



CALTRANS DIVISION OF  
LOCAL ASSISTANCE



# 2020

## *Disadvantaged Business Enterprise (DBE)*

# Evaluation Report

Process Review #20-01

May 2020

Prepared By:

Original Signature

05/08/2020

Kitae Nam, Policy Liaison  
Office of Guidance and Oversight

Date

Approved By:

Original Signature

05/08/2020

Felicia Haslem, Acting Office Chief  
Office of Guidance and Oversight

Date

# Table of Contents

---

03	EXECUTIVE SUMMARY
06	KEY FINDINGS
06	Nondiscrimination Statements & Contract Assurance
06	DBE Liaison Officer (DBELO)
06	Prompt Progress Payment
07	Prompt Payment of Withheld Funds to Subcontractors
07	Monitoring of Prime Contractor Performance (Termination/Substitution)
08	Monitoring of Prime Contractor Performance (Legal Remedy)
08	Commitment compared with Utilization
10	DBE Goal Setting
10	General GFE Procedures
11	Reconsideration Hearing Procedures
12	CONCLUSIONS

---

# EXECUTIVE SUMMARY

Pursuant to the Stewardship and Oversight Agreement between Caltrans and the Federal Highway Administration (FHWA), the Division of Local Assistance (DLA) is required to ensure that agencies receiving federal funding comply with the Disadvantaged Business Enterprise (DBE) program requirements per Title 49 of the Code of Federal Regulations (CFR), Part 26 (49 CFR 26). The DBE program goal is to increase participation by small businesses and socially and economically disadvantaged individuals. As part of its efforts to exercise its stewardship and oversight responsibilities, the DLA has conducted a study regarding the DBE program, and this report summarizes the findings related to the agencies' compliance with DBE requirements. To perform on-site assessment, a consultant, APEX Civil Engineering, was selected to evaluate local agencies' DBE program implementation and any resultant good-faith efforts (GFE).

For the study, 19 agencies (see Table 1) were selected by the DLA for on-site process reviews of the DBE program for compliance with 49 CFR 26, Chapter 9 of the *Local Assistance Procedures Manual (LAPM)*, and Office Bulletin (OB) 14-06. Along with a list of the selected agencies, their compliance with all reviewed regulatory requirements is summarized in Table 1. The agencies were reviewed regarding administration of the DBE program, project goal setting, GFE effort methodology, and project goal attainment, as summarized in Table 2.

**Table 1. Agencies Selected for On-Site Review and Compliance**

N.A.: not available

District	Agency	Nondiscrimination & Contract Assurance	DBELO	Prompt Payment (Progress)	Prompt Payment (Retainage)	Performance Monitoring (Termination)	Performance Monitoring (Remedy)	Commitment vs. Utilization	DBE Goal Setting	General GFE Procedures	GFE Prime Contractor Requirements	Hearing Procedures
1	Lake County	O	O	A&E	X	X	X	X	X	X	O	X
3	Butte County	O	O	O	X	X	X	X	X	X	O	X
3	City of Elk Grove	O	O	X	CON	O	O	X	X	X	X	O
3	City of Rancho Cordova	O	O	A&E	X	X	X	X	X	X	O	X
3	El Dorado County	O	O	A&E	X	X	CON	O	O	O	O	O
3	Town of Truckee	O	O	X	X	O	X	X	O	O	O	X
4	County of Santa Clara	O	O	CON	CON	X	X	O	O	O	O	O
4	City of Palo Alto	O	O	A&E	X	CON	CON	X	X	X	O	X
5	Transportation Agency of Monterey County	O	O	X	X	X	X	X	X	X	X	X
7	City of Long Beach	X	O	X	X	X	X	X	X	X	O	X
7	City of Los Angeles	X	O	X	X	O	O	N.A.	X	X	O	X
7	Los Angeles County	X	O	X	CON	X	X	N.A.	O	X	O	X
8	City of Moreno Valley	X	O	X	X	X	X	X	X	X	X	X
9	City of Ridgecrest	CON	O	X	CON	O	O	X	O	O	O	X
11	City of San Diego	O	O	CON	CON	O	X	X	X	X	X	O
11	Imperial County	O	O	CON	CON	X	O	O	O	O	O	O
11	San Diego County	O	O	CON	CON	O	O	X	X	O	O	O
11	SANDAG	O	O	O	O	O	N.A.	O	O	O	O	O
12	City of Westminster	CON	O	CON	CON	X	X	O	X	O	O	X
<b>Compliance Rate (%)</b>		<b>68%</b>	<b>100%</b>	<b>11%</b>	<b>5%</b>	<b>37%</b>	<b>28%</b>	<b>29%</b>	<b>37%</b>	<b>42%</b>	<b>79%</b>	<b>37%</b>

