
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

Administration and Oversight on Projects with
Alternative Contracting & Procurement Methods

HANDBOOK



U.S. Department
of Transportation

**Federal Highway
Administration**

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INTRO DUCTI ON



INTRODUCTION

The Handbook includes not only notable practices, but lessons learned, pitfalls to avoid, tips for enhancing compliance, and a list of helpful resources.

INTRODUCTION

In the highway construction industry, the need to provide better facilities with fewer resources and in less time constantly drives innovation and experimentation. For the past several years, methods of project delivery in the Federal Highway Administration (FHWA) Federal-aid program have expanded beyond the traditional **design-bid-build** contracting model. However, the Disadvantaged Business Enterprise (DBE)¹ program and corresponding guidance are largely structured around this type of standard procurement. For example, in the context of **design-bid-build**, successful contractors are typically the lowest responsible bidder, and in the case of a DBE contract goal, have either met the goal through sufficient DBE subcontracting or through demonstrating adequate good faith efforts prior to contract award. The DBE program¹ regulations were revised in 2014, to require that all bidders present their DBE commitments and good faith efforts with their bid or within no more than 5 days after bid opening. Although this rule is straightforward to apply in the context of a design-bid-build oversight contract, practitioners may find this rule is not easily applied to many alternative contracting models. In some of the alternative contracting models, such as design-build on multi-year projects, the design is typically only minimally complete when the request for proposals is issued. Therefore, it is difficult for bidders to identify all of the subcontracting opportunities that may arise throughout the life of the contract.

¹DBE program regulations are found in [49 CFR Part 26](#).



As innovation in financing, contracting and partnering expand, civil rights and other oversight practitioners encounter other challenges in the field, such as providing effective oversight and ensuring compliance on projects with multiple and non-traditional partners. Despite these challenges, civil rights and oversight practitioners are still tasked not only with ensuring that regulatory requirements are met, but also that DBEs remain adequately positioned for work and have meaningful opportunities to compete for opportunities on these innovative projects.

The FHWA Office of Civil Rights (HCR) is pleased to provide this document (the Handbook) as a tool for FHWA civil rights and other oversight practitioners. The Handbook was developed in cooperation with a FHWA workgroup comprised of Division oversight practitioners, the Resource Center, and the Offices of Infrastructure, Chief Counsel (HCC), and Civil Rights (the Workgroup).

The practices shared in this Handbook are based solely upon information obtained through interviews with and documents provided by FHWA staff and reflect their oversight experiences of States' implementation of the DBE program in alternative contracting and procurement methods.

Further, the Handbook would not be possible without the contributions from staff from the Build America Bureau, HCC, and numerous Division offices, all of whom have current or past experience in alternative program delivery and/or procurement methods and were generous with their time and suggestions. The Handbook is not a list of directives, nor is it to be considered official guidance for FHWA recipients. Rather, it is intended to be a practical tool for providing effective risk-based stewardship and oversight of the DBE program on program delivery and procurement methods beyond the traditional design-bid-build model around which the governing regulations were primarily developed. The Handbook includes not only notable practices, but lessons learned, pitfalls to avoid, tips for enhancing compliance, and a list of helpful resources. In addition to reviewing the Handbook, HCR encourages FHWA practitioners to consult with HCR and HCC for guidance on implementation of the DBE program on alternative contracting projects.

CONTENT AND STRUCTURE

In developing this Handbook, the Workgroup collaborated with FHWA's Offices of Infrastructure and Innovative Program Delivery to identify projects that constituted alternative contracting methods, that included DBE participation, and that were complete or significantly complete. The Workgroup then met with the relevant Division oversight practitioners to identify salient information on how the DBE program requirements were considered, promoted, tracked, inspected, and reviewed on the selected projects. While this Handbook shares noteworthy practices and identifies them by State and Division, it does not similarly name those that were courageous enough to share missteps and challenges. Again, the purpose of this Handbook is to share information in an effort to improve DBE performance and compliance even as project delivery and procurement methods continue to evolve. As such, this is intended to be a living document to be periodically revised to reflect these evolutions and innovations.

With a few exceptions, this Handbook is broken into three parts that follow the life of a highway construction project:

1. Pre-Award/Procurement
2. Post Award/During Construction
3. Final Acceptance

Within each phase, this Handbook discusses the various types of alternative contracting and/or procurement methods (referencing specific projects where possible), describes practices used, identifies strengths and challenges encountered, and provides information on how to obtain additional information or assistance.

WHAT IS

ALTERNATIVE CONTRACTING?

Despite their progressive names, the concept of alternative and innovative contracting is not new. In the 1990s, FHWA first began supporting enhancements to the traditional design-bid-build (D-B-B) method of highway construction contracting, in which price is the main criterion of award. Like FHWA, the industry and project owners recognized that numerous other factors like timeliness, quality, safety, and livability are just as important as project cost. To increase the value of these formerly ancillary aspects of highway construction and to provide an ongoing incentive for newer, better, and more cost-effective methods of project delivery, Congress first authorized the use of design-build (D-B) contracting in the text of the 2002 authorization legislation, **TEA-21**. Subsequent transportation bills like **SAFETEA-LU** strengthened the use of D-B by eliminating cost thresholds and permitting award prior to completion of processes under the National Environmental Policy Act of 1969 (NEPA). Both **MAP-21** and the **FAST Act** placed further emphasis on streamlining project delivery and supporting innovation and acceleration of project delivery. At its most basic level, alternative contracting is another way of referring to any highway construction contracting process other than awarding a construction contract to a prime contractor based primarily on low bid.

Innovative project delivery generally involves multiple stakeholders beyond the owner and the design-builder or prime contractor. Innovative project delivery may also extend well beyond the life of the average highway construction project, requiring the builder to **design, build, finance, operate, and maintain** the facility for a fixed period of time.

For the purposes of this Handbook, all projects will be referred to as Alternative Contracting Method (ACM) projects, with specifics added as needed.



If the practitioner finds the terms and concepts in this Handbook entirely unfamiliar, then some prerequisite materials might help. Review the Reference section of the Handbook, particularly the **Contract Administration Core Curriculum**, which provides foundational information on Federal-aid contracting.

DEFINITIONS

Refer to the list below, which includes the acronyms, definitions, and resource links for the various terms and concepts.

Alternative Contracting Methods ☺

ACM

Any contract delivery or procurement method that is not design-bid-build or traditional Federal-aid. Typically refers to D-B, Construction Manager General Contractor (CM/GC), Public-Private Partnership (P3), or TIFIA.

Alternative Technical Concepts ☺

ATC

Allows contractors to submit innovative or cost-saving proposals that are equal to or better than the owner's design or criteria. May be used on D-B-B, D-B, CM/GC, etc.

Construction Manager/General Contractor or Construction Manager at Risk ☺

CM/GC OR CMR, CMAR

Consists of two phases – design and construction – where the construction manager (working alongside the designer) may become the general contractor (builder) if the owner and independent estimator agree that the construction manager's suggested design and price are fair.

Concessionaire ☺

Another term for Developer, the private entity in a P3 that is contractually bound to design, build, finance, operate, and maintain a facility.

Design-Build ☺

D-B

Construction contract procurement where the owner considers bids from design-build teams and may award the contract based on best value--generally thought to save money, time, and reduce the risk of the project owner.

Design-Bid-Build ☺

D-B-B

Traditional procurement of a highway construction contract after the owner has developed the design and is ready to fund construction.

Design-Build-Finance-Operate and Maintain ☺

DBFOM

Project in the form of a P3 where a private Concessionaire or Developer not only finances the project, but operates and maintains it for a fixed period of time in exchange for predetermined progress or future payments.

DBE Performance Plan

DBE PP

Sometimes called the DBE Plan, the DBE Performance Plan is a document submitted by proposers that details how they will achieve the DBE goal or meet specified requirements. Levels of detail and due dates vary, although typically the owner requires the plan to be submitted with the Request for Proposals (RFP) in response to the Instructions to Proposers.

Developer ☺

A term for the private entity in a P3 that is contractually bound to design, build, finance, operate, and maintain a facility.

Instructions to Proposers

ITP

The owner's directions for the preparation and submittal of information by proposers in response to an RFP, generally including the requisite forms or documents.

Major Project ☺

ACM MP

Formerly known as “mega” projects, these are Federal-aid projects with a total cost of more than \$500 million.

Owner

Used in this Handbook, the owner is the entity that owns or is responsible for the transportation facility, regardless of whether it receives the Federal-aid. While the owner might be the State Department of Transportation, in Alternative Contracting/ Procurement the owner could be a partner agency, organization, or private entity. This is important because the owner is ultimately responsible for enforcing compliance of DBE requirements.

Practitioner

While DBE compliance on Alternative Contracting/ Procurement contracts often will be the responsibility of the FHWA Division Civil Rights Officer, this is not always so. Division leadership or engineering or other staff assigned to project oversight might assume the role of a Practitioner in ensuring compliant implementation of the DBE program.

Project Management Plan ☺

PMP

Project Management Plan Under 23 U.S.C. 106(h), a PMP is required for all Federal-aid projects over \$500 million (“major projects”). The PMP describes, among other things, project management and oversight, how the project will be delivered, various roles and responsibilities, and how disputes will be resolved. The FHWA Division Office is responsible for approving the PMP.

Public-Private- Partnership ☺

PPP OR P3

Contractual agreements between public and private entities where a share of the financing, delivery, and risk of a highway construction project belongs to the private sector. Private partners typically provide a lump sum amount up-front that will be paid back by the owner with interest.

Risk Based Stewardship and Oversight ☺

RBSO

The FHWA’s methodology for effectively delivering larger and more complex Federal-aid programs, with fewer resources. The RBSO decisions are risk-based, data-driven, value-added, and consistent.

Recipient

Used in this Handbook and unless otherwise specified, the recipient is the entity receiving the USDOT financial assistance, whether or not they own the transportation facility. Recipients may be State Departments of Transportation (State DOTs); Local Public Agencies (LPAs); Transportation Authorities; Institutions of Higher Education (IHEs); Metropolitan Planning Organizations (MPOs) or even private entities. Recipients have an important role in demonstrating Federal-aid eligibility and contract oversight. However, the owner is ultimately responsible for the compliant implementation of the DBE program on the contract or project.

Request for Proposals ☺

RFP

A notice to bidders from a project owner or recipient which describes contract or project parameters and specifications, and solicits price and technical proposals.

Request for Qualifications ☺

RFQ

The primary purpose of an RFQ is to determine best qualified proposers. This is an opportunity for the owner or recipient to share its vision of the project and provides potential bidders with an opportunity to respond with how their experience can meet that vision.² The RFQs often request past DBE program compliance history from the proposers. The RFQ process typically selects three to five proposers. These selected proposers will be allowed to submit an RFP and ultimately, one will be awarded the contract. The selection of short-listed firms is based on stated evaluation criteria.

Transportation Investment Generating Economic Recovery ☺

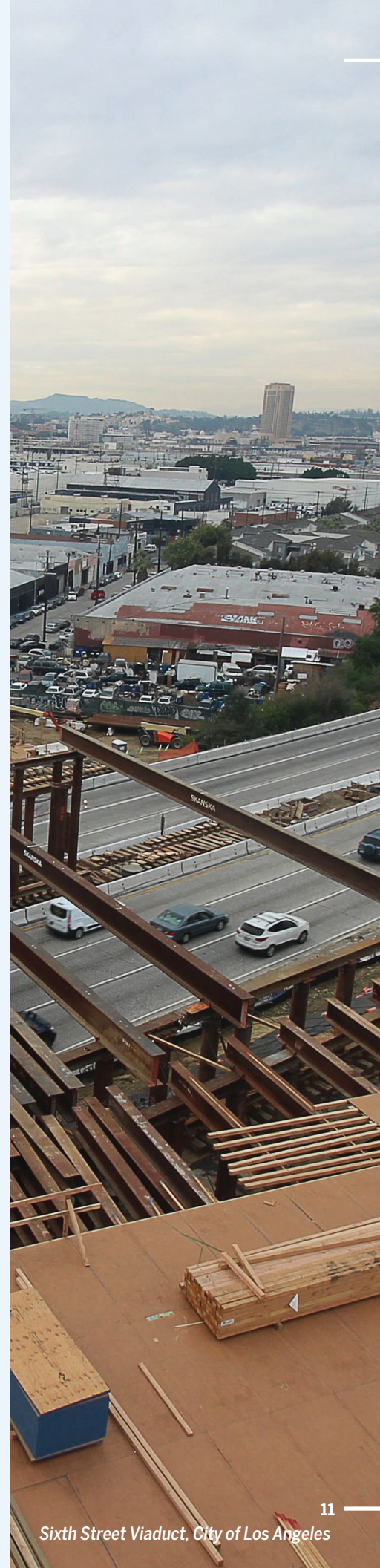
TIGER³

A USDOT discretionary grant program originally authorized by the American Recovery and Reinvestment Act of 2009 (ARRA) and continuing through annual rounds of funding for surface transportation projects. The TIGER grants are sometimes awarded to local agencies as direct grantee/ recipients. The TIGER projects may or may not be examples of Alternative Contracting, but given the funding and the challenges resulting from myriad of possible recipients, they are examples of Alternative Procurement.

Transportation Infrastructure Finance and Innovation Act ☺

TIFIA

A Federal credit assistance program that provides access to funding at generally favorable interest rates and flexible repayment terms. Loans are “sized” so that only Design and Build costs are TIFIA eligible. Operations and Maintenance costs are not.



² See Federal Aid Essentials at www.fhwa.dot.gov/federal-aidessentials/companionresources/81dbproc.pdf.

