

Current Practices to Set and Monitor DBE Goals on Design-Build Projects and Other Alternative Project Delivery Methods

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David Keen, Principal
Keen Independent Research LLC

100 Fillmore St., 5th Floor

Denver CO 80206

303-385-8515

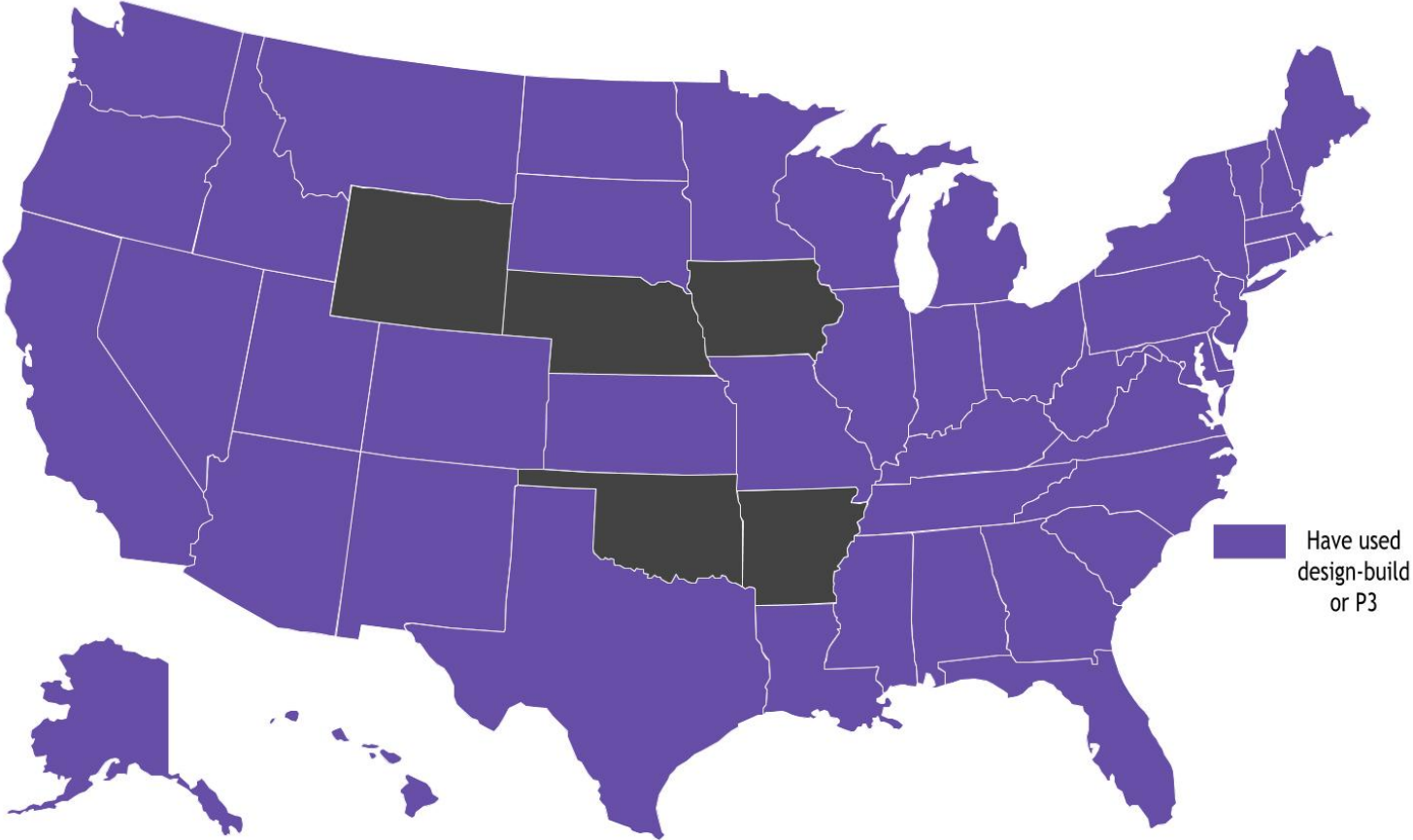
dkeen@keenindependent.com

www.keenindependent.com