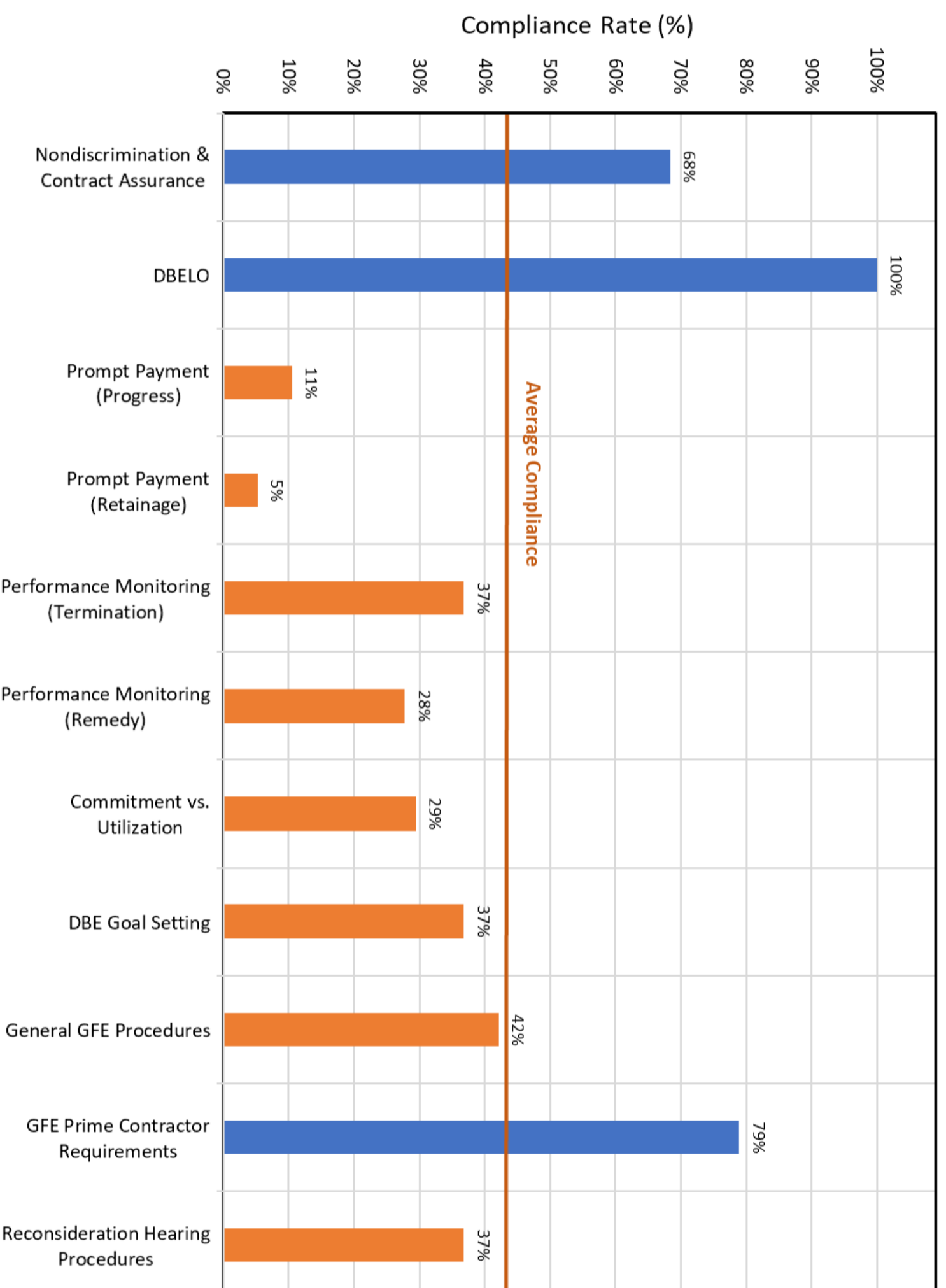
O: compliant  
 X: non-compliant  
 A&E: only professional services contract compliant  
 CON: only construction contract compliant