³ TIGER now called Better Utilizing Investments to Leverage Development (BUILD)

A BRIEF DISCUSSION ON TRANSFER OF RISK

As part of efforts to oversee DBE and other civil rights contract requirements on ACM projects, the FHWA oversight practitioner might sometimes meet with resistance from the owner, developer, design-builder, or other project stakeholders on the subject of risk transfer. A State DOT may choose ACM, in part, because it believes that in so doing it transfers the risks associated with the project to the design-builder or CM/GC firm. For example, an owner may not ensure that it has adequate staff for DBE oversight because it believes that it has delegated these responsibilities to the developer or other third-party through contract. The misunderstanding lies in the owner's belief that all associated risks may legally be transferred to the project developer or builder.

As primary recipient to Federal-aid, the owners bears the responsibility of ensuring that the DBE program received effective oversight and must demonstrate this by producing evidence or reports upon request by FHWA.

No matter how clear the understanding of the parties as to how responsibility will be shared or delegated, the fact is that the primary recipient cannot contract away its civil rights compliance responsibilities.

All parties will avoid expensive, lengthy, and sometimes contentious interaction by making sure that FHWA expectations are clearly communicated to the owner and developer, or potential developer, as early in the process as possible. For example, a project developer may wish to hire a consultant to perform commercially useful function (CUF) reviews of DBE performance. While there is nothing wrong with this on its face, an owner must understand that the developer's consultant is not an independent party upon whose judgment it can ultimately rely. Owners can either rely on their own staff or supplement their workforce with consultants to perform oversight as well as audit the project developer's findings. Further, the owner bears the ultimate responsibility for the enforcement of prompt payment and return of retainage provisions for all subcontractors, despite its lack of direct contractual relationship with the parties. Thus, the oversight practitioner should be an early reviewer in project procurement and management documents, be responsible for the project reviews, coordinating visits, and requests for information.

THE PROJECTS

This Handbook is based upon field experience, drawing from ACM projects nationwide that are frequently cited throughout the document.

To avoid confusion and to provide a resource for practitioners wanting more information, see the following project list. Please note that the links are active as of the publication of the Handbook, but may change or be removed. Those with difficulties obtaining additional project information should contact the applicable Division Office.



Six Street Viaduct Project, City of Los Angeles

Six Street Viaduct Project [↗](#)

Replacement of the 1932 Los Angeles River bridge on Sixth Street east of downtown LA.

California	\$261M	Local	CM/GC
LOCATION	AMOUNT	FUNDING	TYPE



Presidio Parkway, FHWA

Presidio Parkway [↗](#)

Design-Build-Finance-Operate-Maintain project to reconstruct Doyle Drive, the 1936 roadway providing south access to the Golden Gate Bridge.

California	\$272M	TIFIA	P3
LOCATION	AMOUNT	FUNDING	TYPE



Twin Tunnels Widening, FHWA

Twin Tunnels Widening [↗](#)

Added capacity and improved geometry for 3 miles of eastbound I-70 on either side of and through the Twin Tunnels.

Colorado	\$103M	Federal-aid	CM/GC
LOCATION	AMOUNT	FUNDING	TYPE



US 6/I-25, FHWA

US 6/I-25

Reconstruction of 2 miles of major freeway on the outskirts of downtown Denver, including, 8 bridges, an interchange, a public park, and pedestrian features.

Colorado	\$120M	Federal-aid	D-B
LOCATION	AMOUNT	FUNDING	TYPE



I-595 Express, FHWA

I-595 Express

Design-Build-Finance-Operate-Maintain for 35 years, the 10.5 miles of tolled roadway between I-75 and I-95 in Broward County.

Florida	\$1.8B	TIFIA	P3
LOCATION	AMOUNT	FUNDING	TYPE



Port of Miami Tunnel, FHWA

Port of Miami Tunnel

Design-Build-Finance-Operate-Maintain for 35 years, the POMT, one of only two tunnels in Florida, and a strategic link for freight traffic between the Port of Miami and I-395.

Florida	\$1.2B	TIFIA	P3
LOCATION	AMOUNT	FUNDING	TYPE



Lee County Complete Streets, FHWA

Lee County Complete Streets

A project sponsored and overseen by an MPO that connects existing sidewalks and bike paths.

Florida	\$8.04M	TIGER	D-B
LOCATION	AMOUNT	FUNDING	TYPE



I-285 & SR 400, FHWA

I-285 & SR 400

Provision of new flyovers and collector/distributor lanes to relieve congestion along I-285 and SR-400.

Georgia	\$460M	Federal-aid	P3
LOCATION	AMOUNT	FUNDING	TYPE



Intercounty Connector, FHWA

Intercounty Connector (ICC)

New construction of 18-mile multimodal east-west, six lane tolled facility linking I-270/I-370 and I-95/US-1 Corridors.

Maryland	\$2.5B	TIFIA, GARVEE, and Federal-aid	D-B
LOCATION	AMOUNT	FUNDING	TYPE



I-35E MN Pass, FHWA

I-35E MN Pass Project

Installation of MNPASS tolling system and MNPASS lanes along a 3.4 section of I-35 between St. Paul and Little Canada.

Minnesota	\$98M	Federal-aid	D-B
LOCATION	AMOUNT	FUNDING	TYPE



I-64 Daniel Boone Bridge, FHWA

I-64 Daniel Boone Bridge

Construction of a new bridge over the Missouri River between St. Louis and St. Charles Counties, replacing the 1935 structure.

Missouri	\$130M	Federal-aid	D-B
LOCATION	AMOUNT	FUNDING	TYPE



Manchester Bridge, FHWA

Manchester Bridge

Replacement of a structurally deficient ½ -mile bridge on I-70 over the Manchester Trafficway, the Blue River, and a rail yard.

Missouri	\$65M	Federal-aid	D-B
LOCATION	AMOUNT	FUNDING	TYPE



Carlin Tunnels Widening, FHWA

Carlin Tunnels Widening

Rehabilitation of approximately two miles of roadway through Carlin Tunnels area, seven miles east of Carlin and 14 miles west of Elko.

Nevada	\$31M	Federal-aid	CMAR
LOCATION	AMOUNT	FUNDING	TYPE



Memorial Bridge Replacement, FHWA

Memorial Bridge Replacement

Replacement of 1922 structure connecting Kittery and Portsmouth with a sleek, modern design that is reminiscent of the original.

New Hampshire and Maine	\$90M	TIGER and Federal-aid	D-B
LOCATION	AMOUNT	FUNDING	TYPE



Goethals Bridge, FHWA

Goethals Bridge

Design-Build-Operate-Maintain the Goethals Bridge, replacing the 87- year-old structure that connects Staten Island and Elizabeth, NJ over the Arthur Kill.

New York	\$937M	TIFIA	P3
LOCATION	AMOUNT	FUNDING	TYPE



I-6 Tappan Zee, NYS Thruway Authority

Tappan Zee Bridge⁴

Replacement of existing 1955 facility with a 3.1- mile, twin-span bridge over the Hudson River between Westchester and Rockland Counties.

New York	\$3.14B	TIFIA	D-B
LOCATION	AMOUNT	FUNDING	TYPE



Horseshoe Project, FHWA

Horseshoe Project

Replacing the I-30 and I-35E bridges that cross Trinity River in Dallas, as well as interchange reconstruction.

Texas	\$818M	Federal-aid	D-B
LOCATION	AMOUNT	FUNDING	TYPE



I-495 Express Lanes, FHWA

I-495 Express Lanes

Design- Build-Operate-Finance-Maintain 14-mile, HOT lanes with two lanes in each direction on the Capital Beltway (I-495) and replacement of more than 50 bridges and overpasses.

Virginia	\$1.9B	TIFIA	P3
LOCATION	AMOUNT	FUNDING	TYPE



I-95 Express Lanes, FHWA

I-95 Express Lanes

Design-Build-Operate-Maintain-Finance 29 miles of reversible high occupancy toll (HOT) lanes along the I-95/I-395 corridor between Fairfax and Stafford Counties in the northern Virginia suburbs of Washington, DC. The project will convert 20 miles of existing HOV lanes to HOT lanes; widen 14 miles of the existing reversible HOV lanes from two lanes to three lanes; and construct a nine-mile extension of the lanes to the south of their current terminus.

Virginia	\$969M	TIFIA	P3
LOCATION	AMOUNT	FUNDING	TYPE

⁴ Tappan Zee Bridge is now named The Governor Mario M. Cuomo Bridge

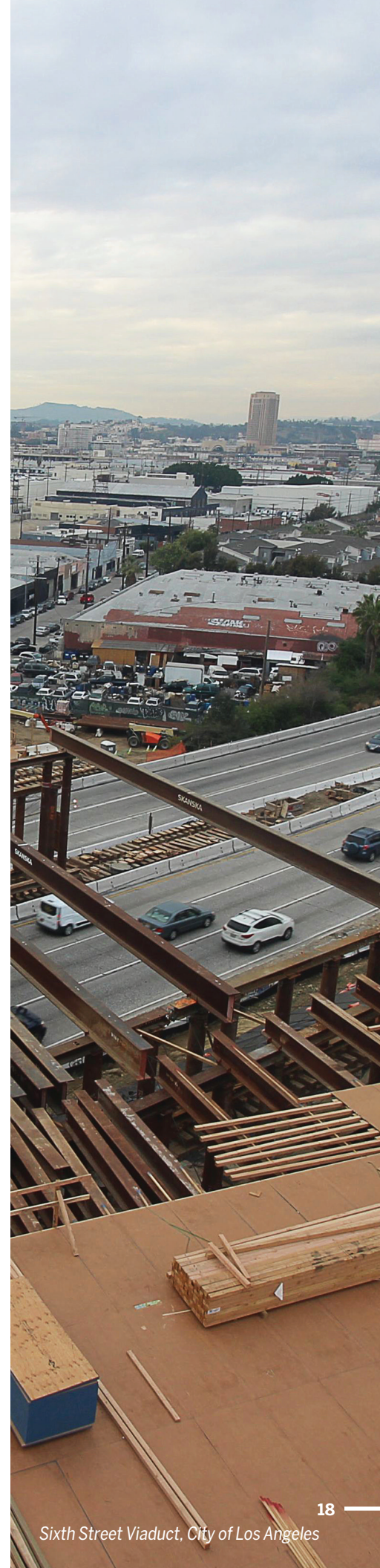
PRE- AWARD

**PRE-AWARD /
PROCUREMENT**

PRE-AWARD/ PROCUREMENT

Many civil rights practitioners report that traditionally they had little or no involvement with the DBE program on projects prior to award, generally to assist with goal setting or evaluation of good faith efforts (GFE). With the expansion of ACM, there is a growing need for early input and participation by civil rights practitioners, both at the recipient and Division levels. Interviews show that contractors and developers must understand the expectations of the owner and Division pertaining to the DBE program preferably *before* initial responses to RFPs are submitted and certainly *before* the contract is awarded. Clear expectations in contract language will inform the type of response submitted by prospective developers and set the stage for good communication throughout the project. Without knowing the rules up front, the owner is more likely to encounter resistance in complying with DBE requirements that were not anticipated during negotiations.

The sheer size of many of these projects means that low DBE performance can impact whether a recipient meets its overall goal or an independently-set project goal. Further, because of the multi-year nature of many of these projects, identifying and using DBEs for a variety of work categories benefits not only the DBEs but also the entire industry. However, providing opportunities requires a keen eye to early identify all potential areas for participation. This section will discuss pre-award DBE program considerations in ACM and highlight some notable examples and important lessons learned.



GOAL SETTING

The DBE regulations do not require a recipient to set a DBE contract goal on every contract. Contract goals, however, must be used to the extent that a recipient projects that it will be unable to meet its overall DBE goal through exclusively race-neutral methods. In some circumstances, FHWA may permit or require a recipient to establish an overall DBE goal on a particular project. When a recipient determines that it is necessary to establish a contract goal or project goal, nothing is more critical to DBE compliance in ACM projects than setting contract or project goals that are reasonable, attainable, and narrowly tailored to account for all potential subcontracting opportunities and the capacity of DBEs in relationship to all firms in the relevant market area. To do so effectively, it is essential that civil rights practitioners play an important role in DBE goal setting.

Part of narrowly tailored goal setting is assessing the number of DBEs within the relative market area that are certified to perform the various work items on the contract. This is not always an easy task. The successful practitioner should keep recipients focused on setting contract goals in line with factors identified in the DBE regulations⁵, such as the type of work involved, the location of the work, and the availability of DBE firms. For instance, when the Florida DOT, City of Miami and Miami-Dade County considered the \$1.2 billion P3 to construct, operate, and maintain the Port of Miami Tunnel for 35 years, they quickly realized that 'Harriet', the largest soft ground tunnel boring machine in the U.S. would not come cheap. In fact, at over \$50 million, the German



Narrow tailoring is more than just a requirement for overall goal setting. The Civil Rights Practitioner must be vigilant of any process that sets contract goals without considering factors such as project size, time, location, type of work, relevant market, available DBEs, capacity of DBEs, etc. Be wary of tables that automatically set goals based on standalone criteria such as cost, type of work, or location. Other factors to consider when reviewing or helping to set a contract goal:

- ✓ Creating opportunities for outreach and education to ensure inclusion of both professional service and construction DBEs.
- ✓ Whether the project could benefit from separate, distinct contract goals for design and construction.
- ✓ Whether all relevant parties have an opportunity to provide input into goal setting, particularly on high visibility or major projects.
- ✓ Ensuring that there is documentation that reflects a sound goal setting process for the project. In other words, is the process demonstrable and defensible?

⁵ See 49 CFR §26.51(e)

manufactured tunnel boring machine came with its own crew and, coupled with its operation costs, represented a significant portion of the \$600 million construction price. Working with FHWA, the principals agreed upon a cost figure representing the materials and work for which there were available DBEs.

TO SET APPROPRIATE GOALS, PRACTITIONERS SHOULD CONSIDER THE FOLLOWING EXAMPLES:

1

Whether the project can support separate goals for professional services (design), construction and beyond.

