

WAIVER DETERMINATION GUIDANCE – DBE SAMPLE 5

1. FACTS

The bid opening for this contract was August 22, 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 \$500,000.00. The DBE participation goal of this contract is fourteen percent (14%). 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
Marge Trucking, Inc.	12-S00	Hauling	\$2,500.00	1%
Total DBE Participation			\$2,500.00	1%

The Contractor is requesting a waiver of 13% of the DBE participation goal. On September 22, 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: bridge painting (5%), concrete (7%), pavement markings (1%), and hauling (1%). Although the Contractor similarly identified pavement markings and hauling, it did not identify bridge painting or concrete as opportunities for DBE participation. For these reasons, we determine that the Contractor did not identify sufficient subcontracting opportunities to meet the 14% 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, a DBE firm will perform hauling, which will meet 1% of the DBE participation goal. Notably, this is only one of the four items of work identified by SHA as opportunities for DBE participation. In addition, although the

Contractor also identified pavement markings as an item of work that could be performed by a DBE firm, it only contacted 3 of the 15 DBE firms identified by the PRG to perform this item of work. In its September 30, 2011 letter describing its good faith efforts, the Contractor stated that it only solicits a DBE when it knows the firm's capabilities and business experience. The Contractor further stated that this knowledge is acquired by working with DBE firms on a regular basis. As a result, the Contractor was only aware of 3 DBE firms that could perform pavement markings and limited its outreach to those 3 firms.

Moreover, a bidder seeking waiver of all or a part of a DBE goal must submit written documentation of its good faith efforts. In response to SHA's request for this documentation, the Contractor submitted a list of the DBE firms it contacted, but it failed to submit any letters, faxes, emails, or other documents demonstrating when and how it contacted any of these firms. In fact, when SHA contacted it regarding this missing documentation, the Contractor informed SHA that it did not maintain such records.

Based on the above, we determine that the Contractor did not actively and aggressively solicit DBE firms or use all reasonable and available means. The Contractor, therefore, has not 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 13% of the 14% DBE participation goal. In their bids, the second bidder has met the 14% goal, and the third has requested a 1% waiver.

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, and has not 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.