

ROLES & RESPONSIBILITIES OF ALL STAKEHOLDERS FOR GOOD FAITH EFFORT EVALUATION

Created By

The TRANSAC Good Faith Waiver Sub Committee

Stakeholder representatives from AICTA, NAMC, WTBA, DBE's, primes, federal and state government

FINAL
11/30/08

INTRODUCTION

To the greatest extent possible, annual program goals should be met with voluntary efforts. The more that voluntary use of DBE's is identified and counted, the less aggressive contract-specific goals will have to be. This benefits everyone.

Good faith is ultimately measured as an evaluation of a prime contractor's total effort. The following is not a formula or strict menu, but a guide to improving the use of DBE's and to growing successful DBE businesses for the long-term. The more relevant effort by prime contractors up-front, the more likely they will receive enough competitive quotes to meet contract-specific goals or, if necessary, to receive a good-faith waiver.

Purpose:	To provide a framework for the actions required by all parties in the processing and evaluation of prime contractors total effort to achieve the project specific DBE goal prior to bid letting date.
Goal:	To outline the most effective and efficient means for working cooperatively with stakeholders who compete on WisDOT projects to access DBE firms to fulfill the requirements of the DBE program.
Regulation:	49 Code of Federal Regulations Part 26 guides this process. <i>This document is a tool to implement the regulation, not replace it.</i>
Expectations:	<ul style="list-style-type: none"><input checked="" type="checkbox"/> At a minimum, follow the steps outlined below to enhance DBE utilization on WISDOT projects with project-specific goals.<input checked="" type="checkbox"/> Primes and DBE firms can always seek assistance from DBE Support Services office.<input checked="" type="checkbox"/> Documentation of all efforts is paramount for all parties in this process.<input checked="" type="checkbox"/> Report all issues that affect the program to the DBE Office.

PRICING

Evaluation of good faith effort must meet the standard of narrow tailoring and strict scrutiny outlined in DBE program guidelines 49 CFR Part 26. When it comes to price there is no hard and fast rule concerning what is, or is not, a reasonable price. Reasonableness is determined reviewing the facts of each situation. A prime contractors determination of reasonableness should be based on all the facts and circumstances, and will be reviewed on a case-by-case basis by WisDOT if the prime contractor does not meet the goal.

PRIME CONTRACTORS

1. DOCUMENT! DOCUMENT! DOCUMENT!

Document all efforts and decisions made toward achieving the DBE goal on the contract.

2. REQUEST FOR QUOTES

Identify potential items to subcontract and solicit. Prime contractors are strongly encouraged to include in their initial contacts a single page including a detailed list of items for which they are accepting quotes, by project, within a letting. See attached sample.

Prime contractors should also indicate a willingness to accept quotes in areas they are planning to perform themselves, ***as required by federal rules***. In some cases, it might be appropriate to use DBE's to do work in a prime contractor's area of specialization.

- a. Solicit quotes through all reasonable and available means from certified DBE firms who match 'possible items to subcontract' and send copies to DBESS office, highlighting areas in which you are seeking quotes.
- b. Acceptable means include postal mail, email, fax, phone call

- The recommended outreach tool is email. DOT will be developing an email list serve for contractors to use in their solicitation
 - Primes must ask DBE firms for a response in their solicitations. See sample.
- c. Solicit quotes at least 10 calendar days prior to the letting date {ideally two Fridays before the letting} to allow DBE firms sufficient time to respond. Prime contractors should contact DBE's early, asking them if they need help in putting together a quote, or helping to arrange for equipment needs, or solve other problems.
 - d. Second solocitation should take place within 5 days
 - Contractors call DBE firms to confirm receipt of information; resends info if necessary
 - Log the phone call date, time and response
 - e. Upon request, provide interested DBE firms with adequate information about plans, specifications and the requirements of the contract by *letter, information session, email, phone call and/or referral*.
 - f. When potential exists, advise interested DBE firms on how to obtaining bonding, line of credit or insurance as may be requested.