Though not required, many practitioners agree that having separate, distinct goals for design and construction resulted in better identification and use of a wider variety of DBEs. This held true across the ACM projects, though it was perhaps more successful for some. For example, Nevada treated its CMAR project as two separate contracts for the purposes of goal setting: one goal for design and one goal for construction. While the State provided for outreach events for the early identification of DBEs, the goal on construction was not set until 80% of the design contract was complete. Because the designer had no way of knowing what the construction goal would be, it had greater incentive to locate and line up DBEs to secure its chances of winning the construction portion of the project. The design firm risked losing the construction contract if it could not effectively develop its DBE construction commitments in the short time between goal setting and letting. Nevada's approach is consistent with the [CM/GC final rule](#).⁶ Since most of the design is completed prior to advertising the construction portion, bidders should be able to identify and commit to specific DBEs within a short time-frame, and certainly prior to contract award. In this way, the CM/GC method more closely resembles the D-B-B process rather than the D-B process.

Other recipients simply recognized that availability of DBEs for professional services was different from that of construction, warranting separate DBE goals. In Missouri, the design aspects of the Boone and Manchester Bridge projects supported the State's decision to separate construction and professional services goals. Both bridges had higher goals for professional services (20% and 18% respectively) than for construction (14% and 12%). Similarly, the Maryland DOT Intercounty Connector project set an overall goal of 15% that included a 20% sub-goal for professional services.

⁶ 23 CFR Parts 630 and 635.

The P3s that include not only design and build, but also the obligation to finance, operate, and maintain (DBFOM), may require recipients to identify additional opportunities for DBE participation. For example, while maintenance costs are traditionally ineligible for Federal-aid, Virginia anticipated a future need for preventative maintenance and/or pavement preservation (eligible for Federal-funding) as part of the operation and maintenance (O&M) portion of its 70-year I-95 Express Lanes project and set goals accordingly. By thinking ahead, Virginia identified future DBE opportunities when setting its project goals.

More commonly, the O&M portion of P3s do not include Federal-aid, as with Florida's I-595 Project, a P3 with a fixed 35-year period of operation, or California's Presidio Parkway, a P3 with 30 years of O&M in which the DBE participation goal was expressed as a percentage of the design and build portions of the contract. Nevertheless, as a matter of policy both States promoted the use of DBEs and other small, disadvantaged business in future O&M activities, even though they could not include race-conscious DBE goals on those aspects of the contracts. In other cases, such as the Goethals Bridge in New York, the sizing of the TIFIA loan covered design and construction, but did not include operations and maintenance.⁷

2

What contracts are subject to DBE program requirements?

Congress first authorized the DBE Program in 1982. Since that time, the DBE Program has applied to contracts that include certain Federal-aid highway funds, as set forth in authorization statutes. Most recently, Congress directed that the DBE Program applies to Federal-aid highway funds authorized under Divisions A and B of MAP-21 and under titles I, II, III, and VI of the FAST Act and 23 U.S.C. 403.

As discussed above, recipients are not required to set DBE contract goals on all Federal-aid contracts. Rather, contract goals must be used to the extent that a recipient projects that it will be unable to meet its overall DBE goal through exclusively race-neutral methods. In the handful of states that operate race-neutral programs, contract goals are not used. The regulations in 49 CFR 26.51(f) provide that where recipients anticipate meeting their overall DBE goal through 100% race neutral means (i.e., without the use of contract goals), they may not implement the use of race-conscious means (i.e., contract goals). This can be worrisome for recipients on ACM projects, primarily because contract amounts are often high enough to impact the recipient's

⁷ ACM projects may have multiple sources of Federal-aid, some of which would require compliance with Titles 23 and 49 of the Code of Federal Regulations, even in operations and maintenance. TIFIA, however, is sized for design and build, with operations and maintenance specifically excluded.

overall goal achievement. Florida, the largest State with a 100% race-neutral program, continues to rely heavily on outreach and education through supportive services, influence of the transportation engineering and construction industries, and design-builder and concessionaire contract obligations to meet the State's overall aspirational goal—I-595 and the Port of Miami Tunnel being notable examples. When New Hampshire and Maine collaborated on the Memorial Bridge P3—the largest in New Hampshire's history—New Hampshire did not expect to achieve its annual DBE participation goal. While it was tempting for New Hampshire to set a higher goal on the project to ensure attainment of its annual goal, the States analyzed the particular circumstances of the project (e.g., type of work and availability of DBEs) and set and achieved a narrowly tailored 4% DBE goal.

The Transportation Investment Generating Economic Recovery (TIGER) program also may preclude DBE goal setting. As an initial matter, TIGER funding has historically been provided through Congressional appropriations statutes, rather than through federal-aid authorization statutes that authorize the DBE program and identify federal-aid highway funds to which the program applies.⁸ As a result, by statute, the DBE program does not apply to TIGER funding. The Department, however, as a matter of policy, applies the DBE program to TIGER grants awarded to State DOTs or their sub-recipients because State DOTs have established DBE programs as regular recipients of federal-aid highway funding, and, thus, they can readily integrate TIGER funded contracts into their DBE programs. Other TIGER grants, though, have been awarded directly to non-traditional FHWA recipients, such as universities, MPOs, and LPAs, that lack existing DBE programs and, thus, lack the necessary policies and capacity to implement the requirements of 49 CFR Part 26.

Such recipients, instead, are directed to follow general grant rules that require taking “all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.” (2 CFR § 200.321.) While recipients are encouraged to actively promote the use of small, women-owned, and minority-owned businesses, and may contractually require design-builders to take steps to locate and use these businesses, they cannot set contract goals.⁹

⁸ TIGER funding was first authorized in 2009 under the American Recovery and Reinvestment Act. Since then, Congress has renewed funding for the program each year through the appropriations process. See, e.g., the Consolidated Appropriations Act, 2016 (Pub. L. 114-113, December 18, 2015), appropriating \$500 million for National Infrastructure Investments.

⁹ The information provided here was verified by both FHWA's Office of Chief Counsel and TIGER office. It was true and correct as of the date of Handbook publication. Practitioners should nevertheless contact HCR and HCC for assistance regarding the application of the DBE regulations at 49 CFR Part 26 to any discretionary grant program.

In contrast, TIFIA-funded projects are subject to DBE Program requirements, regardless of the recipient because TIFIA funds, by statute, are included among the funds to which the DBE program applies.

FIGURE III

TIGER FUNDING DIRECTLY TO	49 CFR 26
State DOT sub-recipient (funding through the State DOT)	✓
LPA, MPO, university, or any public entity	✗
State DOT	✓

3 What parties are important to setting an effective DBE participation goal?

Of the projects surveyed, the recipients that included input from internal and external stakeholders reported a more efficient goal-setting process, including fewer good faith efforts submissions and more accurate and attainable goals. This is consistent with FHWA HCR's view that the more a recipient's contract goal setting process resembles the overall goal setting procedures in 49 CFR 26.45, the more narrowly tailored the goal will be and the less likelihood of DBE program legal challenges.¹⁰ One notable example is Maryland's \$2.5 Billion D-B construction of the Intercounty Connector—one of the nation's largest projects. To set the DBE contract goal for the project, Maryland used its Procurement Review Group (PRG), consisting of the State DOT's offices of construction, maintenance, civil rights, and procurement. However, Maryland also solicited input from, and included communication with, its industry and community groups such as residents, businesses, elected officials, communities, motorists, and environmental and other interest groups within the corridor. It was essential that the design-builder commit to a significant level of community participation and interaction during the development of the design, as well as throughout the construction of the structures and roadway. The input from stakeholders helped the PRG validate DBE availability, while the enhanced communication built an environment of trust and partnership around the project.

¹⁰ 49 CFR 26.51(a) requires that the maximum portion of the recipient overall goal be met through race neutral means. Section (d) provides that contract goals are only set to the extent that race neutral means are insufficient to meet the overall goal. Section (e) states that goals may only be set where there are subcontracting possibilities and after considering factors such as type of work, location, and DBE availability.

One recipient, an LPA, set a substantial goal on a CM/GC project without any forewarning to or discussion with the FHWA Division Office. The project was awarded to a contract manager followed by the letting of a series of construction contracts with varying DBE contract goals to meet the overall project goal. The State and Division recognized that higher contract goals were required to meet the overall project goal, and that the LPA was not considering project goal attainment when setting individual goals. The two agencies worked with the LPA to set higher goals on the remaining construction contracts and account for additional DBE participation obtained on contracts that were previously awarded. These measures reduced the need to place an inordinately high goal on the largest of the construction contracts that would have been necessary to meet the overall project goal. Because of the LPA's rocky start that lacked integral partners, State approval of contract goals and good faith effort evaluation ensured successful execution of contract goal setting and awards. Additionally, the FHWA Division reviewed and concurred with the DBE goal-setting methodology on the largest construction contract.

Regardless of how goals are set on ACM projects, the civil rights practitioner, or other professional trained in civil rights, should provide input and be involved as a reviewer, at a minimum. While it is the recipient's responsibility to set contract goals on Federal-aid projects, the civil rights and/or oversight practitioner oversees compliance and helps to ensure program success and integrity.



The CM/GC project delivery method allows an owner to engage a construction manager during the design process to provide constructability input. The construction manager has the first opportunity to bid on the subsequent construction contracts. If an acceptable bid is submitted by the contract manager that meets the contract DBE goal or documents adequate good faith efforts to meet it, that construction contract is awarded to the contract manager. Otherwise, it is advertised like a normal design-bid-build contract.

GOAL SETTING IN ACM

CONSTRUCTION MANAGER / GENERAL CONTRACTOR

Similar to D-B in that the designer collaborates with the contractor and, where the owner agrees to price and design, awards the contract to the same contractor. For DBE purposes, CM/GC is closer to traditional D-B-B in that the contractor must meet the DBE goal or demonstrate good faith efforts toward meeting the goal as a condition of award.



CONSIDERATIONS

- Can the design portion support its own separate DBE goal?
- Is the Division and/or Owner’s Civil Rights staff able to review the goal before the RFP is issued?
- Is the goal based on a documented, sound understanding of the work, the market area, and the available pool of DBEs?

EXAMPLES

Sixth Street Viaduct Project ☉

- High goal set by LPA with no initial FHWA review.
- FHWA and State had to subsequently assist LPA to ensure higher goal was met.



Twin Tunnels Widening ☉

- Set a 3% goal on ‘preconstruction’; included essential expert advice on likely DBE opportunities.



Carlin Tunnel ☉

- Modest goal based on time, availability, and capacity.
- Very little market interest in tunneling.
- State was an early and regular participant in a carefully considered goal.



DESIGN-BUILD

The owner solicits project proposals for design and construction, and then awards based on best-value – not only price, but innovation, quality, past performance, and other factors.



CONSIDERATIONS

- Professional Services DBE credit must be counted.
- Do design and related professional services require DBE goal separate from construction?
- Is education and outreach sufficiently early and robust to ensure DBE participation in both design and construction?
- Are goals based on documented, sound understanding of the work, the market area, and the available pool of DBEs?
- Do goals take into account all reasonably foreseeable subcontracting opportunities?

EXAMPLES

Tappan Zee Bridge

- Included all agencies with project interest in collaborative goal setting effort.
- A separate goal in the design-build contract for design, or other professional services such as Construction Inspection, may have allowed for more appropriate and narrowly tailored goal in these areas and increased opportunities.
- Documented process of goal setting.
- Program support from leadership at the highest levels.



I-6 Tappan Zee, NYS Thruway Authority

Intercounty Connector (ICC)

- Convened Procurement Review Group (PRG) look at location, scope, size etc.
- PRG included broad representation – construction, procurement, equal opportunity, maintenance.
- Constant communication with industry groups to address interest in and expectations of the community.



Intercounty Connector, FHWA



PUBLIC-PRIVATE PARTNERSHIP

Agreements that typically include private interests in the design, build, financing, operation, and/or maintenance of the facility, often for set periods of time.

CONSIDERATIONS

- Do operations/maintenance activities include federal funds, and if so can they support DBE goals?
- Is outreach and education sufficiently early, broad, and robust to ensure involvement by not only DBEs, but also the business community impacted by the project?

EXAMPLES

I-95 Hot Lanes Project

- Projected DBE use on maintenance functions, to include multiple resurfacing projects over the 70- year operations period.
- State DOT posts its [contract goal setting process](#) on its public website.



I-95 Express Lanes, FHWA

Goethals Bridge

- Collaborative goal setting involving all partners and sponsors.
- Used variance to allow DBEs from multiple States to participate in anticipation of shortage of ready, willing, and able DBEs.



Goethals Bridge, FHWA

TRANSPORTATION INVESTMENT GENERATING ECONOMIC RECOVERY

Often let as D-B, TIGER funding may go directly to State DOTs or may be funneled through the State DOT to sub-recipients. In other cases, it may go directly to an LPA, MPO, university, or other public entity. TIGER funding is awarded in 'rounds' for particular project proposals chosen by a panel of USDOT transportation specialists.



CONSIDERATIONS

- If a TIGER grant is awarded to a State DOT, it applies its own DBE program and goal.
- If a TIGER grant is awarded to a sub-recipient, with funding passing through the State DOT, the State DOT's DBE program and goal apply.
- If TIGER is awarded directly to a non-State DOT, LPA, MPO, or other public entity, the DBE program does not apply
- When required, are DBE goals reflective of the State DOT's program and plan?
- Are goals strictly DBE without separate or local preference goals?
- Does the recipient understand the requirements, and is it able to effect oversight and enforcement?

EXAMPLES

Lee County Complete Streets ☺

- MPO direct recipient with no construction experience.
- MPO required to provide a competent oversight firm with past experience on State DOT projects.
- Race neutral contract following the State DOT's program plan and oversight manual.



Lee County Complete Streets, FHWA

TRANSPORTATION INFRASTRUCTURE FINANCE AND INNOVATION ACT

Provides Federal credit assistance to eligible surface transportation projects, including highway, transit, intercity passenger rail, some types of freight rail, intermodal freight transfer facilities, and some modifications inside a port terminal.



CONSIDERATIONS

- TIFIA credit assistance is Federal assistance, thus all Federal requirements, including DBE, apply.

