

WAIVER DETERMINATION GUIDANCE – DBE SAMPLE 1

1. FACTS

The bid opening for this contract was April 26, 2011. After opening the bid, State Highway Administration (SHA) determined that Bidder One Construction Company (the “Contractor”) was the apparent low bidder with a bid of \$1,000,000.00. The DBE participation goal of this contract is twenty percent (20%). In the Affirmative Action Plan (AAP) submitted with its bid, the Contractor listed the following DBE participation information:

DBE Firm	Certification Number	Item of Work	Subcontracting Amount	Percentage of Contract (rounded)
Flintstone Concrete, Inc.	10-S00	concrete curb and gutter/sidewalk	\$60,000.00	6%
Rubble Highway Safety Co.	09-S00	fence items	\$20,000.00	2%
Pebbles Landscaping Co.	08-S00	landscaping	\$30,000.00	3%
Bam-Bam Safety, LLC	07-S00	maintenance of traffic	\$20,000.00	2%
Slate Signs, Inc.	06-S00	permanent signs	\$20,000.00	2%
Total DBE Participation			\$150,000.00	15%

The Contractor is requesting a waiver of 5% of the DBE participation goal. On May 2, 2011, the Contractor submitted documentation in support of its waiver request (Waiver Request).

2. WAIVER ANALYSIS

(i) Identification of Subcontracting Opportunities and DBE firms

The Contractor identified the following opportunities for DBE participation: concrete curb and gutter and other concrete surfaces; trucking; fencing; landscaping; pavement markings; maintenance of traffic (MOT); and signs. SHA’s Procurement Review Group (PRG) also identified these categories. For these reasons, we determine that the Contractor identified sufficient subcontracting opportunities to meet the 20% DBE participation goal.

(ii) Solicitation of DBE Firms and Market Availability

Pursuant to 49 CFR Part 26, Appendix A, in order to show good faith efforts, a bidder must “actively” and “aggressively” try to obtain DBE participation – mere “pro forma” efforts are not sufficient. Moreover, a bidder must show that it attempted to solicit the interest of all DBE firms capable of performing the work through “all reasonable and available” means.

Of over 50 potentially available DBE firms in all areas, the Contractor contacted only 30 DBE firms via facsimile and made only 10 follow-up telephone calls. There is no documentation that the Contractor solicited the DBE firms by other means (email or webpage). In addition, the Contractor failed to contact most of the available DBE firms in the following categories of work that were not included in the Contractor’s AAP: trucking (2 out of approximately 10 DBE firms) and pavement markings (2 out of approximately 5 DBE firms). These subcontracting opportunities accounted for approximately 5% of the total contract value as follows: trucking (3%) and pavement markings (2%). Based on the above, we determine that the Contractor did not actively and aggressively solicit DBE firms and it did not use all reasonable and available means.

Further, approximately 5% of the contract value accounts for work items that, even though the Contractor received quotes from DBE firms, it opted not to accept those quotes because it would self-perform trucking for a lower price. The Contractor’s ability and desire to perform an area of work instead of subcontracting that item to a DBE firm does not relieve it from making a reasonable demonstration that it was unable to obtain DBE participation. Further, the fact that there may be additional costs in using a DBE firm is not, by itself, sufficient reason to substantiate the Contractor’s failure to meet the DBE participation goal. The Contractor must also show that the higher quotes from the DBE firms were excessive or unreasonable.

Still further, Appendix A of 49 C.F.R. Part 26 also provides that a bidder must negotiate in good faith and shall provide evidence “as to why additional agreements could not be reached for DBEs to perform the work.” In this case, there is no evidence that the Contractor negotiated with any of the DBE firms whose bids were rejected to reach other agreements to perform the work. In fact, although the Contractor rejected the quotes from two DBE trucking firms (Wilma’s Hauling and Betty Trucking) as “too high”, it failed to solicit sufficient DBE firms in the trucking category and it only compared the two DBE quotes with its cost to self-perform. The Contractor, therefore, may not rely on the few DBE quotes received in the trucking category to show that these DBE quotes were excessive or unreasonable.

For the above-reasons, the Contractor did not demonstrate that it reasonably solicited sufficient DBE firms or took any necessary steps, which by their scope, intensity and appropriateness, could reasonably be expected to obtain sufficient DBE participation, even if the Contractor was not fully successful.

(iii) Public Interest

As prescribed by 49 C.F.R., Appendix A, § V, we may consider the performance of other bidders in meeting the goal requirements when determining whether a bidder's efforts are sufficient. Further, COMAR provides that a waiver should only be granted if the public interest would be served by granting the waiver. The Contractor is requesting waiver of 5% of the 20% DBE participation goal. In the DBE Participation Schedule, both the second and third bidders have indicated that they will achieve or exceed the 20% DBE participation goal. Further, if the Contractor's bid was accepted, only approximately \$150,000 would be awarded to DBE firms compared to approximately \$210,000 in awards to DBE firms if the second apparent low bidder was selected.

Pursuant to the standards set forth in COMAR and 49 C.F.R. Part 26, the Contractor has not documented adequate good faith efforts to obtain the goal, or made a reasonable demonstration that it was unable to obtain the DBE overall participation goal, or was unable to obtain the DBE participation goal at a reasonable price.

For all of the above reasons, this waiver request is denied.