3. DOCUMENT! DOCUMENT! DOCUMENT!

Document DBE firm's interest in quoting by taking appropriate steps to follow up initial solicitation with:

- a. Email all prospective DBE firms in relevant work areas
- b. Phone call (maintain a log) the DBE firms who express interest via response or calls to you
- c. Fax / Letter confirmation
- d. Copy of the quote

4. EVALUATION OF QUOTES

- a. **Documentation** is critical if the prime does not utilize the DBE's quote for any reason.
- b. Evaluate DBE firm's capability to perform 'possible items to subcontract' *using legitimate reasons, including but not limited to, a discussion with the DBE firm regarding its capabilities* prior to the bid letting. If lack of capacity is your reason for not utilizing the DBE quote, you are required to contact the DBE directly regarding their ability to perform the work. Documentation of the conversation is required.
- c. In striving to meet a DBE conscious contract goal prime contractors are expected to use DBE quotes that are responsive and reasonable. This includes DBE quotes that are not the low quote.
- d. **Special Circumstance:** Evaluation of DBE quotes with tied bid items.

Tied quotes are the condition in which a subcontractor submits quotes including multiple areas of expertise across multiple work areas noting that the items and price are tied. Typically this type of quoting represents a cost saving to the prime but is not clearly stated as a discount; tied quotes are usually presented as 'all or none' quote to the prime. When non-DBE subcontractors submit tied bid items in their quotes to the prime, the DBE firms' quote may not appear competitive. In such a case, the following steps are taken in comparing the relevant quotes. These are qualitative examples.

- 1) Compare bid items common to both quotes, noting the reasonableness in the price comparison.
- 2) Review quotes from other firms for the bid items not quoted by the DBE firm to see if combining both can provide the same competitive advantage that the tied bid items offered.

5. NOTIFICATION

After notification of contract award, submit '**Commitment to Subcontract**' form within the time period specified in the contract (10 business days).

DBE FIRMS

General Tasks

1. Market your firm presenting its capabilities to prime contractors and aggressively seek education on DOT contracting processes as well as each prime contractor's practices.
2. Take maximum advantage of training opportunities and educational programs offered by the DBE Support Services office and industry partners.
3. Participate in outreach programs for DBE firms initiated by the DBE Support Services.
4. Review contracting resources beginning with the WisDOT web site for addendums, and Notices to Contractors then consult with resources such as Bid Express, Daily Reporter, Western Builder and DBE Support Services for advertisements.
5. Review and sign Attachment A form and return to prime to allow prompt return of Commitment Form.

Specific Tasks

6. Monitor email and fax from or prime contractor solicitation and respond within 5 days. The earlier the response the better. Promptly respond to prime contractor solicitation expressing your intention/interest in quoting or not.
7. Thoroughly review plans and specifications prior to submitting a quote.
8. Seek appropriate assistance and ask questions of DBE Support Services staff and/or prime contractors in a timely manner.
9. Consistent with effective business practices, submit quotes clearly noting which items of work your firm is certified to perform.
10. Maintain a log of all quotes and file of all prime contractor solicitations until contract execution.
11. Review bid tabs and contact prime contractor, as appropriate to your quote or business type, after contract award is complete.

WISDOT

WisDOT Bureau of Project Development maintains the contracting, bid process, policy and documentation while the DBE Office is responsible for process, policy, and documentation when a DBE goal is assigned to a federally funded project. To this end, the DBE office maintains the Civil Rights & Compliance System as a DBE search engine to match prime contractor quote requests on specific contracts.

1. Maintain current, searchable directory of DBE certified firms on the web. DOT is working on an efficient list serve tool.
2. If the prime did not meet the DBE goal on a project and a certificate of good faith waiver is not attached with "Commitment to Subcontract to DBE form", the prime will be requested to prepare and submit a completed, signed and notarized "Certificate of Good Faith" with all relevant documentation within the time period specified in the contract (typically 10 business days).
3. Analyze number of quotes submitted by DBE firms for relative competitiveness between DBE and non-DBE quotes.
4. Solicit reasons why quotes were not submitted and/or received and discuss what contacts, if any, were made seeking assistance, namely with the DBE Support Services Office.
5. Review copies of all documents and records, noting efforts to contact DBE firms.
6. DBE office will compare the unit prices used in WisDOT analysis with those used in the prime's bid. If there is a significant difference between quotes and prime's bid, further discussion will be required between WisDOT and the prime.