EXAMPLES

- DBE goals are set as per State's DBE Program Plan on those portions of the project to which TIFIA was sized (such as design-build costs – most likely not sized to maintenance/operating costs, but good question to ask).
- In Tappan Zee TIFIA federalized the project so goal setting methodology followed 49 CFR Part 26 requirements.



**IMPLEMENTATION OF DBE PROGRAM
IN PRE-AWARD DOCUMENTS:
RFQ, RFP, PMP, ITP, DBEPP**

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. The acronym table on page 2 of the Handbook provides definitions and links to additional information about each document, but the content and level of specificity for DBE project requirements differ among recipients and projects.

Generally speaking, the Request for Qualifications (RFQ) is a notification to bidders to submit their professional qualifications. The RFQ may contain only a notification that the DBE specifications will apply or in some instances, the RFQ will alert proposers that they will be expected to include a DBE Performance Plan with their proposal that identifies specific DBEs and/or the types of work items it will solicit DBEs to perform. Recipients use RFQs to 'short list' proposals by evaluating factors such as innovation, previous work history, bonding capacity, and past DBE program compliance. DBE may be an evaluation factor, either through a de minimis point score or pass/fail rating. For example, Minnesota used a two-phase process for the I-35 MN Pass Project. The RFQ was the first phase in which the recipient included nondiscrimination and DBE legal requirements, but not a goal. Minnesota also provided a link to the DBE directory in the RFQ so that the proposal teams could begin outreach to, and the assembling of, DBEs. Similarly, for Virginia's I-95 Express Lanes Project, the recipient also notified bidders via the RFQ that a goal would be set on the project, but it did not factor anticipated DBE use to shortlist responding firms.



The Instructions to Proposers (ITP) and the Request for Proposals (RFP) are related documents that are not always distinguishable. The oversight practitioner can think of an ITP as a list of what proposers must submit for a responsive bid that will be considered by the recipient. Unlike the RFQ, the RFP will advise proposers in detail of the DBE requirements in the contract specifications. The RFP may also include the DBE goal and require proposers to include in their response or prior to contract award a list of DBEs it will subcontract with and/or the types of work items it will solicit DBEs to perform to achieve the goal or good faith efforts requirements.

The regulations in 49 CFR § 26.53(b)(3)(ii), provide that, in a negotiated procurement, including a design-build procurement, the bidder/offeror may make a contractually binding commitment to meet the goal at the time of bid submission or the presentation of initial proposals but provide the information required by 49 CFR § 26.53(b)(2) before the final selection for the contract is made by the recipient. In some of the ACM models, including design-build on multi-year projects, because the design is typically only minimally complete, it is difficult to identify all of the subcontracting opportunities that may arise throughout the life of the contract. Generally, most of the RFPs for the projects surveyed for this Handbook required some commitment of specific DBEs upfront in order to be considered responsive; however, most recipients did not preclude a bidder/proposer from being awarded a contract if it committed to make additional and ongoing efforts to solicit DBEs to meet the goal. Thus, it is becoming more common in ACM for recipients to use the RFP to impose specific outreach responsibilities on the proposer, including the associated costs, and a commitment to continue to solicit and hire DBE subcontractors throughout the life of the contract.



Of all documents in AC, the most important to DBE program success is the RFP. Practitioners should engage leadership and transportation engineers to ensure they are among the required reviewers of draft RFPs prior to Division approval. More than one Division admitted that most compliance issues encountered during project delivery might have been lessened or avoided had a civil rights technical expert reviewed the draft RFP. This is even more critical where the recipient is an LPA and unfamiliar with program requirements.

Although the regulations in Section 26.53(b)(3)(ii) require DBE commitments prior to the recipient's final selection, the USDOT has long recognized that design build contracts would require something different. The preamble to the 2014 regulatory revisions stated as follows:

"It bears repeating what the Department said in 1999 on the subject, because it remains the case today. On design-build contracts, the normal process for setting contract goals does not fit the contract award process well. At the time of the award of the master contract, neither the recipient nor the master contractor knows in detail what the project will look like or exactly what contracting opportunities there will be, let alone the identity of DBEs who may subsequently be involved. In these situations, the recipient may alter the normal process, setting a project goal to which the master contractor commits. Later when the master contractor is letting subcontracts, it will set contract goals as appropriate, standing in the shoes of the recipient. The recipient will exercise oversight of this process."

Fed. Reg. Vol. 79/No. 191, p. 59585. Further, 49 CFR §26.53(e) arguably supports a more open-ended approach to identifying DBE participation.

"In a "design-build" or "turnkey" contracting situation, in which the recipient lets a master contract to a contractor, who in turn, lets subsequent subcontracts for the work of the project, a recipient may establish a goal for the project. The master contractor then establishes contract goals, as appropriate, for the subcontracts it lets. Recipients must maintain oversight of the master contractor's activities to ensure that they are conducted consistent with the requirements of this part."

By allowing the "master contractor," e.g., developer, design builder, etc., to meet the overall goal initially by agreeing to establish subcontract goals as appropriate, the regulations recognize the necessity of an open-ended commitment at the time of selection and award in certain methods of alternate contracting. Therefore, to require a developer to establish and submit a plan prior to contract award that commits to some DBEs and identifies how it intends to meet the DBE goal through its future subcontracts aligns with the regulatory intent pertaining to design build contracts. Further, the regulation supports the recipient's responsibility to assess the developer's ongoing efforts to meet the project goal as discussed in the Good Faith Efforts section in the Post-Award/During Construction Section.

To illustrate the varied nature and use of the ITP/RFP in ACM, here is a list of some common requirements:



Colorado

The CDOT used the RFP to require the proposer to designate a DBE officer responsible for outreach efforts and to oversee DBE program compliance on the US 6/I-25.



Minnesota

The MNDOT treated the RFP as stage two of procurement for the I-35E MN Pass, requiring the short-listed teams to submit DBE commitments along with letters of intent for each DBE; signed agreements with each DBE; bidders lists for any DBE or non-DBE submitting a bid; certificates of good faith effort and goal certification; a description of what the DBEs were subcontracted to perform; and how the design-builder would monitor performance. If any of these documents was missing or incomplete, the proposer was deemed non-responsive and ineligible for award.



Missouri

The MoDOT used DBE commitments and Disadvantaged Workforce Utilization as an RFP factor worth a total of 5 points in determining the award of its Daniel Boone Bridge project.



Georgia

The GDOT clearly specified in the ITP that, as part of the P3 for I-285/SR 400, “[f]ailure to submit the DBE Performance Plan will be considered a breach of the requirements of the RFP. As a result, the Proposal Security provided by the Proposer will become property of GDOT and the Proposer will be precluded from participating in any re-procurement of the [Project].”



California

Caltrans' Presidio Project, a TIFIA-funded P3, required proposers to sign a document either committing to the goal or making good faith efforts to do so. A DBE Plan was not required until after award, but before the TIFIA loan closed. This was unusual for California in that most of its D-B projects require proposers to submit the DBE plan in response to the RFP as a matter of responsiveness. During pre-award for another Caltrans D-B project, the State found a proposer non-responsive when the proposer submitted a DBE Plan but failed to show that it planned to meet the DBE goal in its initial best-value proposal. Caltrans believed that a proposer that indicates up-front that it does not plan on meeting the goal does not, by definition, demonstrate that it took actions one would reasonably expect a proposer to take if the proposer were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal.¹¹

In ACM, the practitioner will often encounter DBE Performance Plans (DBEPP). The DBEPP is a document submitted either in response to an RFQ/RFP or sometimes after selection, but typically before contract execution. It serves as a contractual obligation as well as a detailed plan of the efforts the design-builder will use to achieve the DBE commitment. The DBE program requirements may be included either as a standalone section of the PMP (for major projects) or by reference to a separate DBE Plan. Unlike in D-B-B projects, recipients place more emphasis on these plans in ACM for several important reasons. First, they recognize that DBE use and availability could fluctuate as the project moves from design into construction and then, in some cases, to operation and maintenance. Commitment alone is not enough to anticipate these changes. Second, the Plans shift focus from *what* the design-builder must do to *how* they will do it. This provides the recipient with a measure for ongoing monitoring and for assessing good faith efforts.¹² Third, Plans provide a contract remedy to the recipient in the event of breach. While the recipient's responsibility is to USDOT, it must rely on its policies, specifications, and contract documents to hold design-builders accountable.

¹¹ [Appendix A to 49 CFR 26](#) provides two means of establishing responsiveness where a DBE contract goal is set. "First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful."

¹² For a broader discussion of GFE, see the "Post-Award/During Construction" Section.

PROJECTS WITH NOTABLE DBE PLANS AND PMPS:

Texas Horseshoe Project

The DBE Performance Plan covers every aspect of the program, including: the designated representative responsible for DBE compliance; required marketing/outreach efforts; a list of line items for DBE subcontracting for both first and lower tiers; tracking and counting; and commitment schedules. Further, the document requires the design-builder to take part in education workshops, job training events, and student internships.



Horseshoe Project, FHWA

California Presidio Parkway

California did not require a DBE Performance Plan on this project until after the award of this P3. On subsequent D-B projects, however, California required a DBE Performance Plan in response to the RFP. Caltrans leaves no room for doubt as to what it expects from design-builders. It posts a [sample on its website](#) and refers all proposers to it as a matter of practice on D-B projects.



Presidio Parkway, FHWA

New York Tappan Zee Bridge

The Plan took 6 months to produce, but the result was a carefully drafted, detailed document specifying DBE program requirements from procurement through final acceptance. The Plan was so successful that it evolved into a method for tracking commitment and crosschecking actual attainment (i.e., running tally).



I-6 Tappan Zee, NYS Thruway Authority

The PMP is a required document on Federally-aid highway projects over \$500 million. It is written by the project sponsor or direct recipient of the Federal funds to effectively and efficiently deliver a quality project. The purpose of the PMP is to clearly define the roles and responsibilities of the agency leadership and management team and to document the procedures and processes that will be used to provide timely information to project decision-makers. The Project Oversight section of the document should include the oversight of the DBE program and describe the roles and responsibilities of both the project sponsor and FHWA to effectively manage the Federal requirements, including review and approval actions.

EXAMPLES OF PMP DOCUMENTS:

[New York's Tappan Zee PMP](#) ↗

New York's Tappan Zee PMP was written by the New York State Thruway Authority, a non-traditional sponsor of federally assisted projects. The PMP, approved by the New York Division Office, includes details of their processes to provide oversight of the DBE program. These procedures ensure that the Thruway is providing adequate oversight and monitoring.

[Maryland's ICC PMP](#) ↗

Maryland's ICC PMP had unique language that called for conducting regular audits and reviews to ensure that DBE participation is monitored, goals are being met, and timely payments are made. In addition, monthly progress reports were required on "DBE Expenses to Date" to measure DBE goal achievement (running tally).

[Virginia's I-95 HOT Lanes/Express Lanes PMP](#) ↗

Virginia's I-95 HOT Lanes/Express Lanes PMP provides details of how the concessionaire, the direct recipient of TIFIA, will manage goals, outreach, reporting, and sanctions.

DBE AND ACM DOCUMENTS AT A GLANCE

REQUEST FOR QUALIFICATIONS

The RFQ is the first part of the D-B selection process whereby the owner lists proposer minimum qualifications. The RFQ also provides a description of the work and requirements, one element of which should be notification that the DBE program will apply to the project.



RFQ

AUTHORS AND REVIEWERS

RFQs are authored by the project owner and should be reviewed by both State and FHWA Division civil rights staff, particularly in the case of nontraditional project owners.

MINIMUM ELEMENTS

- Nondiscrimination assurances
- Notice that DBE compliance will be a factor of RFP evaluation
- DBE goal (if available)
- Notice of any other RFP requirements:
 - Utilization Plan
 - Record of Past Performance
 - Evidence of GFE
 - DBE Performance Plan

EXAMPLES

Tappan Zee Bridge

- RFQ stated there would be a DBE goal.
- Response to, and compliance with, DBE requirements would be factors of evaluation.
- RFQ advised proposers of 49 CFR 26 compliance.
- Technical evaluation included documentation of past performance.

REQUEST FOR PROPOSALS

Generally, the RFP is the second part of the D-B selection process whereby the owner describes the project parameters and specifications in detail, as well as soliciting price and technical proposals. The RFP also includes the Instructions to Proposers (ITP) which are the directions on how the proposal must be submitted.



AUTHORS AND REVIEWERS

RFPs are authored by the project owners; however, it is highly recommended that civil rights staff be involved in the review of DBE-related requirements prior to FHWA-approval, to ensure sufficient detail, as well as ensure the accuracy and adequacy of the goal and the consequences of noncompliance.

MINIMUM ELEMENTS

- Instructions to Proposers listing specific project requirements for responsiveness. Specifies how the proposer must submit information to be responsive to the RFP.
- DBE goal for both professional services and construction, if applicable.
- DBE Performance Plan detailing how proposer will achieve the goal and the firms it will use to do so or future work items it plans to use DBEs to perform.
- Record of past performance, including DBE program compliance, goal achievement, etc.

EXAMPLES

I-64 Daniel Boone Bridge Manchester Bridge

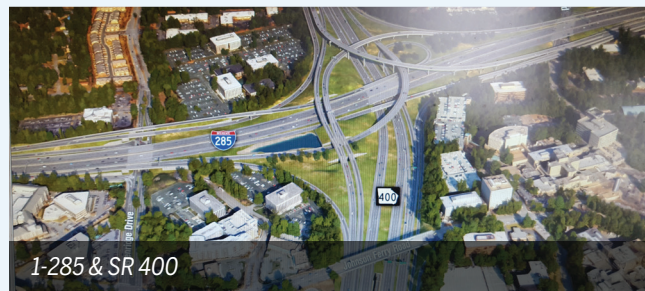
- DBE commitment is required for responsiveness.
- Requires 100% commitments for professional services and 50% for construction.
- Requires draft DBE Performance Plan.



