

Disadvantaged Business Enterprise (DBE) Program

Best Practices for Projects with Alternative
Contracting and Financing



U.S. Department of Transportation
Federal Highway Administration



- The Departmental Office of Civil Rights (DOCR) is the Lead Office in OST for the DBE Program.
- FTA, FHWA and FAA are the Operating Administrations (OAs) required to apply the DBE program requirements to their program funding
- The OA's oversee the day-day-operation of the program by recipients, provide training, and take appropriate action to ensure program compliance.
- DOCR maintains the program website and houses official DOT guidance at <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise>
- Purpose is to create level playing field for disadvantaged firms in a discriminatory free contracting environment– equitable opportunity for all businesses on DOT Contracts
- Components of the program: Certifications, annual goals, contract goals, oversight
- 49 CFR 26

DBE PROGRAM OVERVIEW



FHWA & Alternative Contracting

Home / Programs / Construction / Contract Administration / ACMs

Alternative Contracting Methods (ACMs) Library

The Federal Highway Administration supports the deployment of Alternative Contracting Methods-Design-Build (D-B), Construction Manager/General Contractor (CM/GC), Alternate Technical Concepts (ATC)-to accelerate project delivery, encourage the deployment of innovation, and minimize unforeseen delays and cost overruns.

In traditional highway construction contracting (design-bid-build), cost is generally the one criterion that determines the winning bid. As State and local agencies strive to meet customer needs, factors such as quality, delivery time, social and economic impact, safety, public perception, and life-cycle costs have gained in importance. Since the 1990s, the FHWA has been supporting the use of these innovative alternative contracting methods to help achieve these goals.

* This Library has been assembled to provide access to Samples of documents prepared by State legislatures, and transportation owner agencies in the execution of roadway construction contracting, deploying these methods. It does not constitute a standard, specification, or regulation.

- [Design-Build \(D-B\)](#)
- [Construction Manager/General Contractor \(CM/GC\)](#)
- [Alternative Technical Concepts \(ATC\)](#)
- [Quick Reference, Background Material, and Useful Information](#)
- [FHWA Division ACM Contacts](#)

ACM Technical Contacts

ACM Deployment	ATC	CM/GC	D-B
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Vision & Mission

Vision: ACMs are mainstreamed as viable delivery options for highway construction projects.

Mission: Increase the rapid deployment of ACMs & harness innovation through early contractor involvement, while providing public owners and industry with the knowledge, tools, and skills to successfully implement ACMs.

More Information

- [Quick Reference, Background Material, and Useful Information](#)