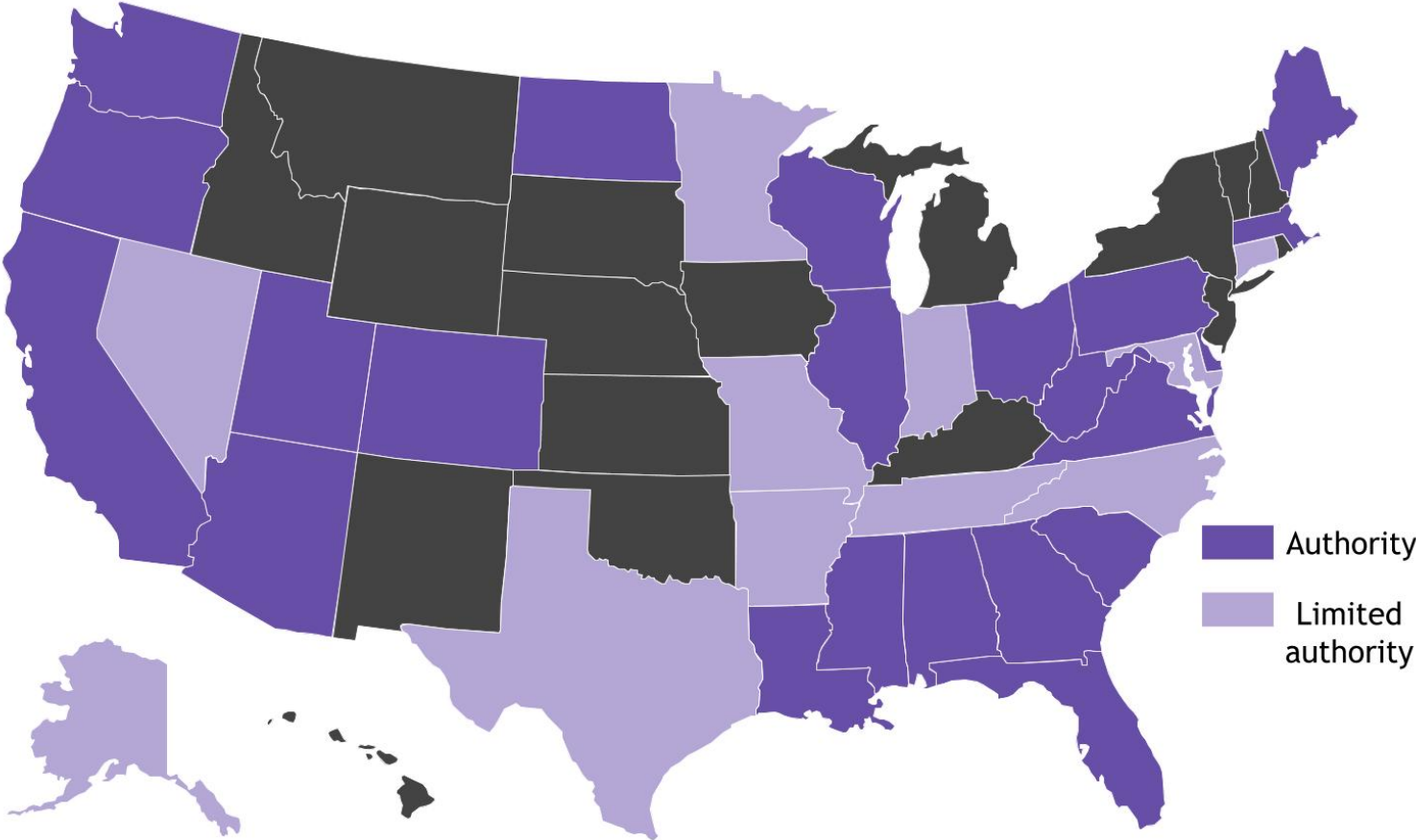
Study overview

- Do state DOTs use DBE contract goals on alternative delivery method projects?
 - Design build
 - P3
 - CMAR/CMGC
- Use same approach as they do for design-bid-build contracts?
- If modify the approach, how?
- What is there experience with different approaches?
- Sample RFQ/RFP language and other documentation
- Results based on state DOT practices as of 2014