7. Determine if the apparent successful bidder has met the good faith effort requirements.
8. Based on the information obtained during the Good Faith Effort Evaluation process, provide appropriate assistance to prime contractors to understand and meet DBE program requirements.
9. Focus DBE Support Services toward firms actively participating in WisDOT contracting to maximize use of resources.

List of Appendices

- A. **Sample Contractor Solicitation letter**
- B. **Best Practices for Primes & DBE firms**
- C. **Types of Efforts considered in determining GFE**
- D. **Appendix E of 49 CFR Part 26**

APPENDIX A
Sample Contractor Solicitation Letter Page 1
This sample is provided as a guide not a requirement

GFW SAMPLE MEMORANDUM

TO: DBE FIRMS
FROM: POTENTIAL PRIME CONTRACTOR OR MAJOR SUBCONTRACTOR
SUBJECT: REQUEST FOR DBE QUOTES
LET DATE & TIME
DATE: JUNE 9TH, 2009
CC: DBE OFFICE ENGINEER

Our company is considering bidding on the projects indicated on the next page, as a prime and/or a subcontractor for the Wisconsin Department of Transportation August 12 letting. Page 2 lists the projects and work items that we may subcontract for this letting. We are interested in obtaining subcontractor quotes for these projects and work categories. Also note that we are willing to accept quotes in areas we may be planning to perform ourselves as required by federal rules.

Please review page 2, respond whether you plan to quote, highlight the projects and work items you are interested in performing and return it via fax or email within 3 days. Plans, specifications and addenda are available through WisDOT at the DBE Support Services office or at the Highway Construction Contract Information (HCCI) site at <http://roadwaystandards.dot.wi.gov/hcci/>

Your quote should include all of the costs required to complete the items you propose to perform including labor, equipment, material, and related bonding or insurance. The quote should note items that you are DBE certified to perform, tied items, and any special terms. Page 2, with the indicated projects and items you plan to quote, should be used as a cover sheet for your quote.

Please make every effort to have your quotes into our office by 9 pm the evening prior to the letting date. **Make sure the correct letting date, project ID and proposal number, unit price and extension are included in your quote.** We prefer quotes be sent via email but fax and postal service mail are acceptable. Our office hours are 6am and 3 pm Monday through Saturday. Please call our office as soon as possible prior to the letting if you need information/clarification to prepare your quote at (000) 123-4567.

If you wish to discuss or evaluate your quote in more detail, contact us after the contract is awarded. Status of the contract can be checked at WisDOT's HCCI site at <http://roadwaystandards.dot.wi.gov/hcci/>

All questions should be directed to:

Project Manager, John Doe,
Phone: (000) 123-4567
Email: Joe@joetheplumber.com
Fax: (000) 123- 4657

Sample Contractor Solicitation Letter Page 2
This sample is provided as a guide not a requirement

REQUEST FOR QUOTATION

Prime's Name: _____
Letting Date: _____
Project ID: _____

Please check all that apply

- Yes, we will be quoting on the projects and items listed below
- No, we are not interested in quoting on the letting or its items referenced below
- Please take our name off your monthly DBE contact list
- We have questions about quoting this letting. Please have some one contact me at this number

Prime Contractor 's Contact Person

Phone:	_____
Fax:	_____
Email:	_____

DBE Contractor Contact Person

Phone:	_____
Fax:	_____
Email:	_____

Please circle the jobs and items you will be quoting below

Proposal No.	1	2	3	4	5	6	7
County							

WORK DESCRIPTION:

Clear and Grub	X		X	X		X	X
Dump Truck Hauling	X		X	X		X	X
Curb & Gutter/Sidewalk, Etc.	X		X	X		X	X
Erosion Control Items	X		X	X		X	X
Signs and Posts/Markers	X		X	X		X	X
Traffic Control		X	X	X		X	X
Electrical Work/Traff. Signals		X	X	X		X	
Pavement Marking		X	X	X	X	X	X
Sawing Pavement		X	X	X	X	X	X
Pipe Material		X	X	X	X	X	X
Field Facilities		X	X	X	X	X	X
Construction Staking		X	X	X	X	X	X
QMP, Base	X	X		X	X	X	X
Pipe Underdrain	X			X			
Beam Guard				X	X	X	X
Concrete Staining							X
Trees/Shrubs	X						X
Architectural Surface Treatment							X
QMP, Subgrade							X

Again please make every effort to have your quotes into our office by **9 pm** the evening prior to the letting date.

