

WAIVER DETERMINATION GUIDANCE – DBE SAMPLE 2

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 (25%). 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%
Betty’s Pavement Services Do.	06-S00	pavement markings	\$10,000.00	1%
Slate Signs, Inc.	05-S00	permanent signs	\$10,000.00	1%
Total DBE Participation			\$150,000.00	15%

The Contractor is requesting a waiver of 10% 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, fencing, landscaping, signs, traffic control devices/maintenance of traffic (MOT), and trucking. 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 25% 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. The Contractor contacted, via email, all 50 of the potentially available DBE firms in all subcontracting areas, and made follow up calls to all of the DBE firms that did not respond to the emails. We, therefore, determine that the Contractor did actively and aggressively solicit DBE firms and it did use all reasonable and available means.

In its AAP, the Contractor included DBE firms to perform the following subcontracting work: concrete curb and gutter and other concrete surfaces, fencing, landscaping, pavement markings, maintenance of traffic (MOT); and trucking. According to the Contractor, although it sent emails and performed follow up calls, it did not receive quotes from any DBE firms certified for the signs category. This information is confirmed by the Contractor's documentation of its emails and telephone calls. This information also was verified by contacting the DBE firms in the signs category. Accordingly, the Contractor's inability to obtain DBE participation was reasonable. Thus, we determine that overall the Contractor did make a reasonable demonstration that it undertook adequate good faith efforts to achieve DBE participation.

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 rejected any bids from DBE firms.

For the above-reasons, the Contractor has demonstrated that it reasonably negotiated with DBE firms or took all 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 a waiver of 10% of the 25% DBE participation goal. Notably, both the second and third bidders have requested waivers in the amount of 7% and 11%, respectively.

Pursuant to the standards set forth in COMAR and 49 C.F.R. Part 26, the Contractor has documented that it made adequate good faith efforts to obtain the goal, and 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 granted.