# EXECUTIVE SUMMARY

**Table 2. Policies and Requirements Reviewed**

Policy Name	Statutory Requirements	Caltrans Guidances
Nondiscrimination & Contract Assurance	49 CFR 26.13 (a) & (b)	LAPM 9.6, Exh. 12-G
DBE Liaison Officer (DBELO)	49 CFR 26.25	LAPM 9.6, Exh. 9-B
Prompt Progress Payment	49 CFR 26.29(a), CBPC 7108.5, CCC 3321	LAPM 9.6, Exh. 12-G
Prompt Payment of Withheld Funds to Subcontractors	49 CFR 26.29(b)	LAPM 9.6, Exh. 9-B
Monitoring of Prime Contractor Performance (termination/substitution)	49 CFR 26.53(f)	Exh. 12-G
Monitoring of Prime Contractor Performance (legal remedies)	49 CFR 26.37(a)	Exh. 12-G
Commitment compared to Utilization	49 CFR 26.37 (b) & (c)	LAPM 9.7, Exh. 10-02, 15-G, 17-F
DBE Goal Setting	49 CFR 26.51(e)	LAPM 9.7, Exh. 9-D
General GFE Procedures	49 CFR 26.53(a)(2)	LAPM 9.8, Exh. 15-H
GFE Prime Contractor Requirements	49 CFR 26.53(b)(2)	LAPM 9.7 & 9.8, Exh. 10-01, 10-02, 15-G
Reconsideration Hearing Procedures	49 CFR 26.53(d)	LAPM 9.8

**Figure 1. Rates of Compliance with Statutory Requirements**



# EXECUTIVE SUMMARY

Reviews of administrative documentation and contract documents suggested that agencies' overall rate of compliance is markedly low, at 43%, with compliance rates of reviewed regulatory requirements ranging from 5% to 100%, as shown in Figure 1. Only three statutory requirements were found to exceed the average compliance rate, and compliance rates for most of the reviewed requirements, except for DBELO, were less than 80%. Also, this assessment revealed significant variance in rates of compliance among the agencies investigated, from 9% to 100%, for an overall average compliance rate of 43%. Other than SANDAG, all agencies' compliance was below 80%. In addition, consultant contracts reviewed totaled \$37,000,000 with \$98,000 paid to DBE consultant firms.

The following section discusses the assessment of each statutory requirement in detail.

 *The review demonstrated an overall compliance rate of 43%* 

# KEY FINDINGS

## **Nondiscrimination & Contract Assurance**

### **Requirement:**

Per 49 CFR 26.13, the entirety of the assurance contained in 49 CFR 26.13(a) and (b) should be included in the agencies' agreements and the prime contractors' agreements, respectively.

### **Finding:**

Among 19 agencies, four agencies did not include the statements in any agreements, and two agencies did not include the statements in professional service contracts, for a 68% rate of compliance with this requirement.

The 49 CFR 26 standard assurance language is provided by DLA in LAPM Exhibit 12-G and should be used in local agency agreements, specifications, and bid documents.

### **Corrective Measures:**

- Non-Discrimination and Contract Assurance clauses will be updated in DLA contract language templates, Exhibits 10-R and 12 -G and are required for all professional services and construction contracts.
- Awareness will be provided to agencies through training and a Caltrans Oversight Information Notification (COIN).

## **DBE Liaison Officer (DBELO)**

### **Requirement:**

Each local agency must designate a Disadvantaged Business Enterprise Liaison Officer (DBELO), who shall have direct independent access to the local agency's Public Works Director (PWD) or Chief

Executive Officer (CEO).

### **Finding:**

All agencies designated a DBELO with direct and independent access to the CEO (generally the PWD) of the agency, for 100% compliance. All agencies had either an engineer from the public works department or an executive staff member acting as DBELO.

