

Good Faith Efforts

Hawaii Civil Rights Symposium

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23.53 - Good Faith Efforts (GFE) Overview

- * GFE only apply to contract goals;
- * Award contract to lowest responsive bidder
 - * Responsive if DBE goal met
 - * Responsive if demonstrate good faith efforts
- * Appendix A lists GFEs;
- * Matter of **responsiveness or responsibility**;
- * Recipients required to provide “**reconsideration mechanism**” for GFE determinations;
- * Condition of award based on providing information on DBE commitment.

DBE Final Rule – GFE Submission

Responsiveness

- * Bidders/offerors required to submit DBE information at the time of bid

Responsibility

- Bidders/offerors required to submit DBE information no later than 7 days after bid opening;
- The 7 days shall be reduced to 5 days beginning January 1, 2017.
- * The DBE information includes North American Industrial Classification System (NAICS) code of work the DBE will perform on the contract.

DBE Final Rule – GFE Submission

- * When a non-DBE subcontractor is selected over a DBE, copies of the quotes from each DBE and non-DBE subcontractor.
- * The bidder/offerors shall make copies of DBE subcontracts available upon request.

Good Faith Effort

- * Contract Goals

If a prime does not meet the DBE contract goal, it must provide the State DOT with documentation to show that it used “good faith efforts” to do so

- * DBE Replacement

GFE – Termination/Substitutions Good Cause

What Constitutes Good Cause?

- * DBE fails or refuses to sign contract
- * DBE fails or refuses to perform to normal industry standards
- * DBE fails to meet prime's reasonable bond requirements
- * DBE goes bankrupt
- * DBE is suspended or debarred (ineligible for fed. contracts)
- * DBE is not a responsible contractor (in opinion of recipient)
- * DBE voluntarily withdraws
- * DBE is ineligible to receive DBE credit for work type
- * DBE (key person) death or disability
- * Other documented good cause

GFE Overview

- * Bidder took all necessary and reasonable steps to achieve a DBE goal that by their **scope, intensity,** and appropriateness to the objective could reasonably be expected to obtain sufficient DBE participation.
- * Efforts should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to meet the goal.

GFE Overview

- * State DOT must consider the quality, quantity, and intensity of the different kind of efforts the bidder made.
- * Must evaluate overall effort of the bidder's documented good faith efforts.

GFE Overview

- * No formula or point system allowed;
- * Determining sufficiency of a bidder's good faith efforts is a judgment call; meeting quantitative formulas is not required, nor possible;
- * Intrinsically fact-specific judgment call particular to specifics of the procurement .

GFE Guiding Principles

- * Rigorous review of documented GFE required;
- * GFE evaluation begins with the amount of work made available;
- * Lowest price not sufficient reason to reject DBE -- Most primes do not award on low bid alone;
- * Beware of meaningless, pro-forma contact/solicitation;
- * Responding to all GFE does not demonstrate adequate good faith efforts;

GFE – Evaluation Factors

- * Did bidder make **enough work items available** to meet the goal?
- * Did bidder **solicit** available DBEs for work items
 - * Did bidder follow up with specific DBEs?
- * Did **2nd & 3rd bidders** get more DBE commitments?

Enough Work Made Available?



- * Did bidder break out work items?
- * Did Bidder choose to self perform?

Bidder's Subcontract Items

Attachment A-1

Item of Work Offered	Bidder Normally Performs Item (Y/N)	Item Broken Down to Facilitate Participation (Y/N)	Amount (\$)	Percentage of Contract	
AGGREGATE SUPPLY	N	Y	\$266,000	1.97%	No firm selected
ASPHALT DIKE / ASPHALT PAVING	N	Y	\$61,000	0.45%	As Dike only DBE
CONCRETE CORING	N	Y	\$50,000	0.37%	self-perform
CONCRETE SUPPLY	N	Y	\$3,000,000	22.20%	solicited 1 of 13 DBEs Non-DBE
CONSTRUCTION AREA SIGNS	N	Y	\$109,000	0.81%	solicited 2 of 11 DBEs Non-DBE
DEMOLITION	N	Y	\$1,700,000	12.58%	self-perform
ELECTRICAL	N	Y	\$36,000	0.27%	DBE
JOINT SEALS	N	Y	\$341,000	2.52%	self-perform
MATERIALS TRUCKING	N	Y	\$132,000	0.98%	No firm selected
MBGR	N	Y	\$214,000	1.58%	DBE
MINOR CONCRETE	N	Y	\$58,000	0.43%	self-perform
STRIPING	N	Y	\$113,000	0.84%	solicited 3 of 4 DBEs Non-DBE

Reasonable Price



- * When another bidder use a DBE quote that the low bidder rejected, the price is probably not unreasonable.
- * **Some bidders choose to self perform**

No GFE = **GET THE
LOWEST
PRICE!**

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DBE Final Rule – GFE

- * Revised GFE Guidance: A bidder/offeror will not be deemed to demonstrate good faith if:
 - * it rejects a DBE simply because it is not the low bidder, or;
 - * if it is unable to find a replacement DBE at the original price.

