractor and lower tier subcontractor labor compliance.

Prime contractors and all tiers of subcontractors are required to pay no less than the wage rates and fringe benefits required by federal or state law, as applicable. The rates of wages and fringe benefits to be paid to each class of construction laborers and mechanics (each employee covered by the prevailing wage requirements) by the prime contractor and all tiers of subcontractors, shall not be less than the total combination of the wage and fringe benefit rates as indicated in the wage decision(s) included in each contract.

It is the responsibility of the prime contractor to post and maintain on the construction site, in a conspicuous place, a copy of all prevailing wage and fringe benefit rates included in the contract.

It is the responsibility of the prime contractor and subcontractor to submit all NMDOT and/or T/LPA requested documentation within the time frame the NMDOT and/or T/LPA specifies in a written request.

It is the responsibility of the prime contractor and subcontractor to actively pursue resolution of contract labor compliance issues in a timely manner upon receipt of the NMDOT's and/or T/LPA's written request.

It is the responsibility of the prime contractor and every subcontractor to keep an accurate record indicating the name and classification and the actual wages and benefits paid to each employee in connection with the contract. This record shall be available for inspection by the NMDOT or T/LPA or their respective representative. The prime contractor and subcontractor must permit the NMDOT or T/LPA or their respective representative to interview employees during working hours on the project and they must advise employees that they must cooperate with NMDOT or T/LPA or their representatives during wage rate interviews.

The prime contractor is responsible for advising all subcontractors of the requirement to pay, at a minimum, the prevailing rate prior to commencement of work. The prime contractor and each subcontractor is liable for the payment of the prevailing rates to its covered employees. The NMDOT or T/LPA may withhold payment from the prime contractor for its or its subcontractor's failure to pay prevailing wages pursuant to FHWA-1273 V.3.

- 3) **Shared Responsibility** – The NMDOT and the contractor have a shared responsibility to ensure all labor compliance provisions of the contract are met. In this effort, the contractor is required to cooperate and work with the NMDOT and the FHWA in their review of the contractor's labor compliance activities under the contract as per FHWA-1273 II.1.a. and the contractor shall make its labor compliance records available for inspection, copying, or transcription by NMDOT, T/LPA and FHWA personnel as per FHWA-1273 IV.3.c.

It is also the responsibility of the NMDOT to cooperate and provide guidance to the contractor in meeting the labor compliance requirements of the contract.

B. T/LPA Federal-aid and State Projects with NMDOT Oversight

- 1) **T/LPA Responsibility** – It is the responsibility of the T/LPA to verify contractor compliance with contract labor provisions and enforce contract provisions when instances of non-compliance arise. It is the T/LPA’s responsibility to notify the NMDOT through its District local government coordinator of labor compliance verification and enforcement activities.
- 2) **NMDOT Responsibility** – It is the responsibility of the NMDOT through its District local government coordinator to ensure T/LPAs are aware of and carry out their labor compliance responsibilities under the contract. This responsibility is also shared with District Support Staff, the District Engineer and the CCRB.
- 3) **Contractor Responsibility** – It is the contractor’s responsibility to comply with all labor compliance contract provisions. (See Contractor Responsibility in 2.A.2. above)
- 4) **Shared Responsibility** – The T/LPA and the contractor have a shared responsibility to ensure all labor compliance provisions of the contract are met. The contractor is required to cooperate and work with the T/LPA, NMDOT, and the FHWA in carrying out its labor compliance obligations and in their review of his or her activities under the contract as per FHWA-1273 II.1.a. The contractor shall make its labor compliance records available for inspection, copying, or transcription by T/LPA, NMDOT, and FHWA personnel as per FHWA-1273 IV.3.c. It is also the responsibility of the T/LPA to cooperate and work with the contractor to ensure that all labor compliance requirements are met under the contract.

3. Labor Compliance Program Contract Provisions

A. **NMDOT Federal-aid Contracts** – Federal-aid contracts will always include both federal and state labor compliance contract provisions. The NMDOT Project Manager and his or her staff will be responsible for verification and enforcement of these provisions. The NMDOT Project Manager and staff should review and become familiar with the labor compliance provisions of their federal-aid contracts.

- 1) **Applicability** – Federal-aid labor compliance requirements as per FHWA-1273 Sections IV and V apply to all federal-aid highway construction contracts exceeding \$2,000 and to all related subcontracts (regardless of subcontract size). Since NMDOT projects will almost always exceed \$2,000, it is safe to say that federal labor compliance requirements will apply to all NMDOT federal-aid projects.
- 2) **Federal-aid contract provisions** – The following federal-aid contract provisions pertaining to labor compliance requirements are normally included in each federal-aid contract. Always check your contract for the applicable provisions related to Labor Compliance requirements.

- a. FHWA-1273, Required Contract Provisions for Federal-Aid Construction Contracts, Sections IV and V. These two Sections of FHWA-1273 incorporate by reference requirements of the Davis-Bacon and Related Acts (DBRA).
 - b. Notice to Contractors, Federal Requirements
 - c. Federal Wage Decision
 - d. State Wage Decision
- 3) **Federal-aid Provisions Incorporated by Reference** - Federal-aid labor compliance contract provisions incorporated into the contract by reference include but are not limited to:
- a. 40 U.S.C. § 3141 Davis-Bacon Act
 - b. 40 U.S.C. § 3145 Regulations Governing Contractors and Subcontractors
 - c. 18 U.S.C. § 874 Kickbacks from public Works Employees the Copeland Act
 - d. 40 U.S.C. § 3701 Contract Work Hours and Safety Standards Act
 - e. 23 C.F.R. § 633.101 (2011)
 - f. 23 C.F.R. § 635.118 (2011) Payroll and weekly Statements, 23 C.F.R. § 635.309 (2007) Authorization
 - g. 29 C.F.R. A Part 1, Part 3, Part 5
- B. NMDOT 100% State Contracts** – Construction contracts funded exclusively with state funds (meaning no federal funds) are generally referred to as 100% state or state-funded contracts and will contain state labor compliance provisions as set forth in the NM Department of Workforce Solutions, Public Works Minimum Wage Act. The NMDOT must verify and enforce contractor compliance with these state labor compliance provisions.
- 1) **Applicability** – construction contracts that include only state funds
 - 2) **100% State contract provisions** that govern Labor Compliance requirements include but are not limited to:
 - a. Notice to Contractors – State Funded Projects
 - b. State Wage Decision
- C. Tribal/Local Public Agency (T/LPA) Contracts** – T/LPA construction contracts may contain both federal and state labor compliance contract provisions depending on whether federal funds are used. The T/LPA must use the NMDOT contract boilerplate when procuring a project with federal funds. In addition to use of the boilerplate, the T/LPA must obtain the appropriate Federal and State Wage Rate Decisions and incorporate them into the contract. Finally, the T/LPA must verify during construction that the appropriate wage rate is paid. The T/LPA must verify and enforce contractor compliance with both federal and state labor compliance provisions as applicable under its contract.
- 1) **Federal-aid T/LPA Contracts** – The labor compliance provisions will be as those listed under NMDOT federal-aid above.
 - 2) **State funded only T/LPA Contracts** – The labor compliance provisions will be as those listed under NMDOT 100% State above.

4. Definitions - Labor Compliance

- A. Laborers and Mechanics** – Laborers and Mechanics are defined as those whose duties are manual or physical in nature, as distinguished from mental or managerial. The term is used to refer to traditional construction workers, truck drivers, equipment operators, flaggers, machinists, etc. The common thread for all these positions is that they focus on manual or physical labor. When the term, “laborers and mechanics” is used, it refers to all classifications of labor (laborers, truck drivers, operators, carpenters, cement masons, iron workers, etc.) as defined in the wage decision.
- B. Davis-Bacon Act** – provides that federal-aid contracts in excess of \$2,000 for construction, alteration, or repair of public works, shall contain a clause that no laborer or mechanic employed directly upon the site of the work shall receive less than the prevailing wage rates as determined by the Secretary of Labor. The Davis-Bacon Act, which took effect in 1931, requires contractors working on federally-funded projects to pay employees a “prevailing wage” including the “anticipated cost of prevailing benefits.” This is generally expressed as a per-hour wage and per-hour cash equivalent value of benefits. Prevailing wages are set by the U.S. Department of Labor and are included in the bid specifications of covered contracts.
- C. Copeland Act** – The Copeland (Anti-Kickback) Act (18 U.S.C. 874 and 40 U.S.C. 3145) makes it unlawful to induce, by force, intimidation, threat of procuring dismissal from employment, or otherwise, any person employed in federal aid construction contracts to give up any part of the compensation to which that person is entitled under the contract. Under the Copeland Act, workers are protected from paying “kickbacks” to employers for the “privilege” of being employed. Federal regulations incorporate the Copeland Act into the contract by reference.
- D. Contract Work Hours and Safety Standards Act** – applies to federally assisted construction contracts over \$100,000. It requires contractors and subcontractors on covered contracts to pay laborers and mechanics employed in the performance of the contracts one and one-half times their basic rate of pay for all hours worked over 40 hours in a work week. This Act also prohibits unsanitary, hazardous, or dangerous working conditions on federally funded construction projects.
- E. Local Public Agency (T/LPA)** – T/LPAs as subrecipients of USDOT federal funding through the NMDOT must abide by all NMDOT labor compliance requirements. The T/LPA is the “Owner” of the project. Federal funding is provided to the T/LPA by the NMDOT. NMDOT maintains an oversight responsibility to ensure the T/LPA complies with all federal requirements. Because of this oversight responsibility, the NMDOT through its District Offices provides engineering and administrative oversight of T/LPA federal-aid projects. The NMDOT essentially stands in the shoes of the FHWA regarding the T/LPA and the T/LPA contractor’s compliance with federal requirements.

5. Guidelines for the Application of Labor Compliance Provisions

The Labor Compliance requirements of federal-aid highway construction contracts are contained in FHWA-1273, *Required Contract Provisions Federal-Aid Construction Contracts, Sections IV and V*. These two sections of FHWA-1273 basically summarize, make reference to, and place in contract language the requirements of the Davis-Bacon and Related Acts (DBRA) that are contained in 29 C.F.R. Parts 1, 3, and 5. DBRA are the provisions that require submittal of payrolls, payment of prevailing wages, payment once a week, overtime, allowable deductions, anti-kickback, etc. These provisions also define the segment of the contractor's or subcontractor's workforce to which they apply.

The New Mexico Public Works Minimum Wage Act generally mirrors the federal labor compliance requirements such as submittal of payrolls and payment of prevailing wages.

The Labor Compliance Provisions are applicable to only that portion of a contractor's workforce deemed a "laborer or mechanic" **and** "working upon the site of the work." Therefore, in order to verify and ensure contractor compliance with the labor compliance requirements of the contract, we must know the definition of each of these terms and how they are applied to a contractor's workforce.

If a contractor's employee meets the definition of **both** a "laborer or mechanic" and "working upon the site of the work," then the labor compliance requirements apply to that employee and the employee can be termed a "covered employee" with respect to the Davis-Bacon and Related Acts (DBRA) requirements. The employee must appear on a payroll and information regarding the employee's pay, classification, deductions, etc. must be shown.

If a contractor's employee does not meet the definition of either a "laborer or mechanic" or "working upon the site of the work," then the labor compliance requirements do not apply to that employee.

The following are general guidelines to use in determining whether DBRA labor requirements apply to contractor and subcontractor employees working on NMDOT or T/LPA projects. If DBRA applies, the employee must be shown on the payroll.

A. Laborer or Mechanic

- 1) The term "Laborer or Mechanic" is defined in Section 4 of this Chapter and generally refers to an employee whose duties are manual or physical in nature. DBRA labor compliance provisions apply only to "laborers and mechanics." All work classifications contained in the wage decision (federal or state) of a contract fall under the definition of "laborer or mechanic" and thus must be shown on the payroll provided the employee meets the "Site of the Work" definition also. This implies that the labor compliance provisions of the contract do not apply to those work classifications that do not fall under the definition of "laborer or mechanic" such as Superintendent, Engineer, Working Foreman, Surveyor, etc.
- 2) "Laborer or Mechanic" means anyone who is performing construction work on the project, including working foremen. Working foremen are paid as follows.

- a. Working foremen or supervisors that regularly spend more than 20% of their time performing construction work (excluding people whose duties are primarily administrative or clerical such as superintendents, office staff, timekeepers, messengers, etc.) are covered “laborers and mechanics” for labor standards purposes for the time spent performing construction work.
- b. On certified payrolls working foremen, who meet the requirements in “a.” of this section, are listed under the classification listed on the wage decision that reflects the actual construction work performed. Only the time working foremen and supervisors spend performing construction work is submitted on the certified payroll.
- c. Working foremen cannot be paid less than the applicable minimum wage that is shown on the wage decision for the classification of the construction work performed.
- d. Non-working foremen (those who spend 20% or less of their time performing construction work) are not covered by the Davis Bacon Act.

B. Site of the Work

- 1) Federal and state labor compliance requirements apply to all “laborers and mechanics ... *employed directly upon the site of the work.*” As an example, the contractor is required to pay prevailing wages and provide certified payrolls for all of its laborers and mechanics employed directly upon the site of the work. Therefore, the definition of Site of the Work becomes very important when determining the applicability of the Labor Compliance provisions of the contract to the contractor’s workforce. Site of the Work is defined in the Federal Code of Regulations as follows.

Title 29 C.F.R. § 5.2 (I)(1) (2017) states, “*The site of the work is the physical place or places where the building or work called for in the contract will remain, and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project.*”

Title 29 C.F.R. § 5.2(I)(2) (2017) states “except as provided in paragraph (I)(3) of this section, job headquarters, tool yards, batch plants, borrow pits, etc., are part of the site of the work, provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the site of the work as defined in paragraph (I)(1) of this section.”

Title 29 C.F.R. § 5.2 (I)(3) (2017) states “Not Included in the site of work are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of work as stated in paragraph (I)(1) of this section are not included in the site of work. Such permanent, previously established facilities are not part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of the contract.”

Also, the regulatory definition of construction provides that the off-site transportation of materials, supplies, tools, etc., is **not** covered unless such transportation occurs between the construction work site and a **dedicated** facility located **adjacent or virtually adjacent** to the construction site.

The key to understanding whether Davis-Bacon wage rates apply is to determine if employees are working on the “Site of the Work” and understanding that the “Site of the Work” by definition, may apply to work sites beyond the limits of the project if the work site is a **dedicated** facility to the project **AND adjacent or virtually adjacent** to the construction project. Federal and state regulations do not define what is considered “virtually adjacent,” therefore, the applicability of Davis-Bacon and the NM Public Works and Minimum Wage Act coverage to the site of work must be evaluated on a case-by-case basis. To aid in determining applicability, the NMDOT defines “virtually adjacent” as a dedicated facility whose boundary is located within **one-half mile** of the closest right of way boundary to the project, as the crow flies.

C. Labor Compliance Applicability Guidelines

- 1) **Covered Applications** - Contractor and subcontractor employees including truck drivers are always covered by DBRA prevailing wages in the following instances (They must be paid at least prevailing wages and must submit and be included on a payroll):
 - a. The employees and truck drivers are working on the “site of the work.”
 - i. Truck drivers hauling from one location on the project to another location on the project are working on the “site of the work” and are covered under DBRA.
 - b. Employees working at a facility and truck drivers hauling to or from a facility that is deemed part of the “site of the work” are covered under DBRA.
 - i. For example, truck drivers hauling between the job site and a batch plant or staging area dedicated exclusively or nearly so, to the project, and whose location is adjacent or virtually adjacent to the project (within 1/2 mile) are covered under DBRA.
 - ii. For example, truck drivers hauling material from a materials pit or hot mix plant to the project provided the materials pit or hot mix plant is dedicated exclusively, or nearly so, to the project, and provided it is located adjacent or virtually adjacent to the project (within 1/2 mile) are covered under DBRA.
- 2) **Non-Covered Applications** - Contractor and subcontractor employees including truck drivers are **not** covered by DBRA prevailing wages in the following instances (the prevailing wage requirements do not apply to these employees and are not included on a payroll):
 - a. Employees working at and truck drivers hauling to the project from a facility not deemed part of the “site of the work” are not covered under DBRA prevailing wage requirements. The facility is not considered to be part of the “site of the work” if it does not meet the criteria of dedicated and/or adjacent (within 1/2 mile) to the project.

- i. For example: If truck drivers are hauling material to the project from a facility that is not adjacent or virtually adjacent to the project (i.e. located more than one-half mile from the closest right of way boundary to the project) they are not covered under DBRA.
- ii. For example: Truck drivers hauling materials to the project from a commercial source are not covered under DBRA. The commercial source is not a facility that is dedicated exclusively, or nearly so, to the project therefore, DBRA does not apply.
- iii. Trucking owner-operators are not covered under DBRA as defined below.

3) **Owner-Operators**

- a. The USDOL has the following enforcement position with respect to bona fide owner-operators who own and drive their own truck:

Certified payrolls must include the names of such owner-operators but do not need to show the hours worked or rates paid, only the notation "owner-operator." This applies only to the owner-operator employed by the contractor and appearing on the contractor's payroll.