It is recommended for the agencies to develop a desk manual. Though not required by law or the LAPM, availability of such a manual would effectively minimize risk when DBELOs move on from their position.

### **Corrective Measures:**

- Awareness will be provided to agencies through training and a COIN.

## **Prompt Progress Payment**

### **Requirement:**

Three statutory requirements are related to this regulation: one federal and two state. Section 7108.5 of the California Business and Professions Code (CBPC) for construction contracts requires that prime contractors or subcontractors pay any subcontractors not later than seven (7) days of receipt of each progress payment, unless otherwise agreed to in writing. Section 3321 of the California Civil Code (CCC) requires that prime design professionals (prime consultants directly in contract with a public agency) pay any subconsultant no later than 15 days after receipt of each progress payment or final retention payment. Federal requirements have a less stringent requirement of 30 days. Prompt payment clauses apply to both DBE and non-DBE subcontractors.

**Findings:**

Only two agencies showed full compliance with this requirement. Some agencies included this clause for professional service contracts only (four agencies) or construction contracts only (five agencies), and eight agencies were completely silent regarding the mention of this requirement in their contracts, for a compliance rate of 11%.

Prior to the year 2020, LAPM guidelines (Chapter 9.6) did not include a reference to state regulations regarding prompt payment for public works contracts.

**Corrective Measures:**

- Prompt Progress Payment clauses will be updated in DLA contract language templates, Exhibits 10-R and 12 -G and are required for all professional services and construction contracts.
- The relevant state regulations (7108.5 of CBPC and 3321 of CCC) will be updated in the LAPM.
- Awareness will be provided to agencies through training and a COIN.

**Prompt Payment of Withheld Funds to Subcontractors****Requirement:**

The agency must include one of the three options listed in Exhibit 9-B in contracts regarding retainage. The statutes stipulate penalties for delayed payments and are intended to ensure prompt and full payment of any retainage kept by the prime contractor or subcontractor to a subcontractor and to provide a legal remedy for subcontractors that lack leverage.

**Findings:**

Of 19 agencies reviewed, only one fully complied with this requirement, for the lowest compliance of any reviewed requirement: 5%. Eight agencies included this requirement in their construction contracts but failed to include it in their professional service contracts.

Lack of guidance in the LAPM regarding mention of this requirement to professional service contracts is believed to have partially contributed to the low compliance rate.

**Corrective Measures:**

- Prompt Payment of Withheld Funds to Subcontractors clauses will be updated in DLA contract language templates, Exhibits 10-R and 12 -G and are required for all professional services and construction contracts.
- For professional service contract (Chapter 10 of the LAPM), improved guidance including and referencing federal regulations (49 CFR 26.29 and Exhibit 9-B of the LAPM) will be included in the 2020 LAPM updates.
- Awareness will be provided to agencies through training and a COIN.

**Monitoring of Prime Contractor Performance (Termination/Substitution)****Requirement:**

Local agency agreements should contain language forbidding termination of a DBE for convenience and requiring a GFE to find another DBE subcontractor to substitute in its place and should also contain an administrative remedy for local agencies to invoke in such cases.

**Findings:**

Seven agencies were compliant with this requirement, and one more included this clause in construction contracts only. The remaining agencies did not include this requirement in any agreements or bid documents, for a compliance rate of 37%.

Excepting Exhibit 12-G of the LAPM, chapters in the LAPM that are relevant to this requirement do not provide guidance for including the required clause in the agreements for both construction (LAPM Chapters 9 and 12) and professional services (LAPM Chapter 10) contracts, which could contribute to the low compliance rate.

The agency is required to use and refer to DBE termination and substitution language in 49 CFR 26.53(f).

Contractors are required to use a specific DBE firm and not terminate or substitute DBE subcontractors for convenience.

**Corrective Measures:**

- Caltrans will enhance the relevant chapters of the LAPM to incorporate the required language and guidance for both construction and professional services contracts.
- Awareness will be provided to agencies through training and a COIN.

**Monitoring of Prime Contractor Performance (Legal Remedy)****Requirement:**

Local agencies should seek legal remedies against prime contractors that do not allow DBEs to perform work initially committed to DBEs.

**Findings:**

Only five agencies complied with this requirement by incorporating legal remedies (or sometimes financial penalties) into the agreements.