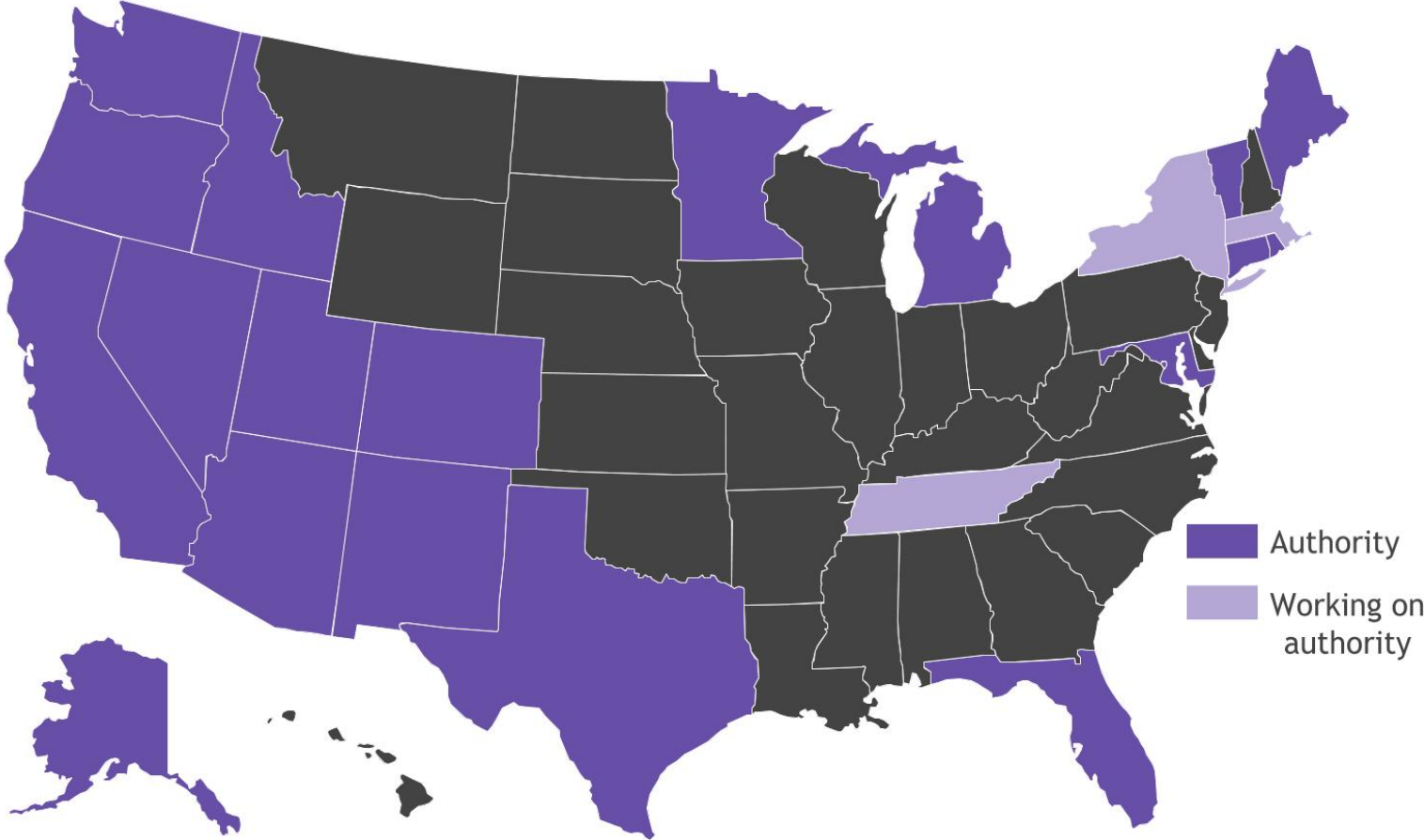
State DOTs that have used design-build as a delivery method (FHWA 2012, Shakya 2013, Gransberg 2013)



