

DBE Contract Goal Good Faith Effort Evaluation Process

March 25, 2014

Effective with the April 15, 2014, letting

The process to evaluate a bidder's good faith efforts (GFE) toward achieving a disadvantaged business enterprise (DBE) contract goal will include a three-step process to determine the apparent low bidder's good faith effort (GFE).

1. Meet the contract goal.
The commitment submitted with bid meets or exceeds the established contract goal.
2. GFE Evaluation Committee
If the commitment of the low bidder does not meet the goal, a three-person committee of Iowa Department of Transportation staff will determine the bidder's GFE based on information submitted with the bid on the DBE Commitment Form (Form 102115).
3. GFE Administrative Reconsideration Committee
The low bidder may appeal the decision of the GFE Evaluation Committee. The appeal will be heard by the GFE Administrative Reconsideration Committee. This group consists of three Iowa DOT staff members who were not involved in the original evaluation. Their decision shall be considered final.

These changes are detailed in GS-12004. Please remember that specific contract documents govern in all cases. Note: Three methods no longer acceptable as GFE measures include: 1) history of using DBEs; 2) 80 percent of the goal; and 3) 80 percent of the average.

Contractors are encouraged to become familiar with the new process and, particularly if their commitment does not meet the goal, to list all DBEs contacted on their DBE Commitment Forms.

Contact the Office of Contracts by phone at 515-239-1414 or email dot.contracts@dot.iowa.gov if you have questions.



Iowa Department of Transportation

800 Lincoln Way, Ames, Iowa 50010

Phone: 515-239-1340

Fax: 515-239-1175

September 6, 2013

Rebecca H. Hiatt, P.E.
FHWA – Iowa Division
105 6th Street
Ames, IA 50010



Ms. Hiatt:

In response to your letter on February 12, 2013, the Iowa Department of Transportation (Iowa DOT) would like to present the Federal Highway Administration (FHWA), Iowa division with the proposed changes to the Iowa DOT Disadvantaged Business Enterprise (DBE) Program's Good Faith Effort process.

Through a series of internal meetings the attached suggested changes were created. We feel we have captured the essence of the federal DBE program and the critical need for determining good faith effort while bidding on projects with a DBE goal.

Upon receiving concurrence from FHWA-Iowa division, the Iowa DOT will meet with AGC Iowa and other members of the contracting community to educate those interested parties in the new process. Additionally, the Iowa DOT anticipates discussing and making the necessary changes to our Standard Specifications during the regularly scheduled Spec committee meeting in October, with the changes taking effect by the April 2014 goal setting.

I welcome your feedback and suggestions and look forward to receiving FHWA-Iowa division concurrence.

Concur 9/10/13
APPROVED Date
Rebecca H. Hiatt
FOR THE DIVISION ADMINISTRATOR
FEDERAL HIGHWAY ADMINISTRATION

Sincerely,

Lee Wilkinson
Director, Operations and Finance Division

Enclosure



Iowa Department of Transportation

800 Lincoln Way, Ames, Iowa 50010

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FHWA – Iowa Division
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Sincerely,

A handwritten signature in blue ink that reads "Lee Wilkinson".

Lee Wilkinson
Director, Operations and Finance Division

Enclosure

Proposed DBE Contract Goal Good Faith Effort Evaluation

Process

July 20, 2013

Background

Federal regulations require that contracts with a DBE goal be awarded only to the bidder who makes a good faith effort (GFE) to meet the goal.

There are two methods to perform GFE. First, meet the contract goal. Second: *the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.* DOT will not deny award to a contractor who has performed a good faith effort (and meets all other requirements).

For many years the specification used five criteria to evaluate GFE. In order of consideration these were:

1. Meet the goal
2. Meet 80% of the goal
3. Meet 80% of the average of the bidders including the goal
4. History of utilizing DBEs
5. Administrative reconsideration

The current regulations (49 CFR 26.53) do not prohibit quantitative formulas, they only say they are not required, from Appendix A: *We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call: **meeting quantitative formulas is not required*** (emphasis added).