Exhibit 12-G of the LAPM for the contract bid document is the only guidance relevant to this legal remedy requirement, although it addresses only construction contracts. Two agencies listed financial penalties in their construction contracts using Exhibit 12-G.

No guidance is available in the LAPM for professional services contracts, which could contribute to the low rate of compliance (28%) with the requirement.

Agencies shall provide performance monitoring and include contractual enforcement mechanisms by referring to 49 CFR 26.37(a).

**Corrective Measures:**

- The required language and guidance will be incorporated into the relevant chapters in the LAPM for both construction and professional services contracts.
- Awareness will be provided to agencies through training and a COIN.

**Commitment Compared with Utilization****Requirement:**

The agency's DBE program must include a monitoring and enforcing mechanism to

ensure that DBE commitments (listed in Exhibit 10-02 or Exhibit 15-G) reconcile to DBE utilization (reported in Exhibit 17-F) for each DBE contract.

**Findings:**

All contracts of five agencies meet this requirement, for 28% compliance. Most agencies did not list any penalties or enforcement mechanisms related to a prime contractor's failure to meet its DBE commitment.

Among reviewed contracts, 20 were complete at the time of the on-site assessment, as summarized in Table 3. Percentages of DBE goal, commitment, and utilization from the table are also given in Figure 2.

To meet this requirement, the DBE utilization percentage must equal or exceed the DBE commitment percentage. Half of contracts in the table did not meet this criterion for compliance, for 50% compliance, whereas 15 contracts' DBE commitment percentage equaled or exceeded DBE goal percentage.

In addition, the average DBE goal percentage for the 20 complete contracts under consideration was 6.67%, with five contracts having "zero" DBE goal. Of the 20 contracts under review, only two had a contract goal above the statewide goal of 12.5%. What's more, five contracts had a DBE commitment below the DBE goal.

The agency should include contractual enforcement mechanisms for cases in which a prime contractor fails to meet its DBE commitment.

The agency should exercise its oversight responsibility to ensure fair bidding practices by eliminating obstacles to DBE participation, such as by the removal of unnecessary contract requirements and a reduction in the unnecessary bundling of contracts.

**Corrective Measures:**

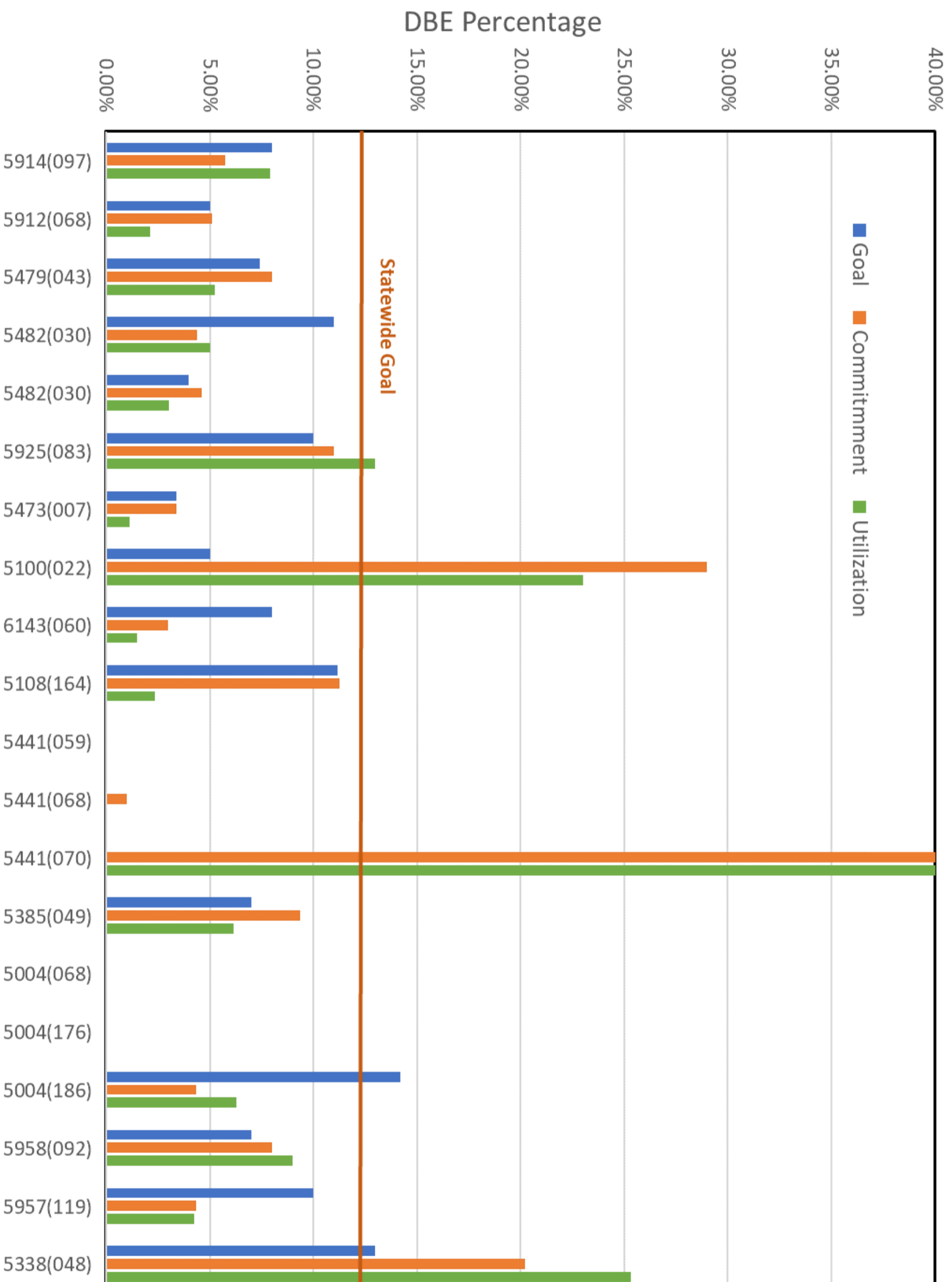
- Awareness will be provided to agencies through training and a COIN.



