

Good Faith Efforts



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**Federal Aviation
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*ACHIEVING SAFETY
THROUGH DIVERSITY*



Good Faith Efforts (GFEs)

General Applicability

- What are GFEs
- To whom should GFEs apply

2014 DBE Regulatory Requirements

- What's new and how should it be incorporated

2011 DBE Regulatory Requirements

- What's old and how should it have been incorporated

General Applicability

Standard for DBE Overall Program Implementation

Non-DBE	DBE	USDOT
Contractors	Contractors	Recipients

Goal Setting Flash-Back

Race-Neutral Measures

- Assist all small businesses
- Maximum feasible portion

Race Conscious Measures

- Focused specifically on assisting only DBEs
- Required to meet remaining portion of goal
 - Unless 9th Circuit

Goal Setting Flash-Back

Are **NOT** Strictly Prohibited from Implementing Contract Goals (***must meet certain requirements***)



Western States Paving Co. v. Washington Dept. of Transportation, 407 F. 3d 983 (9th Cir. 2005)

2014 Regulatory Requirements: Timeframe to Submit Information

Responsiveness: Submit DBE Participation Information and/or GFE Documentation at Time Bid is Entered

Responsibility: Submit DBE Participation Information or GFE Documentation up to 7 Days after Bid Opening and Before Contract Award (**5 days—January 2017**)

2014 Regulatory Requirements: Information Submitted

DBEs identify **appropriate** NAICS Codes to Prime

- Complete and accurate information
- NAICS Code corresponds with the scope of contract

2014 Regulatory Requirements: Information Submitted

DBEs identify **appropriate** NAICS Codes to Prime

Prime Confirms DBE NAICS Codes and Submits **DBE information to Recipient**

- DBE identifying information
- DBE NAICS codes and scope(s) of work
- Amount of DBE subcontract
- Written commitment from prime and DBE

2014 Regulatory Requirements: Information Submitted

DBEs identify **appropriate** NAICS Codes to Prime

Prime Confirms DBE NAICS Codes and Submits **DBE information; OR**

Prime Submits Sufficient Good Faith Efforts

2014 Regulatory Requirements: Information Submitted

Submit Sufficient GFEs

- Appendix A
 - Scope, Appropriateness, and Intensity
 - Active and Aggressive
- DBE and non-DBE subcontractor quotes when DBE was not selected to perform on contract
- Requesting DBE bids through mailings is not sufficient

2014 Regulatory Requirements: Recap

If the goal is not met...

Recipient	Contractor	DBE
Evaluate quality, quantity and intensity of the different kinds of efforts that the bidder has made	Provide Recipient with adequate documentation to show that it used “good faith efforts” to try and meet the goal	Provided timely and reasonable bid to prime and same requirements of lower-tier subs

2014 Regulatory Requirement: Terminating DBE Subcontracts

Must Receive Written Consent to Terminate

- If terminate or replace without consent, prime not entitled to payment for work performed

Document and Submit GFEs within “**Reasonable Time**” after obtaining Approval to Terminate

Reasonable Time = 7 calendar days

2014 Regulatory Requirement: Contract Clauses and Monitoring

Prime Must Make DBE Subcontracts Available upon Request

Subcontractors Must Ensure Lower Tier Subcontracts Satisfy GFE Provisions

2014 Regulatory Requirement: Monitoring Contract Clauses

Failure to comply is material breach of contract

- potential termination of contract or other remedies

DBE prime bidders

- count work DBE has committed to perform with its own forces and its DBE subs and suppliers

Evaluation Factors, cont'd.

Rigorous review of documented GFE required

- Review call logs
- Review faxes or emails
- Verify contacts were actually made!

Evaluation Factors, cont'd.

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** have more DBE commitments

Evaluation Factors: Amount of Work Available

Prime Must Perform 30% of Overall Contract

- What specific subcontracting opportunities did the prime offer?

Evaluation Factors: Soliciting DBEs

Solicitation include specifics about the project

Prime Contact Information

Calls and Follow-ups

Meeting with Stakeholder Groups that Assist with
Recruitment and Placement of DBEs

Evaluation Factors, cont'd.

- Lowest price not sufficient reason to reject DBE -- most primes do not award on low bid alone
- Regulation does not allow rejection of DBE bids without sound reason
- Insufficient GFE if rejection of DBE bid is because it wasn't the lowest received
- However, Prime is not required to accept unreasonable quotes in order to satisfy contract goals

Evaluation Factors, cont'd.



- 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

Evaluation Factors, cont'd.



Solicitation information must include:

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

Evaluation Factors, cont'd.

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.

Evaluation Factors, cont'd.

- Clarify - work items/NAICS codes
- Verify - DBE quotes; solicitations; work items
- Question – Ask why (rejected DBEs)

Case Study 1: Construction

Contract is \$5M. Contract goal is 6%

Low bidder submits DBE commitment of 3.4% and documentation of GFE which reveals:

- Prime identified enough work items that if subcontracted would meet goal
- After soliciting DBEs, Prime uses non-DBE over DBE for landscaping, concrete, and electrical supplies due to price difference
- Prime uses non-DBE over a DBE for guardrail because, even though the DBE submitted a lower quote, the prime heard the DBE was difficult to work with
- After soliciting trucking from DBEs, Prime chose to self-perform \$50K trucking services because its drivers have had a slow season

Case Study 1: Construction, cont'd.

- **Electrical Supplies (Wire)**

DBE	\$15,660
Non-DBE	\$13,746
- **Landscaping**

DBE	\$6,828
Non-DBE	\$4,350
- **Concrete**

DBE	\$85,599
Non-DBE	\$70,918
- **Guardrail**

DBE	\$27,500
Non-DBE	\$30,000

Case Study 1: Discussion

How could the prime have improved its GFE?

Case Study 2: Design-Build

5-yr Design Build Contract for \$1B

- Prime submits DBE commitment as detailed plan
- Commitments to specific DBEs, for specific types of work, for specific dollar amounts—Design and Construction
- Commitment to use unspecified DBEs for specific work for an estimated dollar amount for types of work in which DBEs are available
- Identifies DBE work to be performed in each year of the contract

Case Study 2: Design-Build, cont'd.

Prime:

- Commits to meeting 8% goal with its response to RFP
- hires a full-time employee to identify DBEs and host “meet and greet” and “matchmaking” events
- has strict low bid policy—its corporate headquarters will not allow it to deviate from policy
- Recipient was unaware of prime’s complex procurement practices
- At the beginning of year 3, prime reports it has attained 1.5% of the 8% goal

Case Study 2: Design-Build, cont'd.

- Prime assures Recipient goal will be met by end of contract period
- Recipient begins to receive complaints from DBEs that they have not been hired—passed over for lower bid

Good Practices

- Which practices will help meet a DBE goal or GFE?:
 - a. Low bid policy
 - b. Prime hires employee to locate DBEs
 - c. Routine monitoring of DBE participation
 - d. Rely on prime's assurance to meet DBE goal
 - e. Awareness of prime's procurement practices

Answers: b, c, and e

GFE Written Decisions

- Draft well-reasoned and thorough document 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 cont'd.

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, cont'd.

Analysis: What Evidence did Bidder Submit?

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 UCP for Assistance in Locating DBEs
- Performance of Other Bidders

GFE Written Decisions, cont'd.

If it is determined bidder did not meet goal but GFEs are adequate:

- Detailed memo to support decision—respond to other bidders 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, cont'd.

If it is determined 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 created 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.



Thank you!