The legal test that is utilized to determine if the owner-operator is in fact an independent contractor stems from the right to control test. An owner-operator has the right to agree or disagree upon whether he or she chooses to work on a particular project.

Additionally, an owner-operator makes a significant financial commitment when he or she purchases a truck or enters into a bona fide lease agreement for a truck. The term of that lease must be substantial and not subject to cancellation at any time. A lease agreement that simply provides the driver a percentage of revenue is not a bona fide lease agreement. In short, the financial commitment must be real.

Furthermore, the legitimate owner-operator must assume all responsibility for the maintenance of the equipment, and bears the principal burden of the operating costs such as fuel, repairs, supplies, vehicle insurance, and personal expenses while on the road.

The NMDOT or T/LPA may request copies of driver's license, vehicle registration, insurance, and lease agreements (if applicable) from the contractor at any time in order to verify owner-operator status. District Audit staff and/or CCRB staff may request such documentation upon performing Labor Compliance audits of the contract. One of the tests for owner-operator is to verify that the name appearing on the driver's license, the truck registration, the insurance document and/or lease agreement is the same.

- 4) **Commercial Source Material Supplier** - The manufacture and delivery to the work site of supply items such as sand, aggregate, steel, asphaltic materials, bituminous pavement, ready-mix concrete, etc., when accomplished by a bona fide commercial source material

supplier operating facilities serving the public in general, are activities **not covered** by Davis-Bacon. Thus DBRA prevailing wages do not apply to truck drivers hauling the material from the commercial source to the site of the work, regardless if employed by the commercial source, prime contractor, or subcontractor.

- 5) **Material Production Sites (Pits, Batch Plants, Hot-Mix Plants)** – If the site is dedicated to the construction project and is adjacent or virtually adjacent to the project (one-half mile or less as defined above), DBRA prevailing wages apply to truck drivers hauling material from the site to the project and to laborers and mechanics working at the site.
- 6) **Haul of material off the project site** - If rubble, debris, overburden or other material is hauled from the project site of the work to a location off of the project site of the work designated in the plans and specifications, DBRA prevailing wages apply to the truck drivers. If no location for disposal of the material is designated in the plans and specifications, and the truck drivers are hauling the material from the project site of the work to a location designated by the contractor off the site of the work (i.e. does not meet site of the work criteria of dedicated and adjacent), DBRA prevailing wages do not apply.

D. Project Manager Support for Site of Work Determination - The NMDOT or T/LPA Project Manager or staff should contact the CCRB when questions or concerns are raised about the applicability of Davis-Bacon wage rates to a contractor's or subcontractor's employees or work sites.

E. Examples – Truck Drivers and Davis-Bacon Applicability

- 1) Does it matter who employs the truck driver for the application of Davis-Bacon?

Answer:

No. In the decision reached in *Building and Construction Trades Dept. v. Midway*, decided on May 17, 1991, the Court of Appeals for the District of Columbia Circuit held that language in Department of Labor (DOL) regulation was inconsistent with the Davis-Bacon Act. The Court of Appeals ruled that material delivery truck drivers who come onto the site of the work merely to drop off construction materials are not covered by the Davis-Bacon Act even if they are employed by the government contractor, because they are not “employed directly upon the site of the work.”

- 2) Are truck drivers employed by a construction prime contractor or subcontractor to transport materials or equipment from the contractor's or subcontractor's plant or yard to the project, or from the project to the contractor's or subcontractor's plant or yard covered under the prevailing wage provisions of the contract (Davis-Bacon)?

Answer:

If the contractor's or subcontractor's plant or yard is part of the “site of the work,” the drivers are covered. If the contractor's or subcontractor's plant or yard is not part of the “site of the work”, the drivers are not covered. Department of Labor (DOL) regulations 29 C.F.R. § 5.2(j)(2) (2007) states that the transportation of materials or supplies to or from the “site of the work” by the employees of the construction contractor or a construction subcontractor is not construction. Thus, transportation of such materials or supplies is not covered unless the transportation is between the construction work area and a dedicated

facility located “adjacent or virtually adjacent” to the construction site. Driving to and from a commercial facility that serves the general public (not established to serve the project) would not be covered even if it is adjacent or virtually adjacent to the covered construction area.

- 3) Truck drivers are engaged in hauling excavated material, debris, dirt, asphalt, etc., for recycling away from a Davis-Bacon covered construction site.
One – Is the time spent loading at the site covered?
Two – Is the time transporting the material away from the site covered?
Three – Is the time unloading the material covered?

Answer:

Assuming that the location or facility to which the excavated material or debris will be transported is not a facility that is part of the “site of the work” (adjacent or virtually adjacent to the construction work area: and dedicated exclusively or nearly so to the performance of the contract or project):

- One - The time spent on the site loading the debris, dirt, asphalt, etc., is not covered.
- Two - The time transporting the material away from the covered site is not covered. The regulation specifically states that the transportation of materials or supplies to or from the “site of the work” is not considered construction.
- Three - The time unloading the material off site is not covered. Davis-Bacon only applies to work done on the “site of the work.”

- 4) Are truck drivers who are employed by a supplier or owner of a commercial source to haul material to the project from the commercial source covered?

Answer:

No. If the material source is commercial in nature and supplies the general public, then the drivers are generally not covered under DBRA.

- 5) In situations where truck drivers are employed by an independent contractor or a materialman to deliver materials to the “site of work” from covered supply sources (e.g., batch plants or borrow pits, stockpiles, etc.) that have been established to serve exclusively, or nearly so, the covered project, are such drivers covered?

Answer:

Yes. If the supply facility is part of the “site of the work” because it is dedicated (exclusively or nearly so) to performance of the contract or the project and located within or near the project limits – “adjacent or virtually adjacent” to the actual construction site.

Note: DOL has an **enforcement position** with respect to bona fide owner-operators of trucks who own and drive their own trucks. Certified payrolls including the names of such owner-operators do not need to show the hours worked or rates paid, only the notation “owner-operator.”

6. Wages and Wage Determinations (FHWA-1273 IV.)

A. Wage Decisions

- 1) **Wage Decision Dependent on Funding Type** – The wage decision included in a contract is dependent on the type of funding associated with the project. For federal-aid projects, both a state and a federal wage decision will be included in the contract. For 100% state funded projects, only the State wage decision will be included in the contract. This also applies to Local Public Agency contracts with NMDOT oversight.
- 2) **Federal Wage Decision Identification** – All federal-aid contracts will include a federal wage decision. The federal wage decision number is shown at the top of the wage decision and is indicated by, “General Decision Number:” It will start with the letters “NM.” An example of a federal wage decision number is “NM080002 07/24/2009 NM2.”
- 3) **State Wage Decision Identification** - New Mexico (as well as many other States) has passed laws that allow it to establish its own minimum wage rates through the NM Department of Workforce Solutions. These laws are commonly referred to as “Little Davis-Bacon Acts.” A New Mexico state wage decision is included in all NMDOT and T/LPA contracts with state funding.
- 4) **Comparison of Wage Decisions** - The NMDOT or T/LPA Office Manager shall review both wage decisions and shall compare the minimum wage rates for each classification listed. Whenever differences exist between the minimum wage rates shown under the federal or state wage decision, the higher wage rate for the classification shall govern (See Notice to Contractors – Federal Requirements).
- 5) **Use of Higher Wage Rate** – For federal-aid projects containing both federal and state wage decisions, the Office Manager shall verify the contractor is using the appropriate (higher) wage rates when checking contractor payrolls.

LCPtracker will be using the higher wage rates when it performs its internal pay verifications. It is still good practice for the NMDOT or T/LPA Office Manager to verify that the appropriate prevailing wage rates are being used by the LCPtracker program.

Contact CCRB if there are any concerns regarding prevailing wage rates and wage decisions.

- 6) **Posting of Wage Decisions**
 - a. The NMDOT or T/LPA Project Manager shall verify the contractor complies with the requirement to post the wage decisions on the project bulletin board or in a location that is easily accessible by employees. (See Bulletin Board posting requirements in Chapter III Section 4 Part E of this manual.)

B. Contractor Compliance With Minimum Wage

- 1) **Requirement** - The contractor and its subcontractors are required by regulation to comply with the minimum wage rates as set forth in the appropriate contract wage decision. (See FHWA-1273 IV. & V.)
- 2) **Applicability of Minimum Wage** - Minimum wage rates apply to all contractor and subcontractor laborers and mechanics working at the site of the work or working off-site at facilities dedicated exclusively and in proximity to the actual site of work. (See “Site of the Work” Section 5.B. above)

C. Overtime (FHWA-1273 V.1.)

- 1) **40 Hour Work Week** - The contractor is required to pay overtime at the rate of one-and-one-half times the employee’s basic pay rate for all hours worked in excess of 40 hours per week. Fringe benefits are required to be paid at straight time on all regular and overtime hours worked.

The overtime requirement applies to all laborers and mechanics under the Contract Work Hours and Safety Standards Act (CWHSSA) and to all non-exempt employees under the Fair Labor Standards Act (FLSA). Contact the CCRB for support if there are questions or concerns regarding the applicability of overtime rates to contractor or subcontractor employees.

- a. **Example:** An employee works 45 hrs in one week. He is a Laborer Group III making \$12.00/hr base pay + \$0.35/hr fringe. He would be paid:

(\$12.00/hr)x(40hr) =	\$ 480.00	Regular time
(\$0.35/hr)x(40hr)=	\$ 14.00	Fringe on Regular Time
(\$12.00/hr)x(1.5)x(5hr)=	\$ 90.00	OT at 1-1/2
(\$0.35/hr)x(5hr)=	\$ 1.75	Fringe on OT hrs at straight time
For a total pay of \$585.75		

- 2) **LCPtracker Overtime Function**– The LCPtracker program will automatically check that an employee is paid for overtime at 1-1/2 times the employee’s base pay rate for all productive hours worked in excess of forty hours per week. The program will also check to ensure fringe benefits are paid correctly. The NMDOT or T/LPA Office Manager spot checks contractor payroll overtime pay according to the procedures outlined in this Chapter to verify overtime pay is being addressed correctly in LCPtracker.

D. Withholding due to Unpaid Wages – (FHWA-1273 V.3.)

- 1) In the event the contractor fails to pay its employees’ wages due under the contract, the NMDOT and the T/LPA has the authority to withhold funds from the contractor, as may be determined necessary, to pay employees of the contractor the full amount of wages required by the contract. Withholdings are maintained by the NMDOT or T/LPA until

restitution is evidenced. These withholding provisions also apply to wage underpayment by a subcontractor; however, the actual withholding is taken from progress payments to the prime contractor. The District Engineer or the T/LPA, in consultation with CCRB and the Office of General Counsel, will make the decision to withhold funds under this provision.

E. Allowable Payroll Deductions

- 1) Only deductions authorized by law may be made from an employee's weekly paycheck. Authorized payroll deductions include:
 - a. Federal and state withholding income taxes, federal social security taxes, and workers' compensation.
 - b. Contributions made on behalf of the employee to funds established by the employer or representatives of its employees, or both, for the purpose of providing either from principle or income, or both, medical or hospital care; pensions or annuities on retirement; death benefits; compensation for injuries, illnesses, accidents, sickness, or disability; or for insurance to provide any of the foregoing; or unemployment benefits, vacation pay, savings accounts, or similar payments for the benefit of the employees, their families, and dependents. Other deductions may be allowed.
- 2) The failure of a contractor to withhold taxes from an employee's weekly paycheck may indicate the person is not an actual employee. The NMDOT or T/LPA project manager must follow up in such a case to verify employment status.

F. Classification of Employees (FHWA-1273 IV)

- 1) **Use Classifications as provided in Wage Decision** - The NMDOT or T/LPA Project Manager or designee should verify the contractor's laborers and mechanics are classified based on those classifications shown on the wage decision only.
- 2) **Obtain Approval for Use of New Classification** - The NMDOT or T/LPA Project Manager and contractor shall follow requirements and procedures set forth in FHWA-1273 IV.1.b(2) when additional or new classifications of work are needed on a project. This requires the approval of the US Department of Labor on all federal-aid projects.
- 3) **Work Performed in More Than One Classification** – (FHWA-1273 IV.1.a.) The NMDOT or T/LPA Project Manager and staff shall be aware of the requirement that contractor and subcontractor laborers and mechanics be paid at least the appropriate prevailing wage for the classification of work actually performed without regard to skill.

Federal specifications state, "Laborers and mechanics performing work in more than one classification must be compensated at the rate specified for the classification for the time actually worked therein, provided that the contractor's payroll records accurately set forth the time spent in each classification in which work is performed."

Laborers and mechanics performing work in more than one classification in a payroll period must be paid at least the wage rates specified for each classification only if accurate time records showing the time spent in each classification of work is maintained by the contractor or subcontractor. If accurate time records are not maintained, these employees must be paid the highest wage rate for all of the classifications of work performed during the payroll period. In this era of computerized payroll systems, contractor's payroll records are generally detailed enough to distinguish hours worked in each classification each day. This will be assumed to be the case unless contractor labor compliance audits performed by NMDOT or T/LPA staff reveal otherwise.

7. Labor Compliance Program Records Requirements

A. Maintenance of Records - Contractor Requirements - (FHWA-1273 IV.3.a.) – The contractor and subcontractors are required to maintain payrolls and basic records relating thereto, during the course of the work and shall maintain them for a period of 3 years from completion of the contract as per the *Notice To Contractors Federal Requirements*. This is a New Mexico Public Works Minimum Wage Act requirement. The federal requirement is to maintain records for a period of 3 years. The more restrictive requirement applies, which is the 4 year period. The NMDOT or T/LPA Project Manager or an authorized representative thereof may request copies of the contractor's payroll records, fringe benefits records, plans and programs, and apprentice/trainee records as required to verify compliance with contract provisions.

- 1) **Payroll Records** – The contractor shall maintain payroll records that contain for each employee all those items as indicated in FHWA-1273 IV.3.a., as follows.
 - a. Name
 - b. Address and Social Security Number (SSN) – The contractor maintains this data but it is not shown on certified payrolls submitted to the contracting agency.
 - c. Identification number – can be last 4 digits of SSN or any other unique numbering system for employees.
 - d. Work Classification – must be a work classification as shown in the wage decision for all covered employees.
 - e. Hourly straight time and overtime rates of wages paid.
 - f. Fringe benefits either as a cash equivalent or paid into a bona fide plan. If the fringe benefit is paid in cash, the hourly rate must be shown on the payroll.
 - g. Daily and weekly number of hours worked.
 - h. Payroll deductions.
 - i. Actual wages paid.

- 2) **Fringe Benefits Records** – The contractor shall maintain fringe benefits records. When a contractor provides fringe benefits to its covered employees under a bona fide plan or program, the contractor or subcontractor shall maintain records that show:
 - a. that the commitment to provide such benefits is enforceable,
 - b. that the plan or program is financially responsible,

- c. that the plan or program has been communicated in writing to the laborers or mechanics affected, and
 - d. the cost anticipated or actual cost incurred in providing benefits.
- 3) **Apprentice/Trainee Records** – The contractor shall maintain apprentice/trainee records. Contractors and subcontractors employing apprentices or trainees under approved programs shall maintain written evidence of the certification of apprentices and registration of trainees and ratios of wage rates prescribed in the applicable training programs.

B. Records Availability and Failure to Submit – (FHWA-1273 IV.3.c.)

- 1) **Records Availability** - The contractor and subcontractors are required to make payroll records available for inspection, copying, or transcription by authorized representatives of the NMDOT or T/LPA. An authorized representative of the NMDOT may be the Project Manager or designated staff, ADE, DE, Audit Section Supervisor, CCRB Staff, CCRB Construction Engineer, Deputy Secretary, Secretary or other designated NMDOT employee authorized to act on behalf of any of the above.
- 2) **Authorization to Interview Employees** - The contractor or subcontractor shall permit the NMDOT or T/LPA Project Manager or other authorized agency representatives to interview employees during working hours on the job.
- 3) **Failure to Submit Records** – If the contractor or subcontractor fails to submit the required records or to make them available, the NMDOT or T/LPA, after written notice to the contractor, may take such action as may be necessary to cause the suspension of further progress payments. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 C.F.R. §5.12 (2017) Debarment Proceedings.

C. Daily Work Reports

- 1) **Inspector Daily Work Reports/Project Manager Diaries**
 - a. **Daily Work Reports** – NMDOT or T/LPA field inspectors shall record the following labor compliance and EEO information on their Daily Work Reports. The information may be used to verify work performed, labor used, and hours worked against contractor submitted payrolls.
 - i. **Daily Work Report Information** - The Daily Work Report must contain the name of the contractor and subcontractors performing work on the project. It will contain as much information as possible about the labor working on the project for that particular day. Information may include any or all of the following: employee names, classifications, hours worked, equipment used and who used it as well as items of work performed on the job site. For NMDOT Staff using SiteManager to record Daily Work Reports, the “Remarks” Cloud should be used to document

employee names, classifications, specific equipment, etc. for each selected area for specific information required.

