



Disadvantaged Business Enterprise Program

Airport Concessions Disadvantaged Business Enterprise Program

FINAL RULE

OST • FAA • FHWA • FTA

DBE Open Ended Performance Plans (OEPP) for Design-Build Contracts



Introductions



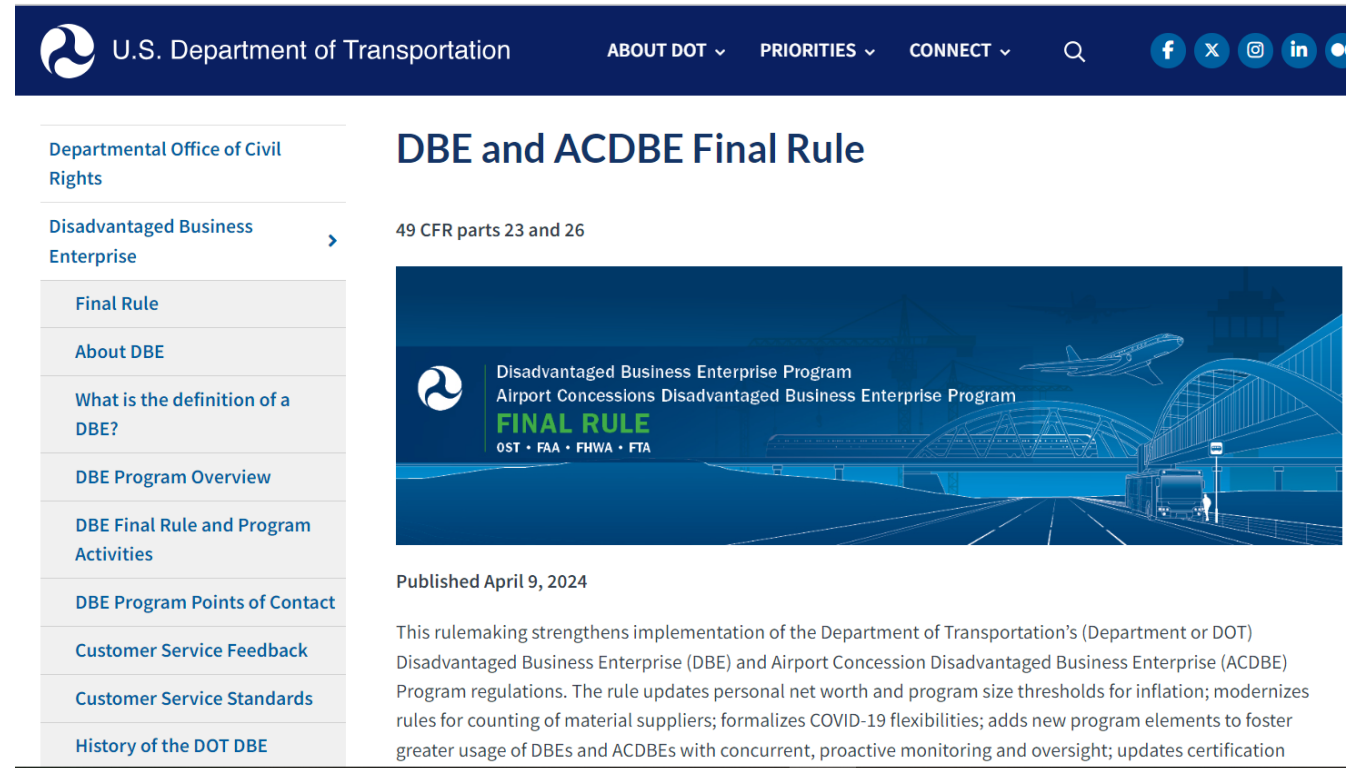
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Agenda

- What is design-build
- Explain what an open ended performance plan is
- Explain the criteria for open ended performance plans
- Review the new regulation
- Share examples