Table 3. Commitment Compared to Utilization of Complete Contracts

District	Agency	Contract No	Goal	Commitment	Utilization
1	Lake County	5914(097)	8.00%	5.74%	7.90%
3	Bute County	5912(068)	5.00%	5.13%	2.13%
3	City of Elk Grove	5479(043)	7.43%	8.00%	5.23%
3	City of Rancho Cordova	5482(030)	11.00%	4.40%	5.01%
3	City of Rancho Cordova	5482(030)	4.00%	4.60%	3.02%
3	El Dorado County	5925(083)	10.00%	11.00%	13.00%
3	Town of Truckee	5473(007)	3.40%	3.40%	1.15%
4	City of Palo Alto	5100(022)	5.00%	29.00%	23.00%
5	TAMC	6143(060)	8.00%	3.00%	1.50%
7	City of Long Beach	5108(164)	11.16%	11.26%	2.34%
8	City of Moreno Valley	5441(059)	0.00%	0.00%	0.00%
8	City of Moreno Valley	5441(068)	0.00%	1.00%	0.00%
8	City of Moreno Valley	5441(070)	0.00%	100.00%	100.00%
9	City of Ridgecrest	5385(049)	7.00%	9.37%	6.17%
11	City of San Diego	5004(068)	0.00%	0.00%	0.00%
11	City of San Diego	5004(176)	0.00%	0.00%	0.00%
11	City of San Diego	5004(186)	14.20%	4.34%	6.28%
11	Imperial County	5958(092)	7.00%	8.00%	9.00%
11	San Diego County	5957(119)	10.00%	4.32%	4.26%
12	City of Westminster	5338(048)	13.00%	20.20%	25.31%

Figure 2. DBE Goal vs. Commitment vs. Utilization



## DBE Goal Setting

### Requirement:

The agency should use a base goal setting methodology. The agency may use any of a variety of tools to justify goals, including work involved, DBE availability, and LAPM Exhibit 9-D. A goal setting methodology should be also employed for “no goals” and “zero percent goals”.

### Findings:

Seven agencies employed an appropriate goal setting methodology such as LAPM Exhibit 9-D, for 37% compliance. Some agencies had a low DBE goal because they determined the number of DBE subcontractors or subconsultants by conducting an inappropriate search in the CUCP database. Such a database search must be performed by Caltrans District only, but some agencies limited the search area to a county or adjacent counties, making fewer DBE firms available and resulting in a lower DBE goal.