- b. **Project Manager Diary Records** - The NMDOT or T/LPA Project Manager's diary shall contain a listing of the contractor and subcontractors working on the project each day.
- c. **Office Manager Familiarity with Records** - The NMDOT or T/LPA Office Manager shall read each inspector's Daily Work Report and Project Manager's Diary to determine which contractor and subcontractors were working each week. The Office Manager will use this information to verify the submittal of contractor and subcontractor payrolls or "Statements of No Work Performed" on a weekly basis.

8. Certified Payrolls

A. Use of LCPtracker

1) What is LCPtracker

- a. LCPtracker is a web-based software program used to collect, verify and manage prevailing wage certified payrolls and related labor compliance documentation.
- b. It provides an online database of all contractor and subcontractor certified payroll reports.
- c. It provides for greater reliability of data and contractor compliance with minimum wage rates and labor classification.
- d. It provides for greater efficiency in verifying and checking contractor submitted payrolls.
- e. It provides the NMDOT or T/LPA Project Manager the ability to review and approve the certified payrolls for contractors and subcontractors online.
- f. All contract-specific wage rates and worker classifications are online, within the system. Minimum wage rates, worker classifications, payroll extensions, etc. are checked and verified internally by the software. Any errors are flagged for contractor correction prior to contractor submittal of the certified payroll.

- 2) **LCPtracker General Responsibilities** – The NMDOT has adopted the LCPtracker program as its primary labor compliance monitoring, verification and reporting tool. Some of the general responsibilities in the set up and use of LCPtracker are as follows.

NMDOT Lead Projects – The CCRB has the primary responsibility for establishing process and procedure for LCPtracker use, training of approved users of the system, and maintaining the software. It also is responsible for project set up, general oversight, support, and project closeout in LCPtracker.

The District Audit Section is responsible for verification of project data used in the set up process, support, auditing, and project final verification in LCPtracker.

The prime contractor is responsible for setting up all its subcontractors in LCPtracker. The prime contractor and subcontractors are responsible for weekly payroll upload and submittal in LCPtracker.

The NMDOT Project Manager is responsible for review and verification of subcontractors and subcontract data set up in LCPtracker, verification of contractor compliance with minimum wage requirements in LCPtracker, checking and approval of payrolls in LCPtracker, and verification of Final Payroll in LCPtracker. The NMDOT Project Manager may delegate this responsibility to appropriate staff members.

Local Lead Projects – Local Public Agencies (T/LPAs) are responsible for prime contractor project set up in LCPtracker, verification of subcontractor set up by its prime contractor in LCPtracker, contractor compliance with minimum wage requirements in LCPtracker, verification and approval of payrolls in LCPtracker, and ensuring its contractors are using and submitting payrolls in LCPtracker. CCRB shall upload the wage decisions in LCPtracker.

- 3) **Contractor Requirement to Use LCPtracker** - The prime contractor and all subcontractors working on NMDOT or T/LPA federal-aid projects, or Local Public Agency projects with NMDOT oversight are required by Notice to Contractors – Federal Requirements to use the LCPtracker labor compliance software to report EEO and weekly payroll information.

4) **Project Set Up In LCPtracker**

- a. The CCRB Labor Compliance Officer has the responsibility for setting up new NMDOT Lead projects in LCPtracker. The T/LPA has the responsibility for setting up new Local Lead projects in LCPtracker except wage decision data.
- b. Prior to setting up the project in LCPtracker, the CCRB or T/LPA obtains the contract, Notice of Award, Notice to Proceed and general contractor information for the new project.
- c. New projects are loaded into LCPtracker by entering specific project and prime contractor following the “New Project Set Up” process in the LCPtracker User’s Manual.
- d. LCPtracker notifies the contractor and CCRB notifies the District Audit Section and NMDOT Project Manager that the new project is set up in LCPtracker. For T/LPA projects, LCPtracker notifies the prime contractor and the T/LPA notifies the District Local Governments Project Manager and District Audit Section, as well as the subcontractor.

- e. The District Audit Section, NMDOT or T/LPA Project Manager shall verify project, contractor and wage decision data entered by the CCRB to ensure information is accurate. Notify the CCRB or T/LPA, as appropriate, if corrections are needed.

5) Subcontractor Set Up in LCPtracker

- a. NMDOT - The prime contractor is responsible for setting up its subcontractors and subcontract data in LCPtracker. The prime contractor must set up or upload its subcontract and subcontractor data into the LCPtracker system prior to the subcontractor starting work. The CCRB will provide support to the prime contractor in subcontractor set up within the LCPtracker system.
- b. T/LPA – The T/LPA’s prime contractor is responsible for setting up its subcontractors and subcontract data in LCPtracker. The prime contractor must set up or upload its subcontract and subcontractor data into the LCPtracker system prior to the subcontractor starting work. The CCRB will provide support to the prime contractor in subcontractor set up within the LCPtracker system.

B. Submittal of Certified Payroll Requirements (FHWA-1273 IV.3.b(1)), (NMAC 11.1.2.9.B(8))

1) Contractor Payroll Submittal Requirements – Contractors shall submit payrolls weekly.

The contractor and each subcontractor is required to furnish, each week in which any contract work is performed, to the contracting agency, a payroll of wages paid each of its employees engaged on the work during the preceding weekly payroll period. The contracting agency is the NMDOT Project Manager for NMDOT projects and the T/LPA Project Manager for Local Public Agency projects. If no work is performed by the contractor or subcontractor in a given week, a “No Work Performed” statement is submitted.

2) LCPtracker Electronic Submittal of Payrolls –Contractors shall submit payrolls weekly in LCPtracker. (See Notice to Contractors, Federal Requirements.)

The contractor and each subcontractor shall submit its certified payroll or “No Work Performed Statement” weekly, by the due date specified, using the LCPtracker payroll reporting system. This requirement applies to both NMDOT and T/LPA projects.

3) Payroll Information Requirement – The weekly payrolls are to include information on employees and wages in order to comply with the Davis-Bacon or “Little Davis-Bacon” requirements of the contract. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under FHWA-1273 IV.3.a & b and/or the NM Public Works Minimum Wage Act.

4) Payment Once/Week Requirement - Contractors/subcontractors are required to pay their laborers and mechanics at least once per week. (FHWA-1273 IV.1.a)

- 5) **Due Date**- Certified Payrolls including the Payroll Statement of Compliance shall be submitted weekly in LCPtracker and are due no later than the time period described in the Notice to Contractors – Federal Requirements.
- 6) **Statement of No Work Performed** - The contractor and subcontractors shall submit a “Statement of No Work Performed” in lieu of a certified payroll in LCPtracker for any week in which no work is performed on the project. The “Statement of No Work Performed” shall continue the payroll numbering sequence.
- 7) **Final Payroll** – The contractor and each subcontractor shall include the words, “Final Payroll” on the final payroll submitted for the project.
- 8) **Prime Contractor Responsibility for Subcontractors** - The prime contractor is responsible for submittal of its certified payrolls as well as those of its subcontractors to the NMDOT or T/LPA Project Manager.
- 9) **Number Payrolls** - The contractor and subcontractors shall number each submitted payroll consecutively starting with payroll #1 for the first week in which work is performed on the project.

C. Statement of Compliance Requirements (FHWA-1273 IV.3.b.(2))

- 1) **LCPtracker Generated Statement of Compliance** - Each payroll submitted must be accompanied by a “Payroll Statement of Compliance” signed by the contractor or subcontractor or his/her agent who pays or supervises the payment of the persons employed under the contract. LCPtracker will generate a “Payroll Statement of Compliance,” which includes information on payroll and fringe benefits requirements, with each payroll uploaded into LCPtracker by the contractor or subcontractor. LCPtracker requires the contractor to complete the forms electronically and provides for an electronic signature by the contractor. The LCPtracker generated forms are acceptable and comply with all federal and state requirements. A print out of a contractor payroll in LCPtracker will automatically print the Payroll Statement of Compliance for that payroll.
- 2) **Contractor Certification** – By submitting a Payroll Statement of Compliance with each payroll, the contractor or subcontractor certifies:
 - a. the completeness and accuracy of information contained in the payroll,
 - b. that full wages were paid each employee without rebate either directly or indirectly and that no deductions have been made either directly or indirectly from the full wages earned other than permissible deductions as set forth in the Regulations 29 C.F.R. §3.1 (2011), and
 - c. that minimum wage rate requirements were met.

- 3) **Falsification of Certification** – (FHWA-1273 IV.3.b (4)) The falsification of the certifications made in the Payroll Statement of Compliance may subject the contractor to civil or criminal prosecution under 18 U.S.C. § 1001 (2006) and 31 U.S.C. § 231.

D. Fringe Benefits Requirements

- 1) **Payment of Fringe Benefits** - The NMDOT or T/LPA Project Manager shall verify that the contractor's laborers and mechanics are paid fringe benefits as required by the appropriate wage decision at the appropriate hourly rate. The contractor may pay fringe benefits in cash or as part of a bona fide fringe benefit plan.
 - a. Fringe benefits as listed on the applicable federal or state wage decision may be paid in the following manner:
 - i. Making payments in the amount of the required fringe benefits to an established program, funded or unfunded. Funded programs are those programs in which the payments are irrevocably made to a trustee or a third person, i.e., the program is established separately from the contractor's own organization, such as health and dental insurance programs (Blue Cross/Blue Shield, Delta Dental, etc.). Unfunded programs are those in which the fringe benefit payments are made directly to a program provided from the general assets of the contractor's organization, such as vacation programs.
 - ii. Making cash payments to the employee in the amount of the required fringe benefits.
 - iii. A combination of the above methods.
 - b. It is the contractor's choice whether the fringe benefits are paid into an approved plan, directly to the employee, or a combination of partial payment directly to the employee and partial payment to a plan.
 - c. The contractor's payroll must reflect how the fringe benefits are being paid. The Project Manager may request the contractor provide a statement and/or breakdown of how it is paying fringe benefits to its Davis-Bacon covered employees by employee or by classification.
 - d. Fringe benefits are required to be paid on all regular and overtime hours worked. However, the required fringe benefit amount, as listed in the wage decision, is not calculated at time and one-half when figuring the overtime rate.
 - e. Apprentices and trainees must be paid fringe benefits in accordance with the provisions of the apprenticeship or training program. If the apprenticeship or training program does not specify or mention fringe benefits, apprentices and trainees must be paid the full amount of fringe benefits listed in the wage rate decision for the applicable classification.

E. Payroll Check and Verification Procedures

1) Responsibility for Payroll Verification

- a. **NMDOT Responsibility** - The Project Manager or designee is responsible for checking and verifying submitted payrolls for contractor compliance with required contract provisions. This responsibility is routinely delegated to the NMDOT Office Manager or other member of the Project Manager's staff. The Project Manager/Office Manager must monitor and verify contractor and subcontractor payroll records received weekly.
- b. **T/LPA Responsibility** – The Local Public Agency Administrator, T/LPA Project Manager, or designated representative shall be responsible for checking and verifying submitted payrolls for contractor compliance with required contract provisions. The T/LPA must monitor and verify contractor and subcontractor payroll records received weekly.

2) Frequency of Payroll Checks

- a. **General** - The frequency of payroll checks is dependent on the payroll submittal process a contractor must follow as specified by the contract. All federal-aid and T/LPA projects require the contractor to submit payrolls electronically in LCPtracker. For these projects, the payroll check frequency is specified in (b) below. There are projects, including 100% State funded projects, in which electronic submittal is not specified. For these projects, the payroll check frequency is specified in (4.iii) below.
- b. **LCPtracker Electronic Payroll Check and Verification Frequency** –Every payroll should be checked and verified prior to the submission of the next payroll .

LCPtracker performs a payroll validation and audit on every payroll submitted by the contractor and subcontractor. In addition to this automated audit function, each payroll submitted in LCPtracker must be verified and approved by the NMDOT or T/LPA Project Manager or designee. Use Form A-1102 *Contractors and Subcontractors Payroll Check* to verify the electronic payroll data.

- c. **T/LPA Payroll Check Frequency** – Local Public Agencies shall follow the payroll check frequency as specified for either electronic submittal in LCPtracker or hard copy submittal.

3) Form A-1102 Contractors and Subcontractors Payroll Checklist

- a. **Use Form A-1102** Contractors and Subcontractors Payroll Checklist to verify and check payrolls. Form A-1102 provides a quick summary of items to be checked on submitted payrolls. File the completed Form A-1102 in the project files and upload into LCPtacker as required by Operations Division Directive (ODD) 2015-03.

Form A-1102 can be downloaded from the NMDOT Forms Library on Intrans or from the Forms Link on the CCRB website at <http://dot.state.nm.us/content/nmdot/en/OEOPFormsManuals.html#LCPforms>.

- b. **Form A-1102 and LCPtracker** – Form A-1102 should be completed for each payroll verified and approved in LCPtracker. This form will serve to document that the payroll was checked and approved in LCPtracker. It will also be used to document findings and action items required when checking payrolls. The person performing the payroll check shall sign the form.
- c. **T/LPA Use of Payroll Checklist** – Local Public Agencies shall use Form A-1102 *Contractors and Subcontractors Payroll Check* when checking contractor payrolls in LCPtracker and manually. T/LPAs shall follow the same procedures as those outlined above for the NMDOT.

4) **Hard Copy Payroll Submission Requirements**

- a. 100% state-funded projects are not entered into LCPtracker and each contractor on such projects must submit hard copy payrolls to the NMDOT or T/LPA Project Manager no more than five working days following the close of the second payroll period. Weekly payrolls shall be submitted bi-weekly..
 - i. **General** – The NMDOT or T/LPA Project Manager is responsible for maintaining contractor payroll records. Maintenance of payroll records includes receipt of, verification of, and filing of payroll records.
 - ii. **Project Files** - The NMDOT or T/LPA Project Manager shall create a project file for the contractor's submitted payrolls and a separate file for each subcontractor submitted payroll. The files shall be created in accordance with the latest edition of the Office Procedures Manual as maintained by CCRB.
 - iii. **Hard Copy Payroll Check Frequency** – Every payroll is checked and verified at time of contractor submittal. This includes verification of all items listed in Section G *Payroll Check Procedures* below. Special attention must be paid to new employees showing up on the payroll. Their information must be checked completely.

F. Payroll Check Procedures - LCPtracker

- 1) **Procedure Overview** – The following is a brief overview of the payroll check procedure to be used in LCPtracker. This procedure applies to both NMDOT and T/LPA Projects. It is assumed each user of LCPtracker has obtained a User ID and Password. If a User ID and Password is needed or if you have forgotten your password, contact the NMDOT CCRB.

- a. Sign on to LCPtracker
- b. Open desired Account
- c. Check for Payroll violations
 - i. If a Violation exists, reject the payroll
 - ii. If a Violation does not exist, proceed with the next step
- d. Check Contractor/Subcontractor Payrolls in the Certifications Tab
 - i. View “CPR Report” (Certified Payroll Report)
 - ii. Check payroll using the payroll Checklist Form A-1102
 - iii. If no Errors are found, accept the payroll.
 - iv. If errors found, reject the payroll.
 - a) Document the error in the “Administrator Notice” window and forward notice to prime contractor
 - b) Document the error on Form A-1102 *Payroll Checklist*
 - v. File Form A-1102 *Payroll Checklist* in project file.