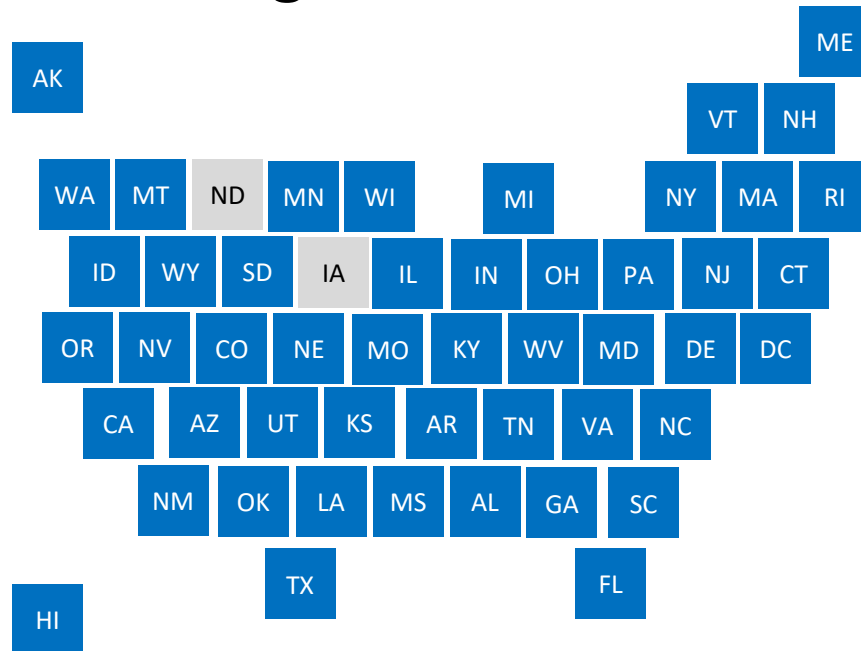


The screenshot shows the U.S. Department of Transportation website. The header includes the DOT logo, the text "U.S. Department of Transportation", and navigation links for "ABOUT DOT", "PRIORITIES", and "CONNECT". Social media icons for Facebook, Twitter, Instagram, and LinkedIn are also present. A left-hand navigation menu lists: "Departmental Office of Civil Rights", "Disadvantaged Business Enterprise" (with a right arrow), "Final Rule", "About DBE", "What is the definition of a DBE?", "DBE Program Overview", "DBE Final Rule and Program Activities", "DBE Program Points of Contact", "Customer Service Feedback", "Customer Service Standards", and "History of the DOT DBE". The main content area is titled "DBE and ACDBE Final Rule" and indicates "49 CFR parts 23 and 26". Below this is a large banner image with the DOT logo and the text "Disadvantaged Business Enterprise Program Airport Concessions Disadvantaged Business Enterprise Program FINAL RULE OST • FAA • FHWA • FTA". The banner is dated "Published April 9, 2024". The main text describes the rulemaking as strengthening implementation of DOT's DBE and ACDBE program regulations, updating thresholds for inflation, modernizing rules for counting material suppliers, formalizing COVID-19 flexibilities, adding new program elements, and updating certification.

<https://www.transportation.gov/DBEFinalRule>

OEPP applies to your state if you can answer yes

- Does your state have design-build legislation?



- Does your state use design-build for transportation projects?
- Does your state have a race-conscious DBE program? Does your state set DBE goals on projects?

What is Design-Build?

- Agency contracts with a **SINGLE** entity to design and construct the project
 - Known as the design-builder or the design-build team
- Proposals based on:
 - Defined performance criteria
 - Very limited design detail
- Single-phase or two-phase procurement process
- Awards may be based on:
 - Low bid
 - Best value (most common)
 - Qualifications (example: progressive design-build)
- Design-build method operationalized for Federal-aid in 2002
 - 23 U.S.C. 112(b)(3)
 - FHWA published 23 CFR part 636

