Managing and Monitoring DBE and SBE Compliance on a Large Scale Design-Build (P-3) Projects

Zamy Silva, Civil Rights Senior Manager
• Design-Build Environment
• Design-Build Advantages and Disadvantages
• DBE/SBE Office - Pre-Solicitation Role and Responsibilities
• DBE/SBE Office - Post-Solicitation/Prior to Award Role and Responsibilities
• DBE/SBE Office - Post-Award Compliance Monitoring and Oversight (Best Practices)
• P-3 Example and DBE/SBE Goals & Attainment
The Design-Build Environment
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Includes the following contracting methods:

- Design-Build Projects (DB)
- Construction Management General Contractor (CMGC) & CMGC at Risk
- Turnkey Projects
- Design-Build Operate & Maintain (DBOM)
- Design-Build Own Operate & Maintain (DBOOM)
- Public Private Partnership (3P)
- Comprehensive Development Agreements (CDA)
- Concessionaire Agreements
- Mega/Large/Multi-Year Projects
- Alternative Project Delivery System
The Design-Build Advantages and Disadvantages
The Design-Build Advantages

• Single Point of Responsibility
• Provides Long-Term Accountability
• Multidisciplinary Influences on Project: Designer, Constructor & Operator
• Price Savings – Predictable Cost – Lower Total Cost
• Time Savings – Faster Completion/Guaranteed On-time Delivery
• Less Owner Management/Oversight
• Improved Quality & Innovation
The Design-Build Disadvantages

- Loss of Owner Control
- Limited Exposure to D/B Process
  - Challenge to fully participate in every Phase
  - Challenge to fully consider DBE issues pre-bid
  - Challenge to modify DBE contract requirements
  - Failure to obtain technical assistance pre-bid
  - Failure/uncomfortable partnering with contractor
  - Failure/uncomfortable partnering internally & perceptions
- Failure of D/B Contractor to Fully Implement DBE Program Requirements and Commit to the Objectives
DBE/SBE Office Pre-Solicitation Role and Responsibilities
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• When should DBE/SBE Office get involved on a Large Scale Design Build Project? DBE/SBE Office must have a voice at the table.

• Goal assessment (Decide whether this project will be part of the Agency’s triennial DBE goal methodology or submit a separate goal methodology for the project to your Federal Administrator?). Establish 2 goals: Design and Construction.

• Get ahead of the project, involve leadership in outreach and communication efforts to the DBE/SBE community to solidify the importance of the DBE/SBE programs with your organization on the project, raise awareness and get DBEs and SBEs ready.

• Understand the method and type of procurement being used (RFQ/RFP process, design build or other alternative methods: CMGC/CM@Risk, etc.)

• Understand why the organization decided on a design-build, CMGC/CM@Risk.

• Can’t advocate if you don’t know what’s going on or the delivery method.
DBE/SBE Office Pre-Solicitation Role and Responsibilities (cont.)

DBE/SBE Evaluation criteria on the solicitation and DBE goals and requirements

- Prime must identify a DBE Manager/Liaison as a key personnel in the solicitation
- DBE/SBE plan must be clearly defined to include proposer’s written approach and strategy to the overall administration of their DBE/SBE program in that project
- DBE/SBE plan should be part of the overall evaluation criteria
- Ask for DBE/SBE Schedule of Participation and Letters of Intent only for the scopes of work that have clearly been defined (may be 100% of design or 1st year or 2 of project, etc.)
- Include a DBE/SBE Flow-down provisions that will essentially become contractual and require that these provisions are inserted in every subcontract with DBEs/SBEs at every tier
- Ask for a DBE commitment (responsiveness vs. responsibilities)
- Require all potential proposers to host their own outreach events
DBE/SBE Office Post-Solicitation/Prior to Award Role and Responsibilities
DBE/SBE Office Post-Solicitation/Prior to Award Role and Responsibilities

• Understand procurement schedules and deliverables
• Combine Pre-Proposal meetings with intentional outreach efforts
  - Invite potential proposers and all small businesses for networking opportunities
• Evaluate solicitation
Meetings:
- Attend kick-off meeting between DBE/SBE office, project manager, procurement, and selected contractor.
- Schedule ongoing compliance meetings with contractors
- Attend all monthly meetings

Review and refine DBE plans and programs submitted with the proposals

Address all reporting requirements
DBE/SBE Post-Award Compliance Monitoring & Oversight (Best Practices)
Establish a comprehensive compliance oversight and monitoring efforts (reports, written certification, CUF reviews, prompt payment, retainage, termination/substitution/reduction of work, good faith efforts, etc.)

