

NCDOT DBE Open-Ended Performance Plan (OEPP) Procedures for Design-Build Projects

In design-build contracting, the Department will set a DBE goal that a proposer must show how it plans to meet the goal when submitting a DBE Open-Ended Performance Plan (OEPP) with its technical proposal. To be considered responsive, the OEPP must include a commitment to meet the goal and provide details of the types of subcontracting work or services (with projected dollar amount) that the proposer will solicit DBEs to perform. The OEPP must include an estimated time frame in which actual DBE subcontracts would be executed.

Once the design-build contract is awarded, the Department will provide ongoing monitoring and oversight to evaluate whether the Design-Build Team is using good faith efforts to comply with the OEPP and schedule. The Department and the Design-Build Team may agree to make written revisions of the OEPP throughout the life of the project, *e.g.*, replacing the type of work items the Design-Build Team will solicit DBEs to perform and/or adjusting the proposed schedule, as long as the Design-Build Team continues to use good faith efforts to meet the goal.

Pre-Award Submittal Requirements

The DBE Open-Ended Performance Plan (OEPP) must be submitted with the technical proposal during the design-build procurement process. To be deemed a responsive bidder, the OEPP must contain the minimum requirements:

- ✓ A commitment to meet the goal
- ✓ Details regarding the types of DBE subcontracting opportunities with projected dollar values that the proposer will solicit DBE participation
- ✓ Estimated time frame in which actual DBE subcontracts will be executed
- ✓ Annual participation target by contract year
- ✓ Proposed DBE Outreach Efforts
- ✓ Statement provided by the proposer agreeing to take all reasonable steps to follow the DBE Open-Ended Performance Plan and meet the DBE requirements as stated in the proposal.

The OEPP is considered Pass/Fail. If a bidder fails to meet the requirements, they will be considered nonresponsive. The OEPP that was included with the technical proposal shall be included in the executed contract and shall become a contractual obligation. The Resident Engineer should become familiar with the details included in the OEPP.

Construction Phase – Proposed OEPP

The Construction Unit and Office of Civil Rights shall be invited to the preconstruction conference and the monthly construction meetings. Topics that should be discussed include but are not limited to: OEPP scopes of work, anticipated timeframe for subcontracts, good faith requirements (if any change is needed), prompt payment requirements, and any other topics relative to the OEPP.

Within thirty (30) days of beginning construction, the Design-Build Team shall submit to the Resident Engineer an OEPP Monitoring Spreadsheet that is consistent with the OEPP included in the contract. The OEPP Monitoring Spreadsheet must include the following details:

- ✓ Scopes of work anticipated to meet the DBE commitments
- ✓ Anticipated Dollar Value of Commitments for each work scope

- ✓ Anticipated timeframe for DBE commitments to be made and availability of subcontractor work
- ✓ Anticipated DBE participation breakdown by calendar year
- ✓ OEPP Point of Contact (POC) for the Design-Build Team

The Resident Engineer will forward the OEPP Monitoring Spreadsheet to the Construction Unit and the Office of Civil Rights for review. A review will be made to ensure it conforms with the original OEPP included in the contract. Any changes to the original OEPP must be approved during this review step.

OEPP Performance Meeting

Upon approval of the OEPP Monitoring Spreadsheet, the Resident Engineer will schedule the first OEPP Meeting. The OEPP Meeting shall be held every three (3) months. Parties that should be invited to the meeting include: the Point of Contact (POC) and Decision Makers for the Design-Build Team, Area Construction Engineer, Office of Civil Rights Utilization and Compliance Manager, the State Construction Operations Engineer, Federal Highway Administration (FHWA), and any other parties interested in the OEPP. Topics of conversation at the OEPP Meeting shall include:

- ✓ When will scopes of work identified in the OEPP Monitoring Spreadsheet be needed.
- ✓ If scopes of work will occur within the next three (3) months, the Design-Build Team's Point of Contact shall discuss efforts being made to secure a DBE commitment. A good faith effort must be made to alter the work scopes identified in the OEPP Plan.
- ✓ If commitments have been made, the Design-Build Team's Point of Contact shall discuss when work will begin and any payments made to date.
- ✓ Any changes that are needed to the OEPP Monitoring Spreadsheet. This includes changing the scope of work to make a commitment, commitment amounts, changes to the committed subcontractors, or any other significant change to the OEPP.
- ✓ Overall progress toward ensuring DBE goals will be met.
- ✓ The Design-Build Team shall be asked if they need any assistance in recruiting firms that are ready, willing, and able. If so, the Office of Civil Rights will be able to provide assistance.