Design-Build

Agency
Identifies
need



Agency
defines
basic scope
of project
with limited
details



Advertises
project as a
design-
build
contract



Proposers
submit
OEPP to
verify their
commitme
nt to the
DBE goal



Contract
Award



design-
builder
completes
design and
constructio
n of project
and GFE to
achieve the
goal

Resources to Learn More About Design-Build

- FHWA's design-build project delivery web page
- <https://www.fhwa.dot.gov/construction/cqit/desbuild.cfm>
- FHWA's alternative contracting methods (ACMs) library
- <https://www.fhwa.dot.gov/construction/contracts/acm/>

DBE Program Considerations in Design-Build

- Sponsor has choice of setting an overall DBE goal **OR** setting individual DBE goals on design and construction.
- Every design-build project is different, as well as the sponsor's goals.
- Some states may want to apply design goal to assure design-builder makes GFE to use professional services firms. Some sponsors prefer to give flexibility to the design-builder with an overall goal.
- DBE team must collaborate with the project development team to understand project details and how best to apply the DBE program.

DBE Program Challenges in Design-Build

- Design build contracts typically advertised at 20-30% plans. Many details yet to be determined – final design, materials, quantities, scheduling.
- For projects with a DBE goal, proposers must submit a commitment plan.
- DBEs reluctant to subcontract due to lack of project details.
- DBEs may commit to subcontracts with lack of details they possibly cannot fulfill.
- Proposers submit documentation of why they cannot achieve the goal instead of subcontracting with DBEs. Premature!

What is the solution for Design-Build?

- Instead of proposers verifying their commitment to the DBE goal with named DBEs, they submit a commitment to meet the goal with details of anticipated subcontracting opportunities.

DBE Open Ended Performance Plan (OEPP)

History of OEPP

- The DBE OEPP was considered a best practice since 2015 but many states did not understand how and why to implement.
- A few Design-build projects were testing the OEPP:
 - The [Governor Mario M. Cuomo Bridge](#)
- In 2018 FHWA published:
 - [Administration and Oversight of DBE Program on Projects with Alternative Contracting & Procurement Methods Handbook](#)



FHWA Every Day Counts Program

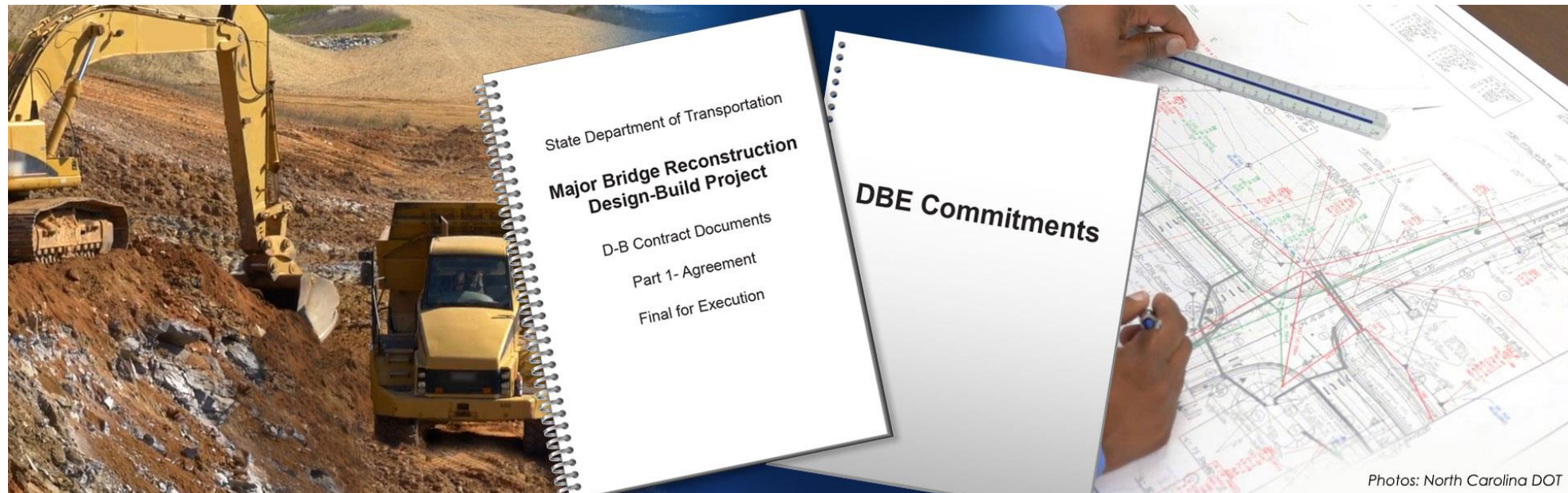
- The Federal Highway Administration's [Every Day Counts \(EDC\)](#) program accelerates the delivery of highway projects and fosters an innovative culture in the transportation community.
- February 2023
 - OEPP selected as an EDC-7 Innovation.
 - Equity and civil rights were selection categories
 - Critically important to improving transportation policies and practices.