Contact

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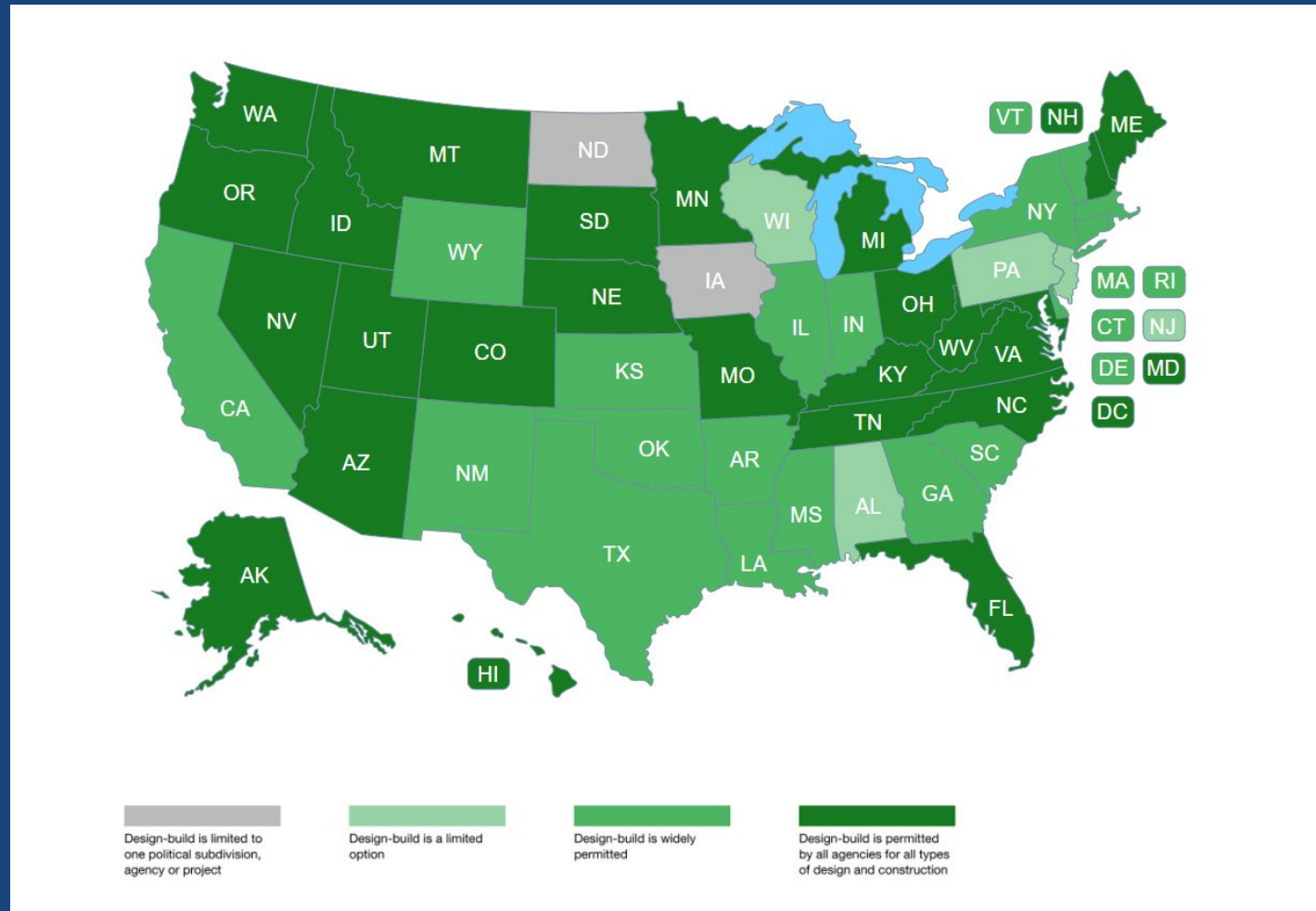
Disadvantaged Business Enterprise and Alternative Contracting