2) Procedure Details – Payroll Check in LCPtracker

a. Sign on to LCPtracker

- i. Open your internet browser
- ii. Enter, www.lcptracker.net
- iii. This will take you to the “Login to LCPtracker” screen
- iv. Enter your User ID: and Password:
 1. Call the CCRB to get a User ID if you do not have one.
- v. Click the “Login” button.

b. Select the desired “Account”

- i. There are two Accounts set up in LCPtracker.
 - a) NEW MEXICO DOT
 1. This Account contains all NMDOT lead projects
 - b) NEW MEXICO DOT – LOCAL GOVERNMENTS
 1. This Account contains all Local Government lead projects
- ii. Click on the desired Account button – this will open the main LCPtracker screen from which action can be taken on your specific projects, if access is available to both NMDOT and Local Government projects.

c. Audit the Payroll for Violations

- i. Check to see if the program has generated any payroll errors for your project based on internal validation checks at the time the contractor submitted its payroll. Since LCPtracker requires the contractor to resolve many types of payroll errors before allowing submittal of a certified payroll, the system generates very few violation errors upon contractor submittal of a certified payroll.
- ii. Select the “Violations” Tab. This will bring up the Violations Data Form.
 - a) Select the Project Control Number from the drop down list.
 - b) Click on the “Load Data” button.
 - c) If any violations have been recorded for the project, a project violation record will appear in the data table. If no violations have been recorded, the table will be returned with blank entries.
- iii. If a “Violation Error” exists for the project

- a) Note the “Contractor” or “Subcontractor” and “Week End Date.”
 - b) Click the “View” button under the “View Record” column to open the “Notices Screen” to review the “Violation Error” generated by the system. The Notice will be found at the bottom of the page. View the “Notice Information” generated and note the payroll number.
 - c) Determine why the payroll generated a “Violation Error” based on the “Notice” information. This may allow you to help the contractor resolve the issue. Contact CCRB labor compliance staff for support.
 - d) Reject the Payroll based on the “Violation Error” following the procedure under 2)f. *Reject the Payroll* below. The contractor will be able to view the violation error once the payroll is rejected.
- iv. If a “Violation Error” does not exist, continue with Audit and Certification procedures under 2)d. *Audit and Certify Payroll* below.

d. Audit and Certify Payroll

- i. Click on the “Certifications” Tab. This brings up the “Certifications” window.
- ii. **Access your project payroll data** using the “Projects” and “Contractors” drop down lists.
 - a) Select your project Control Number from the “Projects” drop down list.
 - b) Click “Load Data,” to list your project’s payrolls for the prime contractor and all subcontractors.
- iii. **Filter your project payroll data** to view only those payroll records with an “Accept Status” of “Submitted” to list project payrolls pending NMDOT or T/LPA Project Manager review and action.
 - a) Filtering can be done a number of ways. The most commonly used is the “From Date” and “To Date” to return payrolls submitted during a given time frame (example: for the month of June, one would enter 06/01/10 to 06/30/10). Remember to click on the “Load Data” button each time a filter field is used.
 - b) In the “Accept Status” selection box at the top of the screen, select “SUBMITTED” from the drop down list.
 - c) Click on the “Load Data” button. A listing of contractor payrolls is returned with the status of “SUBMITTED.” These payrolls must be audited and then flagged as either “Accepted” or “Rejected”.
 - d) The same process is used to check for contractor submitted payrolls with an “Accept Status” of “RESUBMITTED” and “UPDATED” as these payroll records also require auditing.
- iv. **Audit each payroll** with an “Accept Status” of “Submitted,” “Resubmitted,” and “Updated” using the procedure in (iii) above.
- v. **Open the Payroll record** to view and audit the payroll.
 - a) Click on “View” in the View CPR Column of the payroll record to be audited. This will open up a separate window showing the Certified Payroll.
 - b) Adjust the zoom level to view the payroll.
 - c) Check the payroll using Form A-1102 *Contractor and Subcontractor Payroll Check*.

1. Verify, among other requirements, that the employee's name, employee ID, ethnicity, and gender are shown on the payroll for each employee. Note: The contractor must not use an employee's Social Security Number for the employee ID to avert identity theft. If a social security number is used, reject the payroll and notify the contractor.

The LCPtracker software requires contractors and subcontractors to enter the employee's name and ID into the system during the payroll upload procedure. The NMDOT Office Manager or T/LPA shall verify that each payroll employee entry does include ethnicity and gender. The payroll shall be rejected in LCPtracker for failure to include ethnicity and gender. The NMDOT Office Manager or T/LPA shall notify the contractor of the rejection and shall request the discrepancies be corrected and the payroll be resubmitted.

2. The Payroll Statement of Compliance is made a part of each payroll and can be found towards the end of the payroll.
3. LCPtracker internally validates employee pay rates with the wage decision. Spot check employee pay rates manually against a hard copy of the wage decision.
4. Close the payroll window.

e. Acceptance of Payroll.

- i. If no errors or violations are noted, accept the payroll.
- ii. Click on the drop down box under the "Accept Status" column of the payroll record.
- iii. Select "ACCEPTED."
- iv. A window will open asking if you are sure you want to change the status. Select "OK" to confirm the change and "Accept" the payroll. Select "Cancel" if you are not ready to accept or reject the payroll.
- v. The payroll record "Accept Status" field changes to "ACCEPTED" indicating the CPR has been reviewed and "Accepted."
- vi. Sign the Payroll Checklist (Form A-1102) and file it in the appropriate Project File and upload in LCPtracker as required.

f. Reject the Payroll.

- i. If errors or violations are noted, reject the payroll.
- ii. Click on the drop down box under the "Accept Status" column of the payroll record.
- iii. Select "REJECTED."
- iv. A window will open asking if you are sure you want to change the status? Select "OK" to confirm the change and "Reject" the payroll. Select "Cancel" if you are not ready to accept or reject the payroll.
- v. When "OK" is selected to confirm the payroll Rejection, a notice window will be displayed. Provide the reason for "Rejection" and select "OK."

- vi. The payroll record “Accept Status” field changes to “REJECTED.” The payroll is now “Rejected.”
- vii. The contractor automatically receives an email based on the reason for rejection entered in (v.) of this section.
- viii. The CPR is flagged in red on the contractor’s screen.
- ix. A note appears on the contractor’s “Project” tab that a rejected CPR exists.
- x. The prime contractor is sent an email if the payroll rejection was for one of its subcontractors.
- xi. Make a note on the Payroll Checklist Form indicating the reason for the rejection and that the contractor must resubmit a corrected payroll.
- xii. Sign the Payroll Checklist Form and file it in the appropriate Project File location, and upload into LCPtracker.

G. Payroll Check Procedures – Manual Hard Copy

- 1) **Applicability** – The Manual Hard Copy payroll check procedure applies to instances when payroll checks are performed manually from hard copy submittals. Use this procedure when the contract does not specify the use of LCPtracker, for example, if the project is 100% state funded.
- 2) **Checking of payrolls is required** - The verification and checking of submitted contractor payrolls is required and applies to both NMDOT and T/LPA personnel.
- 3) **Verify Complete Payroll Submittal** - The NMDOT or T/LPA Project Manager or designee shall verify that the payroll and Payroll Statement of Compliance are included and attached to each payroll submittal. Notify the contractor if missing the Payroll Statement of Compliance.
- 4) **Verify Payroll Number** - The payroll number must be shown on the payroll in sequential order starting with payroll number 1. Payroll numbering shall continue in sequential order for each week payrolls are submitted on the project. The last payroll on a project shall include the words “Final Payroll” next to the payroll number. Sequential payroll numbering shall continue even for weeks in which no work is performed by numbering the Statement of No Work Performed submitted to the NMDOT or T/LPA Project Manager.
- 5) **Verify Basic Employee Payroll Info** - Verify the employee’s full name, Employee ID, Ethnicity and Gender are shown on each payroll. This information must appear on each payroll submitted.
 - a. **Employee ID** – The contractor may use any numbering system it chooses provided the employee ID is unique to each employee.
 - b. **Ethnicity and Gender** – The contractor is required to provide this information on the payroll. The contractor shall use ethnicity groups as identified in Form PR1391. Gender shall be designated as male or female.

- c. **Address, Social Security Number** – these items are not shown on any payroll to avert identity theft. The contractor is still required to maintain this information internally. This information may be verified and checked during field audits of the contractor's EEO/labor compliance Program.
 - d.
- 6) **Verify Classifications** - Verify that employees' classifications used and shown on the certified payroll are in accordance with the wage decision.
- a. **Work in More Than One Classification** – If a covered employee works in more than one classification during a work week, verify that all classifications are shown and minimum wage rate requirements are met for each. A laborer or mechanic who performs work on the project in more than one classification during a workweek shall be classified and paid at the highest wage rate applicable to any of the work that he or she performed unless the payroll shows hours worked and wages paid for each classification. (See Section 7. *Wages and Wage Determinations*, F. *Classification of Employees*, 3) *Work Performed in More Than One Classification* of this Chapter for additional information and guidance.)
- 7) **Verify 40 Hour Work Week Requirements**
- a. The contractor shall designate its work week and shall not deviate from its designated work week without prior written approval from the NMDOT or T/LPA Project Manager.
 - b. Verify that the 40-hour work week is complied with. Overtime rates apply to all hours worked in excess of 40 hours in one week. Overtime does not apply to hours worked in excess of 8 hours per day, unless the total hours in the work week exceeds forty (40) hours.
 - c. Verify daily and weekly straight time and overtime hours worked are shown for all covered employees listed on the payroll.
- 8) **Verify Wage Rates**
- a. The NMDOT or T/LPA Project Manager or designee shall verify that the contractor's laborers and mechanics are paid no less than the wage rates plus fringe benefits specified in the federal wage decision or state wage decision, whichever is greater.
 - b. **Minimum Wage Rates** – The prevailing hourly wage rate is found in the wage decision and is comprised of the basic hourly wage rate plus fringe benefits.
 - c. Verify gross pay, itemized deductions, withholdings, and net wages are shown on the payroll for each employee. Verify the gross and net pay by multiplying the straight time and overtime pay rates by the applicable straight time and overtime hours worked plus fringe benefits if paid in cash. Net pay is gross pay minus the deductions and withholdings for a given week.

9) **Verify Payment of Overtime**

Overtime - Verify that overtime rates are applied for all hours worked in excess of 40 hours in one week. The overtime rate shall be no less than one and one-half times the basic wage rate plus fringe benefits.

10) **Verify Allowable Deductions**

Review all deductions shown. Only deductions authorized by law may be made from an employee's weekly paycheck. (Refer to Subsection E. *Allowable Payroll Deductions* under Section 6. *Wages and Wage Determinations* of this Chapter). The failure of a contractor to withhold taxes (e.g. social security and Medicare) from an employee's weekly paycheck may indicate the person is not an actual employee. The NMDOT or T/LPA Project Manager must follow up in such a case to verify employment status.

11) **Verify Apprenticeship and Trainee Status and Pay**

- a. Check that apprentices and trainees are correctly identified on the payroll.
- b. Verify that the apprentice/trainee name appearing on the certified payroll is also on the list of registered apprentices/trainees under the apprenticeship program being used by the contractor.
- c. Check that apprentice and trainee classifications include the type of work being performed (carpenter apprentice/trainee, ironworker apprentice/trainee, etc.).
- d. Verify that the Apprentice/Trainee pay rate and fringe benefit rate is in conformance with the rate specified in the approved Apprenticeship/Trainee Program.

12) **Verify Payroll Statement of Compliance** (see Section 8.C. of this Chapter)

- a. The NMDOT or T/LPA Project Manager or designee shall verify that each payroll submittal is accompanied by a Payroll Statement of Compliance.
- b. The NMDOT or T/LPA Project Manager or designee shall verify that the Payroll Statement of Compliance is signed by an authorized agent of the contractor.
- c. The NMDOT or T/LPA Project Manager or designee shall verify that the Payroll Statement of Compliance includes an anti-kickback statement. The statement shall be similar to the following for Federal projects:
 - i. "All persons on said project have been paid the full weekly wages earned, no rebates have been or will be made either directly or indirectly to or on behalf of said person, and no deductions have been made either directly or indirectly from the full wages earned by any person, other than permissible deductions as defined in Regulations, Part 3 of 29 CFR Subtitle A, under the Copeland Act."

- d. For state projects the anti-kickback statement shall be similar to the following:

I hereby certify that the above information is correct and that all workers I employ on this public works project were paid no less than the Prevailing Wage Rate(s) as determined by the Department of Workforce Solutions, Labor Relations Division for this project as identified by the State Wage Decision Number. I understand that contractors who violate Prevailing Wage Laws (i.e., incorrect job classification, improper payment of prevailing wages, or overtime, etc.), are subject to debarment procedures and shall be required to pay back any wages due to workers. (Ref. Labor Relations Division Public Works Minimum Wage Act Policy Manual (11.1.2 NMAC) & Public Works Minimum Wage Act (13-4-11 through 13-4-18, NMSA 1978)). I, _____, being first duly sworn on oath under penalty of perjury, swear that the foregoing information is true and correct.

Contractor's signature. Date

Notary: Subscribed and sworn to before me at ____ this ____ day of _____, 20__

_____ Notary Public

(Signature) (Date)

My commission expires: _____

i.

- e. The Payroll Statement of Compliance shall be stapled to and filed with each certified payroll.

13) Verify Fringe Benefits Information(see Section 8.D of this Chapter)

- a. The NMDOT or T/LPA Project Manager or designee shall verify that the contractor has checked paragraph 4a. and/or 4b. of the Fringe Benefits Section of the Payroll Statement of Compliance indicating how it is paying fringe benefits, either in cash or to an approved program.
- b. **Contractors who pay cash in lieu of fringe benefits** – The fringe benefit rate per hour paid in cash shall be shown on the certified payroll. The NMDOT or T/LPA Project Manager or designee shall verify the fringe benefit rate is no less than that shown on the applicable wage decision in the contract.
- i. Overtime on fringe benefits paid in cash is calculated on a straight time basis.
- c. **Contractors who pay all required fringe benefits to an approved program** - The NMDOT or T/LPA Project Manager or designee shall verify that contractors who pay fringe benefits to approved plans, funds, or programs pay at rates not less than the fringe benefit rates shown by classification in the appropriate wage decision.
- i. This can be accomplished by verifying the contractor's breakdown of fringe benefits it pays to employees. The breakdown should be requested of the contractor and all applicable subcontractors. A good time to do this is at the Preconstruction Conference.

- d. **Contractors who pay fringe benefits as part of a plan and cash in lieu-** Ensure the combined total of the two are not less than the fringe benefit rates shown by classification in the appropriate wage decision.

14) **Complete and Attach Payroll Checklist, Form A-1102**

- a. The NMDOT or T/LPA Project Manager or designee shall, when checking payrolls in LCPtracker or when checking hard copies of payrolls manually, use Form No. A-1102 *Contractors and Subcontractors Payroll Checklist*. Fill out the form for each contractor or subcontractor payroll submitted weekly.
- b. Note any errors or discrepancies found in the remarks section of the form. Describe action taken to resolve the error or discrepancy. Notify the contractor of errors or discrepancies found as detailed in Section H. *Errors in Payroll Records* below.
- c. Sign the Payroll Checklist form.

15) **File Payroll and Payroll Checklist Form**

The NMDOT or T/LPA Project Manager or designee shall file hard copies of the payroll, payroll statement of compliance information, and Payroll Checklist form in the project file.

H. Errors in Payroll Records

- 1) **LCPtracker and hardcopy check** - When errors or discrepancies are found during payroll checks in LCPtracker, the NMDOT or T/LPA Project Manager or designee shall reject the payroll and notify the contractor of the error using the LCPtracker notification function. When errors or discrepancies are found during hard copy payroll checks, the Project Manager shall notify the contractor in writing and request corrections on a supplemental payroll.
- 2) **Do Not Return Payroll** – Under no circumstances shall the submitted payroll be returned to the contractor for correction. A supplemental payroll shall be requested. Instruct the contractor to identify the payroll as corrected by either writing or inserting the word “corrected” at the top of the payroll or by identifying the payroll number as corrected (i.e., payroll # 1-C, or payroll # 8-corrected).
- 3) **T/LPA Contracts** – T/LPAs shall withhold progress payments for contractor or subcontractor noncompliance in submittal of timely payrolls.

In LCPtracker, once a submitted payroll is rejected by NMDOT or T/LPA staff, the contractor is required to make the correction and resubmit. Once a payroll has been accepted by the NMDOT or T/LPA, it cannot and should not be modified in any way. Contact CCRB if a correction must be made to a previously accepted payroll.

- a. The NMDOT or T/LPA shall upon its own action or upon written request of the DOL withhold, or cause to be withheld, from the contractor or subcontractor as much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics the full amount of wages required by the contract.
- b. In the event of the contractor's failure to pay any laborer or mechanic, the NMDOT or T/LPA Project Manager may, after written notice to the contractor, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

4) **Procedures**

- a. Errors identified during the payroll verification process shall be noted in LCPtracker and on the Payroll Checklist form.
 - b. The NMDOT or T/LPA Project Manager or designee shall notify the contractor in writing of errors encountered and shall identify action items required of the contractor to make the necessary corrections. This notification is generally performed within LCPtracker using its internal notification system.
 - c. The NMDOT or T/LPA Project Manager or designee shall request the contractor submit evidence of corrective action and that a supplemental payroll be submitted with the necessary corrections. In LCPtracker, the contractor shall make the corrections and resubmit the payroll for review and acceptance by the NMDOT or T/LPA.
 - d. Any willful or continual non-compliance with labor standards by the contractor or subcontractors shall be reported to the CCRB Director and the ADE for further action.
- 5) **Local Public Agency Projects** – T/LPAs shall follow the same procedure as outlined above when errors are encountered on contractor's payroll(s).

I. **Late Payroll Procedures**

- 1) **Due Date** – Certified Payrolls including the Payroll Statement of Compliance shall be submitted weekly to the NMDOT or T/LPA Project Manager and are due no later than seven (7) days after date that the actual payment is processed by contractor or subcontractor, at any tier, to its employee.. Certified Payrolls not submitted within the specified time will be deemed late and may result in the withholding of progress payments.
- 2) **Notify Contractor if Late** - The NMDOT or T/LPA Project Manager shall notify the prime contractor in writing when payrolls are late and shall request that payrolls be brought up to date.
- 3) **Prime Contractor Responsible for Subcontractors** - The prime contractor is responsible for timely submittal of subcontractor payrolls.

9. Non-Compliance Procedures

A. NMDOT responsibility for enforcement

- 1) Enforcement of the labor compliance provisions of federal-aid contracts as summarized in FHWA-1273, Sections IV. and V. is the NMDOT's responsibility. For T/LPA federal-aid projects receiving funding through the NMDOT, responsibility for enforcement of the labor compliance provisions of the contract lies with the T/LPA and NMDOT.

B. Non-Compliance in Submittal of Timely Payrolls (FHWA-1273 IV.3)

- 1) T/LPA Contracts – T/LPAs shall withhold progress payments for contractor or subcontractor noncompliance in submittal of timely payrolls.