Five “zero” goal contracts were identified among the 20 complete contracts. Contract goals may be zero when there is a lack of firms available to perform the work or there are limited subcontracting opportunities. Contracts such as emergency opening, sole-source, nonprofit, or force account contracts do not require a DBE contract goal. The regulations are very clear on the circumstances in which contract goals may be zero. None of the contracts under review met the standard, and the agencies did not provide adequate justification for their lack of a DBE contract goal.

Goal setting methodology did not consistently follow procedures listed in the instructions of Exhibit 9-D in the LAPM.

### Corrective Measures:

- Awareness will be provided to agencies through training and a COIN.

## General GFE Procedures

### Requirement:

General procedures should be set by a local agency for who opens and reviews bid packages to determine whether a prime

contractor made a GFE to meet and exceed DBE goals. Also, the local agency should have procedures for reviewing a GFE when the prime bidder does not meet its DBE goal.

### Findings:

Eight agencies were exercising proper general GFE procedures, for 42% compliance.

The agency should develop general GFE procedures and include them in its desk procedures.

Good faith contracting efforts should be documented and included in contract bid and proposal solicitations. LAPM Exhibits 9-E and 15-H are good examples of how to evaluate and exercise contractor GFE to meet DBE goals.

### Corrective Measures:

- DLA will create sample procedures for the agencies to adopt.
- Awareness will be provided to agencies through training and a COIN.

## Prime Contractor Requirements

### Requirement:

Per 49 CFR 26.53(b)(2), the winning bid must contain the following:

- DBE names and addresses
- Description of the work that the DBE will perform
- Dollar value for each participating DBE
- Written confirmation from the DBE that it is participating in the contract

### Findings:

LAPM Chapter 9.7 states that the foregoing information regarding DBE firms must be provided by each bidder using Exhibits 10-01 and 10-02 or Exhibit 15-G, for professional services and construction contracts, respectively.

Most of the agencies under consideration (15 of 19) fully complied with this requirement, for 79% compliance. Two agencies committed minor mistakes, such as failing to indicate dollar amounts and obtain written confirmation from participating DBE firms. Chapter 9 of the LAPM instructs that a copy of a DBE’s quote can serve as written confirmation, so a prime contractor’s inclusion of a properly filled-out Exhibit 10-02

or Exhibit 15-G fulfills this requirement without requiring a separate written confirmation from DBEs.

The agency is required to include Exhibit 10-02 or Exhibit 15-G in the professional services or construction contract, regardless of whether a DBE goal is included.

**Corrective Measures:**

- The required language and guidance will be incorporated into the relevant chapters in the LAPM for both construction and professional services contracts.
- Awareness will be provided to agencies through training and a COIN.

- A method for the reconsideration panel to evaluate a prime bidder's GFE to subcontract to DBEs
- A method for the agency to notify prime bidders about the decision made after reconsideration

**Corrective Measures:**

- DLA will create sample procedures for the agencies to adopt.
- Awareness will be provided to agencies through training and a COIN.

**Reconsideration Hearing Procedures**

**Requirement:**

If the local agency determines that the apparent successful bidder has failed to meet the GFE requirements, the local agency, before awarding the contract, must provide the apparent successful bidder the opportunity for administrative reconsideration in accordance with 49 CFR 26.53(d).

**Findings:**

Seven of 19 agencies under review fully complied with this requirement, for 37% compliance.

Some noncompliant agencies did not have a formal process for reconsideration, whereas others did not specify the reconsideration panel that would evaluate the prime bidder's intensity to subcontract to DBEs. Also, some panel members were not identified independent of the initial GFE review.