I-64 Daniel Boone Bridge, FHWA

I-285 & SR 400

- Encourages outreach events by shortlisted proposers.
- Requires proposers to specify DBE work types, utilization plan, monitoring plan and the percentage each DBE contributes to the project goal.
- Scoring weighted for use of a variety of DBEs throughout the entire project.



I-285 & SR 400

DBE PERFORMANCE PLAN

The DBEPP is often required as part of the RFP (at least as a first draft), the details how the proposer will achieve the goal and meet other DBE program requirements.



AUTHORS AND REVIEWERS

DBEPPs are authored by the proposer and should be scrutinized by the owner's civil rights staff. While Division approval is not required, the practitioner may find compliance determinations much easier knowing the level of specificity and commitment to the program.

MINIMUM ELEMENTS

- DBEs to be used to achieve the goal and in what categories.
- Details on how the proposer will:
 - Achieve the goal
 - Ensure compliance
 - Conduct outreach
 - Report/track DBE participation

EXAMPLES

South Carolina DOT's newly drafted DBE special provisions (Section 107) require a detailed DBEPP within 30 days of award.

- Naming a DBE Liaison Officer.
- Listing all committed DBEs with signed contracts.
- Submitting monthly performance reports.
- Approval of the DBEPP is a requirement for progress payments, review of design submittals, and to avoid contract sanctions.

PROJECT MANAGEMENT PLAN

A comprehensive oversight plan is required for FHWA-assisted projects that exceed \$500M and describes the various roles and responsibilities for project delivery and oversight by the project sponsor.



AUTHORS AND REVIEWERS

PMPs are developed by the owner and must be approved by FHWA. The PMP establishes the roles and responsibilities for project oversight on DBE and other Federal requirements to ensure compliance.

MINIMUM ELEMENTS

- PMPs are more flexible than the RFP or specifications.
- PMPs may be updated during the life of the project.
- PMPs may not contradict or alter contract terms.

EXAMPLES

Horseshoe Project

- PMP required a certification that proposer would meet the goal and, if selected, submit a DBEPP explaining how it would comply with the owner's DBE specifications.
- PMP stated that failure to submit the DBEPP would deem the company nonresponsive and result in forfeiture of the bid bond.



OUTREACH AND EDUCATION

Special outreach efforts played a part in all but a few of the surveyed projects. In some cases, as in New York's Tappan Zee and Maryland's Intercounty Connector projects, public interest and high visibility meant that project marketing was a constant and shared responsibility among the owner, the State DOT, and the developer. Project marketing started early; all parties sponsored networking events—beginning at the time the short-listed firms were announced and continuing well into construction. In Florida, the I-595 Express Project, a P3, included separate and specific outreach by the Developer in addition to the extensive services regularly in use by Florida DOT. The Developer participated in all matchmaking events, as well as volunteered at youth construction and engineering programs throughout south Florida. Florida DOT provides both FHWA and State-funded supportive services, including those specifically for large or innovative projects. See the [resource section](#) of this manual for more information on assistance available to both DBEs and design-builders.



Outreach and education of DBEs and other small businesses as part of, or required by, ACM are excellent ideas for increasing the quantity and quality of DBEs on FHWA-aid projects. However, no outreach is effective unless it results in participation. Thus, the owner should set performance metrics to document and evaluate the value of the efforts.

PROJECTS THAT USED A MORE FORMAL OUTREACH STRUCTURE:

Maryland



Maryland, as described in its PMP, opened a separate civil rights office that was dedicated specifically to its Intercounty Connector project. This office, staffed with an outreach coordinator and compliance specialists, was responsible for overseeing DBE and EEO requirements. This resulted in an estimated 40 DBE outreach events from project award through construction and the creation of a mailing list that included over 2000 companies.

Georgia



Though Georgia's RFP for I-285/SR 400 had nonspecific language on DBE outreach, it nonetheless required that proposers specify how they would solicit DBE participation on the project, and included in its ITP a requirement for firms to cooperate with Georgia's public outreach. Even though not officially required, all four short-listed firms held independent outreach events, in addition to participating with Georgia's efforts.

Virginia



Another notable outreach approach occurred in Virginia as part of its I-95 Express Lanes project. Building off the lessons learned in an earlier P3 effort, Virginia DOT hired a firm to provide DBE supportive services tailored specifically for the project before the contract was executed. Virginia DOT then developed a plan and conducted DBE outreach, working with each of the short-listed firms.

Regardless of how or when the surveyed projects undertook outreach and education, one thing remains clear: FHWA supportive services programs cannot alone support the growth and sustainability of DBEs and other small businesses. Recipients requiring design-builders to pursue outreach efforts has the potential of effectively leveraging recipient resources and encouraging program ownership by all parties: the industry, recipients, and FHWA.

BEST PRACTICES TO ENCOURAGE / CONTRASTED WITH PITFALLS TO AVOID

This Handbook would not be complete without listing some of the pitfalls associated with DBE program implementation on ACM projects, identified through hard-won experience. The details and identity of those who shared their troubles are not listed but each are commended for helping to share these important lessons learned. The chart below identifies best practices to be encouraged contrasted with pitfalls to be avoided:

FIGURE VI

✓ ENCOURAGE	✗ AVOID
<p>Early involvement by practitioners</p> <p>DBE and other civil rights issues can be overlooked or marginalized when the civil rights practitioner is not involved from project inception. Reviewing RFP, PMP, DBE Plans, and contract language is an important first step in establishing compliance.</p>	<p>'Business as usual' approach</p> <p>ACM/IPD projects are high risk and have high visibility. Small issues can rapidly spiral into major problems that have the potential of exposing the State and entire DBE program to legal challenge.</p>
<p>Partnership</p> <p>Of the projects surveyed, those deemed most successful were the result of close communication between FHWA, the recipient and later, the design-builder. At a minimum, regular communication lowers the risk of misunderstandings and differences of opinion, both of which slow compliance oversight and drive up costs.</p>	<p>Fragmentation of civil rights and operations programs</p> <p>Division engineers and the civil rights / oversight practitioner must cooperate and communicate to provide effective stewardship and oversight as well as good customer service. The agency should consider establishing office procedures requiring interdisciplinary review and approval of ACM/IPD draft documents.</p>
<p>Visible Leadership</p> <p>ACM/IPD projects benefit when they demonstrate visible recipient executive leadership support. At a minimum, leadership must emphasize a commitment to the DBE program and ongoing DBE opportunities.</p>	<p>Shortcuts and lack of transparency</p> <p>ACM projects are typically larger and more visible, thus, more likely to be audited by external agencies and law enforcement. Hitting only the 'minimums' in project procurement and delivery impacts transparency and increases associated risks.</p>

✓ ENCOURAGE

Considered and Documented Goal Setting

Recipients that use transparent, interdisciplinary, and multi-factor processes for goal setting improve the accuracy and achievability of the goal—not to mention reduce the risk of stakeholder complaints or legal challenge. Simply stated, the closer the contract goal setting process mirrors the setting of the recipient’s overall goal, the more likely it is to be narrowly tailored and survive scrutiny.

Promoting Local Business Opportunity

Early, continued, aggressive, and targeted promotion of ACM projects by recipients increases the likelihood that local businesses will participate and benefit from the project.

Meaningful outreach to and education of DBEs

Outreach and education of DBEs and other small businesses as part ACM are excellent ways to increase the quantity and quality of DBEs on FHWA-aid projects. The more these efforts are documented and evaluated, the better owners can tailor future activities in support of the program.

Enthusiastic use of approved DBE Program Plans & Goals

Recipients with approved DBE Programs and goals must implement them on ACM/IPD projects, as with any other FHWA-aid project. With minor exceptions, sub-recipients must use the recipients’ FHWA-approved DBE Program Plan.

✗ AVOID

Standard goal tables or merely applying the State’s overall DBE goal

Fixed contract goal matrices based upon size or other standalone factors are not considered a narrowly-tailored method of goal setting. The practitioner should work with recipients to ensure goals established on ACM/IPD are defensible and supported with documentation of the process—similar to overall goal setting.

Local Preference Clauses

Including local participation through local preference clauses or separate local-use goals is problematic and could violate procurement rules unless part of a FHWA-approved pilot program.

Window-Dressing Outreach as Evidence of GFE

Engaging in voluntary or contract required outreach **solely** as a method establishing or documenting good faith is considered “pro-forma”, and should not be tolerated by the owner or FHWA. Communicate to the design-builder that neither the owner nor FHWA will support pro-forma outreach efforts that rarely result in subcontract awards.

Operating under Unapproved DBE Programs and the Inclusion of State and Local Minority and Women Enterprise (MBE/WBE) goals

FHWA requires sub-recipients to use the State DOT’s approved DBE program plan and not operate under a separate plan when using FHWA dollars.¹³ USDOT does not permit including State MBE/WBE goals on federally-funded projects as doing so defeats the narrow-tailoring requirement of the DBE program. State and local affirmative action goals may only be included on 100% State-funded contracts.

¹³ Under the revised 49 CFR 26.21, FHWA’s primary recipients are required to have an approved DBE program plan. As explained in the preamble to the most recent revision of these regulations: “For FHWA, the proposed modification makes clear that under FHWA’s financial assistance program, its direct, primary recipients must have an approved DBE program plan, and sub-recipients are expected to operate under the primary recipient’s FHWA-approved DBE program plans . . . Where more than one operating administration is providing funding for a project or a contract, recipients should consult the [Operating Administration (OA)] providing the most funding for the project or contract and the OA, in turn, will coordinate with the DOT agencies involved to determine how to proceed.” Fed. Reg. Vol. 91/No. 191, p. 59580.

✓ ENCOURAGE

Leveraging Available Resources

Contract requirements for outreach and education may assist recipients with stretching limited supportive services dollars. They also help share program ownership and provide an opportunity to assess the design-builder's commitment to program compliance.

✗ AVOID

Viewing Goal Attainment versus Submission of GFE Documentation as a choice

Practitioners and recipients should be mindful that GFE and goal attainment cannot be separated. Contractors must use those efforts one could reasonably expect a bidder or contractor to take if they were actively and aggressively trying to meet the DBE goal. GFE documentation is considered if the goal is not met, or in the case of a DBE Plan, if the contractor is not on-track with its committed schedule to meet the goal. It is never appropriate for a prime to begin the project with the notion that it will meet its contract obligation through documented GFE only, rather than through actively trying to meet the DBE goal.

POST- AWARD

**POST-AWARD /
DURING CONSTRUCTION**

POST-AWARD / DURING CONSTRUCTION

It should be no surprise to the practitioner that DBE program risks on all highway projects increase during the construction phase of the project. This is equally true in ACM projects: greater visibility, higher dollar amounts, increased complexity, and/or nontraditional partners associated with these projects all raise the likelihood of exposure and resulting impacts. By its very nature, ACM is under scrutiny by layers of compliance/enforcement authorities and by the general public. This section will provide key considerations and helpful tips in delivering successful, compliant, and opportunity-rich ACM projects.



MONITORING OR OVERSIGHT PLANS

[49 CFR 26.37](#) ↗

A notable aspect of preparing this Handbook was the unanimous agreement that DBE project oversight should not begin post-award. It bears repeating that the more developers, design builders, and owners understand the DBE program, the regulatory requirements, and the expectations of the owner and FHWA upfront, the more effective and efficient the oversight. Among those interviewed whose projects did not address DBE expectations pre-award, all concluded that use of monitoring or oversight plans would have carried compliance expectations through to construction, reducing developer resistance, and forging a sense of shared responsibility for the program.

While there is no fixed definition for a DBE monitoring and oversight plan, it is any document, series of documents, resources, or tools used to describe, document, track, and report DBE program compliance during project delivery. Regardless of whether the plan is a single overarching document or is comprised of a number of individual components, to be effective, monitoring plans must be specific to the project and go beyond just restating the regulations or the owner's DBE program plan. It may cover all aspects of civil rights compliance and contract administration, or be limited to the DBE program.



In ACM, Federal-aid might not be used until later in the project or, in some cases, not at all. Practitioners should remember that just the possibility of Federal funds requires 49 CFR 26 compliance. Please note, including DBE participation on semi-annual Uniform DBE reports is only required when Federal funding kicks in.

Similarly, it can be included as part of the contract documents, the PMP, or as a separate manual. A DBE monitoring and oversight plan should be shared with and discussed by all project partners – from owner to contractor. Though not necessarily subject to the agreement of all parties, effective plans are developed collaboratively and describe the roles each partner will perform in ensuring and documenting oversight. However, the practitioner should emphasize that it is ultimately the owner’s responsibility to ensure that effective monitoring takes place as well as to provide “[w]ritten certification that you have reviewed contracting records and monitored work sites in your state for this purpose.” 49 CFR 26.37(b).

Consider these examples when developing or reviewing monitoring plans:

1

Does the plan provide sufficient detail in describing expectations?

In addition to requiring both cooperation with and adherence to the owner’s policies, the Comprehensive Agreement (Agreement) for the Virginia I-95 Express Lanes project specified developer outreach efforts, regular performance reporting, and contractor disqualification (for a minimum of 90 days) from any State contracting in the event of noncompliance. The Agreement also obligated the State to collaborate with the developer on outreach activities; identify those DBEs eligible to bid on specific work items; and provide access to state technical and managerial assistance programs for DBE subcontractors on the project. In addition to the Agreement, however, Virginia also developed a *Civil Rights Team* document that listed a “game plan” for the ACM Project. This document included oversight objectives, an outreach plan, a schedule for updates/reports, and the key DBE program contacts. The document is now standard practice for all major projects in Virginia and is regularly updated to account for lessons learned from each successive project

The New York Thruway Authority used very specific DBE oversight instructions as part of the RFP on the Tappan Zee Bridge project. The section is written in plain language and describes compliance activities as well as their specific purpose and use. For example, the owner acknowledges state M/WBEs and small businesses and encourages their use, but very clearly and repeatedly advises that “[t]his is a Federal-Aid contract with a single DBE goal and only DBE attainment will be counted towards meeting that goal.” The plan also requires the use of New York State DOT’s web-based data collection system for reporting and demonstrating compliance.