State DOTs with legislative authority to use P3 (Rall 2013)



State DOTs with legislative authority to use CMAR/CMGC (Fall 2013)



Use of DBE contract goals on design-build and P3

- 33 state DOTs have used DBE contract goals on either design-build or public-private partnership (P3) projects
 - 5 have only used same methods as for D-B-B projects (Del., Ind., Miss., Penn., Tenn.)
 - 28 always or sometimes use new methods
- 8 state DOTs have not used DBE contract goals on these projects
 - Typically those that do not set goals for any contract
- For a few state DOTs, unclear whether they have used DBE contract goals

Approaches to using DBE contract goals CMAR/CMGC

- Construction manager-at-risk (CMAR) and construction manager/general contractor (CMGC) are similar alternative delivery methods
- 10 state DOTs have used DBE contract goals on CMAR/CMGC
 - 2 have only used same methods as for D-B-B projects at time of report (Colorado, Connecticut)
 - 7 use a “negotiated DBE goal” method (Ariz., Cal., Minn., Nev., Ore., Utah)
 - For 1, approach unclear

Challenges when applying DBE contract goals program to alternative delivery method projects

- Setting contract goal with limited information
- Any new process can create confusion among proposers and potential subs
- Some engineering-related DBEs say they are left out
- Can be long lead time between proposal date and when subs actually used in construction phase
- With other complexities of a design-build project, DBE Program compliance can be low priority for prime and project manager
- Often mega-projects, with resulting challenges
- Local agency projects

When use traditional goals methods on design-build ...

- Set DBE contract goal before issue RFP
- Proposers meet goal or show good faith efforts at time of proposal
- Proposals include \$ commitments to specific DBEs
- Post-award compliance monitoring focuses on use of those DBEs

Range of state DOT application of DBE contract goals to design-build contracts

Component	Like design-bid-build	Unlike design-bid-build	
		Approach	State DOT examples
How goals are set	Evaluate prelim costs, similar projects	No additional approaches identified	
Number of goals	1	2 (separate design phase and construction phase)	DelDOT (bridge) MnDOT, RIDOT
When submission is required	RFP	RFQ	NCDOT
Requirements at time of submission	Meet goals or show GFE Then identify DBEs and \$	Plan for meeting DBE goal Commitment that will meet goal (no plan req.)	Caltrans, Nevada DOT, MoDOT, Ohio DOT VDOT
Evaluation at time of submission	Pass/Fail	Points	FDOT (in DBE Program Plan) KYTC (Ohio River Bridges) Ohio DOT
Extra points for exceeding goal	No	Yes	FDOT (in DBE Program Plan)

Experience when use new methods for goals for D-B or P3

- DBE plan at time of proposal rather than specific DBE commitments can achieve more objectives of Federal DBE Program
- Can require more strategies for assisting DBEs and other small businesses
- Higher DBE contract goals can be set
- Contractors better able to meet contract goals (and consistently do)
- Monitoring must focus on whether DBE plans are implemented

Advantages of approaches depend on project size/length

		<i>Project length</i>	
		Short	Long
<i>Project size</i>	Mega		Best opportunity for innovative approaches
	Small-Moderate	Best opportunity to use traditional D-B-B approaches	

New methods for goals for CMAR/CMGC

- No DBE contract goal set for proposals
- Proposers commit to making good faith efforts to meet a goal once set
- Some state DOTs require DBE plan with proposal
- State DOT sets goal at 60%+ design (before construction phase)
- State DOT reviews whether contractor makes good faith efforts to meet goal