C. Non-Compliance with FHWA-1273 Sections IV and V – (FHWA-1273 IV.7)

- 1) Failure of the contractor to comply with the requirements of FHWA-1273 Section IV, Payment of Predetermined Minimum Wage, and FHWA-1273 Section V, Statements and Payrolls, may be considered as grounds for contract termination and contractor debarment under 29 CFR § 5.5(a) (2007)

D. Withholding Due to Unpaid Wages – (FHWA-1273 V.3)

1) Requirements

2) Procedure

- a. The NMDOT or T/LPA Project Manager shall notify the contractor in writing of any wages due an employee under the contract. The NMDOT or T/LPA Project Manager shall require the contractor pay all wages due the affected employees.
- b. Should the contractor or subcontractor willfully fail or refuse to pay its covered employees the full amount of wages required under the contract, the NMDOT or T/LPA Project Manager shall notify his or her immediate supervisor and the CCRB Director.
- c. The CCRB Director, ADE and/or District Engineer in consultation with the FHWA shall determine the appropriate action to take under the contract including withholding of current progress payments and suspension of future progress payments.

- d. The NMDOT or T/LPA Project Manager shall be directed by his or her immediate supervisor on the course of action to take. If directed, the NMDOT or T/LPA Project Manager shall cause the withholding of current progress payments or the suspension of future progress payments until such time as the violations have ceased.

E. Compliance Procedures at Project Substantial Completion – NMDOT Projects

- 1) The NMDOT Project Manager shall contact the CCRB and District Audit staff just prior to and no later than at the time of substantial completion to initiate 90% audit in LCPtracker.
- 2) CCRB and District Audit staff shall conduct an audit of labor compliance records to ensure contractor compliance with contract documents. CCRB will notify the Project Manager of any corrective action required by the contractor.
- 3) CCRB completes its 100% audit by sending its notice of compliance before the NMDOT Project Manager finalizes project and submits Final Documents to District Audit for final audit. The Project Manager completes corrections to final audit, if applicable. District Audit mails Final Documents with Estimate to Contractor that includes request for “Affidavit of Wages Paid” form from the contractor to include all subcontractors. The “Affidavit of Wages Paid” must be obtained before the project can close.
 - a. If the “Affidavit of Wages Paid” cannot be obtained the NMDOT Project Manager shall send a letter requesting the same from the contractor or subcontractor. If the same still cannot be obtained from the contractor, then the NMDOT Project Manager shall document their attempts to obtain the “Affidavit of Wages Paid” in the project file and copy CCRB.

F. Compliance Procedure at Project Substantial Completion – T/LPA Projects

- 1) The T/LPA Project Manager shall contact the NMDOT District Local Government Coordinator at 50%, 90% and 100% project completion to initiate an audit in LCPtracker.
- 2) CCRB shall conduct an audit of labor compliance records to ensure contractor compliance with contract documents. CCRB will notify the NMDOT District Local Government Coordinator of any corrective action required by the contractor. NMDOT Local Government

Coordinator holds Final Estimate Payment until all outstanding labor compliance (as well as EEO/DBE compliance) issues have been resolved.

- 3) T/LPA submits Final Documents to NMDOT District Local Government Coordinator for final audit. T/LPA and NMDOT District Local Government Coordinator ensure corrections to final audit are made as required.

G. Contact CCRB for Guidance

The NMDOT or T/LPA Project Manager shall contact the CCRB for guidance and support regarding labor compliance issues that may require withholding of contractor progress payments except for routine withholdings due to late payroll submittal.

Chapter V – Labor and EEO Compliance Interview Procedures (Wage Rate Interviews)

1. Purpose

- A. The Labor and EEO Compliance Interview is a “tool” or method used by the Department or LPA to verify contractors and subcontractors are complying with EEO and Labor requirements of the contract. Contractor employees are interviewed by the contracting agency at the site of work to gather certain wage and EEO information from the employee. The information gathered is identified in Form A-1077 *Labor and EEO Compliance Interview* or Form A-1265 *Labor and EEO Compliance Interview (Spanish)*. This information is then reviewed and verified by the contracting agency to ensure employee wage and classification statements and employer payroll information match, to ensure minimum wage rates are being complied with, and to ensure employees know about and are indoctrinated into the employer’s EEO policy and procedures.

2. Requirements

- A. The NMDOT or LPA Project Manager or designee shall conduct labor and EEO compliance interviews on all federal-aid projects.
- B. See section 6. for frequency of interviews

3. Authority

- A. Form FHWA-1273 IV.3.c. – The contractor and subcontractor shall permit representatives of the contracting agency (NMDOT or LPA), the FHWA, or the DOL to interview employees during working hours on the job.

4. Responsibility

A. NMDOT Projects

- 1) The NMDOT Project Manager shall be responsible for conducting “Labor and EEO Compliance Interviews” on assigned federal-aid and 100% State projects. This responsibility is routinely delegated to the Project Manager’s field staff. (See Section 5.B.)
- 2) The NMDOT Project Manager shall be responsible for verifying the content of the “Labor and EEO Compliance Interview” data. This responsibility is routinely delegated to the Project Manager’s Office Manager or other staff members. (See Section 5.C.)
- 3) The NMDOT Project Manager shall be responsible for seeking corrective action by the contractor to resolve any non-compliance issues revealed by the Labor and EEO Compliance interview. The Project Manager should seek guidance and support from the CCRB when needed. (See Section 5.D.)
- 4) The NMDOT Project Manager shall report the number of Interviews conducted for each project as the interviews are completed to CCRB/CCRB. (See Section 5.E.)

B. Local Public Agency (LPA) Projects

- 1) The LPA Project Manager is responsible for conducting “Labor and EEO Compliance Interviews” on their federal-aid and 100% State projects.
- 2) The LPA Project Manager is responsible for verifying the content of the “Labor and EEO Compliance Interview” data.
- 3) The LPA Project Manager is responsible for seeking corrective action to resolve any non-compliance issues revealed by the Labor and EEO Compliance interview. The LPA Project Manager should seek guidance and support from the District Local Government Coordinator when needed. The District Local Government Coordinator should seek guidance and support from the CCRB when needed.
- 4) The LPA Project Manager shall report the number of Interviews conducted for each project on a monthly basis to the District Local Government Coordinator (See 5.E). The District Local Government Coordinator shall forward the report to the CCRB.

5. Procedures

- A. **Form A-1077 or Form A-1265** - Interviews shall be recorded on Form A-1077 *Labor and EEO Compliance Interview* or Form A-1265 *Labor and EEO Compliance Interview (Spanish)*.
- B. **Conduct Interview** - The NMDOT or LPA Project Manager or designated staff member shall conduct employee Labor and EEO Compliance Interviews.
 - 1) As a courtesy, the employee’s supervisor should be informed that interviews will be conducted at some point during the day.
 - 2) Select a contractor or subcontractor employee to interview (see Section 7. below). Every effort shall be made not to disrupt or interfere with the work at hand. Try to interview employees during periods of inactivity or a break in the work.
 - 3) Introduce yourself and explain who you are. Inform the employee that you would like to interview him or her with regards to his/her employment with the company for which he or she works. Explain that the wage interview is a way the Department verifies that employees are being paid correctly for the work being performed. Try to put the employee at ease with the interview process.
 - 4) Form A-1077 or Form A-1265 shall be filled out by the NMDOT or LPA Staff Member conducting the interview. Upload the completed forms to LCPtracker.
 - 5) Record answers for each question asked on the form. If the employee does not know the answer to a question, write “unknown” in the space provided.
 - 6) At the conclusion of the interview, ask the employee if he or she would like to make any additional comments. Record this information in the Remarks section of the form.

- 7) The form must be signed by the NMDOT or LPA staff member conducting the interview.
- 8) Thank the employee for his participation in the interview.
- 9) The completed form is submitted to the NMDOT Office Manager, LPA Project Manager, or individual assigned to review and verify the information.

C. Verify Interview Information

- 1) The results of the interview must be checked and verified against the information contained in the weekly payroll record for that date.
- 2) Any discrepancies must be reported to the CCRB immediately.
- 3) The NMDOT or LPA Project Manager or designee shall sign the verification portion of Form A-1077 or Form A-1265. The completed and verified form shall be filed in the appropriate section of the project file.

D. Corrective Action

- 1) The NMDOT or LPA Project Manager, or designated representative shall notify the prime contractor in writing of any issue of non-compliance revealed by the Labor and EEO Compliance Interview and shall require corrective action be taken by the contractor or its subcontractors to resolve the issue.
- 2) The NMDOT or LPA Project Manager shall notify his or her immediate supervisor and the CCRB should the contractor fail to perform corrective action. The LPA shall notify the District Local Government Coordinator should the contractor fail to perform corrective action. The District Local Government Coordinator shall contact the CCRB for support and guidance.

E. Form A-1236 Monthly Summary Report

- 1) The NMDOT Project Manager shall fill out Form A-1236 *Labor and EEO Compliance Interview Monthly Summary Report* on a monthly basis for each active project and shall forward the report to the CCRB. The Summary Report is due to the CCRB office by the tenth of each month.
- 2) The LPA Project Manager shall fill out Form A-1236 *Labor and EEO Compliance Interview Monthly Summary Report* on a monthly basis for each active project with NMDOT oversight and shall forward the report to the District Local Government Coordinator by the tenth of each month. The District Local Government Coordinator shall forward the Summary Report to the CCRB by the thirteenth of each month.

6. Frequency of Interviews

- A. Enough interviews must be conducted throughout the course of a project to ensure a representative sampling has been made for all covered classes of workers employed on the contract by the prime contractor and all subcontractors. Covered classes of workers include all classifications listed in the contract wage decision. A representative sampling is, at a minimum,

50% of employees in each covered classification. More interviews may be conducted should circumstances warrant.

- B. It is suggested that a minimum of four interviews be conducted each week until a representative sampling is attained. The NMDOT or LPA Project Manager shall direct the frequency of contractor interviews with its staff given the above guidance and contractor operations. In this way the NMDOT or LPA Project Manager is afforded the flexibility needed to manage the project but recognizes the importance and need for conducting Labor and EEO Compliance Interviews.

7. Who should be interviewed?

- A. Interviews should be conducted on both contractor and subcontractor(s) employees. An employee shall not be interviewed more than once per project unless circumstances warrant otherwise. Only those employees (laborers and mechanics) whose classifications are subject to the Davis-Bacon Act will be interviewed. Generally, laborers and mechanics are defined by all classifications in the federal or state wage decision (laborers, operators, carpenters, truck drivers, etc.) Examples of labor classifications that are exempt from Davis-Bacon contract requirements and need not be interviewed are supervisors, non-working foremen, salaried employees and surveyors.

8. Guidance

- A. **Wage Rate Interviews** - Labor and EEO Compliance Interviews are commonly referred to as Wage Rate Interviews in the field. They are one and the same.
- B. This procedure applies to federal-aid projects. Federal-aid projects require compliance to both the federal and state wage decisions. 100% state projects require compliance with the state wage decision.
- C. **Obtaining Forms** - Form A-1077 *Labor and EEO Compliance Interview* or Form A-1265 *Labor and EEO Compliance Interview (Spanish)* is used to conduct the labor and EEO compliance interview. Form A-1236 *Labor and EEO Compliance Interview Monthly Summary Report* is used to summarize the number of Interviews taken each month for submittal to the CCRB. These forms may be obtained by:
 - 1) Downloading from the NMDOT Intrans website by clicking on “Library” in the upper right hand corner of the screen. Go to “Department Forms” and conduct a search for Form A-1077, A-1265 or A-1236.
 - 2) Downloading from the NMDOT public website at www.dot.state.nm.us.
 - a. Click on “Site Index” under the DOT Icon.
 - b. Click on “Office of Equal Opportunity Publications” under “Office of Equal Opportunity Programs” in the alphabetical listing.
 - c. The Labor and EEO Compliance Interview Forms and the Labor and EEO Compliance Interview Monthly Summary Report are listed under “Forms”.
 - 3) Contacting the NMDOT Office of Equal Opportunity Programs at 505-827-1774 or 1-800-544-0936.

Chapter VI – On-The-Job Training (OJT) Program and Procedures

(FHWA-1273 IV.4.), (23 CFR 230 Subpart A Appendix B)

1. Program Description

A. Purpose

- 1) The New Mexico Department of Transportation (NMDOT) created its On the Job Training Program and Special Provision (OJT Program) to fulfill the Training Special Provision requirements of federal-aid construction contracts included in 23 CFR 230, Appendix B to Subpart A.
- 2) The purpose of the OJT Program is to address the underrepresentation of minority and female workers in the construction trades through the assignment of OJT goals. To that end, the primary objective of the OJT Program is the training and upgrading of minorities and females to journeyman status on NMDOT federal-aid contracts.

B. Program Description

- 1) The OJT Program fulfills its objective by:
 - a. Fostering long-term relationships between contractors and trainees,
 - b. Encouraging contractors to assist trainees in fully attaining journeyman status, and
 - c. Offering contractors abundant flexibility in fulfilling their training obligations.
- 2) The OJT Program assigns contractors an annual training goal based on past dollar amounts awarded to the contractor as an NMDOT federal-aid prime contractor.
- 3) Contractors may assign eligible trainees that are enrolled in an approved training program, as outlined in Section 2A, to any construction project on which the contractor is a prime, including non-NMDOT projects. Contractors may also assign trainees to be trained by subcontractors on any project, so long as the prime contractor retains the primary responsibility for fulfilling its federal-aid training requirements.
- 4) Contractors shall make every effort to meet their OJT Program goals by enrolling minority and female trainees (i.e. by conducting systematic and direct recruitment through public and private sources likely to yield minority and female trainees) to the extent that such persons are available within a reasonable area of recruitment. When a contractor cannot meet its annual training goal with minorities and females, it is responsible for demonstrating its Good Faith Efforts taken to meet the goal. Examples of what actions constitute Good Faith Efforts are set forth in Section 3 below. NMDOT will make compliance determinations regarding the OJT Program based upon either attainment of the annual goal or the Good Faith Efforts to meet it.

- 5) No employee shall be employed as an apprentice or trainee in any classification in which he or she has successfully completed a training course leading to certification in any classification or in which he or she has been employed as a journeyman. The contractor shall satisfy this requirement by including appropriate questions in the employment application or by other suitable means. Regardless of the method used, the contractor's records shall document the findings in each case. Such records shall be available for inspection by authorized representatives of NMDOT and the Federal Highway Administration (FHWA).
- 6) The ratio of apprentices and trainees to journeymen shall not be greater than permitted by the terms of the approved training program being utilized. When a specific ratio is not provided, the ratio of apprentices and trainees to journeymen expected to be on the contractor's work force during normal operations shall, pursuant to 23 CFR 230.111(c)(10), fall between 1:10 and 1:4.

C. Annual Training Goal

- 1) The NMDOT CCRB will notify contractors by September 1 of an assigned training goal that must be completed within a fifteen month period (October 1 to December 31 of the next calendar year) within which they must participate.
 - a. Contractors are assigned a training goal based on the dollar amount awarded to the contractor as an NMDOT federal-aid prime contractor during the previous state fiscal year (July 1 through June 30). More specifically, each contractor cumulatively awarded ten million dollars or more as a prime contractor on NMDOT federal-aid projects shall be required to train, certify and advance the required number of trainees to certification status during and before the expiration of the training period.
 - b. The trainee must begin training during the training period within which the contractor must participate and trainee(s) time cannot "roll-over" from one training period to another for purposes of meeting the training goal.
- 2) While NMDOT strongly encourages contractors to independently provide on the job training on their projects, only those contractors who have reached the above-mentioned threshold are required to participate in and are bound by the provisions of this OJT Program.
 - a. When a contractor is not assigned an annual training goal but still utilizes trainees/apprentices on a federal-aid project, the contractor shall be reimbursed for training hours under the OJT pay item, and the contractor may pay the trainees/apprentices the wages allowed in the approved training program, which may be less than the minimum pay rate for the classification.
 - b. The contractor is still required to use an approved training program, register its trainees in the program, pay trainees according to the program, and show trainees on its payrolls as required by FHWA-1273, Sections IV and V.

2. Program Requirements

A. Use of Approved Training Program

- 1) NMDOT recognizes four types of contractor based training programs. Those programs are:
 - a. contractor in-house training programs that have received prior approval from both FHWA and NMDOT;
 - b. training programs approved in other states subject to proof of approval;
 - c. the approved Workforce Development Program provided through the Associated Contractors of New Mexico (ACNM); and
 - d. the New Mexico Department of Workforce Solutions' State Apprenticeship Council programs (e.g. union apprenticeships, if the contract employees are otherwise eligible).
- 2) If a contractor wants to use a training program other than one of the four mentioned above, the contractor must have the program approved by NMDOT and FHWA prior to commencing work.
- 3) All training programs must be administered in a manner consistent with the equal employment obligations of federal-aid highway construction contracts. NMDOT reserves the right to request documentation that a program fulfills these obligations.
- 4) Contractors must ensure that each trainee does not exceed the maximum number of training hours required for the completion of the selected training program.