In September 2012 USDOT issued a Notice of Proposed Rulemaking to the DBE regulations (NPRM). There are a number of proposed changes including the following: *"Determinations **should not be made using quantitative formulas*** (emphasis added). The impact of the proposed changes cannot be fully evaluated until a final rule is issued.

On December 21, 2012 the Iowa Division Office of FHWA directed the Department to "immediately cease and desist from further implementation" of a history of utilizing DBEs. That has been accomplished. The letter also instructed the Department to revise its procedures to eliminate 80% of the goal and 80% of the average and revise its GFE review criteria. This report describes a proposed process to replace those criteria.

Process goals

Fair evaluation of bidder's efforts to meet contract goal
Prohibit post letting changes to bid or commitment
Prohibit bid shopping
Convenient process for industry and the Department
Timely award determination
Comply with the current regulations and not necessarily those in the NPRM

Proposed Process

- **Step #1 Meet Goal**

Bidder submits a DBE commitment (Form 102115) with their bid that meets or exceeds the contract goal. No further action necessary.

- **Step #2 GFE Evaluation Committee**

The apparent low bidder submits a DBE commitment (Form 102115) with their bid that is less than the contract goal.

The Department's GFE Evaluation Committee will evaluate the bidder's efforts. The committee will consist of three members appointed by the Director.

When the apparent low bidder has not met the goal, the committee will meet within one business day following the letting to consider the apparent low bidders GFE. In the event the committee determines that the bidder performed a GFE, their bid will be determined responsive for meeting the DBE goal and will be further considered for award. In the event the committee determines that the bidder did not perform a GFE they will be denied award. A written decision will be issued.

A bidder denied award by the GFE Evaluation Committee may appeal that decision to the GFE Administrative Review Committee. The bidder will be allowed one business day to request an appeal. If an appeal is not so requested, the GFE evaluation process starts over with the next lowest bidder.

- **Step #3 GFE Administrative Review Committee**

The apparent low bidder submits a DBE commitment with their bid that is less than the contract goal, is denied award by the GFE Evaluation Committee and appeals that decision to the GFE Administrative Review Committee.

The Department's GFE Administrative Review Committee will consist of three members appointed by the Director. The members will not have been involved in the original evaluation of GFE.

The bidder must request appeal within one business day of being notified of the decision made by the GFE Evaluation Committee. A verbal request is acceptable. The bidder will have the opportunity for a face to face meeting with the committee and to provide written documentation of their efforts. The GFE Administrative Review Committee will issue a written decision to the bidder. This decision is administratively final.

In the event the bidder's appeal is denied. The GFE evaluation process starts over with the next lowest bidder.

GFE Evaluation Committee Information Submittal

The committee will consider only the information submitted on the contractors DBE Commitment (Form 102115).

Administrative Review Committee information submittal

Information provided is a description of the bidder's efforts to perform a GFE to meet the contract goal, when they did not actually meet the goal. It is supplemental to the DBE commitment information as currently provided on the Form 102115.

It is documentation that describes and demonstrates the bidder's efforts to achieve the DBE contract goal. This may include project specific as well as on-going company-wide efforts. The following information may be requested:

- Solicitation of DBE participation and determination of DBE interest
"...bidder must determine with certainty if the DBEs are interested..." (49 CFR Part 26 Appendices A)
- DBE participation opportunities identified by the prime
- Assistance to respond to solicitations
- Negotiation efforts
- Process and factors to determine acceptance or rejection of DBE offers
- Assistance to obtain bonding, credit, insurance, equipment, supplies, or related assistance
- Copies of each DBE and non-DBE quote when a non-DBE was selected instead of a DBE. This is required documentation in the NPRM.

The bidder will not be allowed to change their DBE commitment and only those efforts made prior to the bid deadline will be considered. With regard to project specific activity, only those efforts directed toward DBE firms listed on the bidders Statement of DBE Commitments (Form 102115) will be considered.