Maryland's Intercounty Connector project used an extensive oversight plan to ensure compliance. In addition to staffing a separate project-specific civil rights office, the State's plan called for periodic compliance reviews, including tracking DBE commitments each month and reviewing all subcontract agreements. The plan also included mediation and complaint investigation procedures.

As with other States, Georgia takes a layered approach to monitoring and oversight. It hires consultant engineering oversight firms to oversee the design-builder's compliance with State and FHWA specifications. The State then conducts quality assurance reviews of the oversight firm, while the Division regularly visits the project to verify the effectiveness of Georgia's oversight and compliance.

2

Does the plan describe methods that will be used to monitor compliance?

Maryland's Intercounty Connector project included an extensive civil rights oversight and audit section. Most notably, it defined an independent audit oversight process which included regular audits to monitor DBE participation and attainment towards the goals, and independent audits by the consultant and the Maryland State Highway Administration (SHA) staff. The project assigned the consultant and SHA staff to work on the project full time to develop a comprehensive audit program that addressed monitoring DBE participation. It also required the owner to staff a separate civil rights office specifically for the ACM project that consisted of a compliance manager, DBE outreach coordinator, technical specialists, compliance staff, and administrative support. The office developed the ICC Compliance Guide to provide ongoing technical assistance to the builder and contractors, and a responsibility matrix that established the various types of compliance activities, the parties responsible for them, and the time period for conducting them.

On Caltrans' Presidio Parkway project, the State specified as part of its monitoring approach, the quarterly review of DBE reports and further detailed what constituted adequate reporting, GFE, site visits, and other activities. In addition, Caltrans provided sample site visit reports and other templates to assist compliance staff with oversight and to establish a clear set of expectations of design-builder, DBE, inspection, and compliance staff.

Given the size of the Goethals Bridge and Tappan Zee Bridge projects in New York, the FHWA Division assigned a full time civil rights program manager to the projects who was responsible for coordinating the civil rights responsibilities. The manager convened and attended regular meetings with the project owners; scheduled in-depth reviews; and provided oversight, training, and technical assistance. To document oversight activities using the Division's Risk Based Stewardship and Oversight model, a project tracker was created to capture all oversight, including pending issues or questions, goals, and accomplishments. There is a similar tracker for Tappan Zee and for the other New York major projects.

3 Does the plan clearly define the consequences of noncompliance?

Florida had a longstanding, successful Contractor Compliance Workbook that described in detail how the DBE program is monitored on projects, the forms/documents used, and the consequences of noncompliance. Nevertheless, it found modifications necessary on the I-595 Express project because no Federal-aid funds were scheduled for release until *after* construction when the project was in the operations phase. Without the ability to withhold progress payments for noncompliance, it established a point system, each point equivalent to a dollar amount to be deducted from future payments. Compliance points were assessed against the contracted amount, permanently reducing it unless the issue was remediated during a defined cure period. Though not specific to DBE, the point system proved an effective means of not only addressing issues but promoting universal commitment to compliance.

California includes a contract provision in its D-B contracts that imposes liquidated damages defined as the difference between the DBE goal and actual DBE participation if adequate GFE are not demonstrated. This contrasts with the bidder being deemed nonresponsive if its DBE commitment fails to meet the goal or if it fails to demonstrate adequate GFE for traditional D-B-B contracts. This approach requires at least quarterly documentation of the execution of the DBE plan, questioning the need for revising the original plan if the contractor is behind schedule on its efforts to meet the DBE goal as one of many means of demonstrating adequate GFE, and ensuring that the contractor's

For the Sixth Street Viaduct, the City of Los Angeles set DBE goals subject to Caltrans approval and provided a summary roadmap of past goals/commitments and future goals. This approach served to demonstrate to the design-builder not only that the goal was achievable but examples of how it could be achieved. The project included some unusual terms for sanctions, in that both Caltrans and the Division had to review the City's decisions on GFE.

Colorado DOT clearly advises design-builders of what constitutes default, notably if “[t]he Contractor breaches any other agreement, representation or warranty contained in the Contract Documents, or the Contractor fails to perform any other obligation under the Contract Documents, including EEO and DBE requirements.” The State provides 15 days from notice of breach as a “cure” period, after which it declares an Event of Breach.

CUF AND COUNTING

49 CFR 26.55 

Project owners must have a process for conducting and documenting CUF reviews as part of their monitoring and oversight plans in order to document DBE compliance pursuant to 49 CFR 26.37(b). The CUF determination indicates that the DBE is performing with its own forces the work that it is certified and was contracted to perform. This also includes, depending upon the function the DBE provides, requirements such as negotiating price and purchasing its own supplies, obtaining and operating its own equipment, and directing its workforce. The CUF determinations have several purposes. First, they support the owner's oversight of the DBE program on the project. Second, as discussed above, they serve as a means of documenting DBE compliance, required by 49 CFR 26.37. Third, they can be indicators of noncompliance or fraud. Fourth, they verify the appropriate crediting of DBE performance toward contract goals. Lastly, CUF is a necessary means of protecting program integrity – it benefits both the DBE and the design-builder by establishing evidence of program propriety when responding to the inevitable third-party complaints.

In ACM, the definition of CUF does not change. However, ACM presents challenges to conducting and documenting CUF. Depending on size, these projects may have numerous tiers of subcontracting, numerous and overlapping construction schedules, and multiple years of work—complicating already resource-intensive compliance activities. Further, because 49 CFR 26.55(a)(1) and (2) tie counting and DBE credit to both professional services and construction contracts, owners must be able to document compliance with both.

Establishing CUF and counting of DBE services toward goal credit has other challenges beyond project size and logistics. One is for the recipient to verify and accurately count credit for DBE trucking services so that the use of DBE and non-DBE trucks or the use of a DBE for brokering services does not lead to over-counting.¹⁴ On large projects, contractors are often disinclined to sign a vast number of subcontracts with DBE trucking owner/operators, preferring the more convenient option of hiring one or a few DBE firms to provide trucking services with their own employees and equipment and brokering supplemental trucking services. This means that the design-builder should have a means of separating and reporting accurate DBE credit, and the owner should have a system to verify it; this is no small task when the projects call for hundreds of trucks.

¹⁴ 49 CFR 26.55(d) provides the requirements for counting DBE trucking credit.

Another example is the use of DBEs to provide materials, and in particular, bulk items, such as steel and petroleum. It is often difficult to determine whether a DBE supplier of such bulk items performs as a “regular dealer”¹⁵ and is entitled to count 60% of the cost of the items supplied, or whether the DBE is facilitating a transaction for the purchase of supplies between a prime and a manufacturer, and is thus entitled to count only the fees or commissions paid by the prime to provide this service. Obviously, it is in the prime’s best interest to consider a material supplier of bulk items as a regular dealer so that it can count 60% of the cost of such supplies as petroleum and steel toward the contract goal. In response to this, in 2014, USDOT revised 49 CFR 26.55(e)(4), which now requires recipients to determine whether a DBE supplier is performing a CUF on a contract-by-contract basis.¹⁶

Although CUF and counting requirements on ACM projects must be robust, they cannot be so rigid that they become a barrier to opportunity or create a chilling atmosphere between the primes and DBEs in the field. Fortunately, the regulations provide flexibility in how CUF is determined and documented, and collaborative decision-making post-award can anticipate high-risk participation like those examples above. Note that the regulations require that recipients count all eligible DBE participation in which the DBE provides a CUF. Regulations do not permit recipients to forbid certain types of legitimate DBE services or to forego tracking because the activity is nontraditional or inconvenient to monitor.



Tech tools can simplify or streamline CUF reviews. For example, Tappan Zee uses Skype to conduct CUF interviews for offsite firms more than 100 miles from the project. In addition, the growing use of electronic payrolls and other e-paper can help reduce CUF from a matter of days to just hours. Note that time or labor saving CUF processes should not preclude careful review and approval of the CUF by both project management and civil rights/oversight staff.

¹⁵ 49 CFR 26.55 (e)(2)(ii)(B) provides: “A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (e)(2)(ii) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers’ own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.”

¹⁶ 49 CFR 26.55(e)(4) states that “[y]ou must determine the amount of credit awarded as a regular dealer or a transaction expeditor) on a contract-by-contract basis.”

There are many excellent examples of CUF and counting nationwide, some practicable for ACM projects. The practitioner might consider the following:

1

Is the CUF inspection process sufficiently comprehensive, extensive, and documented to support written certification of compliance as required by 49 CFR 26.37(b)?

Virginia used a multi-tiered review to both establish CUF and to verify DBE program compliance on its I-495 and I-95 Express Lanes projects. The Virginia DOT DBE Compliance Review form was completed by the State's District Civil Rights Office in cooperation with project inspectors. It required regular site visits, interviews with project staff (including the Prime and DBEs), document inspection, and collection of relevant evidence supporting CUF. The form was then reviewed and signed by both the District and Division Civil Rights managers. Virginia DOT's form provided separate sections for DBE supply and hauling. Florida lacked a process for reviewing professional services firms on both its I-595 and Port of Miami Tunnel projects. However, those DBEs performing construction and related activities were reviewed multiple times during the life of the project—no fewer than three times within the first 90 days of activity and then randomly thereafter.

Like Virginia, Florida DOT completed the CUF documents onsite and reviewed/collected supporting information such as daily work reports, certified payrolls, supply invoices, equipment leases or deeds, and other similar information. Also like Virginia, the CUF document required multiple levels of review and approval, beginning with the inspector, and then going in turn through the compliance specialist, compliance manager, and finally the project manager.

New York's Tappan Zee project has used DBEs well outside the New York area, especially suppliers. To perform CUF reviews on a DBE located further than 100 miles from the project, the Thruway Authority researched the company's website, set up a phone interview with the DBE owner, and then scheduled a Skype call to get a "tour" of their facility.

Texas DOT developed a process for documenting DBE compliance on its Horseshoe Project and other design-build contracts. It drafted a mandatory monthly agenda for DBE Plan meetings to be attended by the developer, the design-builder, and compliance staff. At the first meeting, the partners discussed roles and responsibilities; the forms to be used for documentation; the process for tracking commitments and attainment; the subcontract and other documents to be reviewed; CUF procedures, including under what circumstances credit might be denied; joint check approval procedures; outreach efforts; and auditing. Each month thereafter, Texas DOT collected minutes showing the results of each meeting topic:

- ✓ Commitments to goal attainment
- ✓ Monthly reporting
- ✓ CUF reports and progress
- ✓ Subcontracts collected/requested
- ✓ Joint check issues
- ✓ Trucking credit worksheets
- ✓ Status of audits
- ✓ Results of outreach events
- ✓ Upcoming outreach events

2

Whether compliance is a shared responsibility, transparent to stakeholders

When the FHWA California Division Office realized that Caltrans's Presidio Parkway project initially anticipated \$6M of trucking, it voiced concerns about the capacity of DBE haulers to support such a substantial commitment and how compliance could be monitored. A subsequent lower figure was established and, with Division encouragement, the project owner (LPA) hired a firm to identify DBE trucks and to develop a process for monitoring trucking CUF compliance. The consultant photographed license plates and recorded DOT numbers of every truck and documented ownership, load, departure point, destination, and a variety of other information. This information was used to counter multiple developer claims of DBE participation for non-DBE owner and operated trucks.

Florida took an unprecedented approach to transparency on I-595 Express, inviting the USDOT Office of Inspector General (OIG) to visit the project, attend a progress meeting, and shadow the compliance process. Including OIG as a partner in project delivery allowed Florida DOT to explain its oversight processes, avoid unnecessary investigations, and gain the valued perspective of OIG on areas of compliance risk that the Division Office, Florida DOT, or the developer may have overlooked.

PROMPT PAYMENT AND RETAINAGE RETURN

49 CFR 26.29

The opportunity for small and disadvantaged businesses to both sustain and grow does not end with securing work on ACM projects. Rather, the ladder of opportunity has multiple rungs, one of the most important of which is adequate operating capital. By definition, all DBEs and many other subcontractors are small businesses that depend on timely, accurate payments in order to continue providing services, pay suppliers, and meet payroll. All owners must include prompt payment and retainage return requirements in their special provisions and have a mechanism to monitor and track compliance. Many State DOTs further narrow the 30-day minimum payment window through State statute, local ordinance, or contract specifications. However, until recently, many recipients believed that having adequate contract provisions met regulatory requirements. In March 2016, USDOT released guidance in the form of **Q&A's** about prompt payment and retainage return. In addition to discussing the need for contract requirements and complaint procedures, the document recognizes that subcontractors might not complain due to fear of reprisal. As such, it emphasizes that “recipients are expected to take affirmative steps to monitor and enforce prompt payment and retainage return requirements.”



Prompt payment is among the most serious issues facing the DBE program and industry in ACM. Lack of timely payments injures the growth and capacity of small and disadvantaged business and threatens the future health of the industry. Owners are increasingly taking a hard line on violators. For instance, in November 2016, New Mexico DOT suspended one prime contractor, “based on evidence of repeated violations of prompt payment requirements in contracts.” Some owners, like those in New York, find electronic systems helpful in verifying subcontractor payment. One caveat in selecting systems, however, is that they must be capable of tracking multiple tiers of subcontracting.

As with other aspects of ACM projects, prompt payment oversight can be more difficult for all parties— simply due to size, scope, and multiple tiering of subcontractors. Further, although prompt payment and return of retainage requirements pertain to subcontractors at all tiers, those at the end of the food chain must wait a very long time for payment, especially if the State uses the Federal 30-day pay window.