B. Wage Requirements- Contractors must pay each approved trainee at the appropriate percentage of training wage rate based on the approved training program and consistent with applicable State and Federal regulations and guidance.

C. Reporting Requirements

- 1) Contractors must submit the following documents to the administrator of the approved training program being utilized, the NMDOT Office of Equal Opportunity Programs, and, for NMDOT and LPA federal-aid projects, to the NMDOT or LPA Project Manager:
 - a. Contractors shall complete and submit Form A-2201, Contractor OJT Enrollment Form, within seven business days of the contractor's intent to assign a trainee(s) to a project.
 - b. For NMDOT or LPA federal-aid projects, contractors shall complete and submit Form A-2203, OJT Program Labor Classification Request within seven business days of the contractor's intent to assign a trainee(s) to a project.
 - c. Contractors shall complete and submit Form A-2202, OJT Program Monthly Reporting Form, on or before the 10th of each month, reporting on the preceding month.
- 2) Contractors shall submit to the NMDOT CCRB an Annual Summary Report by January 20th following the completion of the training period. The report must give an accurate account of all trainee hours; identifying each trainee by name, ethnicity and gender and identifying each project and/or contract and the trainee hours attributed thereto. Monthly reports submitted after January 10th of the following year will not be accepted or considered towards goal attainment for the previous calendar year.

- 3) If a contractor did not attain its annual goal, it must submit, with its Annual Summary Report, documentation of its Good Faith Efforts to attain the goal (see Section 3 below).
- 4) Contractors should only submit paperwork for individuals accepted and enrolled in an approved training program as outlined in Section 2A, and not for individuals participating in other training and/or apprenticeship programs.

D. Contractor Participation

- 1) The contractor's Equal Employment Opportunity Officer (EEO Officer) shall be responsible for monitoring and administering the trainees' progress. The EEO Officer shall serve as the point of contact for NMDOT and LPA representatives regarding information, documentation, and conflict resolution.
- 2) The contractor shall furnish each trainee a copy of the Training Program and other documentation related to the training program.
- 3) The contractor shall provide training that develops skills as required by the training program.
- 4) The contractor shall ensure at least 85% of the training provided to non-supervisor trainees is conducted on a bona fide construction project.
- 5) The contractor shall furnish to each trainee, upon successful completion of their training program, a certificate showing the type and length of training satisfactorily completed.

E. Contractor Reimbursement

- 1) NMDOT will reimburse the contractor 80 cents per hour of training given an employee on a NMDOT lead State or Federal-aid project in accordance with an approved training program.
- 2) Reimbursements will be made upon submission to and approval by the Project Manager of a request for change order with the properly completed OJT monthly reporting forms attached.
- 3) Reimbursement will not be made for a trainee's hours that exceed the maximum number of training hours required for the completion of the selected classification in the training program.

3. Good Faith Efforts

- 1) If a contractor does not or cannot achieve its annual training goal with female or minority trainees, it must produce adequate Good Faith Efforts documentation.
- 2) Good Faith Efforts are those efforts designed to achieve equal opportunity through positive, aggressive, and continuous result-oriented measures. (23 CFR 230.409(g)(4)). Good Faith

- Efforts should be taken as trainee hiring opportunities arise. Whenever a contractor requests NMDOT approval of someone other than a minority or a female for credit towards its annual training goal, the contractor must submit documented evidence of its Good Faith Efforts to fill that position with a minority or female.
- 3) NMDOT will consider all contractors' documentation of Good Faith Efforts on a case-by-case basis, and take into account the following:
 - a. Availability of minorities and females for training;
 - b. The potential for effective training;
 - c. Duration of the contract;
 - d. Dollar value of the contract;
 - e. Total normal work force that the average bidder could be expected to use
 - f. Geographic location;
 - g. Type of work;
 - h. The need for journey level individuals in the area.
 - 4) Good Faith Efforts may include, but are not limited to, documentation of efforts to:
 - a. Contact minority and female employees to gain referrals on other minority and female applicants;
 - b. Upgrade minority and female unskilled workers into the skilled classifications when possible;
 - c. Accept applications at the project site or at the contractor's office;
 - d. Review and follow up on previously received applications from minorities and females when hiring opportunities arise; and
 - e. Maintain evaluations that monitor efforts made to achieve diversity on federal-aid projects and the contractor's workforce in general (i.e. significant numbers of minorities and females employed on a company wide basis).
 - 5) NMDOT may reject utilization of non-minority male trainees for credit toward meeting the annual goal if it determines that the contractor failed to make sufficient Good Faith Efforts to hire minorities or female trainees and/or the contractor failed to document or submit evidence of its Good Faith Effort to do so.

4. NMDOT Program Monitoring

A. Site Visits - NMDOT may conduct periodic site visits to a contractor's worksite to review OJT Program compliance along with other contract compliance issues related to the project. NMDOT will make every effort to ensure minimal disruption to a contractor's work.

B. End of Year Audits and Sanctions for Non-Compliance

- 1) NMDOT will perform an end of year audit of each contractor to verify attainment of the annual OJT goal. If a contractor, through its Annual Summary Report, can demonstrate that it attained its annual OJT Program goal or made adequate Good Faith Efforts to do so, then NMDOT will determine that the contractor is in compliance with the OJT Program requirements.

- 2) If a contractor has neither attained its goal nor submitted adequate Good Faith Efforts documentation, NMDOT will issue a Show Cause Notice outlining its findings of non-compliance and providing its determination of sanctions attributed thereto. Within thirty (30) days of receiving the Show Cause Notice, the contractor may submit a written response to the Show Cause Notice providing argument and evidence in opposition to the NMDOT findings of non-compliance and/or its determination of sanctions
- 3) If a contractor fails to submit a written response to the Show Cause Notice within the specified period or the written response to the Show Cause Notice does not cause NMDOT to change its findings of non-compliance and/or its determination of sanctions, NMDOT will issue its Final Order to the contractor regarding the non-compliance and assessing sanctions.
- 4) Sanctions for non-compliance may include, but are not limited to: liquidated damages, suspension of any payment in whole or in part, termination or cancellation of contracts in whole or in part, and/or suspension or debarment of the contractor. If Good Faith Efforts are not accepted by the NMDOT then the contractor may be subject to a Contractor Compliance Review by the NMDOT and other penalties for non-compliance in the Code of Federal Regulations in FHWA 1273.

Chapter VII - Subcontracts

1. General Provisions

The prime contractor is wholly and solely responsible and liable for the performance of all work or any act by its subcontractors, truckers, and suppliers on the project.

Any individual, partnership, firm, corporation, or joint venture performing work on the project that is not an employee of the prime contractor is a subcontractor unless otherwise accepted in the contract. A supplier or fabricator is not a subcontractor unless work is being performed on the project.

The prime contractor shall perform with its own organization at least 40% of the work based on the total bid amount. The prime contractor's organization shall include workers employed and paid directly and equipment owned or rented by the prime contractor but shall not include employees or equipment of its subcontractor, assignee, or agent. For DBE contractors the previous sentence may not apply. The prime contractor shall submit to the NMDOT or T/LPA Project Manager Form A-1086 - *Permission to Subcontract Request* before subcontracting work and shall not circumvent this requirement by placing a subcontractor's employees on its payroll.

The prime contractor shall submit a completed Form A-1310 - *Subcontractor List* at the preconstruction conference and update the list as the work progresses. The prime contractor is responsible for ensuring that its subcontractors are prequalified by the NMDOT and are also duly licensed for the work to be performed on the project; are registered to do business in New Mexico and to perform work on public works projects with all necessary state agencies including the New Mexico Taxation and Revenue Department and the New Mexico Department of Workforce Solutions or successor agencies; and are in compliance with all applicable state and federal laws and regulations including the New Mexico Public Works and Minimum Wage Act. The prime contractor shall comply with the New Mexico Subcontractor Fair Practices Act to the extent it is applicable to the project.

2. Truckers

A trucker transporting materials solely within the project site or within the project limits or is a DBE trucker being used to meet the DBE project goal must have an approved subcontract. A subcontract is not required if the trucker is only transporting materials onto or off of the project site.

3. Prompt Payment

The prime contractor shall promptly pay its subcontractors and suppliers for satisfactory performance of their contracts no later than seven (7) days after receipt of the progress payment for the subcontractor's work or supplier's materials by the NMDOT or T/LPA. Monitoring of prompt payment is done through the B2Gnow payment reporting and confirmation function. For purpose of this section, a subcontractor's portion of the work is satisfactorily completed when it is accepted by the NMDOT or T/LPA. When the NMDOT or T/LPA has made an incremental acceptance of a portion

of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed. In no event shall the prime contractor and its subcontractors fail to promptly pay their subcontractors and suppliers the amounts due for undisputed accepted work within seven (7) days of the prime contractor receiving a progress payment from the NMDOT or T/LPA. The payment by the NMDOT or T/LPA to the prime contractor is not a condition precedent for payment by the prime contractor to any subcontractor or supplier. A zero dollar (\$0.00) progress payment by the NMDOT or T/LPA does not relieve the prime contractor from paying the subcontractor or supplier for accepted work.

The prime contractor shall promptly and fully return any retainage withheld from its subcontractor within 30 days after the subcontractor's work is satisfactorily completed.

The prime contractor's failure to timely or promptly pay its subcontractors or suppliers for undisputed accepted work or the prime contractor's failure to promptly and fully return any retainage may take place only for good cause, with the prior written notice to the NMDOT or T/LPA. Non-compliance with the prompt payment and return of retainage provisions without the prior written notice to the NMDOT or T/LPA is a non-conformance and shall result in the NMDOT or T/LPA withholding 25% of the progress payment. Failure for the contractor to provide good cause for untimely payment shall result in the CCRB issuing a prompt payment finding. The prime contractor's repeated failure to make timely subcontractor payment may lead to suspension, debarment or rejection of bids.

4. Verification of EEO, Labor Compliance, DBE Requirements on Federal-aid Contracts

A. Requirements

- 1) All EEO, Labor Compliance, and DBE requirements imposed on the prime contractor are in turn imposed on each subcontractor or lower tier subcontractor. The prime contractor is required to insert and include in each subcontract and lower tier subcontract all the provisions pertaining to EEO, Labor Compliance, and DBE found in its contract with the NMDOT or T/LPA. (FHWA-1273, I.1)
- 2) The prime contractor is required to attach a completed copy of the Statement of Intent to Pay Prevailing Wages to each of its subcontracts and lower tier subcontracts. This is a Department of Workforce Solutions form. The form must be signed by the prime contractor and/or subcontractor. The NMDOT or T/LPA Project Manager shall ensure the Statement of Intent to Pay Prevailing Wages is attached to Form A-1086 - *Permission to Subcontract Request* prior to approval of the subcontract. (Use Form A-1108 - *Subcontract Checklist*).
- 3) The prime contractor must certify that the required civil rights and EEO provisions are incorporated into the subcontract and that the subcontractor has these provisions in its possession with a signed original form of the subcontract. The prime contractor does this by checking off these forms on the face of Form A-1108 - *Subcontract Checklist*.

B. Procedures

Check each subcontract for included provisions - The NMDOT or T/LPA Project Manager shall review use Form A-1108 - *Subcontract Checklist* to ensure the prime contractor has placed a check next to each of the EEO, Labor Compliance and DBE provisions listed. These provisions are uploaded to B2GNow for Project Office verification.

- 1) Not all of the required provisions are listed on the Permission to Subcontract Request. This does not relieve the prime contractor of the responsibility for ensuring its subcontracts include all the required provisions.
- 2) **Check federal-aid subcontracts for DBE status.** On federal-aid projects, the prime contractor will identify DBE subcontractors by marking the DBE check box on the Permission to Subcontract Request.
- 3) Verify that (1) the subcontract amount matches the committed amount on Form A-585A and (2) each DBE listed on form A-585A has a subcontract.
- 4) During the course of the project, the NMDOT or T/LPA Project Manager shall notify the prime contractor of any discrepancy and seek clarification of how the prime contractor intends to meet the DBE goal as committed on Form A-585A. (See Chapter 2, Section F)

5. Verification of Labor Compliance Requirements on 100% State Contracts

A. Requirements

- 1) All Labor Compliance requirements imposed on the prime contractor are in turn imposed on each subcontractor or lower tier subcontractor for 100% state contracts. The prime contractor is required to insert and include in each subcontract and lower tier subcontract all the Labor Compliance provisions found in its contract with the NMDOT or T/LPA.
- 2) The prime contractor is required to attach a completed copy of the Statement of Intent to Pay Prevailing Wages to each of its subcontracts and lower tier subcontracts. This is a Department of Workforce Solutions form. The form must be signed by the prime contractor or subcontractor. The NMDOT or T/LPA Project Manager shall verify the Statement of Intent to Pay Prevailing Wages is attached to Form A-1086 - *Permission to Subcontract Request* prior to approval of the subcontract. (Use Form A-1108 - *Subcontract Checklist*)
- 3) The prime contractor must certify that the required civil rights and EEO provisions are incorporated into the subcontract and that the subcontractor has these provisions in its possession with a signed original form of the subcontract. The prime contractor does this by checking off these forms on the face of Form A-1086 - *Permission to Subcontract Request*. (Use Form A-1108 - *Subcontract Checklist*)

Chapter VIII - Civil Rights/EEO Preconstruction Conference Procedures

**Americans with Disabilities Act (ADA)
Disadvantaged Business Enterprise (DBE)
Equal Employment Opportunity (EEO)
Labor Compliance (LC)
EEO and Labor Compliance Interviews (wage rate interviews)
On-The-Job Training (OJT)**

1. General Requirements - Civil Rights Preconstruction Conference

- A. Purpose of Chapter VIII** - The topics discussed in Chapter VIII, Civil Rights/EEO Preconstruction Conference Procedures describe in general terms procedures to be used and items to be discussed at the EEO Preconstruction Conference. The following procedures are in support of the use of Form A-1244 *Civil Rights/EEO Pre-Construction Conference Outline* and serve to provide guidance for each area of the form. Form A-1244 contains all the relevant Civil Rights/EEO topics contained in the contract. The NMDOT or T/LPA Project Manager may choose which topics contained in Form A-1244 to cover at the Preconstruction Conference given time constraints. The Project Manager shall make a statement at the Preconstruction Conference directing the contractor to review those items on Form A-1244 not specifically discussed and shall direct the contractor to contact the Project Office should questions or clarification be needed. For a more detailed discussion of the items contained in Form A-1244, refer to Chapters I through VII of this Civil Rights/EEO Field Procedures Manual.
- B. Scheduling the Preconstruction Conference** - The Civil Rights Pre-construction conference is generally made part of the overall preconstruction conference for the project. On larger projects, if time will not afford a complete discussion of Civil Rights requirements, the NMDOT or T/LPA Project Manager may elect to hold a separate Civil Rights/EEO preconstruction conference. If a separate Civil Rights/EEO preconstruction conference is scheduled, it must be held prior to the start of construction.

When scheduling the Pre-construction Conference for the project, include a copy of Form A-1244 *Civil Rights/EEO Pre-Construction Conference Outline* in the pre-construction invitation sent to the contractor. This will afford the contractor the opportunity to review the EEO Preconstruction Conference outline and submit all required EEO, Labor Compliance, OJT, and DBE information to the NMDOT or T/LPA Project Manager in a timely manner or as required by Section 108.2 of the NMDOT Standard Specifications for Highway and Bridge Construction 2014 Edition (Standard Specifications).

- C. Purpose of Civil Rights/EEO Preconstruction Conference** – The Civil Rights portion of the Preconstruction Conference is set aside to discuss all civil rights requirements of the contract. Each of the civil rights requirements should be discussed so that expectations are clearly identified on the part of the contractor and the owner. Form A-1244 *Civil Rights/EEO Pre-Construction Conference Outline* is provided in the Forms Section of this manual to aid in preparation for and conducting the Civil Rights-EEO Preconstruction Conference.

The civil rights portion of the Preconstruction Conference is the appropriate time to discuss EEO submittals received from the contractor, submittals that will be required monthly, and contractor EEO, Labor Compliance and DBE and ADA requirements of the pertaining contract and how those requirements will be monitored, verified, and enforced.

- D. Definition of Civil Rights** – The Civil Rights requirements of the contract are taken to mean, as a whole, all of the Equal Employment Opportunity Requirements, Labor Compliance requirements including On-the-Job training and Wage Rate Interviews, the Disadvantaged Business Enterprise Program requirements, and the Americans with Disabilities Act requirements of the contract.
- E. Attendees At Preconstruction Conference** – The following should attend or be invited to attend the Civil Rights portion of the Preconstruction Conference.
- 1) NMDOT or T/LPA Project Manager, Office Manager and other Staff members
 - 2) Prime contractor superintendent, EEO Officer, payroll administrator
 - 3) District Audit Supervisor
 - 4) Assistant District Engineer for Construction
 - 5) FHWA Area Engineer or Civil Rights Specialist
 - 6) Construction Liaison Engineer (CLE) or CCRB personnel
 - 7) Local Government Coordinator (if applicable)
- F. Records** – The NMDOT or T/LPA Project Manager or designee shall be responsible for taking Minutes of the Civil Rights pre-construction conference for the purpose of documenting items discussed. Attendees of the conference will be documented on a separate sign-in sheet. The Minutes should be written and distributed to all attendees in a reasonable time frame after the meeting is held. The Minutes will serve as a permanent record of items discussed and shall be placed in the project files. The Project Manager is not required to separate out the Civil Rights portion of the Preconstruction Conference for submittal to the CCRB.
- G. Review the contract** – It is the responsibility of the NMDOT or T/LPA Project Manager or designee to review the contract for Civil Rights requirements prior to the Preconstruction Conference.
- <http://dot.state.nm.us/content/nmdot/en/OEOPFormsManuals.html#EEOhtml>. The following is a general summary of Civil Rights requirements. It may not contain all Civil Rights requirements for your particular contract so review the contract.