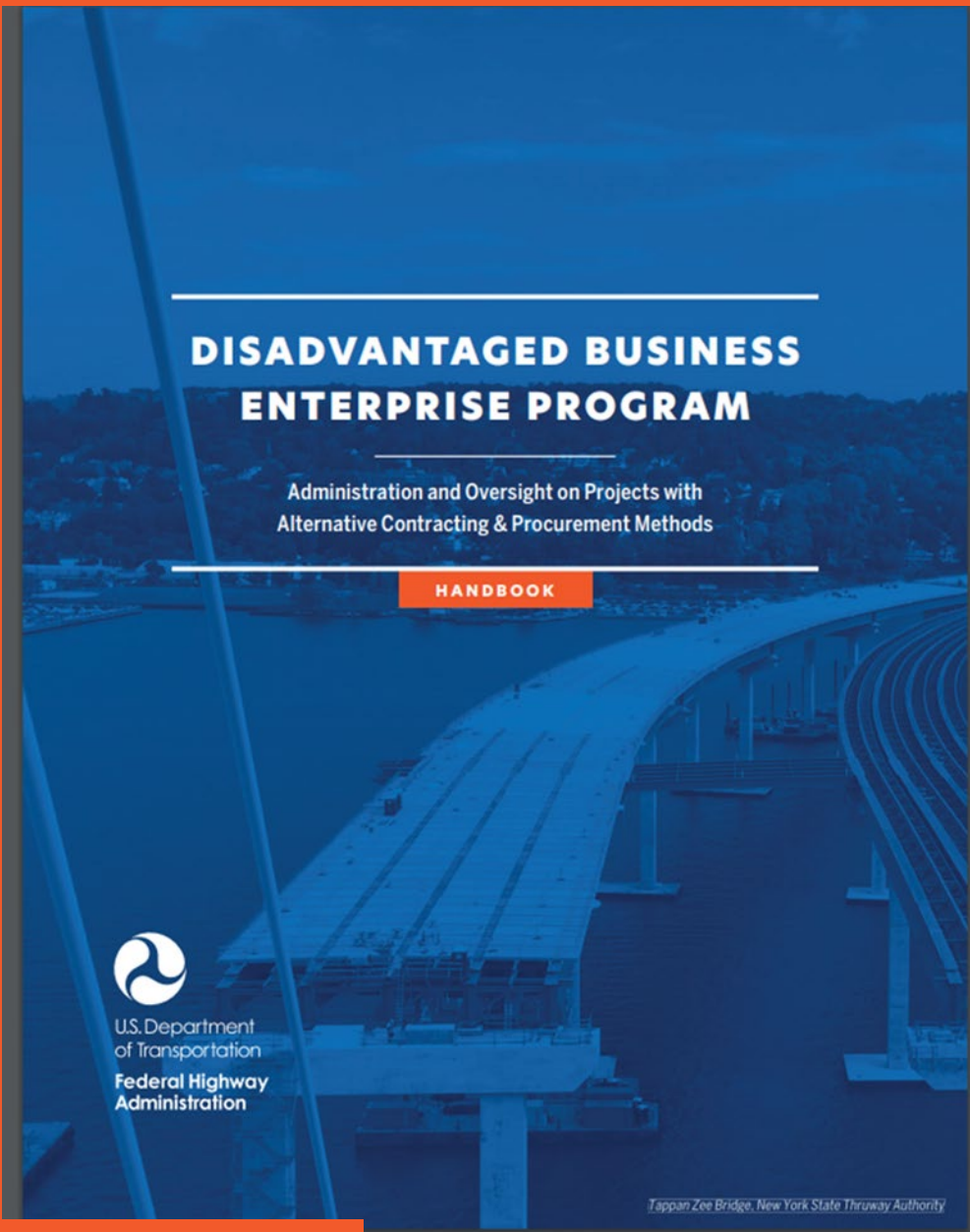
Memorial Bridge Replacement, FHWA, New Hampshire

- Challenges in Alternative Contracting include:
 - Ensuring regulatory requirements are met
 - DBEs have meaningful opportunities to compete
 - Many undefined subcontracting opportunities at time of award
 - New/non-traditional partners
 - Coordinating oversight by multiple parties and multiple subcontracting tiers
 - Understanding the contracting method

Design-Build State Authorization 2021*



*Design Build Institute of America



- Best practices and lessons learned
- Design-Build, P3, CMGC, TIGER, TIFIA
- Focus: to support efficient and effective project delivery
- Where to Find -

Google “DBE Oversight on Alternative contracting”

USDOT’s DBE Website

FHWA Office of Civil Rights - DBE Website



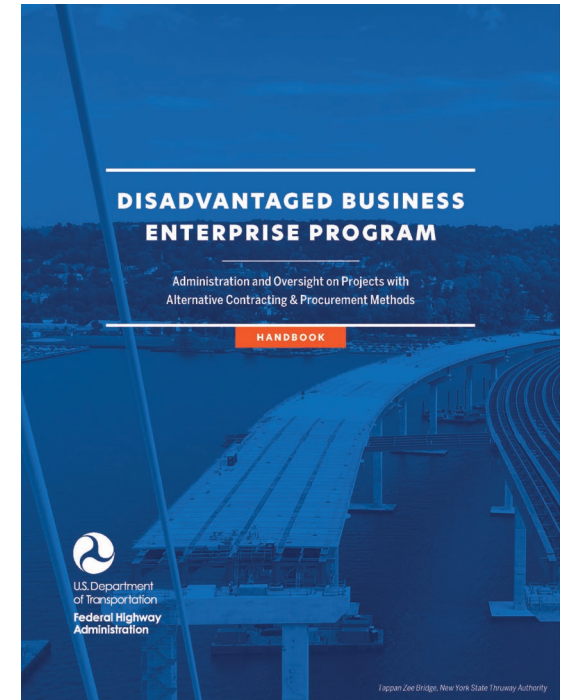
Background

The Handbook was created to address many questions the FHWA Office of Civil Rights (HCR) received from the field regarding the requirements of the Disadvantaged Business Enterprise (DBE) program in alternative contracting.

