

# Disadvantaged Business Enterprise Program: A State Perspective

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Arizona's Disadvantaged Business Enterprise (DBE) program is discussed from the experience and perspective of the Arizona Department of Transportation (ADOT). ADOT establishes goals for DBE participation on highway design and construction projects. Attainment of a goal of 10 percent for design jobs is part of a scoring schedule. Goals ranging from 0 to 15 percent for construction projects are set according to project size and location, DBE availability, and type of work involved. The DBE program has positive and negative aspects. On the positive side, the program has opened doors for small businesses to participate in the construction industry as evidenced by such firms' also working on projects without goals. The program has also enabled minorities and women to move from being employees to owning small businesses. Also, the increased competition among DBEs and other subcontractors appears to have resulted in lower construction costs. On the negative side, setting goals on construction projects can be difficult because of the nature of the work. The bidding process has become problematical. Further, the program has resulted in increased responsibilities in the field and has involved Arizona in the prime and subcontractor relationship. Finally, addressing problems arising when DBEs are unable or unwilling to perform is time consuming and controversial.

The Arizona Department of Transportation (ADOT) is charged with designing, constructing, and maintaining all federal and state highways and roads in Arizona. Currently, the majority of funds to perform these functions are allocated from the Arizona Highway User Revenue Fund. Approximately 17 to 18 percent of total funds expended is federal aid.

The 1987 Surface Transportation and Uniform Relocation Assistance Act requires recipients, in this case ADOT, to expend no less than 10 percent of the federal funds on firms owned and controlled by socially and economically disadvantaged individuals. ADOT has consistently exceeded this goal (see Table 1). In 1985, disadvantaged business enterprises (DBEs) received \$30 million, or 18 percent of the federal dollars. In 1986, the figure increased to \$36 million (14 percent), whereas in 1987, Arizona experienced a decrease in federal funds and the DBE share was \$26.5 million (16.5 percent). In 1988, federal funding declined further and \$22 million was expended with DBEs, or approximately 11.6 percent of the total federal dollars. Only federally assisted contracts have DBE requirements—no state law mandating DBE requirements on state-funded projects exists.

ADOT is proud of the success of the DBE program. The largest factor for this success is the strong support the program receives from the director, the state engineer, and the state transportation board. Other significant factors include sup-

port and guidance from FHWA and the efforts of field personnel.

The DBE program includes engineering, consulting, and construction contracts. Inclusion of engineering projects is a recent development. In 1986, engineering consultant services included points for use of DBEs as part of the overall scoring system. DBE participation counted for five points in a go or no-go system. However, the department found that this policy was not as effective as anticipated. DBE participation was low and most of the work was going to firms specializing in geotechnical work or surveying. A system was then developed in which prime consultants received an additional three bonus points for using a DBE firm specializing in design. Subsequently, the maximum number of points a prime consultant could receive is 103. Since this development, contract provisions were revised to include a 10 percent DBE participation requirement. Another development is that the affirmative action office now reviews, scores, and approves all statements of interest and technical proposals for DBE compliance. Since implementing these changes, a significant increase in DBE participation occurred, from 4.5 percent in 1986 to 6.0 percent in 1988. Also many smaller DBE design firms are being included in the prime consultants' teams. ADOT's goal in 1989 is 10 percent DBE participation in designing projects.

As with most states, the construction aspect of highway projects is where the DBE goal has the most impact. ADOT annually establishes a 10 percent DBE goal, which has always been exceeded. DBE construction goals are established on a project-by-project basis. Factors taken into consideration include type of work involved, availability of DBEs to perform the work, location of the project, duration of the project, and size of the project. DBE goals on ADOT projects range from 0 to 15 percent. The average goal is 7.8 percent and the median goal is 10 percent.