The agency is required to develop a reconsideration hearing process consistent with 49 CFR 26.53(d). Such a process should include the following key elements:

- A method by which the agency notifies prime bidders if they failed to perform a GFE on their bid
- A list of panel members who are independent of the initial GFE review
- A method for scheduling a reconsideration hearing so as not to delay projects

---

# CONCLUSIONS

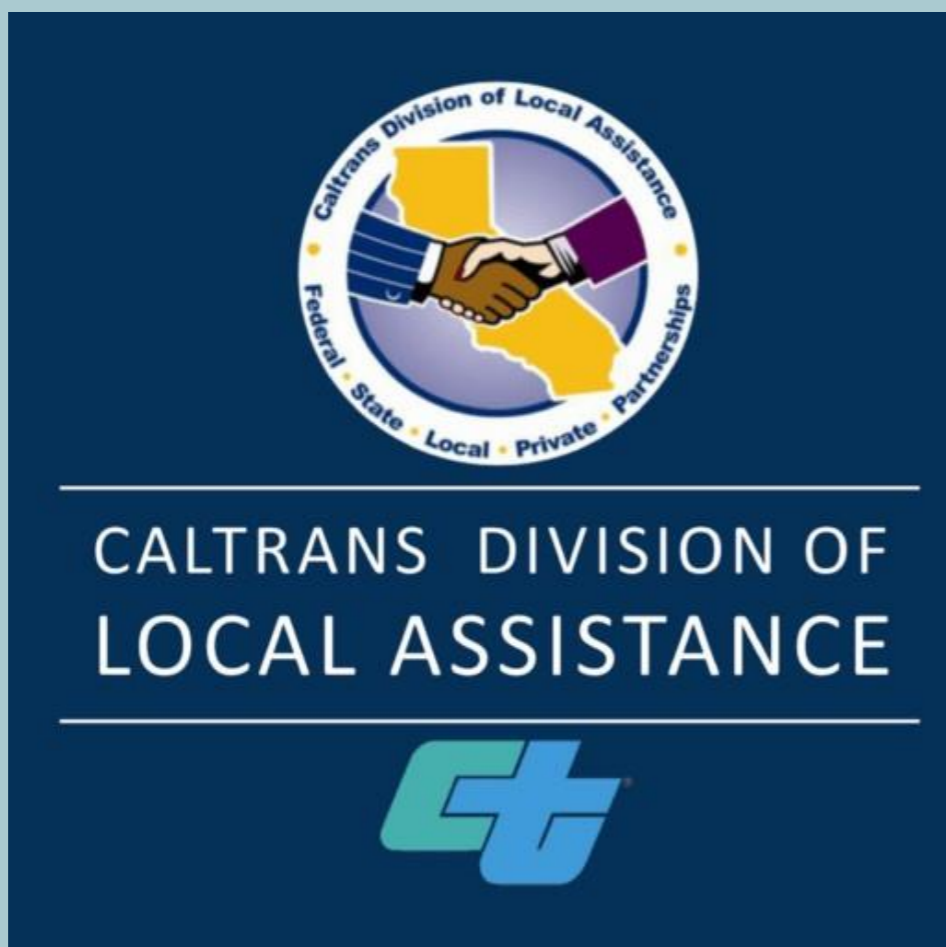
On-site local agency reviews were conducted to identify and document areas of improvements addressed in this report, with the intent of increasing agencies' awareness of the DBE requirements in 49 CFR 26. This will be key to the program's ability to achieve the statewide DBE goal set by FHWA.

Overall performance of DBE programs throughout the state was unsatisfactorily low, at a compliance rate of 43%. Lack of agency procedures consistent with the 49 CFR 26 regulatory statutes, and agencies' seeming unfamiliarity with federal requirements and the guidance listed in the LAPM, have caused a low level of conformity to DBE and GFE regulations.

In addition, insufficient guidance for construction and professional services contracts has partially contributed to low compliance among agencies, especially in three reviewed areas:

- Prompt payment of withheld funds to subcontractors for professional services contracts
- Monitoring of prime contractor performance (termination and substitution) for both construction and professional services contracts
- Monitoring of prime contractor performance (legal remedies) for both construction and professional services contracts

Further guidance on these areas would will be provided by enhancing the *LAPM* and providing needed training, to be conducted by the Caltrans DLA in the near future. And DLA will communicate with the agencies through the Office Bulletin (OB) and COIN to ensure the agencies are informed effectively and promptly of the new development and updates of the DBE related procedures, and therefore, it enhances their compliance.



# DBE Oversight

DBE Oversight provides guidance on federal-aid contracts for local agencies.

[dot.ca.gov/programs/local-assistance](https://dot.ca.gov/programs/local-assistance)