NOTEWORTHY EXAMPLES OF PROMPT PAYMENT MONITORING:

New York



For the Tappan Zee bridge project, the New York Thruway Authority used a comprehensive DBE electronic tracking system provided by New York State DOT. The system assists with setting agency and contract goals, monitoring procurement and award, and running statistical reports. However, it also has the added feature of monitoring prompt payment by requiring prime contractors to enter payment dates electronically into the system and requiring the subcontractors to verify receipt—also electronically. State law requires prime contractors to pay their subs within 7 days of payment by the owner. If payments are late, the system notifies the oversight agency. Unfortunately, the system could only monitor the first tier of subcontractors. To oversee payment at all tiers, the Thruway monitors lower tiers manually through spreadsheets and outreach to the subcontractors to ensure they are receiving payments on time. Since the award of this project, New York State DOT has updated their electronic data collection system to monitor prompt payment for all tiers of subcontractors.

Colorado



One common problem with prompt payment occurs when, by either contract structure or design-builder choice, Federal-aid funding is scheduled for later in the life of the project or, in rare cases, not at all. In Colorado, the prime agreed not to invoice or receive compensation from the State until after 6 months of project performance, even though subcontractors and DBEs were active. FHWA and the Owner insisted that the contractor adhere to prompt payment and retainage return requirements based upon satisfactory completion of work by the subcontracts. The contractual time lag of contractor invoicing and owner payment to the prime did not preclude the contractor's obligation to pay its subcontractors promptly on this Federal-aid project.

GOOD FAITH EFFORTS

GFE

49 CFR 26.53 

One of the challenges of administering DBE requirements in project delivery that deviates from D-B-B is the GFE requirement. In D-B-B, in response to a letting with a DBE contract goal, the bidder must submit with its bid, or within 5 days thereafter, a list of DBEs committed toward goal achievement, and the type and dollar amount of the work they are committed to perform. A bidder that falls short of the goal must submit documentation of the steps it took to solicit DBEs to achieve the goal (i.e., GFE). The recipient is responsible for evaluating holistically the quantity, quality, and intensity of the efforts described in the documentation to determine whether, despite falling short of the goal, the bidder made sufficient GFE to meet it and is eligible for contract award. Many recipients, however, found it difficult to evaluate the adequacy of GFE where proposers failed to identify sufficient DBEs at the time of the proposal.

Through the review and analysis of the projects identified in this Handbook, FHWA has determined that the most logical and efficient means of evaluating GFE in an ACM project, other than GM/GC, is for the recipient to use the DBEPP as a roadmap to evaluate the design-builder's ongoing GFE to achieve the goal. As discussed in the Pre-Award section above, 49 CFR 26.53(e) supports a more open-ended approach to DBE participation and the evaluation of GFE. This section allows the "master contractor" (e.g., developer, design builder, etc.) flexibility to use GFE to meet the goal throughout the life of the contract. This section also requires the recipient to maintain oversight of the contractor's activities to ensure that they are conducted in a manner consistent with the requirements of this part



(e.g., evaluating GFE on an ongoing basis), as DBEs are solicited and hired. Evaluating compliance with the DBE plan best provides ongoing DBE opportunities and ensures adequate and timely reporting. The Owner's oversight requirements cannot be limited to a document review, however. It must ensure that it makes accurate CUF determinations and holds the prime accountable for pro forma efforts that may not be intended to result in actual DBE participation. The owner is responsible for thoroughly examining all documentation provided by a prime who deviates from the schedule included in the DBE Performance Plan. For example, the owner must keep in mind basic GFE principles included in Appendix A to 49 CFR Part 26, such as rejecting a design-builder's desire to self-perform work to which it committed to soliciting DBE participation.

This Handbook strongly advocates early communication among all parties. This applies to GFE as well. To implement GFE requirements, the oversight practitioner should consider:

- ✓ Sharing expectations about basic principles of GFE
- ✓ Providing design-builders and developers with examples of what is, and what is not, considered a GFE
- ✓ Providing early and continuous emphasis that GFE is an ongoing effort to achieve a contract goal and not a choice between hiring DBEs and submitting paperwork
- ✓ Describing how and when GFE will be evaluated
- ✓ Emphasizing early and continuous evaluation of GFE to ensure sufficient time to correct any deficits in DBE participation that may arise.

EXAMPLES OF GFE FROM THE SURVEYED PROJECTS INCLUDE:

I-70 Manchester Bridge

Missouri's I-70 Manchester Bridge was a D-B project with an 18% goal for design and a 12% goal for construction. The RFP required the proposers to respond with a "minimum of 100% Design Services Goal and 50% Construction Goal". This meant that the RFP required the proposer to respond with evidence that they had contracts with DBEs for 100% of the 18% design goal and a minimum of 50% of the 12% construction goal or provide evidence of GFE to meet those targets. Because the contract required DBEs for the design work at the time of proposal, the proposer made a plan to meet the goal, which was initiated at award; thus, oversight was straightforward.



I-70 Manchester Bridge, FHWA

Sixth Street Viaduct Project

California's 6th Street Viaduct project was a CM/GC project with an overall project goal and contract goals set on 10 individual construction contracts. The project goal acted like an overall annual DBE goal for a recipient in that the LPA set contract goals to enable it to meet the overall project goal. Each of the 10 separate contracts in this project was like a normal D-B-B contract, but the CM/GC contractor received the first opportunity to bid on the contract. The LPA could either accept the CM's bid or reject it and advertise the contract. However, by advertising the construction portion, the LPA ran the risk of higher bids and lower DBE commitments relative to the CM/GC contractor's bid. Procedures already in place were applied to this project that required Caltrans' review and approval of each contract goal, including a review of the GFE when the contractor failed to meet the contract goal. In addition, the FHWA Division required Caltrans to submit the DBE contract goal on the largest of its 10 contracts for the Division's review and approval. Caltrans has identified four critical items that must be included in all D-B contracts to document and evaluate GFE:



Sixth Street Viaduct, City of Los Angeles

- A DBE Performance Plan that describes how the contractor plans on meeting the DBE goal (Caltrans posts an example of a [DBE Plan](#) on its website).
- Monitoring the execution of the Plan at least quarterly.
- Including a contractual enforcement mechanism that provides consequences for not meeting the goal or demonstrating adequate GFE. Caltrans uses liquidated damages, defined as the difference between the DBE goal and the actual DBE participation if the goal is not met or adequate GFE demonstrated. Without an effective enforcement mechanism and the willingness to exercise it, the DBE Performance Plan is just a piece of paper!

While not a contract item, Caltrans believes that it is *critical to document* (at least quarterly) the contractor's efforts (or lack thereof) to meet the DBE goal. This documentation, along with the liquidated damages enforcement mechanism, will motivate the contractor to meet the goal and is invaluable to the evaluation of the adequacy of the GFEs if the contractor fails to meet the DBE goal.

Presidio Parkway

Examples of effective documentation on this ACM project motivated an initially reluctant developer to meet the DBE goal. Initially, Caltrans noted discrepancies between reported DBE participation and actual participation supported by documentation from monitoring activities, including tracking payments to DBEs. These included discrepancies between reported trucking participation and documented DBE trucking participation from truck monitoring records. For example, on this project the developer was over-reporting DBE credit by claiming DBE participation and dump fees by non-DBE trucks. The State also identified over-reporting of DBE participation, namely:



- Claiming credit for furnishing and installing concrete when a DBE provides only concrete pumping.
- Claiming DBE credit when a DBE is not certified to perform the work.
- Overstating the dollar amount of DBE subcontracts.

In addressing these issues, Caltrans documented the following:

- Caltrans encouraged the developer to identify contracting opportunities for DBEs early in the project, since opportunities late in the project may not materialize. Caltrans learned from previous experience that if a developer must replace work that it originally planned for DBEs, it will have more options to find replacement work if the developer identifies these DBEs early in the project.
- Caltrans questioned the reasonableness of requiring the developer to meet every work item it identified for DBE participation in the DBEPP. During site inspections, the developer asked Caltrans if it could substitute specific work items for which it committed to recruit DBEs with alternate work items. Caltrans documented these and similar conversations as an aid in evaluating the sufficiency of GFEs in the event that the developer fell short of meeting the contract goal.

- Caltrans learned that it is problematic when a developer that is falling behind in reaching the DBE contract goal, submits many documented GFEs during the last phase of the contract. If the developer finally makes diligent efforts to obtain DBE participation during the final phase of the contract, it will argue that it's doing everything it can to meet the goal by submitting stacks and stacks of documented efforts. However, this contrasts with its lack of efforts during most of the contract period. This behavior caused Caltrans to wonder why the developer didn't make these kinds of efforts earlier? Did the developer take actions of one that is "actively and aggressively" trying to meet the goal throughout the life of the contract?¹⁷
- Caltrans inspected the developer's maintenance of DBE records after the FHWA Division Office's first DBE site inspection revealed numerous DBE issues. This entailed a review of the developer's record of its implementation of *all* of its DBE requirements and claims of DBE participation (including copies of DBE subcontracts, invoices and payments). It also put the developer on notice that it was responsible for fulfilling its DBE obligations.
- Caltrans noted any responsibilities that were not being fulfilled, including discrepancies between reported DBEs under contract for less than committed amounts and any DBE payments not supported by developer documents. To remedy these shortcomings, Caltrans followed-up on the developer's efforts to address (or not address) the deficiencies. This documentation also helped with Caltrans' evaluation of the adequacy of the developer's GFE to meet the DBE contract goal.

¹⁷ See 49 CFR Part 26, Appendix A II

REPORTING

REPORTING ON UNIFORM REPORTS

OF DBE AWARDS, COMMITMENTS AND PAYMENTS

[49 CFR 26.11](#)  [Appendix B](#) 

The increasing availability of web-based data collection and reporting technology is making it easier for owners to timely and accurately track DBE performance on projects and to complete semi-annual reporting. Proponents of ACM projects have utilized e-tracking tools as these projects often span multiple years. As a result, more owners are implementing commercial or State-developed systems to track their entire DBE program. This Handbook does not discuss the merits of particular tools; however, interested practitioners should contact the project owner or FHWA Division Office for more information.

The project sponsor only submits Uniform Reports when Federal funding is used. In ACM major projects, federal funds might be one of many funding sources. For example, on the Goethals Bridge Replacement Project, Private Activity Bonds from NJ Economic Development were used the first two years of the project. The project began in November 2013 but TIFIA funds were not drawn until September 2015, which is when the sponsor began submitting uniform reports.

ONGOING OUTREACH & EDUCATION

ONGOING OUTREACH AND EDUCATION

49 CFR 26.39 

23 CFR 230.204 

The most successful ACM projects included sustained outreach throughout the life of the project by both the owner and contractor. Supportive services offered only on the front end of an ACM project could set small businesses up to fail, especially as contract responsibilities for Federal-aid subcontractors are extensive and can be complicated for small businesses new to Federal requirements. Moreover, ACM contractors can only forecast subcontracting needs. They have no way of knowing the number or extent of change orders, if unforeseen issues will arise, or whether identified subcontractors will remain on the project. The practitioner should promote any activity that encourages the use, sustainability, education, and growth of small and disadvantaged businesses.

- The Horseshoe Project in Texas required the developer to engage in outreach, training, and matchmaking events throughout construction of the project.
- Virginia's I-95 Express Lanes project required ongoing and cooperative efforts by the developer and VDOT

BEST PRACTICES

BEST PRACTICES TO ENCOURAGE / CONTRASTED WITH PITFALLS TO AVOID

FIGURE VII

✓ ENCOURAGE	✗ AVOID
<p>A documented process for certifying project-level compliance</p> <p>Whether a standalone review or a compilation of compliance documentation, accountability is a requirement of the regulations and the only means of demonstrating DBE program integrity on projects.</p>	<p>Certified or sworn statements of compliance with no underlying support or validation</p> <p>Collecting certified statements from contractors or recipients without a means of verification leads to the potential for false statements (the largest number of OIG investigations are related to the DBE program).</p>
<p>A reliable method for comparing payments to DBE commitments</p> <p>Whether a spreadsheet, computer program, or compliance review, recipients must have a demonstrated method of ensuring a running tally toward goal achievement. Despite regulatory flexibility, the ongoing nature of running tally suggests that a single evaluation may be insufficient to document compliance on an ACM project.</p>	<p>Allowing the DBE Semiannual Uniform Report of Awards and Commitments to serve as the lone report of program performance</p> <p>The regulations now require a project level means of ensuring a running tally. Reliance on system-wide program reporting may not be enough to comply with 26.37(b).</p>
<p>Monitoring or Oversight Plan specific to the ACM project</p> <p>Documenting expectations for oversight reduces the likelihood of later resistance. Developers and contractors can also be important resources for identifying issues and proposing solutions.</p>	<p>Assumption that the owner's existing procedures are adequate for ACM</p> <p>After twenty years of ACM experience, one Florida DOT manager said, "These things seem basic but they boil down to the same thing . . . elevating the importance of equal opportunity compliance on the front end avoids problems later on. And in major projects, problems get expensive - for us, for the developer and contractors, and ultimately for the public, our customers."</p>
<p>A proactive CUF process that is sufficiently broad and documented to demonstrate compliance</p> <p>Of the projects surveyed, the ones with fewest compliance issues all had established well-documented CUF and compliance programs. The very best tailored procedures in anticipation of particular ACM project considerations.</p>	<p>Rigid, burdensome CUF processes relying on prime contractors' or their consultants' CUF determinations</p> <p>A firm commitment to compliance is creditable, but when it becomes overly burdensome and resource intensive, it may preclude DBE use and create a roadblock to growth and opportunity. The owner should consider hiring its own CUF consultant.</p>

✓ ENCOURAGE

Use of supportive services and other outreach to achieve the goal

Projects that tailored Supportive Services to major projects had a leg up on increasing DBE capacity and success.

Innovative compliance requirements

A lesson learned in two States resulted in a new requirement for P3s, namely that if at any time during project delivery the owner must add compliance resources, the developer must pay for them. Not likely to be popular among bidders, but it should elevate the importance of program compliance.