In the past, bidders were required to indicate with their bids which DBEs were being used to meet the goals. However, this requirement was changed approximately 2 years ago. The apparent low bidder is allowed five working days to submit this information. Three reasons brought about this change. First, contractors were simply not completing the affidavit properly, resulting in approximately one job per month being awarded to the second-low bidder. Second, bidders were alleging the DBEs were submitting their bids too late to be considered. This situation was confirmed. Many DBEs believed that the later bids are submitted, the lesser the chances were that their prices would be bid-shopped. Third, the extra time would permit contractors to better research a DBE's bonding and insurance capabilities and, subsequently, result in fewer requests to substitute DBEs for these reasons. In the

TABLE 1 SUMMARY OF ARIZONA DEPARTMENT OF TRANSPORTATION DBE GOAL ATTAINMENT, 1985-1989

	FY 1985	FY 1985	FY 1986	FY 1986	FY 1987	FY 1987	FY 1988	FY 1988	FY 1989	FY 1989
	DOLLARS	PERCENT	DOLLARS	PERCENT	DOLLARS	PERCENT	DOLLARS	PERCENT	DOLLARS	PERCENT
<b>Total Prime Contracts</b>										
Number	132		94		91		116		76	
Total Dollars	\$170,583,171.00		\$257,825,216.00		\$160,387,344.00		\$180,919,375.00		\$108,193,940.00	
<b>DBE Prime Contracts</b>	\$6,254,110.00	3.67%	\$400,968.00	0.16%	\$1,304,392.00	6.07%	\$527,967.00	3.16%	\$529,264.00	6.19%
DBE Subcontracts Awarded	\$21,850,955.00	12.81%	\$27,612,479.00	10.71%	\$17,106,194.00	10.67%	\$14,984,476.00	8.28%	\$7,851,905.00	7.26%
DBE Subcontract Commitments	\$19,070,985.00	11.18%	\$28,019,854.00	10.87%	\$21,481,375.00	13.39%	\$16,728,177.00	9.25%	\$10,168,895.00	9.40%
<b>WBE Prime Contracts</b>	\$2,175,082.00	1.28%	\$810,917.00	0.31%	\$1,098,140.00	0.68%	\$0.00	0.00%	\$375,157.00	0.35%
WBE Subcontracts Awarded	\$3,341,203.00	1.96%	\$7,550,822.00	2.93%	\$2,659,872.00	1.66%	\$3,445,218.00	1.90%	\$2,188,358.00	2.02%
WBE Subcontract Commitments	\$3,080,476.00	1.81%	\$6,934,245.00	2.69%	\$2,620,918.00	1.63%	\$3,702,931.00	2.05%	\$2,956,241.00	2.73%
<b>DBE/WBE PARTICIPATION BY AWARD</b>	\$33,621,350.00	19.71%	\$36,375,186.00	14.11%	\$22,168,598.00	13.82%	\$18,957,661.00	10.48%	\$11,044,684.00	10.21%
<b>DBE/WBE PARTICIPATION BY COMMITMENT</b>	\$30,580,653.00	17.93%	\$36,165,984.00	14.03%	\$26,504,825.00	16.53%	\$20,959,075.00	11.58%	\$14,129,557.00	13.06%
<b>DBE Awarded Contracts by Race/Ethnic/Sex</b>										
Blacks	\$1,823,693.00	5.42%	\$2,370,560.00	6.52%	\$1,294,713.00	5.84%	\$1,572,467.00	8.29%	\$547,419.00	4.96%
Hispanics	\$16,886,295.00	50.22%	\$18,493,007.00	50.84%	\$11,900,222.00	53.68%	\$10,643,805.00	56.15%	\$5,607,446.00	50.77%
Native Americans	\$3,484,459.00	10.36%	\$6,334,014.00	17.41%	\$4,238,296.00	19.12%	\$2,475,975.00	13.06%	\$1,884,247.00	17.06%
Asian Indians	\$5,910,618.00	17.58%	\$509,850.00	1.40%	\$392,099.00	1.77%	\$62,689.00	0.33%	\$0.00	0.00%
Asian Pacific Islanders	\$0.00	0.00%	\$246,600.00	0.68%	\$538,121.00	2.43%	\$757,507.00	4.00%	\$442,057.00	4.00%
Other	\$0.00	0.00%	\$59,416.00	0.16%	\$47,135.00	0.21%	\$0.00	0.00%	\$0.00	0.00%
Women	\$5,516,285.00	16.41%	\$8,361,739.00	22.99%	\$3,758,012.00	16.95%	\$3,445,218.00	18.17%	\$2,563,555.00	23.21%
<b>Total</b>	\$33,621,350.00	100.00%	\$36,375,186.00	100.00%	\$22,168,598.00	100.00%	\$18,957,661.00	100.00%	\$11,044,724.00	100.00%