Summary of results

- Of 48 state DOTs that appear to have used alternative delivery methods, 33 have applied DBE contract goals
- Many state DOTs started by using goals methods for design-bid-build, 5 continue to do so
- State DOTs, contractors, DBEs and FHWA report substantial difficulties using traditional goals methods, 28 state DOTs have used new approaches
- New approaches focus on DBE plan rather than specific commitments at time of proposal
- State DOTs and others report that new methods are workable and can achieve more of the objectives of Federal DBE Program
- For CMAR/CMGC, most state DOTs no longer set DBE contract goals prior to awarding these contracts

Barriers to widespread implementation of new methods

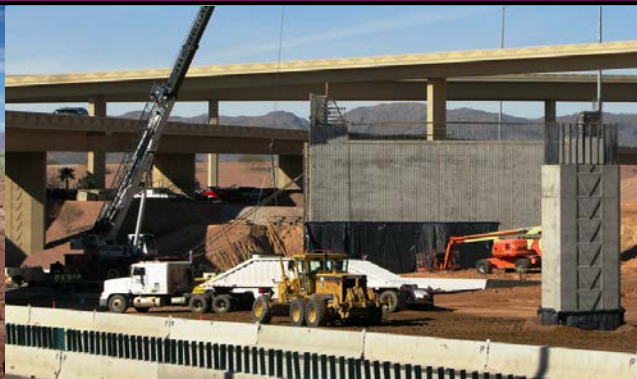
- State DOTs implementing new methods with very limited ...
 - Knowledge
 - Experience
 - Guidance from USDOT
- 49 CFR Part 26 primarily relates to design-bid-build projects and traditional consultant contracts
- Long-standing state DOT practices and USDOT guidance do not pertain to alternative delivery method contracts

Suggestions for future research

- State DOTs identified many gaps in the information needed to apply contract goals program to alternative delivery projects
- Gap greatest for P3 (especially operations phase)
- State DOTs would value more info about:
 - Successes/failures
 - Clarification from USDOT or FHWA
 - RFQ, RFP, contract and Program language customized for alternative delivery method projects
- State DOTs eager to receive the study report

Further research should include ...

1. How to coordinate between design, contracts, PM and DBE staff
2. Language for RFQ, RFP, contracts
3. Options for how/when to set goal for CMAR/CMGC
4. Setting DBE goals for P3 phases
5. Outreach with DBE groups
6. How to evaluate whether contractor has met goal or shown GFE
7. Whether DBE plans should be required, and what is in plan
8. Whether to work with selected proposer to augment DBE plan
9. When to request dollar commitments to DBEs
10. How to count DBE participation, monitor plan execution (esp. on P3)
11. How to remedy lagging DBE participation
12. Remedies available for failing to meet goal or show GFE post-award
13. How to incorporate contractor request for reconsideration
14. Guidance on when need to ask FHWA for waiver
15. Steps to comply with federal regulations
16. Opportunities to apply new D-B methods to traditional D-B-B contracts



Setting and Monitoring DBE Goals on Alternative Delivery Projects

November 18, 2015

Vivien Lattibeaudiere, Ph.D., Manager
Business Engagement & Compliance Office
Arizona Department of Transportation

Objectives



1. Types of Alternative Delivery Projects done by ADOT
2. DBE Goal Setting Process for Alternative Delivery Projects
3. DBE Goal Application and Monitoring on CM@R and Design-Build projects
4. DBE Goal Application and Monitoring for P3 projects
5. Lessons Learned



Types of Alternative Delivery Projects



1. CM@R Construction Manager at Risk
2. Design-Build
3. P3 – Design-Build-Maintain

DBE Goal Setting Process for Alternative Delivery Projects



- Project scope and estimates for project bid/line items submitted in Online DBE Goal Setting System
- System calculates preliminary DBE goal based on standardized percentages of potential subcontractable work for each bid/line item
- System makes adjustments based on DBE availability, which is based on programmed parameters

DBE Goal Setting Process for Alternative Delivery Projects



Project Summary | Project Work Categories | Additional Work Categories | New Work Categories | Home

Project Information Summary

Save Data

Submit Goal

Submit Goal Request

Please provide all required information requested below:

Save Data

Project Number	H88001C	Contract/Agreement Number	2015-008.01
Project Type	CONST-Pavement Markings	Contract Work Type	Construction - Transit
Project Title/Description	Description of the Project		
Federal Aid Number	F73729-H923	Federal Funding Type	FHWA
Total Proposed \$ Amount	\$8,300,000	Project County	Maricopa
Total Contract Estimate	\$8,300,000	Funding Source 'Other'	
Funding Source	Federal	Estimated Bid/Advertisement Date	05/25/2015
Federal Funding Percentage	88	Estimated Award/Selection Date	06/08/2015
ADOT Dept./LPA/Subrecipient Name	BECO	Email Address	bdomke@azdot.gov
Goal Requestor Name	Barb Domke	Phone Number	(602)712-8552
Procuring Department	ADOT C&S	Fax Number	

DBE Goal Setting Process for Alternative Delivery Projects



Project Summary | **Project Work Categories** | Additional Work Categories | New Work Categories | Home

Project Work Categories

Contract Estimate: \$200,000 Proposed Amount: \$200,000 The Difference: \$0

Please provide dollar amount for all work categories applicable to the project below:

Save Data

CATEGORY	SUB-CATEGORY	DOLLAR VALUE	NOTES/COMMENTS
Total Project Work Categories		\$200,000	
201/202	Clearing And Grubbing (Not Inc. Tree Removal)	\$20,000	
	Clearing And Grubbing - Tree Removal	\$0	
202	AC Milling	\$0	
	Removals	\$0	

DBE Goal Setting Process for Alternative Delivery Projects



- Committee of ADOT staff meets to further narrowly tailor goals based on:
 - ✓ Project Scope/Type
 - ✓ Project Size
 - ✓ Location
 - ✓ Historical DBE utilization on similar projects
 - ✓ Other applicable circumstances
 - ✓ ADOT decides to keep some work in-house



DBE Goal Setting Process for Alternative Delivery Projects



Project BECO Goal Setting

Category / Subcategory	\$ Value	Cost Type
Clearing And Grubbing (Not Inc. Tree Removal)	\$75,000	Sub
Removals	\$109,332	Sub
AC Milling	\$65,293	Sub
Earthwork	\$497,355	Sub
Aggregate Base	\$418,132	Sub
Portland Cement Concrete Pavement Supply	\$12,950	Sub
Portland Cement Concrete Pavement Haul	\$12,950	Sub
Portland Cement Concrete Pavement Placement	\$38,850	Sub
Tack, Fog, Prime, Blotter	\$49,000	Sub

Preliminary Submittal based on Default %: 35.04
 Default %'s adjusted based on Project Scope: 35.04
 Final APG Adjusted for DBE Availability: 35.01
 Divide By:
 Pre Final Goal Assessed: 11.67

Adjustment %-Project Size:

Adjustment %-Project Location:

Adjustment %-Project Type/Limited Scope:

Adjustment %-DBE Availability/Capacity:

Adjustment %-Special:

Adjustment %-Running Tally:

Final Goal Assessed %: **8.67**

DBE Adj	ADBEs
\$7,500	15
\$27,333	8
\$19,588	6
\$124,339	22
\$104,533	7
\$1,088	2
\$1,088	2
\$3,885	8
\$4,116	1

DBE Goal Setting Process for Alternative Delivery Projects



- Final calculated goal is included in contract letting/advertisement
- Generally speaking larger CM@R, Design-Build, and P3 projects in large metropolitan areas have higher DBE goals
- Generally well above our annual DBE goal

DBE Goal Application on CM@R Projects



- One design contract advertised
- One advertisement is let that produces 2 contracts (Pre-Construction and Construction)
 - ✓ Pre-Construction contract negotiated first (Race-Neutral)
 - ✓ Construction contract (Race-conscious) goal set prior to negotiation of Guaranteed Maximum Price
 - ✓ DBE commitments are submitted
- Contract advertisement and contract specifications modified to reflect variation