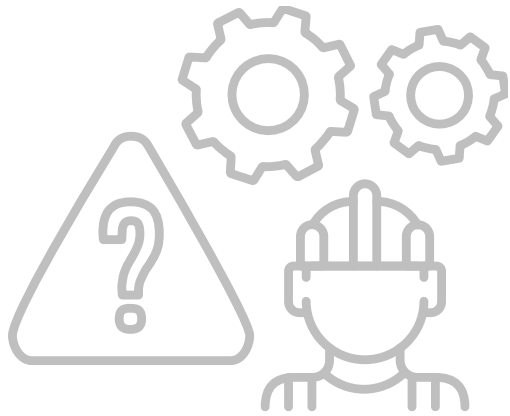
- Interviews and data collection from 19 Alternative Contracting Methods (ACM) projects
- Compiles best practices and lessons learned
- Curated by Offices of Civil Rights, Chief Counsel, Resource Center, Divisions, Office of Infrastructure
- Fully reviewed by appropriate program areas: Chief Counsel and U.S. Department of Transportation

Outline of Handbook

- 1** Background
 - Summary tables
 - Links to key terms
 - Project information
- 2** Pre-Award
 - Goal setting
 - Contract documents
 - Outreach/Education
- 3** Post Award
 - Monitoring
 - Commercially Useful Function (CUF)/Good Faith Efforts (GFE)/Prompt Pay/Reporting
 - Outreach
- 4** Final Acceptance
 - Documentation



What is Alternative Contracting?



Alternative Contracting

Alternative Contracting is how the project is procured, designed, and built.

- Anything other than design-bid-build
- Constantly evolving as innovative contracting methods continue to develop
- No matter what method, DBE regulations apply as long as there is Federal funding



Highlights of what we learned Since.....



I'm exhausted from
all I've learned about
the DBE Program and
Alternative
Contracting!

Credit: Thorkildsen, 2021



Alternative Financing**

Considerations if DBE Program Applies

- TIGER – BUILD – RAISE
 - If directly to STA – DBE Program applies
 - If to a sub-recipient through the STA – DBE program applies
 - If directly to a sub-recipient (local agency) – DBE Program does Not apply
 - If directly to a recipient with no approved DBE Program Plan – DBE program does not apply
- INFRA
 - All projects – regardless of recipient - must consider DBE program requirements
- TIFIA
 - Same as INFRA requirements
- When DBE program does not apply, common grant rule applies:
 - 2 CFR 200.321 (a): "The non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible."

**If you need assistance call us ☺ - we know this is complex!



DBE Goal Setting

Involving civil rights practitioners early in the goal setting process is key.

Involve	Consider
Civil rights practitioners	Subcontracting opportunities
Input from all stakeholders	Availability of DBEs
Project Engineers	Market area (may not just be in geographic boundaries of State)

Same considerations as setting any goal!

Goal Setting Lessons Learned

- Understand the project's financial details
- Document your goal setting process and make it available
- Use credible data and follow 49 CFR 26
- Do not be influenced by political pressure to make the goal higher or lower
- Include input from civil rights practitioners, stakeholders, project engineers and construction specialists