Embracing technology

RFPs, PMPs, and other contract instruments can specify the use of electronic systems for collecting and reporting data. The owner can make doing so the responsibility of the developer.

Effective enforcement mechanisms, frequent monitoring, and documentation of DBE Plan implementation

Frequent monitoring of critical DBE requirements such as prompt payment, GFE, return of retainage, and termination and replacement requirements are necessary as well as monitoring DBEPP and revising as necessary. Ongoing monitoring of DBE goal attainments and GFE documentation of DBE Plan implementation is necessary to determine if enforcement mechanisms are appropriate.

✗ AVOID

Not considering the benefits of outreach and supportive services

Without supportive services and outreach, the prime may contend it is unable to locate sufficient DBE participation to achieve the goal.

Shouldering the responsibility for the entire compliance process

Even though the owner is ultimately responsible for compliance, the methods used for review, data collection, and documentation can and should be shared. For example, verifying the accuracy of a design-builder's CUF may be more effective than duplicating the review.

Overreliance on tech-tools without accessing the information or occasionally auditing the results

One State learned a hard lesson on an ACM project currently in construction. The owner must maintain the right to access information created or received by contractors to establish compliance. Contract documents that require use of E-Systems must specify reasonable access by the project owner, regardless of system ownership.

Allowing GFE to be a routine process where efforts are evaluated up front, prior to the delivery phase

While this may be easier, it deprives DBEs of being considered for numerous opportunities that may become available during the life of the contract.

Lack of prompt follow-up on issues, not questioning the reasonableness of planned DBE participation, infrequent monitoring of DBEPP execution, and lack of documentation of DBE issues Not addressing DBE complaints promptly

Only timely, solid, accurate, and complete monitoring and documentation along with an effective enforcement mechanism will motivate a contractor to fulfill its DBE obligations.

FINAL

ACCEPT

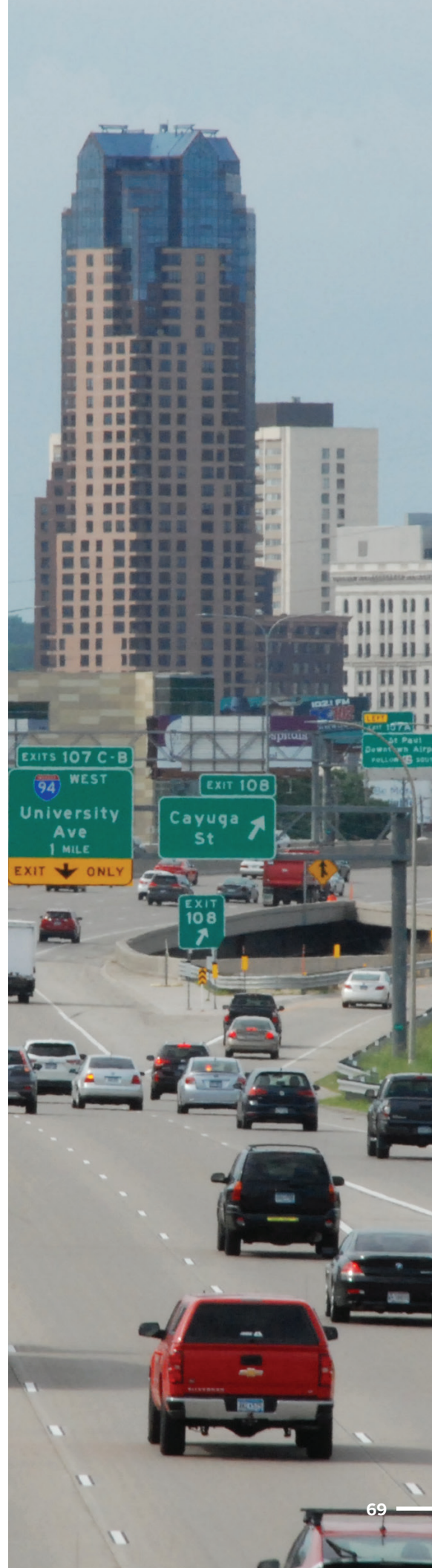
TANCE



**FINAL ACCEPTANCE
AND BEYOND**

FINAL ACCEPTANCE AND BEYOND

By now the practitioner should recognize that there is no one aspect of ACM projects that sets them apart from more traditional D-B-B method of delivery. This is true even after construction is complete. While the Handbook has already covered a number of considerations also applicable to post-construction, this section will further discuss those identified on the surveyed projects.



BEYOND CONSTRUCTION

The practitioner can be forgiven for assuming that final acceptance ends project level involvement. After all, nothing in traditional contracting lends itself to federally funded maintenance or ongoing activities. However, with ACM projects come additional considerations. For example, and as previously mentioned, ACM projects may include as “maintenance” type work anticipated future resurfacing(s) of the facility. Similarly, operation of the facility might require the use of various eligible professional services. The practitioner should remain vigilant that all Federal-aid opportunities are identified and that there is a compliance mechanism to provide accountability.

There are other post-construction items that might prove helpful in administering or overseeing the DBE program. By no means comprehensive, the surveyed projects identified the following:

I-495 and I-95 Express Lanes

Virginia took a visionary approach to the DBE program on ACMs. It collected issues and suggestions identified during delivery of I-495 and developed a checklist that it then used on the I-95 project. This helped staff to avoid repeating mistakes or unsuccessful practices and to carry forward activities that were especially useful. Virginia modifies the checklist as warranted and currently uses it on all of its major ACM projects. It has the added benefit of dispelling contractor resistance in that it serves to justify recipient rationale for requests or requirements.

FHWA Office of Infrastructure

Though this Handbook has focused on recently completed projects, the workgroup identified a strong practice in the FHWA Office of Infrastructure. Thanks to lessons learned on Tappan Zee Bridge (NY), the Horseshoe project (TX), and other ACMs, Major Project Engineers have developed a risk-based, team approach to high profile projects before NEPA evaluation is completed. The engineers meet with each Division discipline responsible for the upcoming project, including oversight practitioners. They collectively score the project for risk likelihood and impacts before developing an oversight monitoring plan. While not every major or ACM project is assessed, this represents an interdisciplinary examination of projects that can be easily sized or duplicated for Divisions.

BEST PRACTICES

BEST PRACTICES TO ENCOURAGE / CONTRASTED WITH PITFALLS TO AVOID

FIGURE VIII

✓ ENCOURAGE	✗ AVOID
<p>Maintaining a list of lessons learned that can be applied to future ACM projects</p> <p>While no one project will ever be identical to another, each may benefit from lessons learned from previous projects if sufficient information is documented and maintained. A documented, experience-based rationale also makes it easier to explain requirements to contractors on upcoming projects.</p>	<p>Approaching each project in a vacuum without the benefit of past experience</p> <p>ACM projects push the limits of regulations and raise complicated questions—new solutions today can become future standard practice. Unfortunately, decentralized programs may not be able to measure effectiveness from project to project. This makes the Division an important part of recognizing trends/issues.</p>
<p>Including ACMs as part of inter-disciplinary discussions of risk, responsibility, and resource sharing</p> <p>All of those surveyed reported early cooperation and communication as a key to successful ACM delivery—an approach that fits well into the FHWA RBSO framework. A documented assessment is an excellent way of informing needs on future projects and continuity of knowledge despite staff attrition.</p>	<p>‘Not my problem’ mentality</p> <p>A recurring theme in this Handbook is that shared responsibility results in an overall better project. This necessarily means that it is essential for civil rights and compliance staff to partner with engineering, inspections, and management to identify, address, and learn from both mistakes and successful practices.</p>

RESOURCES



RESOURCES

The HCR is not the only office or organization researching ACM practices or providing information about innovative project delivery.

CONSIDER THE FOLLOWING FOR ASSISTANCE:

[Office Q&A's for DBE Program Regulation 49 CFR Part 26](#) ↗

US DOT's 2016 update to the DBE Q&A's, including the most recent information on prompt payment and retainage return.

[Federal Aid Essentials](#) ↗

FHWA Resource Center series of videos for LPA compliance, specifically DBE overview; Contract Admin; Prompt Payment; Contract Goals; GFE; CUF.

[Increasing DBE Participation on Design-Build Projects](#) ↗

South Carolina DOT and Division Office provide brief description of increasing DBEs on ACM projects.

[NCHRP Synthesis 481](#) ↗

A 2013-2015 compendium of current practices used to set and monitor DBE goals on design-build projects and other alternative project delivery methods.

[DBE Considerations in Procurement of Professional Services](#) ↗

2016 updated Q&A's regarding DBE program requirements in procurement, management and administration of design and engineering services.

[FDOT Specialized Development Program](#) ↗

FDOT operates both FHWA and State funded supportive services. The Specialized Development Program assists contractors with locating DBEs on larger and ACM projects.

ACRONYMS

ACM Alternative Contracting Methods	LPA Local Public Agencies
ARRA The American Recovery and Reinvestment Act of 2009	MAP-21 Moving Ahead for Progress in the 21st Century
ATC Alternative Technical Concepts	MBE Minority Business Enterprise
Caltrans California Department of Transportation	MNDOT Minnesota Department of Transportation
CDOT Colorado Department of Transportation	MoDOT Missouri Department of Transportation
CFR Code of Federal Regulations	MP Major Project
CM/GC Construction Manager/General Contractor	MPO Metropolitan Planning Organization
CMR/CMAR Construction Manager at Risk	NEPA National Environmental Policy Act of 1969
CUF Commercially Useful Function	O&M Operation and Maintenance
D-B Design-Build	OIG US Department of Transportation Office of Inspector General
D-B-B Design-Bid-Build	P3 or PPP Public-Private-Partnership
DBE Disadvantaged Business Enterprise	PMP Project Management Plan
DBEPP Disadvantaged Business Enterprise Performance Plan	PRG Procurement Review Group
DBFOM Design-Build-Finance-Operate and Maintain	RBSO Risk Based Stewardship and Oversight
DOT Department of Transportation	RFP Request for Proposals
EEO Equal Employment Opportunity	RFQ Request for Qualifications
FHWA Federal Highway Administration	SAFETEA-LU Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
FAST Act Fixing America's Surface Transportation Act	TEA-21 Transportation Equity Act for the 21st Century
GDOT Georgia Department of Transportation	TIGER Transportation Investment Generating Economic Recovery
GFE Good Faith Efforts	TIFIA Transportation Infrastructure Finance and Innovation Act
HCC Federal Highway Administration Office of Chief Counsel	USDOT United States Department of Transportation
HCR Federal Highway Administration Office of Civil Rights	VDOT Virginia Department of Transportation
ICC Intercounty Connector	WBE Women Business Enterprise
IHE Institutions of Higher Education	
IPD Integrated Project Delivery	
ITP Instructions to Proposers	

IN CLOSING

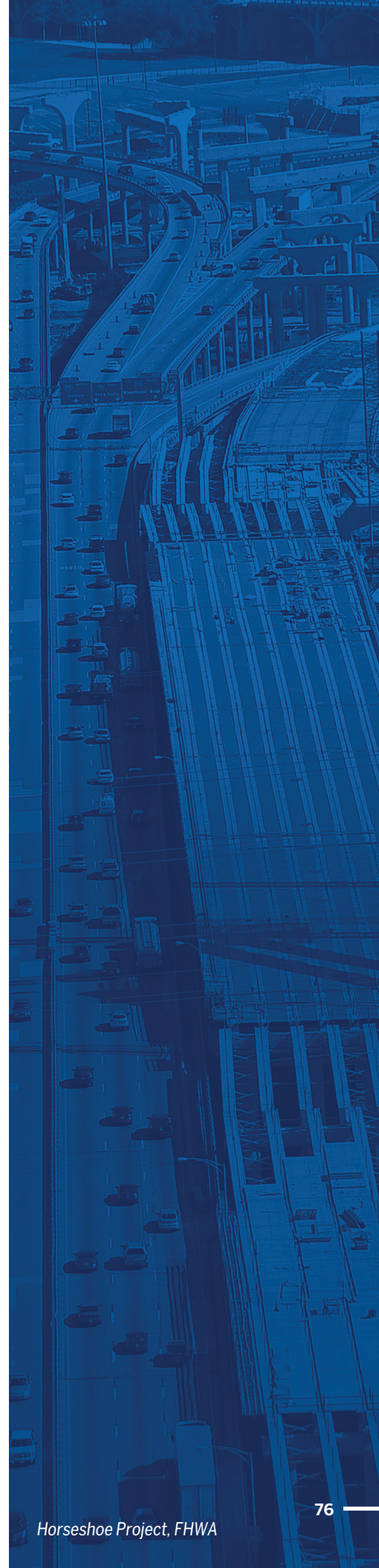


IN CLOSING

IN CLOSING

In the highway construction industry, the need to provide better facilities with fewer resources and in less time constantly drives innovation and experimentation, movement that can be faster than the governing regulations, official guidance, and standard practices and procedures. This is particularly true in project delivery, as expansion of innovative and alternative financing, contracting, and partnering has far outstripped traditional regulatory interpretation of oversight responsibilities in Federal-aid. As stated in the Introduction to this Handbook, FHWA civil rights and oversight practitioners have an added challenge in this fast-paced, progressive environment. They are tasked not only with ensuring corresponding compliance oversight, but also that DBEs and other small businesses remain adequately positioned for work and have meaningful opportunities to compete for their piece of these innovative projects.

The HCR hopes that this Handbook, developed in cooperation with the FHWA workgroup and the staffs of numerous Divisions proves helpful as FHWA continues to explore innovative methods to accelerate project delivery. The Handbook is intended to be easily comprehensible, practical advice for successful stewardship of DBE programs on ACM projects. However, although the contributors to the Handbook all have current or past experience in ACM, each emphasizes that it is only a beginning, a tool for sharing notable practices, lessons learned, and pitfalls to avoid. The HCR encourages civil rights and other practitioners to share questions, comments, advice and emerging issues on ACMs so that the Handbook remains a living compendium of information and a useful tool well into the future.





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