

WAIVER DETERMINATION GUIDANCE – DBE SAMPLE 4

1. FACTS

The bid opening for this contract was August 15, 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 \$1,000,000.00. The DBE participation goal of this contract is fifteen percent (15%). 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
Bam-Bam Safety, LLC	07-S00	maintenance of traffic	\$5,000.00	1%
Jet & Son Milling, Inc.	11-S00	milling & grinding	\$45,000.00	4%
Marge Trucking, Inc.	12-S00	hauling	\$50,000.00	5%
Total DBE Participation			\$100,000.00	10%

The Contractor is requesting a waiver of 5% of the DBE participation goal. On September 15, 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%), hot mix asphalt/milling/grinding items (5%), pavement markings (3%), and hauling (5%). These are the same DBE participation opportunities that the Contractor identified. For these reasons, we determine that the Contractor identified sufficient subcontracting opportunities to meet the 15% 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.

According to the Contractor’s AAP, DBE firms will perform three of the four items of work identified by SHA as opportunities for DBE participation. Although the Contractor obtained less participation than SHA anticipated in 2 of those areas – 1% for MOT

versus 2% identified by SHA and 4% for milling and grinding versus 5% identified by SHA – the differences are not significant. Moreover, after reviewing the project specifications and the Contractor's bid documents, as well as discussing the differences with the Contractor, SHA has determined that the participation amounts in the AAP are valid and the Contractor is neither self-performing nor using a non-DBE subcontractor to perform any work in those two categories.

With respect to pavement markings, the category of work that was not included in the Contractor's AAP, the Contractor provided copies of emails demonstrating that it requested quotes from all 8 of the available DBE firms 12 days before bids were due. These emails were accompanied by specifications, plans, and other relevant project information. The Contractor also provided copies of telephone logs documenting its follow-up telephone calls to all 8 DBEs a week before bid opening. These telephone logs included the name of the DBE firm, date and time of the call, telephone number and name of the representative the Contractor spoke with.

Notably, 2 of the DBE firms solicited by the Contractor completed unavailability certificates, and 1 firm sent the Contractor a letter stating that it could not travel to the geographical location of the project. The remaining 5 DBE firms did not respond. Further, SHA attempted to independently confirm the information provided by the Contractor. SHA confirmed that the unavailability certificates had indeed been signed by 2 of the DBE firms. The remaining 6 firms did not respond to SHA's inquiries.

Based on the above, we determine that the Contractor actively and aggressively solicited DBE firms and it used all reasonable and available means. The Contractor, therefore, has demonstrated that it reasonably solicited sufficient DBE firms and took the 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. The Contractor is requesting waiver of 5% of the 15% DBE participation goal. In their bids, the second bidder has requested a 10% waiver and the third has requested a 3% waiver of the 15% DBE goal.

Pursuant to the standards set forth in COMAR and 49 C.F.R. Part 26, the Contractor has documented 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.