The initial submittal is not expected to be so complete as to prove the actions took place. For example actual phone or fax logs would not have to be sent in, only a listing of those activities. However, the Administrative Review Committee may request additional documentation from the bidder, DBEs or others as necessary to substantiate and validate the efforts presented in the original submittal. Furthermore the Office of Employee Services, Civil Rights Section may perform routine monitoring of any GFE information submitted by any bidder to ensure validity.

Information submittal should be electronic via email if at all possible. The bidder will be allowed one business day to provide requested information.

Evaluation Considerations

Both the GFE Evaluation Committee and the GFE Administrative Review Committee are tasked to make a fair and reasonable determination whether a bidder who did not meet the goal made adequate efforts to do so. The committee should look at the quality, quantity and intensity of the bidder's efforts. The efforts should be those demonstrated by a contractor who desires to meet the goal and is not just taking steps to meet a requirement.

Issues that may be considered:

- "...performance of other bidders in meeting the contract." (49 CFR Part 26 Appendices A)
- Follow up actions "...bidder must determine with certainty if the DBEs are interested..." (49 CFR Part 26 Appendices A)
- Bid solicitations: who, what work
- DBE opportunities available/considered: sub work, material supply, trucking, brokers; breaking out work, flexible timelines
- Bonding assistance
- Plan reading assistance
- Technical assistance
- Cost
- Past performance
- Capability
- A comparable consideration as for non-DBEs regarding qualification, capability, price, etc.
- Networking efforts
- Correspondence documentation: phone, fax, verbal, written
- Verbal communication between DOT and industry (prime, DBE, others)
- Other efforts to secure DBE participation – general/annual vs. project specific

Implementation timeline

Lee Wilkinson's letter of April 3, 2013 estimated that a draft specification change to implement these changes will be considered at the October 2013 meeting of the Specification Committee, with final approval at the November 2013 meeting. This allows implementation with the April 2014 General Supplemental Specification.

Additional considerations

- Locally let federal aid contracts
- Consultant contracts – DOT and locals



U.S. Department
of Transportation
**Federal Highway
Administration**

Iowa Division

105 Sixth Street
Ames, Iowa 50010-6337
(515) 233-7300
(515) 233-7499
www.fhwa.dot.gov/iadiv

In Reply Refer To:
HDA-IA

December 21, 2012

Mr. Lee Wilkinson, Director
Operations and Finance Division
Iowa Department of Transportation
800 Lincoln Way
Ames, Iowa 50010

SUBJECT: Disadvantage Business Enterprise (DBE) Program Plan

Dear Mr. Wilkinson:

The Iowa Department of Transportation (Iowa DOT) submitted its DBE Program Plan for approval on February 1, 2012. The Iowa Division proceeded with the approval process in accordance with the provisions of 49 CFR §26. The Federal Highway Administration Office of Civil Rights cannot approve the plan until areas of concern described in the enclosed letter have been addressed. The Office of Civil Rights requests a status update by January 31, 2013.

If you have any questions, please contact Kim Anderson at Kimberly.Anderson@dot.gov or 515-233-7324.

Sincerely,

Lubin M. Quinones
Divisionb administrator

Enclosure

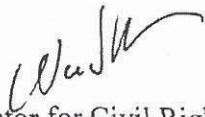
ec: w/enclosure
Todd Sadler, Iowa DOT



Memorandum

Subject: **ACTION:** Iowa DOT DBE Program
(Reply Due: 1/31/13)

Date: December 13, 2012

From: Warren S. Whitlock 
Associate Administrator for Civil Rights

In Reply Refer To:
HCR 30

To: Mr. Lubin Quinones
Division Administrator, HDA-IA
Ames, Iowa

Your office submitted a copy of the Iowa Department of Transportation's (Iowa DOT) DBE program plan, revised February 1, 2012, for HCR's review and approval. As Iowa's DBE program plan may have received Federal Highway Administration approval in the past, please note that as the United States Department of Transportation (USDOT) DBE program evolves through regulation change, guidance and case law, narrow tailoring of a recipient's program becomes increasingly important. In reviewing the plan, we identified the following areas of concern that must be addressed before this plan can be approved by our office. The page numbers below refer to the Iowa DOT DBE program plan.