DBE Goal Application on Design-Build Projects



- One advertisement is let with 2 DBE Goals:
 - ✓ Design
 - ✓ Construction
- Both DBE goals are included in RFP Package
- Encourage use of Small Business Concerns
- Contract advertisement and contract specifications modified to reflect variation

Monitoring of DBE Goal on CM@R & Design-Build Projects



- Work with Contractor and Construction staff as bid items are finalized to set final DBE goal (CM@R)
- Two DBE goals are tracked separately in DBE System (Design-Builds)
- DBE Commitment Affidavits secured at beginning of project
- Approve DBE subcontracts throughout project
- Contractor uploads/reports data on DBEs and all subcontractor payments every month
- Conduct Commercially Useful Function Reviews
- Primes submit Certification of Final DBE Payments at the end of project

DBE Goal Considerations for P3 GEC Contract



- General Engineering Contract let prior to Primary P3 Contract
- Oversight of Project on ADOT's behalf
- DBE goal set on project – Professional Services
- Submit DBE Program Plan (list of DBEs)
- Requires DBE Compliance Manager & staff
- Coordinates monthly Compliance meetings with ADOT staff and Developer



Monitoring of DBE Goal on P3 GEC Contract



- Task Order contract
- DBE Commitment Affidavits submitted with each Task Order
- Must meet goal on each Task Order or make GFE
- Report DBE payment/utilization monthly
- Working on process to conduct CUF on project-construction management
- Provide DBE certification of final payment as DBE completes work



DBE Goal Considerations for P3 Primary Contract



- One advertisement (RFQ and RFP) is let with 3 DBE Goals:
 - ✓ Design
 - ✓ Construction
 - ✓ Capital Maintenance
- Encourage use of Small Business Concerns
- All DBE goals are included in RFP Package
- DBE goals can change between initial RFP and final addendum to RFP is issued



DBE Goal Considerations for P3 Primary Contract



- DBE Preliminary and Final Utilization Plan and additional information requested in RFP
 - ✓ DBE Project Manager – Key Personnel
 - ✓ List and experience of DBE Project Staff
 - ✓ Record of past DBE performance
 - ✓ Marketing and outreach efforts
 - ✓ List of pre-proposal DBE commitments
 - ✓ Signed documents for pre-proposal DBEs



DBE Goal Considerations for P3 Primary Contract



- ✓ Identify Scope Items for future DBE participation
- ✓ How they will phase the project and use DBEs throughout project
- ✓ Strategies and GFE to be made throughout project
- ✓ Subcontractor procurement methods



DBE Goal Considerations for P3 Primary Contract



- Evaluation criteria and points assigned to Preliminary DBE Utilization Plan
- DBE Staff involved in evaluation of RFP
- Short-Listed proposers required to attend Networking Event with DBEs
- Conduct bonding & financing workshops for DBEs
- DBE Training about how to participate on P3 Projects
- Provide additional Supportive Services for DBEs (one-on-one technical assistance)



Monitoring of DBE Goal on P3 Projects



- Final DBE Utilization Plan due prior to contract execution
- Developer must address any concerns found in Preliminary DBE Plan
- DBE Commitment Affidavits submitted for design work
- Track each DBE goal separately
- Developer must report data separately for each goal
- Developer must report data separately for DBEs, Small Businesses and other subcontractors
- GEC and ADOT DBE staff coordinated Monthly Compliance meetings with Developer – Compliance Committee

Monitoring of DBE Goal on P3 Projects



- Developer submits Monthly Reports (procurements, DBE/SBC utilization, payments, bidders list/outreach efforts, certification of final payments, GFE, projected procurements)
- GEC consultants track progress based on project schedule and DBE Utilization Plan
- Developer Revise DBE Utilization Plan as needed
- GEC and ADOT staff conduct Commercially Useful Function Reviews
- Annual Report for multi-year projects – Closeout Report
- Sanctions for non-compliance much larger than other contracts