Every Day Counts Round 7

- Rethinking DBE for Design-Build

Many disadvantaged business enterprise program procedures do not adequately address design-build contracting. New practices are available to support the effective integration of program requirements to help small, disadvantaged businesses compete for design-build contracts



The New 49 CFR 26.53(e)

- Proposers must meet DBE goal by submitting a DBE Open-Ended DBE Performance Plan (OEPP) with their proposal
- OEPP replaces the requirement to provide the information required in paragraph (b) of this section that applies to design-bid-build contracts
- OEPP must include a commitment to use good faith efforts 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.
- The recipient must provide ongoing monitoring and oversight to evaluate whether the design-builder is using good faith efforts to comply with the OEPP and schedule
- The recipient and the design-builder may agree to make written revisions to the OEPP throughout the life of the project as long as the design-builder continues to use good faith efforts to meet the goal.

Details of a DBE Open Ended Performance Plan

A complete OEPP includes:

- Anticipated work type
- Anticipated timeframe of that work
- Anticipated dollar value of the work opportunities

When submitted, OEPP adds up to dollar value of the goal percentage.

Details of a DBE Open Ended Performance Plan (Con't)

- Submitted by all bidders as a condition of a responsive proposal.
- The OEPP is the proposer's binding commitment to use good faith efforts to meet the DBE goal.
- OEPP is first step in the awarded design-builder's good faith efforts to achieve the DBE goal.
- OEPP must be complete: anticipated type of subcontracting or services, time frame and dollar value.
- The sponsor will provide ongoing monitoring of the design builder to assure every effort is made to fulfill the OEPP with actual DBE subcontracts when project details are known.

Example of an OEPP

DBE Plan Work Activities / DBE Contractor	Time Frame	Estimated Dollar Value for DBE Participation	Anticipated DBE %
Surveying	Year 1, Q1	\$7,500	0.38%
Design Support	Year 1 - Q1, Q2	\$5,500	0.25%
Traffic Control	Year 1 – Q2, Q3	\$20,000	1.00%
Excavation	Year 1 - Q1, Q2	\$67,000	3.38%
Erosion Control	Year 1 – Q3, Q4	\$100,000	5.00%
Striping	Year 2 - Q1, Q2	\$10,000	0.50%
Landscaping	Year 2 - Q1, Q2	\$10,000	0.50%
Sum		\$220,000	11.00%

Why is the OEPP Successful?

- DBEs sign subcontracts when the details are known.
- Opportunities for DBEs arise throughout the project, diversifying services DBEs provide.
- Due to details known at time of execution, high probability DBE will successfully complete their subcontract, be paid for their work.
- Design-builders are more likely to achieve the DBE goal with DBE subcontracts (as compared to documented efforts of how they could not).
- Design-builders like the OEPP because they select DBEs when they know more about the project.

Why is the OEPP Successful? (Con't)

- Flexibility to OEPP is essential.
- Design-builders and sponsors work together to address modifications to the OEPP to align with the changing conditions of the project (typical of design-build).
- Design-builder has time to plan and monitor DBE achievement, providing a better experience for the DBEs.