- Page 13: Process to judge good faith efforts of bidders who have not met the contract goal. The document provides that bidders who have achieved 80 percent of the established contract DBE goal will be assumed to have made a good faith effort.

Further, Iowa DOT determines the sufficiency of a bidder's good faith efforts by calculating 80 percent of the average of the percentages of the DBE commitments submitted by all bidders on the contract. If the low bidder exceeds this average, it is assumed to have made a good faith effort despite having fallen short of the goal.

These objective considerations do not conform to the Federal regulations with respect to an appropriate good faith efforts analysis. Contract goals should be reasonable and attainable and narrowly tailored to reflect the specific subcontracting opportunities available on a contract and the availability and capacity of DBEs in the market area that perform the relevant work types. Bidders who do not meet the contract goal must undergo a thorough and robust review by

the State DOT to determine if the bidder submitted sufficient documentation to “show that it took all necessary and reasonable steps to achieve a DBE goal . . . which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.” 49 CFR, Appendix A.

The regulations do not provide that the achievement of 80 percent of the goal is sufficient; nor do they provide 80 percent of the average of all bidders’ DBE commitments is sufficient. The USDOT does not encourage the use of such quantitative formulas. Rather, it is the responsibility of the Iowa DOT to evaluate each bidder’s documented efforts and make a judgment call with respect to their sufficiency in light of all the facts and circumstances involved, e.g., ability of other bidder’s to meet the goal as evidence of goal attainability; evidence of a bidder’s “active and aggressive” efforts to seek out specific DBEs; efforts to follow up and negotiate fairly with DBEs--even accepting a higher price, if not unreasonable, in order to meet the contract goal.

Please work with the Iowa DOT to revise its program plan and procedures to conform to the Federal regulations as they pertain to good faith effort reviews. Further, please ensure that the DBE Liaison Officer or member of the Iowa DOT’s civil rights section is involved in good faith efforts evaluations.

- Page 35: Attachment D “Contractors with History of Utilizing DBE’s Good Faith Efforts (GFE) Program”. Attachment D provides that Iowa DOT will evaluate a prime contractor’s prior use of DBE firms by awarding a prime “one point for each percentage of subcontracted dollars awarded to a DBE subcontractor and an additional point for each percentage going to a DBE/ESB.” Contractors with enough points to exceed 67 percent of Iowa DOT’s annual DBE goal; and who have been awarded at least two contracts in the last 24 months; and who have been awarded a dollar amount at least twice the size of a contract currently under consideration, will be assumed to have made a good faith effort to achieve the DBE goal.

This method of evaluating a prime contractor’s good faith efforts to achieve a DBE contract goal meets neither the letter nor the intent of the DBE regulations. The DBE program is meant to create opportunities for small disadvantaged firms that have been historically excluded from the construction industry on Federal-assisted contracts in which subcontracting is an option. The fact that a prime contractor used a DBE subcontractor two years ago does not provide needed jobs for DBEs today.

Please inform the Iowa DOT that it must immediately cease and desist from further implementation of this practice and revise its program plan to eliminate this method of evaluating good faith efforts.

- Page 6: Joint checks. The program plan's section on the use of joint checks must contain more detail. For example, Iowa DOT should specifically list safeguards to prevent the use of joint checks in ways that would result in the denial of DBE credit or would compromise the independence of a DBE firm. Please direct Iowa DOT to the USDOT guidance for specific information on what a recipient's joint check policy and procedure should contain:
<http://www.osdbu.dot.gov/DBEProgram/dbeqna.cfm> and scroll to questions pertaining to 49 CFR 25.55(c)(1).

Should you have any questions pertaining to this memorandum, please contact Martha Kenley at 202-366-8110, or martha.kenley@dot.gov. In addition, please provide Ms. Kenley with a status update on the resolution of these program deficiencies by January 31, 2013. We value your assistance in this important matter.

cc: Kimberly Anderson, Civil Rights Manager, FHWA Iowa Division
Martha Kenley, National DBE Program Manager, FHWA

Informational Only