



 **WASCITO**

CIVIL RIGHTS TRAINING SYMPOSIUM | AUSTIN 2019

A photograph of the Austin skyline at sunset, with buildings reflected in a body of water. A bridge is visible on the left side of the image.

DBE Best Practices – Hot Topics and Metrics that Matter

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Hot Topics FHWA DBE Team Initiatives

- Alternative Contracting Handbook
- CUF-Streamlined Tools and Training
- On-the-Job-Training – Evaluating Best Practices
- Overall Methodologies

Alternative Contracting Methods (ACM)

Part of Project Delivery

- Not just for civil rights
- Acting, Executive Director issued handbook
- Joined Bridge (Project) Bundling Team
- Contributed to P3 Procurement Guidance Document
- Presented at national P3 Conference
- Presented at AASHTO, ACCA, etc.
- Presented poster at TRB

What Conditions are Different than DBEs on Design-Bid-Build

- Design-build - minimal plans
- Lack of design details, quantities, scheduling at time of award
- Conditions of 49 CFR 26.53(b) cannot be met – names of DBEs, description of work, dollar amount of contracts
- List of work items or type of work with DBE opportunity
- As project is designed, anticipated commitments become actual commitment to a DBE

Pre-Award Documents

- During pre-award, the practitioner has the best opportunity to influence the future success of the project's DBE program by conducting a thorough review of the documents that precede ACM delivery.
- RFQ
- RFP
- Instructions to Proposer
- Require DBE Performance Plan at Time of Proposal

DBE Performance Plan

- The Performance Plan must have enough information to assure the project sponsor that the proposer has a well thought out plan committing to the goal
- The details of what should be included in the Performance Plan must be in the Request For Proposal (RFP)
- The DBEPP must be approved by the project sponsor
- Required as part of proposal (best practice)
- Provides a “roadmap” of how proposer will achieve the goal
- Monitoring DBEPP continues through life of project

DBE Performance Plans: Best Practices

- Tracking anticipated commitments → actual commitment
- Requires anticipated work items (& \$\$) for Disadvantaged Business Enterprise (DBE) solicitation to meet the goal
- Design-Builder has qualified DBE Team
- Monthly progress meetings with State DOT/FHWA (the right people at the table)
- Flexibility: If DBE is not awarded subcontract for anticipated work type, find another opportunity

CUF Initiative

- Supports the Secretary's priorities of developing small businesses and preventing fraud, waste, and abuse in the DBE Program.
- Develop CUF tools and revised training to address program concerns identified by the USDOT and FHWA through their ongoing oversight and enforcement activities.
 - CUF Adobe Acrobat tool to be used on tablets in field
- Risk-based delivery strategy
- On-site technical assistance visits
- Inclusion of all project oversight staff. Not just civil rights!
- Input all Disciplines
- Propose TRB study on DBE Program Fraud. TRB Committee support

CUF High Risk Areas

- Suppliers Regular Dealers (bulk items) Must be determined on a case-by-case basis
 - What is the process?
 - What documents are reviewed?
 - Who is responsible for performing review?
- Trucking
 - How are DBE trucks identified
 - How are supplemental trucks identified
 - Who is responsible for reviewing?

Hot Topics

- Running Tally
- Race/Ethnicity-Based Incentives
- *Western States Paving Co. v. Washington State Department of Transportation, et. al.*, 407 F.3d 983 (9th Cir. 2005), applies to States in west only. Disparity studies not necessary in States in other circuits
- Meaning of “overconcentration”

Running Tally

Overall Concerns

- Running Tallies must be kept and monitored to see if contractor on track to meet goal
- DBELO must be involved in all termination and replacement decisions
- Don't wait until end to ask for “good faith efforts” when fall short of goal

Incentives

- No race/ethnicity/gender-based incentives
 - Examples:
 - Paying contractors more for using DBEs owned by certain race/ethnicity/gender
 - Giving contractors more goal credit for using DBEs owned by a certain race/ethnicity/gender
 - Allowing contractors to meet a lower DBE goal if use DBEs owned by a certain race/ethnicity/gender
- Any deviation would require a program waiver approved by the USDOT Secretary

Western States Paving Co. v. Washington State Department of Transportation

- Applies to recipients under the jurisdiction of the 9th Circuit Court of Appeals only
- Requires disparity study to support use of contract goals
- May require a program waiver if study shows underutilization of DBEs owned by some, but not all, disadvantaged groups
- Applies only to States in 9th circuit: Alaska, Arizona, California, Oregon, Washington, Hawaii, Montana, Idaho, Nevada
- Best Practice: Use of data outside of effect of DBE program goals

Overconcentration

- 49 CFR 26.33 means DBEs in certain work categories are placing an undue burden on non-DBEs in those same work categories
- Does NOT mean:
 - Primes are using too many DBEs in a particular work area, e.g., trucking
 - Prime contractors are using too many DBEs owned by a certain race, ethnicity, gender, e.g., non-minority women

Delivery of the DBE Program Requires Effort by Entire Agency

- Consider DBE as part of agency's overall project delivery process
- Leadership support is essential
- Civil Rights staff must learn how to speak about project delivery!
- Alternative Contracting Methods, be at the table early!
- Get involved in other agency initiatives, e.g, project bundling
- Train and involve field staff in monitoring/oversight

Other

- Requiring More of State DBE Goal Methodologies: Must survive legal challenge
- ORION INSURANCE GROUP v. WASHINGTON STATE OFFICE OF MINORITY & WOMEN'S BUSINESS ENTERPRISES: What does it mean to be socially and economically disadvantaged?
- DBE applying as woman after rejected as male on individual basis
- FAA gross receipts size standard increased. Applicable to FAA-funded contracts only

FAA – DBE Hot Topics

- Prompt Payment Monitoring
- Prompt Payment Complaints Reporting
(<https://www.surveymonkey.com/r/PromptPaymentComplaints>)
- DBE Race Neutral Participation Tracking and Reporting
- Subcontracts Required Review, Monitoring, and Tracking
- Online DBE/ACDBE Compliance Assessments
(<https://faa.civilrightsconnect.com/FAA/login.asp>)
- Online DBE Goal Setting Tool (S & M size airports) - **Coming Soon**