Lessons Learned



- Research best practices – customize to State DOT's processes
- DBE staff involvement from early stage of the process is crucial
- Need to be flexible in responding to RFP and project changes
- DBE goals are often exceeded on these projects
- Flexibility to include clauses to revise DBE goal on long range items like Capital Maintenance
- Flexibility to add DBEs to meet goal as project progresses is essential
- Collect paperwork from contractor and DBEs as they complete work rather than wait until end of project
- Be open to new approaches

Questions and Answers



VDOT Practices to Set DBE Goals and Monitor DBE Participation on Design-Build Projects

Shay Ponquinette

Virginia Department of Transportation

DBE Program Challenges on Design-Build Projects

Design-Build project delivery poses a unique set of problems

- DBE goal calculation
- Identifying DBE firms to perform work on design-build projects
- Monitoring of DBE goal participation

Collaboration

- Design-Build Committee of the Virginia Transportation Construction Alliance met with VDOT representatives on several occasions to discuss challenges with identifying DBE firms in the procurement stage to meet the DBE goal, in accordance with 49 CFR 26.53(b)(i).
- Collaborative effort between Industry, VDOT, and DBE firms resulted in Special Provision 107.15 – Use of DBEs for Design-Build Projects

Special Provision

Use of DBEs on Design-Build Projects

Special Provision Based Upon:

- P3 Business Model
- 49 CFR 26.53 - Good Faith Efforts Procedures
- DBE Commitments and Participation

Special Provision

Use of DBEs on Design-Build Projects

Special Provision Highlights

- Commitment upfront in submittal of Expression of Interest and Letter of Submittal to utilize DBE firms to meet the DBE goal.
- Design Phase – 30 days after Notice To Proceed
 - Design-Builder must identify DBE firms to be used to meet the DBE goal
 - Certificate of Binding Agreement with DBE Firms must be signed by DBE firms and Design-Builder

Special Provision

Use of DBEs on Design-Build Projects

Special Provision Highlights

- Construction Phase – 30 days before DBE firms perform work
 - Design-Builder must identify DBE firms to be used to meet the DBE goal
 - Certificate of Binding Agreement with DBE Firms must be signed by DBE firms and Design-Builder

Special Provision

Use of DBEs on Design-Build Projects

Special Provision Highlights

- Failure to meet DBE goal or demonstrate good faith efforts upon project completion will result in notice to Design-Builder for opportunity to request a Good Faith Efforts (GFE) Administrative Reconsideration Panel Hearing
- The panel hearing provides the opportunity for the Design-Builder to establish that all feasible means were used to meet such participation requirements. If GFE is not demonstrated, the sanction for Design-Build team would be enjoinderment from bidding for 90 days to two (2) years.

Special Provision 107.15

Use of DBEs on Design-Build Projects

- Proposed Special Provision was submitted to FHWA Headquarters and received approval.



Ensure the DBE Goal Setting Process is a Forethought not an Afterthought

- Ensure DBE goal setting process is part of the design-build procurement process check list
- Obtain preliminary estimate and items of work areas as soon as possible
- Identify necessary reference documents related to meeting the DBE goal or demonstration of good faith efforts to meet the DBE goal

DBE Goal Calculation

DBE Goals

- Design & Construction (combined goal)
- Operations & Maintenance
 - Annualized DBE goal based upon estimated budget
 - DBE participation based upon actual operational expenditures

DBE Goal Setting Process

- Obtain most recent cost estimate
- Determine estimated value for design and constructible items
- Determine potential design and constructible items DBE firms can perform
- Identify DBEs ready, willing, and able to perform identified areas of work

Short-Listed Proposers Information Day

Schedule meeting with short-list proposers to discuss project scope, status of NEPA study, procurement schedule, and DBE Program

- Summary of DBE Program
- DBE Goals
 - Design & Construction
 - Operations & Maintenance
 - Good Faith Effort Monitoring
- DBE Program Requirements

Monitoring DBE Participation

Monitor good faith efforts documentation quarterly to determine progress

- Total contract value
- DBE goal and DBE goal amount
- DBE subcontracts and subcontract value
- Payments made to DBE firms quarterly