Commitments

Once the Design-Build Team has selected a DBE to complete a scope of work identified in the OEPP, the Design-Build Team must submit a Letter of Intent (LOI) committing to a specified scope and dollar amount of work. A Subcontract Approval Form (SAF) shall also be submitted to the Resident Engineer. The Resident Engineer shall review the Letter of Intent to ensure it conforms with the OEPP. If it conforms, the Resident Engineer will approve and submit the Letter of Intent to the Construction Unit and the Office of Civil Rights. If it does not conform, the Letter of Intent shall be sent to the Construction Unit and the Office of Civil Rights for review and comments. Comments shall be provided back to the Resident Engineer within five (5) business days. Once the Letter of Intent has been approved, the Resident Engineer will review the SAF to ensure conformance with the commitments and verify that it has been completed correctly as detailed in the Construction Manual. Upon a successful review, the Resident Engineer will approve the SAF and enter the information into HICAMS.

With the approval of both documents, the Design-Build Team shall submit an updated version of the OEPP Monitoring Plan with the commitments shown. All changes to the OEPP shall be tracked on the sheet labeled *Modification History*. The Resident Engineer will upload the updated version of the OEPP to the SharePoint team site and share it with the Construction Unit and the Office of Civil Rights. Upon written consent of the Resident Engineer, the committed subcontractor will be required to perform the work as designated in the Letter of Intent (LOI).

Modifications

Any modification of the OEPP Monitoring Spreadsheet must be reviewed by the Resident Engineer, the Construction Unit, and the Office of Civil Rights. A modification is considered any of the following:

- ✓ A change to the work scopes identified in the OEPP
- ✓ A change to the committed value of work
- ✓ A change to the committed subcontractor

Any modification to the OEPP must be reviewed by the Resident Engineer, Construction Unit and the Office of Civil Rights. Comments shall be provided to the Resident Engineer within five (5) business days with a recommendation of approval/denial. The Resident Engineer will review all comments and provide a response to the Design-Build Team. Any changes approved must be made in the OEPP Monitoring Spreadsheet and denoted to the sheet labeled *Modification History*.

If the Design-Build Team is not able to procure a DBE to perform a specific area of work as designated in the OEPP Monitoring Spreadsheet, then the Design-Build Team shall submit a good faith effort report to the Resident Engineer which provides the following information:

- ✓ Solicitations shall be provided at least thirty (30) days prior to the availability of the work scope as defined in the DBE Open-Ended Performance Plan.
- ✓ Solicitation through all reasonable and available means, including use of the NCDOT Directory of Firms for all available certified DBEs who have the capacity to perform the work.
- ✓ A summary of all interested bidders who provided quotes and written justification for selection of a non-DBE.
- ✓ Provide a revised DBE Open-Ended Performance Plan specifying new work scopes that can be used to achieve the DBE goal.

The Resident Engineer will forward all information to the Office of Civil Rights and the Construction Unit and consider this as modification. Comments shall be provided to the Resident Engineer within five (5) business days with a recommendation of approval/denial. The Resident Engineer will review all comments and provide a response to the Design-Build Team. If the Design-Build Team's request is approved, they must identify a new scope of work to procure DBE participation. The OEPP Monitoring Spreadsheet must be updated to reflect the new scope and the sheet labeled *Modification History* shall be updated with the changes.

OEPP Monitoring Spreadsheet

The OEPP Monitoring Spreadsheet shall be updated and submitted to the Resident Engineer every three (3) months or upon approval of any modification, whichever comes first. All payments made to the subcontractor shall be reported in the Subcontractor Payment Tracking System and updated on the spreadsheet.

The OEPP Monitoring Spreadsheet can be downloaded from the Construction Unit's website for use on any project. The sheets included in the OEPP Monitoring Spreadsheet are as follows:

- ✓ OEPP During DB Process – A copy of the OEPP plan submitted during the design-build procurement shall be included in the document as a reference.
- ✓ OEPP Proposed – Design-Build Team shall complete this sheet within thirty (30) days of beginning construction detailing all scopes of work, anticipated commitment value, anticipated commitment date, and anticipated participation by year of construction

- ✓ OEPP Commitments – Design-Build Team shall update commitments to the scopes of work as they are made, specific details including subcontract number, date of approval, actual commitment, and payment information as compared to the target participation identified in at the time of commitment and tracking of total DBE Commitments.
- ✓ Modification History – History of all changes made to the OEPP Monitoring Spreadsheet. This should include a summary of comments made by the Resident Engineer, Construction Unit, and the Office of Civil Rights.

The Resident Engineer shall review the OEPP Monitoring Spreadsheet each time the contractor submits a modification. For each OEPP submittal, the Resident Engineer's review should include, but is not limited to, the following:

- ✓ Modifications to the OEPP
- ✓ Payments reported on the OEPP. These should also be reported via the NCDOT Subcontractor Payment Tracking System
- ✓ Commitments made during the life of the project
- ✓ Review tracking of DBE goals for each calendar year and overall performance
- ✓ Any other changes that the Design-Build Team has proposed

Failure to meet DBE Goals

A written justification with supporting documentation shall be submitted to the State Construction Engineer if the DBE goal is not achieved at the project conclusion. Failure to meet contract requirements in accordance with Subarticle 102-15(J) of the *Standard Specifications* may be cause to disqualify the Prime Contractor or any affiliated companies within the Design-Build Team from further bidding.