

## WAIVER DETERMINATION GUIDANCE – DBE SAMPLE 3

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### 1. FACTS

The bid opening for this contract was August 8, 2011. After opening the bids, State Highway Administration (SHA) determined that Bidder One Construction Company (the “Contractor”) was the apparent low bidder with a bid of \$100,000.00. The DBE participation goal of this contract is twenty-seven percent (27%). 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)
Bam-Bam Safety, LLC	07-S00	maintenance of traffic	\$2,500.00	2.5%
Total DBE Participation			\$2,500.00	2.5%

The Contractor is requesting a waiver of 24.5% of the DBE participation goal. On September 8, 2011, the Contractor submitted documentation in support of its waiver request (Waiver Request).

### 2. WAIVER ANALYSIS

#### (i) Identification of Subcontracting Opportunities and DBE firms

SHA’s Procurement Review Group (PRG) identified the following as opportunities for DBE participation: maintenance of traffic (MOT) (2.5%), hot mix asphalt/milling/grinding items (10%), pavement markings (10%), and hauling (5%). Although the Contractor similarly identified maintenance of traffic, hot mix asphalt/milling/grinding items, and pavement markings, it did not identify hauling as an opportunity for DBE participation. For these reasons, we determine that the Contractor did not identify sufficient subcontracting opportunities to meet the 27% 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 one DBE firm, Bam-Bam Safety, LLC, to bid on the MOT item, and that firm is listed on the AAP to participate in the project. For the other items

of work, however, the Contractor only contacted 2 firms, Betty's Pavement Services, Company (BPS) and Wil Ma Asphalt, Inc. (WMA). In fact, 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: hot mix asphalt/milling/grinding (1 out of approximately 8 DBE firms); pavement markings (1 out of approximately 13 DBE firms); and hauling (0 out of approximately 120 DBE firms). As indicated in section 2(i) above, these subcontracting opportunities accounted for approximately 25% of the total contract value.

Further, as part of its good faith efforts documentation, the Contractor submitted a copy of the BPS letter declining to bid because the geographic location for the project is outside of their service area. Although this letter documents the outcome of the solicitation sent to BPS, it is insufficient to support a waiver request because there were approximately 12 other firms that the Contractor could have solicited to perform the pavement markings. Still further, although the Contractor provided a copy of a fax soliciting a bid from WMA, this documentation is insufficient because it does not indicate whether the Contractor followed up with or received a response from the DBE firm<sup>1</sup>. Moreover, even if WMA declined to bid, there were 7 other DBE hot mix asphalt/milling/grinding firms the Contractor could have solicited. In addition, the Contractor did not identify hauling as an opportunity for participation and, as a result, failed to contact over 100 additional DBE firms that were potentially available.

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. The Contractor, therefore, 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 a waiver of 24.5% of the 27% DBE participation goal. In their bids, the second bidder has requested a 7% waiver and the third has agreed to meet the 27% DBE goal.

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.

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<sup>1</sup> The Contractor did not respond to our e-mail and telephone requests, dated September 12 and September 15, respectively, for documentation to support any follow-up attempt(s).