Solicitation



- * Written solicitations should be sent to certified DBEs listed to do work made available by bidder See 49 CFR part 26, Appendix A, IV A;
- * Bidder must document solicitation;
- * Soliciting DBEs that do not do relevant work constitutes *pro forma* efforts;
- * Adequate time must be allowed for DBE to respond.

Solicitation



Solicitation Information must include:

- * Bidder contact information – phone and fax number
- * Project number
- * Types of work made available
- * Bid date and time

GFE Evaluation Factors

Review performance of other bidders

- * When apparent low bidder fails to meet the contract goal, but the second low bidder meets it, you may reasonably raise the question of whether, with additional efforts, the apparent low bidder could have met the goal

Adequate Good Faith Efforts?

Quality,
Quantity,
Intensity of
Efforts

- ◆ **Solicitations**
- ◆ **Break Out Items**
- ◆ **DBE commitment of 2nd & 3rd bidders**
- ◆ **Amount of work made available**
- ◆ **DBE Commitment**
- ◆ **# and \$ of DBE Bids**
- ◆ **Bonding, Insurance, Materials, and Supplies Assistance**
- ◆ **Plans, Specs., and Requirements Available**
- ◆ **Other Factors**

Actively &
Aggressively trying to meet goal?

GFE Evaluation



- * Clarify - from bidder DBE work items; DBE quotes
- * Verify - DBE is certified for work items (NAICS); DBE quotes matches DBE commitments; bidders solicitations and follow-up; work items
- * Question – Ask Why (rejected DBEs); how is the DBE expected to perform

GFE Administrative Reconsideration

- * If bidder's good faith efforts are deemed inadequate, the bidder must be offered an opportunity for administrative reconsideration;
- * Give opportunity to provide written documentation or oral argument;
- * Reconsideration official cannot take part in the original determination.

GFE Administrative Reconsideration

- * Bidder must have the opportunity to meet in person with the reconsideration official
- * Bidder must receive a written decision
- * Not administratively appealable to USDOT

GFE Written Decisions

- * Draft well-reasoned and thorough memorandum on all Good Faith Efforts decisions;
- * Reasonable Good Faith Efforts decisions are difficult to challenge because the decision maker is given latitude to weigh a variety of factors in reaching their conclusion

GFE Written Decisions

Key Components of a Comprehensive Written Decision

- * Description of Project; Contract Number; Location
- * Prime Contractor: ABC Prime
- * Bid Amount: \$934,772.50
- * Contract Goal: \$ 56,086.35 (6%)
- * Amount Achieved \$ 31,621.35 (3.4%)
- * Difference: \$ 24,465.00 (2.6%)
- * List DBE quotes accepted by price/work item
- * List DBE quotes rejected by price/work item
- * List Non-DBEs quotes accepted by price/work item

GFE Written Decisions

Analysis: What Evidence did Bidder Submit to Show Address each area, and explain why Bidder was or was not successful:

- * Selected Portions of Work to be Performed By DBEs
- * Solicitation and Follow-Up; Timeliness
- * Negotiated in Good Faith with Interested DBEs
- * Made Plans Available; Assisted with Bonding, etc.
- * Contacted the State for Assistance in Locating DBEs
- * Performance of Other Bidders

Quality of Efforts—Not Necessarily Quantity—

GFE Written Decisions

If determine bidder did not meet goal but **GFE adequate**—

- * Detailed memo to support decision—respond to other bidder and DBE complaints
- * Note if other bidders also unable to meet goal
- * Identify good practices by bidder: effective solicitation; outreach; negotiations
- * How facts differ from others with different outcome

GFE Written Decisions

If determine bidder did not meet goal but **GFE inadequate**—

- * Detailed memo to support decision during reconsideration process
- * Analyze all quotes; compare quotes when non-DBE chosen over DBE due to cost; create charts
- * Discuss how other bidders were able to meet goal
- * Identify procurement practices that create barriers

Conclusion

A contract that was awarded to a bidder who did not meet the goal or demonstrate adequate good faith efforts is ineligible for Federal participation