1. Project specific dedicated staff
2. Re-define relationship with Contractor – Trust
3. Define expectations – relationship, meetings, reports, plan modifications, pre-approvals, approvals, complaints, removals, replacements, substitutions, community involvement, change
4. Subcontract Agreements and flow-down provisions
5. What are your supportive services/technical assistance/expectations
6. Define how you are handling Mentoring
7. Define how you are going to handle “graduated” DBE firms (impact of change orders/extensions)
8. Address counting DBE/SBE Participation
9. Prompt Payment of DBE/SBE Subcontractors
10. DBE/SBE Removal/Terminations/Substitution/Reduction of Scope from Contract
11. Good Faith Efforts
12. Joint Check Utilization - a two party check between a DBE/SBE, a prime contractor and a regular dealer of materials/supplies. Must be pre-approved by your organization, must be initiated by the DBE to remedy a financial hardship for a specific period of time and must be reported on a monthly basis in order to receive DBE participation credit.
Modifications and Substitutions (Termination and Replacement of DBEs)

- You must require that a prime contractor not terminate a DBE subcontractor (or an approved substitute DBE firm) without your prior written consent. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.

- Before transmitting to you its request to terminate and/or substitute a DBE subcontractor, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to you, of its intent to request to terminate and/or substitute, and the reason for the request.

- The prime contractor must give the DBE five days to respond to the prime contractor's notice and advise you and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why you should not approve the prime contractor's action.

- Is there just cause per 49 CFR part 26.
Assessing Good Faith Efforts after a termination of a DBE

• If just cause exists and the agency agrees and approve a termination of a DBE firm include in your approval letter the good faith efforts steps that must be taken by the contractor for substitution and approval of new DBE, the 7-day deadline to submit GFE documentation, etc.
  - Have contractors identify areas for additional DBE participation and assist in identifying those areas if requested or needed
  - Review Contractor’s Efforts to Replace DBE or increase level of DBE Participation
  - Approve new DBE firms in writing (check NAICS codes - ensure that DBEs are properly certified to provide the scope of work that the prime intends to use them for)
Assessing Post-Award ongoing Good Faith Efforts to ensure DBE participation and prime commitments

• Don’t wait until the end of the project, ensure contractors are documenting GFEs on a ongoing basis
• Work with Project Manager to understand the following
  - Impact on Construction
  - Impact on Budget
  - Impact on Schedule
  - Reasonableness of Proposed Changes
• Assess Contractor’s DBE Plan on a yearly basis
• Assess Proposed DBE Utilization Plan v Actual DBE Utilization
• Examine Reasons for any Substitution or Modifications
DBE/SBE Post-Award Compliance Monitoring & Oversight (Best Practices; cont.)

• Agency Review of Contractor’s GFE
  - Going beyond “Pro-Forma” Efforts
  - Reasonableness of Efforts
  - Interfacing with new DBEs and rejected DBEs
  - Development of findings and determination

• Reconsideration Process

• Keeping an ongoing relationship with the DBE community and working with primes and understanding their ongoing good faith efforts with the intent to maximize DBE participation and meeting their commitments
P-3 Project Overview and DBE/SBE Goals & Attainment

• Eagle P3 is a public-private partnership comprised of RTD’s University of Colorado A Line, Gold (G) Line, Commuter Rail Maintenance Facility and the Northwest Rail (B) Line Westminster segment.

• The Eagle P3 Project is being delivered and operated under a concession agreement that RTD has entered into known as Denver Transit Partners (DTP), a special purpose company owned by Fluor Enterprises, Uberior Investments and Laing Investments.

• A public-private partnership (P3) is an innovative financing and project delivery method in which a public entity partners with the private sector on a public infrastructure project. The private team invests its own money through borrowing or equity and assumes much of the risk associated with a project. This allows the public entity to spread out large up front costs while preserving public cash for use in the early construction years of a project.

• The Eagle P3 is a $2.2 billion capital project comprised of federal funds, RTD sales tax bonds and private equity from the concessionaire team, Denver Transit Partners. Eagle P3 received a $1.03 billion Full Funding Grant Agreement (FFGA) from the Federal Transit Administration on Aug. 31, 2011.
Eagle P-3 had 4 Goals

- DBE Design Goal: 19%
- DBE Construction Goal: 20%
- SBE Design Goal: 19%
- SBE Construction Goal: 18%

- DBE Design Goal Attainment: 20.85%
- DBE Construction Goal Attainment: 24.30%
- SBE Design Goal Attainment: 45.63%
- SBE Construction Goal Attainment: 42.34%