- Benefit of D-B is transfer of risk for design/construction of the project
 - This is **not true** for civil rights compliance responsibilities
 - Project sponsor bears responsibility to ensure DBE program receives effective oversight and enforcement
- DBE goal setting – one goal or two
- DBE Performance Plan – an approach to DBE commitment in D-B
 - Conditions at time of proposal– lack of design details, quantities, schedule, materials, etc
 - DBEPP - List of work items or type of work, est dollar value, time frame and oversight/compliance approach
 - As project is designed, anticipated commitments become actual commitment to a named DBE
 - Monitoring of Good Faith Efforts to achieve DBEPP by project sponsor is key!
- Procurement process - include DBE Program information/requirements
 - RFQ – RFP (ITP & Contract Docs) – PMP
- Complexity of tiering of subcontracting
 - Prompt Payment
 - Commercially Useful Function
 - Crediting
 - Running Tally
- Electronic systems for collecting and reporting DBE data

Design-Build



DBE Performance Plan (DBEPP)

The DBEPP details the proposer's commitment to achieve the goal and meet other DBE program requirements.

- 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 Plan (DBEPP)

Successful 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

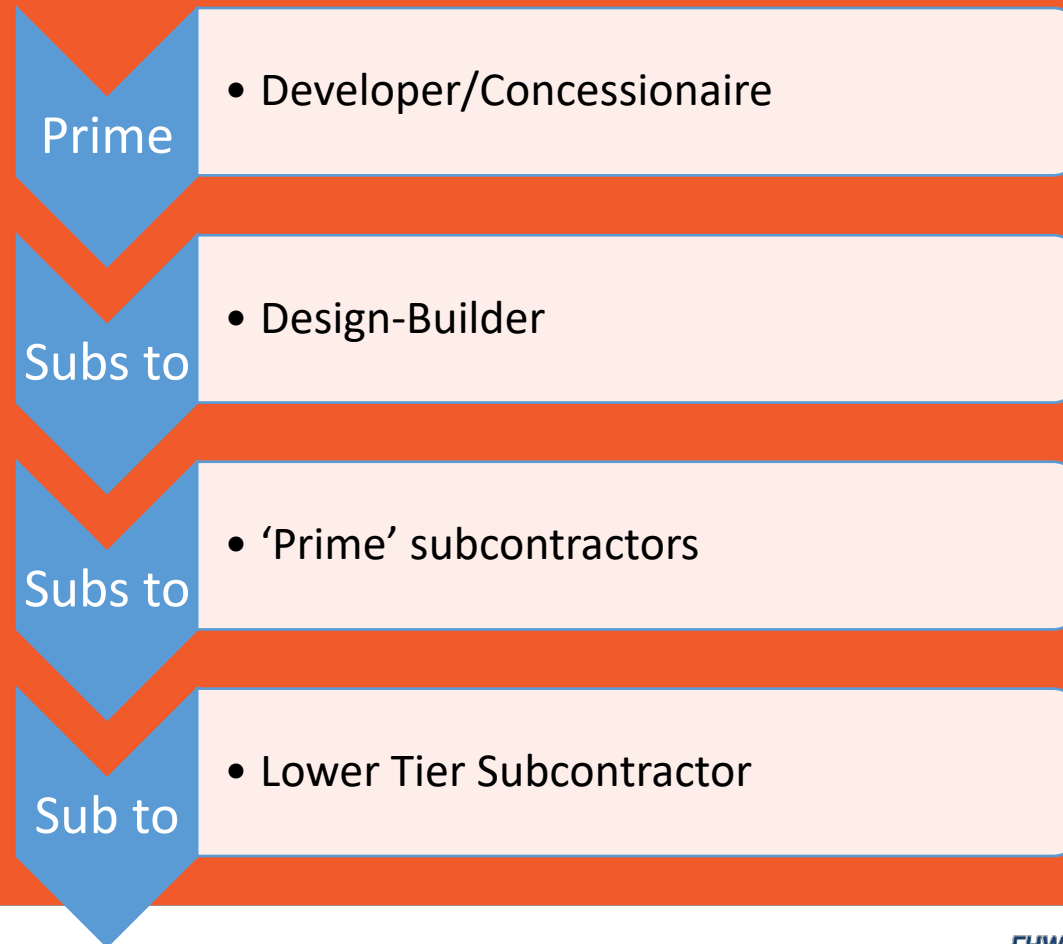
DBE Performance Plan (DBEPP)

What Conditions are Different than 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