We prefer quotes be sent via email but fax and postal service mail are acceptable.

If there are further questions please direct them to **Prime Contractor's Contact person listed above** at **(000) 123-4567**

APPENDIX B BEST PRACTICES FOR PRIME CONTRACTOR & DBE SUBCONTRACTOR GOOD FAITH EFFORT

This list is not a set of requirements; it is a list of potential strategies

Primes

- Prime contractor open houses inviting DBE firms to see the bid “war room” or providing technical assistance
- Participate in speed networking and mosaic exercises as arranged by DBE office
- Host information sessions not directly associated with a bid letting;
- Participate in a formal mentor protégé or joint venture with a DBE firm
- Participate in WisDOT advisory committees i.e. TRANSAC, or Mega Project committee meetings
- Facilitate a small group DBE ‘training session’ Clarifying how your firm prepares for bid letting, evaluates subcontractors, preferred qualifications and communication methods
- Encourage subcontractors to solicit and highlight DBE participation in their quotes to you
- Quality of communication, not quantity creates the best results. Contractors should do as thorough a job as possible in communicating with DBE firms before the bid and provide any assistance requested to assure best possible bid.

DBE

- DBE firms should contact primes as soon as possible with questions regarding their quotes or bid; seven days prior is optimal.
- Continually check for contract addendums on the HCCI website through the Thursday prior to letting to stay abreast of changes.
- Review the status of contracts on the HCCI website reviewing the ‘apparent low bidder’ list, and bid tabs at a minimum.
- Prepare a portfolio or list of related projects and prime and supplier references; be sure to note transportation-related projects of similar size and scope, firm expertise and staffing.
- Participate in DBE office assessment programs
- Participate on advisory and mega-project committees
- Sign up to receive the DBE Contracting Update
- Consider membership in relevant industry or contractor organizations
- Active participation is a must. Quote as many projects as you can reasonably work on; quoting the primes and bidding as a prime with the department are the only ways to get work.

APPENDIX C

Types of Efforts considered in determining GFE

This list represents concepts being assessed; analysis requires additional steps

1. Whether the contractor attended any pre-solicitation or pre-bid meetings that were scheduled by WisDOT to inform DBEs of contracting and subcontracting opportunities;
2. Whether the contractor provided written notice to a reasonable number of specific DBEs that their interest in the contract was being solicited, in sufficient time to allow the DBEs to participate effectively;
3. Whether the contractor followed up initial solicitations of interest by contacting DBEs to determine if the DBEs were interested; returned the phone calls of interested DBE firms.
4. Whether the contractor selected portions of the work to be performed by DBEs in order to increase the likelihood of meeting the DBE goal;
5. Whether the contractor provided interested DBEs with adequate information about the plans, specifications and requirements of the contract;
6. Whether the contractor negotiated in good faith with interested DBEs, not rejected DBEs as unqualified without sound reasons based on a thorough investigation of their capabilities;
7. Whether the contractor made efforts to assist interested DBEs in being more competitive.
8. Whether the contractor effectively used the services of available minority community organizations: minority contractors groups, local, state, and Federal minority business assistance offices, and other organizations that provide assistance to small businesses and DBE firms.
9. Whether Prime used CRCS to identify DBE who specialize in relevant work areas.
10. Whether the contractor used available resources including contacting the DBE office, using WisDOT's website
11. Whether the contractor returned calls of firms expressing interest in a timely manner.

APPENDIX D
Good Faith Effort Evaluation Guidance
Excerpt from Appendix A of 49 CFR Part 26

APPENDIX A TO PART 26 -- GUIDANCE CONCERNING GOOD FAITH EFFORTS

- I. When, as a recipient, you establish a contract goal on a DOT-assisted contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part 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.
- II. In any situation in which you have established a contract goal, part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, it is up to you to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements. 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.
- III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (i.e., obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring bona fide good faith efforts.
- IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.
 - A. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.
 - . Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.
 - C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
 - D. (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for

subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

- (2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

- E. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.
 - F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.
 - G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
 - H. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.
- V. In determining whether a bidder has made good faith efforts, you may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.