past 2 years, only one project has been awarded to the second lower bidder because of DBE problems.

Once a project begins, the prime contractor is required to submit to the affirmative action office, through the project office, the fully executed agreements between the prime contractor and the DBEs. These contracts are used by the project office and the affirmative action office to ensure DBE compliance. Although field personnel have the day-to-day responsibility for monitoring compliance, affirmative action staff try to visit projects at least once. Projects with questionable prime contractors or DBEs are monitored more often.

At the completion of the project, the prime contractor is required to submit certification of payment affidavits. These affidavits certify what primes have paid or will pay DBEs for their work on projects. DBEs are required to confirm what the prime contractors submit. Retention money is held pending receipt of these affidavits. Staff in the affirmative action office compare the affidavits with the subcontracts to ensure that DBE goals were achieved. In addition, audit and analysis has included DBE compliance as a regular part of any audit.

During the past 4 years, increasing numbers of DBEs are working on projects that are state funded. These firms are competing in a market where they have no advantage. Their name, service, and reputation are getting the DBE work, not their certification status.

Many DBE owners worked previously as employees of non-DBE firms. They now are responsible for their own firms. In the past year, four DBEs have begun working as prime contractors on smaller jobs. Some of these jobs involve federal funds, whereas others are state funded.

From an informal comparison of the difference between the state's estimate and the low bid on federally assisted contracts and the state's estimate and the low bid on state funded contracts, the DBE program may not have higher costs. Because the state's estimate does not take into consideration DBE program requirements, increased competition may actually be lowering the cost of jobs.

The DBE program, despite all its successes, also has negative aspects. First, setting DBE goals on federally funded

projects can be difficult. Until 1987, Interstate 10 through Phoenix was under original construction. This situation meant that there were large projects with a variety of work, such as reinforcing and structural steel; concrete curbs, gutter, noise walls, and paving; pipe; drilled shafts for caissons; signing; electrical; fence and guardrail; and trucking. Setting goals on these projects was easy. Now, with all of these projects under construction, setting goals is more difficult. Arizona has finally caught up with the rest of the country and must try to achieve 10 percent DBE participation on jobs that do not lend themselves to DBE goals. Landscaping projects now make up a large part of the federally funded work in Phoenix. However, the only available work for DBEs is supplying gravel, hauling, surveying, and perhaps, electrical. Work outside of the major metropolitan areas seems to be rebuilding bridges and milling, which have limited opportunities for the use of DBEs. Two DBE firms specializing in milling have decided not to work in Arizona in the future.

Despite these changes, the bidding process is still problematic. Even with the new procedure, one bidder failed to submit the 5-day information within the time frame stipulated in the contract. Another contractor indicated that specific DBEs would be used to meet the goal, only for the ADOT to discover the DBEs had not even submitted bids on the project. Another problem is that many new bidders are unaware of ADOT requirements. Consequently, after bids are opened, the affirmative action office must find them and explain the procedure to ensure that the required paperwork is completed properly and submitted on time. The 5-day period after bids are opened has also become an issue. Many DBEs have indicated that this 5-day period has led to intensified bid-shopping by the apparent low bidder. As a result, a committee has been established to discuss this matter and to develop recommendations addressing the situation.