1) Federal-aid Contracts

- a. EEO Requirements – All federal-aid contracts will contain EEO requirements.
 - i. Form FHWA-1273 Required Contract Provisions Federal-Aid Construction Contracts
 - ii. Notice to Contractors – Federal Requirements (see current NTC for updates)
- b. Labor Compliance Requirements – All federal-aid contracts will contain both federal and state labor compliance requirements.
 - i. Federal Minimum Wage Rates
 - ii. New Mexico Minimum Wage Rates

- iii. NM Public Works Minimum Wage Act
 - c. Disadvantaged Business Enterprise Program – All federal-aid contracts with a contract DBE goal are required to follow procedures as outlined in the most current Federal Requirements NTC.
- 2) **100% State Contracts** – no federal dollars included in funding of project.
- a. EEO Requirements
 - i. Notice to Contractors – Required Contract Provisions, Title VI – Civil Rights Act
 - b. Labor Compliance Requirements
 - i. NM Minimum Wage Rates
 - ii. NM Dept. of Workforce Solutions – Notice to All Public Works Contractors
 - iii. Public Works Minimum Wage Act
 - c. Disadvantaged Business Enterprise Program Requirements – None

2. CCRB Civil Rights Communication to Contractor (Federal-aid Projects Only)

CCRB EEO Letter and Package to Contractor – Upon naming the Apparent Low Bidder for a construction project, the CCRB will send an EEO Letter and Package to the Apparent Low Bidder. The letter will notify the Apparent Low Bidder of specific Civil Rights/EEO Affirmative Action requirements of the contract with the Preliminary Award Letter.

- 1) The Letter will request the Low Bidder provide the following submittals.
 - a. Company EEO Policy Statement
 - b. Letter designating Company and/or Project EEO Officer.
 - c. Minority and Women referral and contact letters/responses
 - d. Evidence of indoctrination of supervisory personnel in Company EEO Policy
 - e. Completed and signed Form A-1237 *Civil Rights/EEO Pre-Construction Report*
 - f. Department of Workforce Solution's *Subcontractors List*
 - g. Department of Workforce Solution's *Statement of Intent to Pay Prevailing Wages Form*
- 2) Attachments to the letter will be as follows:
 - a. "EEO/Affirmative Action Contractor Compliance Information Package" – This package contains sample letters and group contact lists to assist the contractor in meeting the affirmative action requirements of the contract.
 - b. Form A-1237 *Civil Rights/EEO Pre-Construction Report* - which the contractor shall complete and submit to the NMDOT or T/LPA Project Manager a minimum of 10 days before the Preconstruction Conference. The purpose of the Report is to ensure the contractor is aware of pertinent Civil Rights/EEO requirements under the contact. The contractor shall fill out Part A of the report, read Part B and sign Part C.

3. Civil Rights-EEO Preconstruction Conference Opening Statement and Submittals

- A. Opening Statement** – The NMDOT or T/LPA Project Manager or designee makes an opening statement summarizing what the Civil Rights/EEO portion of the Preconstruction Conference will address. Make sure to include that it will address specific contractor Civil Rights/EEO requirements, submittals required of the contractor, time lines and due dates for weekly and monthly submittals, and procedures for verification of contractor compliance and non-compliance.
- B. Submittals** - The NMDOT or T/LPA Project Manager verifies the required Civil Rights/EEO submittals were received from the contractor 10 days before the pre-construction conference. Required documents are listed below and described in detail in the following Paragraphs of this Chapter. The contractor shall submit the following, which is included in Standard Specifications 108.2 at the following paragraphs
- 1) Form A-1237 *Civil Rights/EEO Pre-Construction Report* (§ 108.2.13)
 - 2) Contractor EEO Policy (§ 108.2.9)
 - 3) EEO Officer Notification Letter (§ 108.2.9)
 - 4) Minority and Women referral and contact letters/responses (§ 108.2.10)
 - 5) Letter of Indoctrination of Supervisory Personnel in Company EEO Policy (§ 108.2.11)
 - 6) Department of Workforce Solution’s Subcontractors List (§ 108.2.5)

4. Discuss Contractor EEO Compliance Requirements - (Federal-aid Projects)

EEO contractor compliance requirements are reviewed and discussed at the Preconstruction Conference so that the contractor understands its EEO responsibilities under the contract and so that the items mentioned become part of the permanent Preconstruction Conference record. All EEO requirements are listed here in general terms for reference at the Preconstruction Conference should questions arise in specific areas. See the Civil Rights/EEO Compliance and Procedures Manual, Chapter III EEO Program, for a more detailed discussion of requirements and procedures for each section.

- A. Contractor EEO Responsibilities as a Federal Recipient** - Title VI of the Civil Rights Act of 1964 makes it a Policy of the United States that discrimination will not occur in programs and activities receiving federal funds. Put another way, Title VI mandates that the Federal Government will not subsidize discrimination. This project contains federal funding. Therefore, as the prime contractor awarded this NMDOT federal-aid construction contract, you become a “federal recipient” under FHWA regulation and thus are mandated to abide by all nondiscrimination and EEO obligations under the law. As a federal recipient and as a condition

of contract award, the prime contractor and its subcontractors affirm that they will carry out all EEO obligations and will work with the NMDOT and the FHWA in their review of its EEO activities under this contract.

- B. EEO Responsibility of the Contractor** – The contractor is responsible for compliance with all EEO requirements of the contract. The goal of EEO is increased participation of minorities and women in the work force, and extends to contractor practices in recruitment, hiring, pay, training, promotion, and retention. No person is to be subjected to discrimination because of race, color, religion, sex, sexual orientation, gender identity, national origin, age, or disability. The nondiscrimination provisions extend to the contractor’s employment practices, solicitations for employment, selection of subcontractors and suppliers, and procurement of materials.
- C. Contractor Responsible for Subcontractors** - The contractor is responsible for ensuring its subcontractors comply with all EEO requirements of the contract.
- D. Form A-1237 Civil Rights/EEO Pre-Construction Report** – (submittal) The contractor submits this Form to the NMDOT or T/LPA Project Manager at the Preconstruction Conference. The contractor is responsible for filling out Part A, reading Part B, and Signing Part C. The contractor attaches any documents referenced in the Form.
 - 1) Verify the Form is filled out completely. Some information may need to be filled in by the NMDOT or T/LPA Project Manager such as Project Manager name and Office Manager name.
 - 2) Verify that the form is signed by the contractor.
 - 3) The Project Manager shall sign the Form acknowledging receipt and verification of content
 - 4) File the original in the Project EEO Files
- E. Contractor EEO Policy**– (Submittal) The contractor is required to have an EEO Policy established and implemented before the start of the project. The contractor is required to submit its EEO Policy and shall submit a copy to the NMDOT or T/LPA Project Manager at the Preconstruction Conference.
 - 1) Verify that the Company EEO Policy contains the statement as required in federal regulations FHWA 1273 II.1.b. of the contract.
 - 2) Verify the Company EEO Policy is on company letterhead and is signed by the owner or a designated representative of the owner.
 - 3) The contractor posts a copy on the Project Bulletin Board.
 - 4) File in Project EEO Files
- F. EEO Officer Notification Letter** – (Submittal) The contractor shall submit a Letter notifying the NMDOT or T/LPA Project Manager of its designated Company and/or Project EEO Officer.
 - 1) The letter must state that the EEO Officer is responsible for and is capable of effectively administering and promoting an active contractor program of EEO and that the EEO Officer is assigned adequate authority and responsibility to do so.
 - 2) Verify the designation letter is signed by the owner or a designated representative of the owner

3) File in Project EEO Files

- G. Goals for Participation of Minorities and Women** - The *Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity (Executive Order 11246)* specifies goals and timetables for participation of minorities and women in each trade on the project by County. This Notice can be found in the contract. The contractor is required to make a good faith effort to meet these goals. The CCRB will verify contractor compliance with these goals through its routine contractor audits.
- 1) Prior to the Preconstruction Conference, look up the specific goals set forth in the Notice for the County in which the project resides.
 - 2) Enter the goals on Form A-1244 Civil Rights-EEO Preconstruction Conference Outline in the space provided.
 - 3) If the project spans multiple counties, determine in which county the majority of the project resides and use that county for determining the minority goal.
- H. Dissemination of Contractor's EEO Policy** – The contractor is required to ensure that all of its employees who have an active role in the hiring, supervision, or advancement of its employees are aware of and implement the company's EEO policy and EEO contract provisions. The contractor posts a copy of its EEO policy on the Project Bulletin Board.
- I. Periodic EEO Meetings** – The contractor's supervisory and personnel office employees are required to attend EEO meetings not less often than once every six months.
- J. Indoctrination of Contractor Supervisory Personnel** – (Submittal) The Company's EEO Officer is required to indoctrinate new supervisory personnel in all major aspects of its EEO obligations under the contract within 30 days of their reporting for duty.
- 1) The contractor shall submit a Letter of Indoctrination of Supervisory and New Supervisory Personnel into its EEO Policy and Program to the NMDOT or T/LPA Project Manager.
 - 2) Review the Letter to ensure it informs supervisory personnel of Company EEO Obligations
 - 3) File the original in the Project EEO Files and upload in B2GNow.
- K. Indoctrination of Contractor Recruitment Personnel** – The contractor's EEO Officer shall instruct all personnel engaged in direct recruitment for the project of the contractor's procedures for locating and hiring minority group employees. The contractor shall utilize every recruitment resource available in addressing hiring opportunities. Emphasis shall be placed on minority and female representation when recruiting employees, and providing and satisfying training requirements. The contractor must document its activities.
- L. Nondiscrimination in Contractor Recruitment Practices** – Contractor requirements are set forth in Form FHWA-1273 II.4.
- 1) When advertising for employees, the contractor will include in all advertisements the words, "An Equal Opportunity Employer"

- 2) The contractor shall not discriminate in its recruitment practices and shall make an effort to identify sources of potential minority and women employees.

M. Referral of Minority Group Applicants – (Submittal) The contractor is required to submit its Minority Group/Female Referral/Contact Letters to the NMDOT or T/LPA Project Manager a minimum of 10 days before the Preconstruction Conference. These types of letters fulfill the contractor’s requirement to identify sources of potential minority group employees, make contact, and establish procedures whereby minority and women applicants may be referred to the contractor for employment consideration.

N. Nondiscrimination in Contractor Personnel Actions – Contractor requirements are set forth in Form FHWA-1273 II.5.

- 1) The contractor is required to periodically review project sites, wages, personnel actions, etc., for evidence of discriminatory treatment. The contractor is to promptly investigate all alleged discrimination complaints.

O. Nondiscrimination in Training and Promotion – Contract requirements are set forth in Form FHWA-1273 II.6

- 1) The contractor is required to advise employees and applicants of training programs available and to assist in the improvement of the skills of minorities, women, and applicants through such programs.

P. Nondiscrimination in Selection of Subcontractors, Procurement of Materials and Leasing Equipment – Contract requirements are set forth in Form FHWA-1273 II.9.

- 1) The contractor’s EEO policy also pertains to its selection of subcontractors, including material suppliers and equipment leasing companies. Contractors are encouraged to use DBEs or other subcontractors that employ minorities and women. Furthermore, contractors are required to exercise their best efforts to ensure that subcontractors comply with the EEO requirements.

Q. Periodic Review of Contractor’s EEO Files – Periodic reviews of the contractor’s project EEO files may be conducted to ensure compliance with contract EEO policy requirements.

- 1) These periodic reviews may be conducted by the NMDOT or T/LPA Project Manager, District Audit Section, CCRB or FHWA.
- 2) The periodic reviews may be scheduled or unscheduled

R. Contractor EEO Records and Reports (Form FHWA-1273 II.11.)

- 1) Records that document compliance with the EEO policy are to be prepared and retained by the contractor for a period of three years after project completion. These records should include the numbers of minority, women, and non-minority employees in each work

classification on the project, and the progress and effort being made to increase the employment opportunities for minority and women.

- 2) Such records shall be available at reasonable times and places for inspection by authorized representatives of the NMDOT, FHWA, DOL or contracting agency.
- 3) Contractor records shall document the following:
 - a. Number of Minority Group Members Employed
 - b. Progress and Effort Being Made to Increase Employment
 - c. Progress and Effort Being Made in Advancement of Minority and Female Employees
 - d. Progress and Effort Being Made in Securing Subcontractors

S. PR-1391 Annual EEO Report

- 1) The contractor and its subcontractors are required to submit an annual EEO report (PR-1391) to the NMDOT by the second full week of August of each year in which there is work on a federal-aid project during the last full payroll period preceding the end of July.
- 2) The contractor shall generate a PR-1391 using the LCPtracker Software and submit the LCPtracker generated report.

T. Nonsegregated Facilities (FHWA-Form 1273 III., 23 C.F.R. Subpart A of Part 633 (2016))

- 1) The intent of this provision is to ensure that past discriminatory practices of providing separate facilities or prohibiting minorities access to facilities are eliminated.
- 2) By entering into the contract, the contractor ensures that it maintains nonsegregated facilities that conform to requirements of 41 .C.F.R § 60-1.8 (2016). The prime contractor is required to obtain a similar assurance from each subcontractor and supplier, as applicable.

U. EEO Non-Conformance

- 1) The NMDOT or T/LPA Project Manager will notify the contractor in writing of any EEO non-conformance by issuing a corrective action report and will state the time frame to resolve the non-conformance, if possible, before the estimate cutoff date.
- 2) Unresolved Non-Conformance(s) with contract EEO requirements will result in withholding of 25% as a non-conformance from each progress payment and subsequent progress payments until the non-conformance is resolved, in accordance with Section 109.8.2 of the Standard Specifications. Non-conformance with contract EEO requirements may result in withholding of progress payments, withholding of final payment, and/or suspension or termination of the contract or debarment of the contractor in accordance with Form FHWA 1273-I.3.

V. Bulletin Board, Notices, Posters-

- 1) Erect and Maintain Bulletin Board - The contractor is required to erect and maintain a project bulletin board. The Bulletin Board with all required documents shall be erected prior

to the start of construction. The Bulletin Board should be protected from the weather and the documents shall be readable for the life of the project.

In those instances when an on-site project bulletin board is not feasible, the contractor shall create a project bulletin board notebook containing all required documents. This notebook shall be readily accessible to all employees and shall be available on site and kept in a convenient location for use by its employees. The NMDOT or T/LPA Project Manager shall approve the use of a Bulletin Board Notebook in lieu of a project Bulletin Board at the contractor's request and in only those instances in which it is not feasible or practical to locate the Bulletin Board at the site of work.

- 2) Location of Bulletin Board - The Bulletin Board shall be placed in a conspicuous location readily accessible to employees, applicants for employment, or potential employees. Ask the contractor where the project bulletin board will be located and document its location on the Civil Rights/EEO Preconstruction Conference Outline.
- 3) Required Notices and Posters – The contractor is required to post required Notices, Posters and Company EEO Documents on the Project Bulletin Board and shall maintain the Posters in a presentable manner. All Notices and Posters as indicated on Form A-1245 *Bulletin Board Checklist for Federal-Aid Projects* or A-1246 *Bulletin Board Checklist for 100% State Funded Projects* shall be placed on the Bulletin Board.
 - a. Provide the contractor with a copy of the Bulletin Board Checklist.
 - b. Required posters may be obtained online from the NMDOT CCRB Website located at <http://dot.state.nm.us/content/nmdot/en/OEOPFormsManuals.html#EEO>.
- 4) Inspection of Bulletin Board – A Bulletin Board Inspection shall be performed within the first two weeks of the start of construction then periodically thereafter at the discretion of the NMDOT or T/LPA Project Manager. Bulletin Board Inspections will be performed using Form A-1245 *Bulletin Board Checklist for Federal-Aid Project* or A-1246 *Bulletin Board Checklist for 100% State Funded Projects*.
- 5) Inform Employees - The contractor should notify all of its employees of the information contained on the Bulletin Board. The prime contractor is responsible to ensure all personnel, including subcontractors, know where the bulletin board is located, their job classification(s), and wage rate(s) for the project.

5. Labor Compliance Requirements

The NMDOT or T/LPA Project Manager reviews the following with the contractor at the Preconstruction Conference, and follows up by asking if the contractor has any questions concerning any of the points discussed.