Can OEPP be used for other types of contracting?

- The short answer is no.
- The Department has approved OEPP only for design-build contracting because of the lack of detail needed to make subcontracting commitments to named DBEs prior to contract award.
- The OEPP is a solution to complying with the requirements of 'traditional' DBE commitment plan with named DBEs ([49 CFR 26.53\(b\)](#)).

Best Practices to Evaluate an OEPP

- Expectations of OEPP must be communicated in the contract's Request for Proposals (RFP).
- Anticipated work listed must align with type of work needed for the project.
- A well thought out plan should be scored/evaluated higher.
- The plan must show enough work opportunities for DBEs to achieve the goal.
- A best practice: Request proposers submit a narrative detailing how the OEPP plan was formulated and how it will be successfully implemented. This information would assist the sponsor in evaluation and future monitoring.

Monitoring OEPP

- Recipient monitors the design-builder's efforts to comply with the OEPP and its schedule.
- Recipient and the design-builder can agree on revisions to the OEPP over the course of the project.
- Sponsor must approve all changes to the OEPP.
- As contracts are executed with named DBEs and payments are made, achievement toward the the DBE goal is credited.
- Best practice: Require design-builder to meet regularly with the sponsor to review progress in achieving the OEPP with DBE participation. Require the attendance of design-builder decision-makers.

Evaluation of GFE Post Award

- OEPP at time of award shows anticipated work that adds to the dollar value of the DBE goal
- The plan can be modified throughout the project with different work opportunities, the value of work opportunities or timeframes but it must add up to the goal value.
- If the goal cannot be achieved and no subcontracting opportunities remain in the contract, the prime can submit documentation of their unsuccessful efforts for the sponsor's review and approval.

More on OEPP

- If contract details are available, up-front (design) work can be subcontracted to a named DBE and the value of that contract would be added to the OEPP to show a complete commitment plan.
- If the OEPP includes a named DBE, 49 CFR §26.53 requirements apply, including termination due process requirements.
- If the design work is defined, the sponsor can require a traditional commitment plan for the design work goal (named DBEs as per 49 CFR 26.53(b)) and an OEPP for the construction work.

More on OEPP

- The purpose of the OEPP is to address the lack of the essential project details required in a traditional DBE commitment plan. When the details are known, named DBEs can be identified, and subcontracts executed.
- The contractors lack of effort to implement the plan from work types to actual subcontracts with DBEs is considered a lack of good faith efforts that may lead to breach of contract.

States incorporating OEPP

- New York -
<https://www.fhwa.dot.gov/innovation/everydaycounts/edcnews/20240307.cfm>
- Ohio -
<https://www.fhwa.dot.gov/innovation/everydaycounts/edcnews/20240321.cfm>
- Colorado – [Innovator](#) article in July 2024 edition
- Texas
- Arizona

NYSDOT Approach to OEPP – List of proposed work

Form LDB Table 1 - LIST OF PROPOSED DBE/MBE/WBE/SDVOB PARTICIPANTS							
CONTRACT #				PROPOSER			
Firm Name	DBE/MBE/WBE/SDVOB Certified (Select 1)	1 st or 2 nd Tier	DBE/MBE/WBE/SDVOB NYSDOT/NAICS Codes (See Note 1)	Description of Work	% Credit Claimed (see Note 2)	Work Category (Design, Inspection, Materials, Construction, Trucking, etc) (See Note 3)	Commitment (In Dollars Committed) (See Note 4)

Form LDB Table 2 - PROPOSED WORK FOR DBE/MBE/WBE/SDVOB FIRMS (excluding DBE/MBE/WBE/SDVOB commitments listed in Table 1)			
CONTRACT #		PROPOSER	
Work Category (Design, Inspection, Materials, Construction, Trucking, etc) (See Note 3)	DBE/MBE/WBE/SDVOB NYSDOT/NAICS Codes (See Note 1)	Description of Work	Net Minimum Proposed Participation (in Dollars) (See Note 4)

NYSDOT Approach to OEPP - Timeframe

List proposed DBE Utilization by indicating percentages of the contract value that are anticipated for each 3 month interval over the duration of the contract. Total DBE utilization should agree with Forms LDB – Tables 1 & 2.