During construction of a job, field personnel must monitor the DBEs. Often, the inspectors provide informal technical assistance to DBEs by showing certain aspects of the job. Field personnel must also determine when and if a DBE on a project has entered into an unauthorized second-tier sub-

contract with a non-DBE firm and whether this agreement exceeds the contract stipulated limit. In the recent past, lack of an approved agreement has led to a myriad of problems, such as unauthorized or unlicensed subcontractors on projects and the possibility of the prime contractor's not meeting DBE goals. Field personnel must also ensure that DBEs are submitting other required paperwork, such as Equal Employment Opportunity project workforce reports and certified payrolls.

With the DBE program, ADOT often finds itself in the middle of the relationship between prime and subcontractors. ADOT has held that its legal relationship is with the prime contractor or consultant on all projects, whereas the subcontractor or subconsultant has a relationship with the prime contractor. In the typical prime and subcontractor relationship, the prime is responsible for all work and notifies the subcontractor when changes are required. However, field personnel often find themselves communicating directly with the DBE subcontractors when problems arise with the DBE's work. Another issue that ADOT is often asked to mediate is scheduling. DBEs allege that prime contractors deliberately schedule their work so that they will experience difficulties, i.e., requiring the DBEs to report to projects but not being ready for them or requiring the DBEs to perform their subcontracts in small, distantly spaced pieces. Less-frequent problems arise from disputes over plan interpretations, personality conflicts, and scope of work of the subcontract.

The largest issue that ADOT finds itself in the middle of is prompt payment. When DBEs have not been paid when they believe they should have, they call the affirmative action office, field report staff, or the resident engineer. DBEs are told that ADOT cannot ensure payment, but instead tries to determine the reasons. Sometimes the problem results from something as simple as failure to submit required documents, such as certified payrolls or material certifications. Occasionally, prime contracts do not have the money even though ADOT has paid them. At other times, the problem is contractual. In these cases, ADOT advises the DBE to seek legal advice.

Because field report staff processes all paperwork for monthly progress pay estimates, DBEs often call to see what work ADOT is paying the prime contractor for that month. This

action involves a great deal of work for field report staff. DBEs then base their invoices to the prime contractors on the quantities they were told. Occasionally, the quantities indicated by field report staff are different from the DBE's records, thus creating another dispute. When this situation occurs, the resident engineer is called in to resolve quantity disputes, expedite change orders or force account work, and special requests for early release of retentions. This action again requires the field personnel to circumvent traditional relationships with prime contractors.

A final problem arises when DBEs are unable or unwilling to perform their subcontracts. The construction industry holds that there are few DBEs qualified to do the work. However, when experienced and qualified DBEs submit bids that may be more realistic but higher, these bids are rejected. Subsequently, DBEs who submit lower unrealistic bids are used to meet the goals. These firms often experience difficulties performing their contracts, thereby perpetuating the stereotype.

When DBEs fail, ADOT must determine whether to hold the prime contractors to the DBE goals or to lower them. In all instances, prime contractors are required to submit evidence of their good-faith effort to meet the DBE goals. However, each project must be evaluated on its own merits when deciding to stay with or lower the DBE goal. Several factors then come into consideration. First, will the traveling public suffer if the project is delayed while the prime contractor seeks additional DBEs? Second, how is ADOT progressing toward its annual commitment? Third, what is the nature of the remaining work and are there DBEs who will do it? Fourth, how much time is remaining on the contract? Fifth, will the prime contractor file a claim for more money? Sixth, why did the DBE fail? All of these questions require a great deal of time and interaction between the affirmative action office, the resident engineer, and field personnel, field report staff, and FHWA.

In spite of these challenges, ADOT remains firmly committed to the DBE program. The department is proud of its successes and of those firms that have grown as a result of it.

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