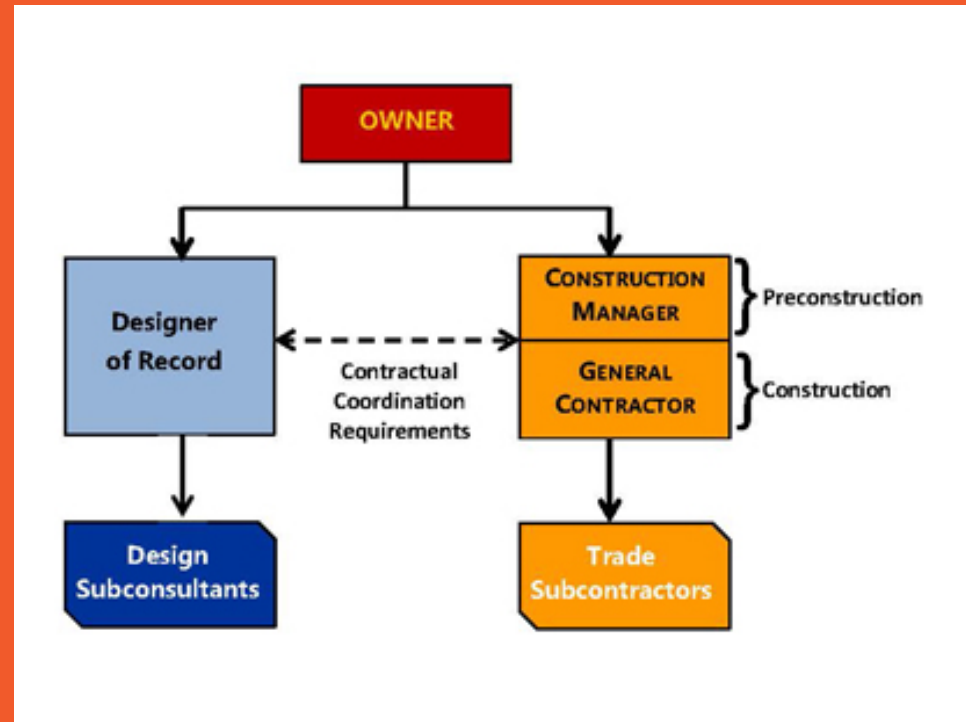
Private-Public-Partnerships

- Typical elements: Design, Build, Finance, Operate, Maintain
- Same conditions as D-B
- Additional layer with the Concessionaire (Developer)
- If elements include operations and maintenance determine if federal funding applies and if there are DBE opportunities



Construction Manager General Contractor

- Design contract – DBE goal?
- Construction Manager hired for pre-construction services
 - What are services
 - DBE opportunity
- Independent Cost Estimate
- Early work packages
- Construction contract post award



Pre-Award Findings



- Not involving Civil Rights requirements early in the project development process
- DBE oversight and compliance is complicated – details in contract language is essential
- Projects move fast and accumulate enormous amount of data – be ready!
- Prepare for tiering of subcontracting

Outreach

Outreach is effective when it results in DBE participation—the owner should set performance metrics to document and evaluate the value of the efforts.

- Early involvement
- Partnership
- Visible leadership
- Transparent goal setting
- Targeted outreach to DBEs to meet the goal objective
- Leverage resources – DBE Supportive Services

Post-Award

The Post-Award section provides key considerations and helpful tips in delivering successful, compliant, and opportunity-rich Alternative Contracting Methods projects.

- Accurate Crediting towards the goal
- Monitoring
 - Commercially Useful Function Reviews
 - Prompt Payment and Return of Retainage
 - Good Faith Efforts
- Enforcement

Monitoring Goal Achievement

Successful monitoring of the DBE goal achievement includes shared responsibilities among all parties.

- Conveying expectations of appropriate crediting towards the goal
- Continual running tally
- Well documented process of oversight
- Regular meetings with partners
- Communicates importance of goal commitment
- Crediting only when CUF has been determined and payment made to the DBE
- Continual oversight of DBE Performance Plan supports importance of this document

Commercially Useful Function (CUF)

The CUF determination indicates that the DBE is performing with its own forces the work that it is certified and was contracted to perform.