Use additional rows as necessary.

PROPOSER		
Time Interval (Beginning at Notice to Proceed)	DBE Work Codes (To be utilized during interval)	Anticipated Utilization (% of Contract Value to nearest 0.1%)
0 – 3 months		
4 – 6 months		
7 – 9 months		

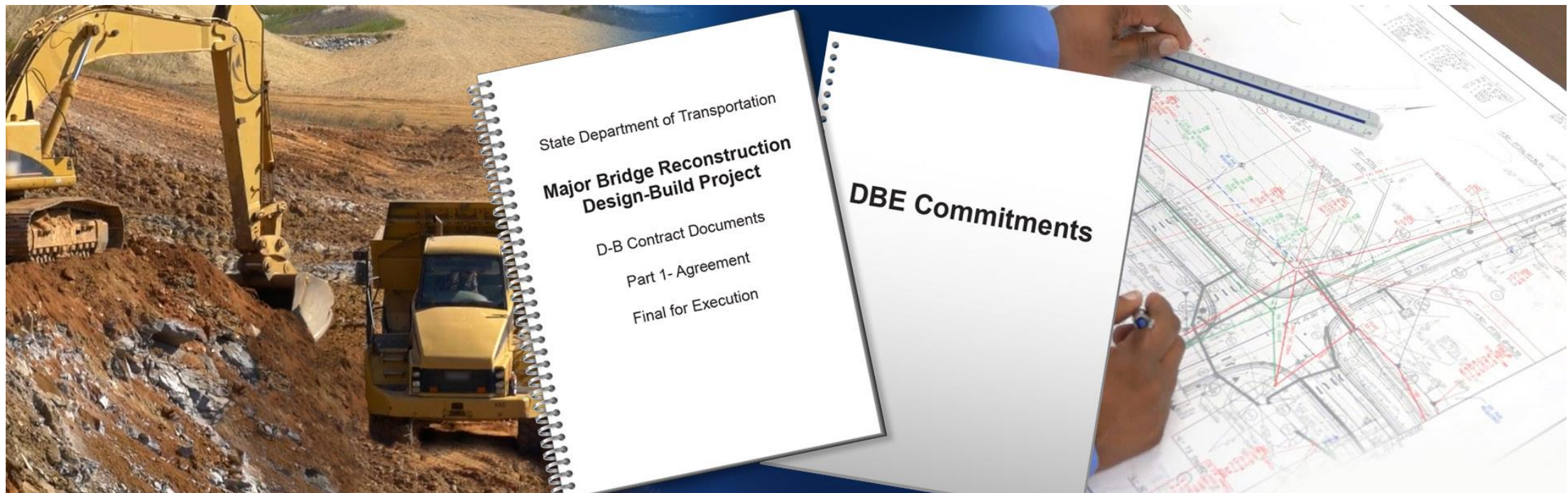
Why now, why is design-build and DBE Program important?

- Bipartisan Infrastructure Law - enacted as the Infrastructure Investment and Jobs Act, P.L. 117-58
- States have additional funding
- Grants are providing more funding
- States can address signature, once in a generation type projects
- Design-build addresses many issues such as lack of resources, project efficiency and in some instances can reduce project costs.
- USDOT is elevating equity, compliance and innovation
- Strong emphasis on wealth creation

Why Educating Stakeholders on OEPP is so important

- Few named DBEs at time of award.
- DBEs may infer selection is complete and there are no more opportunities.
- Confusion about NO pre-award good faith efforts.
- Will monitoring and oversight be more difficult?
- Questions about regulatory compliance and cost.

Will this innovation improve equity and support wealth creation?



Source: FHWA



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Thank you!
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