- A. Contractor Compliance with Contract Provisions - The contractor shall abide by all labor compliance requirements of the contract including the Davis-Bacon Act and all related Acts. (Form FHWA-1273 IV, V)

- B. Wage Decision** - The contract contains both a state and federal wage decision. Whenever differences exist between the minimum wage rates shown under the federal or state wage decision, the higher wage rate for the classification shall govern.
- C. Covered Employees** – The Davis-Bacon Act and Minimum wage requirements apply to all contractor and subcontractor laborers and mechanics working at the construction site or working off-site at facilities dedicated exclusively and adjacent or nearly adjacent to the actual construction site.
- D. Rate of Pay** – The contractor and its subcontractors are required to comply with the minimum wage rates as set forth in the appropriate contract wage decision. No laborer or mechanic shall receive less than the prevailing wage rates including fringe benefits as indicated in the wage decision for the classification of work being performed unless they are trainees or apprentices working under an approved trainee or apprenticeship program.
- E. Payroll Records** – Payroll records shall be maintained for each covered employee on the project. The weekly payrolls are to include information on employees and wages in order to comply with the Davis-Bacon or “Little Davis-Bacon” requirements of the contract. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under Form FHWA-1273 IV.b and/or the New Mexico Public Works Minimum Wage Act including: employee name, employee identification number, ethnicity, gender, classification, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. In addition, each payroll must identify the contractor or subcontractor’s name and address, project number, and week ending date.
- F. Employee Classifications as per Wage Decision** – The work classifications of covered employees on payrolls shall be as shown on the wage decision.
- G. Request for New Classification** – When the classification of work to be performed on the project by a laborer or mechanic is not covered by a classification on the wage decision, the contractor may make a request for an additional work classification to the US Department of Labor following procedures set forth in Form FHWA-1273 IV.1.b.
- H. Work Performed in More Than One Classification** - Laborers and mechanics must be paid no less than the prevailing wage rate for the classification of work actually performed.
- I. Maintenance of Records** - The contractor and subcontractors are required to maintain payroll records, fringe benefits records and other basic wage and hour type records for its employees on this project. These records shall be maintained for a period of four years from completion of the contract.
- J. Payroll Submittals** – The contractor and each subcontractor on NMDOT or T/LPA federal-aid projects shall furnish certified payrolls each consecutive week starting from the first week it performs work on the project through the last week it performs work on the project or project completion, whichever comes first. Certified payrolls shall be submitted by uploading required payroll information into LCPtracker. The submitted payrolls shall cover a one week (7 day) period. The payroll submittal shall be accompanied by a Payroll Statement of Compliance.

- K. Frequency of Payroll Submittals - Certified Payrolls including the Payroll Statement of Compliance shall be submitted weekly in LCPtracker and are due no later than seven calendar days following the actual payment date. LCPtracker is not available for 100% state-funded projects, and on those projects, one hard copy of the contractor's and subcontractor's payrolls with attached Payroll Statement of Compliance must be submitted to the NMDOT or T/LPA Project Manager each week.
- L. Numbering of Payrolls – The contractor and subcontractors shall number each submitted payroll consecutively starting with payroll #1 for the first week in which work is performed on the project. The final payroll shall include the words “Final” Payroll.
- M. Statement of No Work Performed - The contractor and subcontractors shall submit in LCPtracker a “Non-Performing Payroll” in lieu of a certified payroll for any week in which no work is performed on the project. The payroll numbering sequence shall continue.
- N. Payroll Statement of Compliance – Each payroll submitted must be accompanied by a “Payroll Statement of Compliance” signed by the contractor or subcontractor. LCPtracker will automatically generate a Payroll Statement of Compliance with each payroll submittal.
- O. Mandatory Use of LCPtracker - The prime contractor and all subcontractors working on NMDOT or T/LPA federal-aid funded projects are required by contract to use the LCPtracker labor compliance software to report EEO and weekly payroll information. On NMDOT lead projects, the CCRB will set the project up and make it ready for use in LCPtracker. On T/LPA lead projects, the T/LPA must notify CCRB for project set up of LCPtracker. The prime contractor is responsible for set up of its subcontractors in LCPtracker. Inquiries for User IDs and training opportunities shall be directed to the NMDOT Construction and Civil Rights Bureau at 1-800-544-0936..
- P. Payment Once a Week - Covered employees shall be paid at least once a week.
- Q. Overtime - The contractor is required to pay overtime at the rate of one-and-one-half times the employee's basic pay rate plus fringe benefits for all hours worked in excess of 40 hours per week. Fringe benefits are required to be paid on all regular and overtime hours worked. However, the required fringe benefit amount, as listed in the wage decision, is not calculated at time and one-half when figuring the overtime rate.
- R. Posting of Wage Decision - The wage decisions must be conspicuously posted and accessible to all employees on the project site. Generally they are posted on the project bulletin board and in the prime contractor's project office.
- S. Records Availability - The prime contractor and subcontractors are required to make payroll records available for inspection, copying, or transcription by authorized representatives of the NMDOT, T/LPA, FHWA, DWS, USDOL, OFCCP, or other authorized entity upon request.
- T. Payroll Data Verification – The NMDOT or T/LPA Project Manager or designated staff member will verify the data contained on all prime contractor and subcontractor submitted certified

payrolls. Should errors or discrepancies be found, the NMDOT or T/LPA Project Manager or designated staff member shall reject the payroll in LCPTracker, and shall notify the contractor or subcontractor of the error and require the contractor to correct the error and submit a revised payroll.

U. Non-Compliance

- 1) Non-Compliance In Submittal of Timely Payrolls – Monthly progress payments shall be withheld if a contractor’s or subcontractor’s payrolls are not submitted timely. Payrolls shall be considered delinquent or late if not submitted within seven calendar days following the payment date.
- 2) Failure to Pay Wages - In the event the contractor fails to pay its covered employees’ wages due under the contract, the NMDOT or T/LPA has the authority to withhold funds from the contractor, as may be determined necessary, to pay covered employees of the contractor the full amount of wages required by the contract.
- 3) Non-Compliance with Form FHWA-1273 Part IV- Failure of the contractor to comply with the requirements of Section IV, Davis-Bacon and Related Act Provisions, may be considered as grounds for contract termination and contractor debarment under 29 CFR Part 5.
- 4) Failure to Pay Overtime Wages – In the event the contractor or subcontractor fails to pay overtime wages to its covered employees as required by Form FHWA-1273 V.1, it shall be liable to the affected employee for its unpaid wages and to the United States for Liquidated Damages.

6. Labor and EEO Compliance Interviews

The NMDOT or T/LPA Project Manager shall inform the contractor that Labor and EEO Compliance Interviews will be conducted during the course of the project. The Project Manager shall review the following points with the contractor and follow up by asking if the contractor has any questions.

- A. Interviews will be Conducted** - Labor and EEO Compliance Interviews will be conducted during the course of the project by the NMDOT or T/LPA Project Manager’s field staff.
- B. How the Interviews will be Conducted** – The interviews will be conducted on the job during normal working hours utilizing Form A-1077 *Labor and EEO Compliance Interview* or the Spanish version, Form A-1265. The project Superintendent or foreman shall be notified at the beginning of the day that Labor and EEO Compliance Interviews will be conducted. Interviews will be conducted in a manner so as not to disrupt or interfere with the work. The contractor Superintendent’s or foreman’s presence is not required during the interview.
- C. Who will be Interviewed** – Contractor and subcontractor employees working at the site of work in covered classifications are subject to interviews. Covered classes of workers include all classifications listed in the contract wage decision.

- D. Frequency of Interviews –Normally, two to four Labor and EEO Compliance Interviews should be conducted each week during the course of the project. The goal is to conduct enough interviews to ensure a representative sampling has been made for all covered classes of workers employed on the project. A representative sampling is, at a minimum, 50% of employees in each covered classification. More interviews may be conducted should circumstances warrant.
- E. Purpose of Interviews – Labor and EEO Compliance Interviews will be used to verify contractor and subcontractor compliance with certain labor and EEO requirements of the contract. The information gathered is reviewed and verified by the NMDOT or T/LPA Project Manager’s office staff to ensure employee statements and employer payroll information match, to ensure minimum wage rates are being complied with, and to ensure employees know about and are indoctrinated into the employers’ EEO Policy and procedures.
- F. Authorization to Interview Employees - The contractor or subcontractor shall permit the NMDOT or T/LPA Project Manager or other authorized agency representatives to interview employees during working hours on the job. (Form FHWA-1273 IV.3.c.)
- G. Non-Compliance - The NMDOT or T/LPA Project Manager shall notify the prime contractor in writing of any issue of non-compliance revealed by the Labor and EEO Compliance Interview and shall require corrective action be taken by the contractor or its subcontractors to resolve the issue. . The contractor will have five (5) calendar days to review and respond to any findings noted by the Project Manager. If the Project Manager is unable to resolve the issue, the Project Manager should follow Non-Conformance procedures. .

7. Disadvantaged Business Enterprise (DBE) Requirements

The NMDOT or T/LPA Project Manager shall discuss the DBE requirements of the contract to ensure that the contractor is aware of its DBE obligations and is informed of the administration and reporting procedures that will be utilized by the Department. The Project Manager should at a minimum state the DBE goal for the project and the DBE subcontractors that will be participating in the project.

- A. Good Faith Effort (GFE) to Meet the Goal- The contractor is required to make a good faith effort to meet or exceed the DBE goal by the time the project is complete and final acceptance is issued.
- B. B2GNow, Tracking of Goal Achievement – The NMDOT utilizes the web-based software program B2GNow to collect, track, and report DBE participation and goal achievement on federal-aid projects. It is also used to collect, verify, and manage prompt payment information for prime contractors and subcontractors on federal-aid projects.
 - 1) Mandatory Use of B2GNow Software – The contractor and all subcontractors on NMDOT or T/LPA federal-aid projects are required to use B2GNow as per the contract.

- 2) Reporting of all Payments - The contractor and all subcontractors are required to upload monthly payment information into B2GNow and confirm receipt of payment. This is how DBE participation will be tracked for this project.
 - 3) The contractor can obtain a user ID and password for access to the system by contacting the CCRB office at 1-800-544-0936. B2GNow training is available for contractor personnel. Contact the CCRB office for inquiries on training.
- C. Should Contractor Anticipate Not Meeting DBE Goal** – The contractor should periodically, during the course of the project, make a DBE goal assessment to determine if the DBE goal will be achieved. The sooner it is realized the DBE goal will not be met, the more time will remain before project completion to pursue other opportunities to meet the goal. The contractor shall notify the NMDOT or T/LPA Project Manager immediately should it anticipate a DBE goal shortfall. The Project Manager and the CCRB will provide any support needed to the contractor in this effort. The contractor shall document all efforts to meet the goal.
- D. Termination/Substitution/Replacement of DBE Firms** – Provisions under the DBE Program address termination, substitution and replacement of DBE firm on the project. The contractor shall adhere to these provisions in meeting its DBE obligations under the contract. In general:
- 1) The contractor cannot terminate for convenience a DBE subcontractor or approved substitute DBE firm, and then perform the work themselves without prior approval from the NMDOT or T/LPA Project Manager.
 - 2) If a DBE subcontractor is terminated or fails to complete its work on the contract, the prime contractor shall make good faith efforts to find a replacement DBE subcontractor.
 - 3) Substitutions/Terminations/Replacements of DBE subcontractors on the project will not be allowed without prior submission of written justification to the NMDOT or T/LPA Project Manager and the CCRB for approval.
- E. Failure to Meet DBE Goal** – If at Substantial Completion of the project, the contractor fails to meet the DBE goal, it shall notify the NMDOT or T/LPA Project Manager in writing. An assessment will be made of the contractor’s good faith efforts in its attempt to meet the goal. If the good faith efforts are acceptable to the CCRB, no further action will be taken. If the good faith efforts are unacceptable, action will be taken against the contractor as per the DBE Program Provisions. Failure to meet the goal may result in Liquidated Damages for the difference between the DBE goal and the actual DBE participation achieved.
- F. Monitoring for Commercially Useful Function** – The NMDOT or T/LPA Project Manager shall monitor and document DBE Subcontractor construction activities during the course of the project to verify Commercially Useful Functions are being performed. This will be done through a combination of daily routine documentation of DBE work activities and field verification using Form A-1239 *Commercially Useful Function Interview and Assessment*.

A DBE subcontractor performs a Commercially Useful Function when it is responsible for execution of the work or a distinct element of the work of a contract or subcontract and

carries out its responsibilities by actually performing, managing and supervising the work involved. If a Commercially Useful Function is not performed, credit will not be given for that portion of the work.

- G. Prompt Payment Requirements** – Prime contractors shall pay all subcontractors including DBE subcontractors their respective subcontract amount for undisputed acceptable work within seven calendar days after the prime contractor receives payment for such work from the NMDOT or the T/LPA. The prime contractor is required to release retainage payments to the subcontractors (including DBE subcontractors) within thirty calendar days of satisfactory completion of the entire subcontractor’s work and final payment of such work by the NMDOT or T/LPA.
- H. Counting DBE Participation Towards Goals** – When a DBE participates in a contract, only the value of the work actually performed by the DBE will be credited towards DBE project goals. See the DBE Program Provisions for Counting DBE Participation Towards Goals and Credit for DBE Truck Owner-Operators for more information.
- I. Records Requirements** – The prime contractor will keep such records necessary to ensure compliance with its DBE utilization obligations.
- J. Compliance Procedures** – Compliance procedures are specified in the NTC Federal Requirements Compliance Procedures. The contractor shall make itself fully aware of the provision. For non-compliance with the NTC Federal Requirements, the NMDOT or T/LPA shall initiate administrative action against the contractor that may include but is not limited to:
 - 1) Termination of the contract.
 - 2) Withholding a percentage of partial payments pursuant to the NMDOT Standard Specifications for Highway and Bridge Construction.
 - 3) Initiation of appropriate debarment or decertification proceedings.
 - 4) Referral of any unlawful actions to the appropriate enforcement agencies.
 - 5) Other actions as appropriate.

8. Americans with Disabilities Act (ADA) Requirements

Pedestrian Access Facilities like sidewalks, curb ramps, street crossings and pedestrian overpasses serve as critical links in the transportation network by providing pedestrian access to businesses, schools, government offices and recreation areas. Because these pedestrian facilities provide such fundamental services to the public, they must be designed and constructed to meet the needs of the widest possible range of users. Recent Census data indicates that people with disabilities make up one-fifth of the American population. The Americans with Disabilities Act is a civil rights law that prohibits discrimination on the basis of a disability, and it protects persons with visual impairments, hearing impairments, mobility impairments and mental disabilities. Of specific relevance to transportation projects, the ADA prohibits public entities from constructing new facilities or altering existing facilities that are not accessible to people with disabilities.

ADA compliance is ultimately enforced by the US Department of Justice (DOJ), and their penalty provisions are significant and long-lasting. Non-compliance with ADA requirements on New Mexico transportation projects is enforced not only by the DOJ, but also by the US Department of Transportation's Federal Highway Administration, through their denial of federal funding on non-compliant projects. Accordingly, and in furtherance of its commitment to accessibility under the ADA, the NMDOT has adopted the Public Right Of Way Accessibility Guidelines, referred to commonly as the PROWAG, as its design policy for pedestrian access facilities, and NMDOT requires such facilities to be designed and constructed accordingly.

Forms and Checklists

Forms Listing

The following forms were created and are maintained by the OEOP. Contact the OEOP with any corrections or modifications needed or desired. These forms are not to be modified in any way without the approval of the OEOP.

The forms may be obtained from the NMDOT Intrans in the “Forms Library” or from the OEOP web site at: <http://dot.state.nm.us/en/OEOP.html>.

- A-1077 [Labor and EEO Compliance Interview](#)
- A-1265 [Labor and EEO Compliance Interview \(Spanish\)](#)
- A-1236 [Labor and EEO Compliance Interview Monthly Summary Report](#)
- A-1237 [Civil Rights/EEO Pre-Construction Report](#)
- A-1102 [Contractor and Subcontractor Payroll Checklist](#)
- A-1239 [DBE Commercially Useful Function \(CUF\) Interview and Assessment](#)
- A-1245 [Bulletin Board Checklist - Federal Aid Projects](#)
- A-1246 [Bulletin Board Checklist - 100% State Projects](#)
- A-2201 [On-the-Job Training Program Enrollment Form](#)
- A-2202 [On-the-Job Training Program Monthly Reporting Form](#)
- A-2203 [On-the-Job Training Program Labor Classification Request](#)

The following NMDOT forms were created and are maintained by the PS&E Bureau and the Construction Bureau. Contact the NMDOT State Construction Engineer for corrections or desired modifications to the forms. Many of these forms can be obtained from NMDOT Intrans “Forms Library.”

- A-585 Disadvantaged Business Enterprise (“DBE”) Goal Form A-585
- A-644 Disadvantaged Business Enterprise (“DBE”) Bidder’s Commitment and DBE’s Confirmation Form A-644
- A-1086 Permission to Subcontract Request
- A-1086A Permission to Subcontract Request Attachment
- A-1108 Subcontract Checklist
- A-1310 Subcontractor List Form