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 (&C$) 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