- Early CUF monitoring recommended
- Know when DBEs are working
- Request “Look Ahead Schedule” in RFP
- CUF final approval from public agency
- May need additional resources for sufficient monitoring
- Professional Engineering firms – same process
- Use skype, internet, other resources

Prompt Payment/ Return of Retainage

Lack of timely payments/return of retainage affects the growth and capacity of small businesses and threatens the future health of the industry.

- Applies to all subcontractors, including DBEs
- Multiple layers of subcontract tiering
- Make sure electronic data system can monitor tiering
- Contract structure may not pay prime regularly
- Address in RFP when payments will be due to lower tiers, even when prime is not paid

Embracing Technology

The contract can require the use of specific electronic systems for collecting and reporting DBE data.

- RFP must require
- Training must be provided
- Avoid overreliance without accessing/auditing
- Specify reasonable access for sponsor/prime/subcontractors

Enforcement

Sanctions should be imposed for contract violations.

- RFP should explain sanctions, e.g., point system
- Documentation of violations
- Prompt follow-up of complaints
- Timely, solid, accurate and complete monitoring → effective enforcement
- Report suspicions of fraud/waste/abuse to USDOT Office of Inspector General

Project Closeout – DBE Program Requirements

- Sponsor must have documentation of oversight, approvals, sanctions
 - Commercially Useful Function review for each DBE credited to the goal (49 CFR 26.55)
 - Prompt payment verification for all subcontractors (49 CFR 26.29)
 - Running tally – accurate accumulation of DBE credit (49 CFR 26.37)
 - Approval of Good Faith Efforts documentation if goal is not achieved (49 CFR 26.53)



Lesson Learned

- The Project Sponsor CANNOT perform monitoring only at contract close-out
- The Project Sponsor must assure the Project Management Plan approved by the FHWA in the beginning of the project is followed through to the end of the project
- Documentation of oversight is required (49 CFR 26.37)



FHWA HCR
DBE
PROGRAM
INITIATIVES
FY21/FY22

• **Research and Publish DBE/ACM Handbook II**

- Bi-State Projects
- INFRA/FASTACT Projects
- Indefinite Delivery Indefinite Quantity (IDIQ)
- Operations & Maintenance of Private Public Partnerships
- Project Bundling
- Additive Alternative Bidding
- Construction Manager General Contractor
- Min/Max (or Not to Exceed) Subcontracting

Research by interviewing ~3 projects/delivery method
Division Office, Project Sponsor and prime contractor

We are looking for projects!

Released 2022



FHWA HCR
DBE
PROGRAM
INITIATIVES
FY21/FY22

NHI Training Course (361033)

Best Practices of Administering the Disadvantaged Business Enterprise (DBE) Program in Design-Build

- Introduction to DBE program on DB Projects
- Timelines and Contract Documents
- Leveraging a Team/DBE Outreach and Education
- Setting DBE Goal(s)
- Developing a DBE Performance Plan (DBEPP)
- Monitoring DBE Requirements post Award
- Final Acceptance and Beyond
- Other Alternative Contracting and Financing Methods

WBT/WCT - Released in 2022



Major Takeaways in ACM

Considerations for implementing DBE Program in ACM

- Understand the financing and contracting method
- Early communication of DBE requirements in pre-award
- Outreach and education for DBEs throughout project
- Well documented goal setting process
- Requiring DBE performance plan prior to award
- Ongoing monitoring of GFE toward achieving the commitment
- Detailed oversight plans
- Frequent meetings with partners to evaluate progress towards goal achievement and resolution of issues



Thank you!

- Christine Thorkildsen
- DBE and Contractor Compliance Program Analyst
- FHWA Headquarters Office of Civil Rights
- 518-487-1186
- https://www.fhwa.dot.gov/civilrights/DBEandACM_Handbook/

"The contents of this presentation do not have the force and effect of law and are not meant to bind the public in any way. This presentation is intended only to provide clarity regarding existing requirements under the law or agency policies."

