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Civil Rights Disadvantaged Business Enterprise **Evaluating Good-Faith Efforts**

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Bidders must make good-faith effort to meet the contract Disadvantaged Business Enterprise goal to be awarded a federally funded contract



The use of contract goals is an important part of the Disadvantaged Business Enterprise, or DBE, Program. Contract goals are the value of DBE work stated as a percentage of total contract value. For example, a contract DBE goal is stated as, “4.15 percent or 12.5 percent.”

When a contract has a DBE goal, only a bidder that demonstrates adequate good-faith efforts to meet the goal qualifies to be awarded a federally funded contract.



How does your agency evaluate good-faith efforts?

As you might expect, a contractor that commits to meet the DBE goal automatically demonstrates good-faith efforts. However, an agency should have good criteria to evaluate the efforts of the contractor that does not meet the goal. Otherwise, the agency runs the risk of misjudging the adequacy of good-faith efforts and inviting a challenge to its award decision. By using evaluation techniques that comply with DBE regulations, agencies can better defend the award decisions they make.

When a bidder fails to meet the goal, an evaluation of good-faith efforts is necessary. An evaluation starts with the bidder’s own documentation that typically includes:

- The DBE commitment – a list of DBE firms that the bidder obligates itself to use and a summation of their bid values. The commitment may be expressed as a percentage of the total bid value. For example, a commitment may state that “7% of the bid value is to be performed by DBEs.”
- Outreach efforts, including a contact log, copies of any ads and letters, and if professional assistance was offered.
- A list of rejected DBE bids and the reasons for rejection.

No two evaluations are alike, so the level of effort for each one is dictated by the individual situation.

Let's look at some considerations when evaluating good-faith efforts including:

- The DBE goal and commitments of the low bidders
- The work type solicited
- Outreach efforts
- Rejected DBE bids

First, evaluators compare how close the low bidder's DBE commitment is to the goal and the commitment of other bidders.

If the difference between the low bidder's commitment and the goal is within one percentage point of a 10-percent goal, a brief review might be sufficient.

However, a fuller review of the documentation is expected when the commitment falls significantly below the goal.



The evaluator compares the DBE firms solicited for the work types needed in the contract and removes from consideration outreach to unnecessary DBEs. If, for example, landscaping is not part of the contract, do not evaluate outreach efforts made to landscaping companies.

When assessing outreach efforts, the evaluator looks for a large number of DBE bids and a good variety of work to be performed by them. Advertisements for DBEs, written solicitations sent to all qualified firms, offers of assistance, and follow-up phone calls support an effective outreach campaign.



Lastly, the evaluator considers the rejected DBE bids and the reasons for the rejection. For example,

- Did the bidder reject a marginally higher DBE bid that could have allowed the bidder to meet the goal?
- Did the bidder reject a DBE bid that another bidder accepted?
- Did the bidder forgo a reasonable bid to do the work himself?

A "yes" answer may suggest an inadequate good-faith effort.

To see how these techniques work in practice, let's follow the evaluation of the good-faith efforts of First Construction, the low bidder on an asphalt resurfacing and safety upgrades project.



The DBE commitment of First Construction is 7 percent. The goal is 10 percent and the commitment of the second low bidder is 10.2 percent.

Because the difference between First Construction’s commitment and the goal is three percentage points, the evaluator decides to conduct a fuller review.

To start, the evaluator turns to the DBE contact log and notices that First Construction solicited landscaping, electrical contractors, striping, trucking, and safety hardware firms.

Because no electrical work is on the contract, the evaluator disregards any outreach efforts made to electrical contractors.

While considering outreach efforts, the evaluator notices that First Construction sent letters to 70 DBE firms. First Construction also made two follow-up calls to unresponsive DBE firms. A search of the State’s DBE database confirms that First Construction contacted every qualified firm.

The evaluator sees that First Construction also placed several timely ads and offered to assist with the bond premium.

These outreach efforts resulted in 10 DBE bids for four types of work.

In reviewing the list of rejected bids, the evaluator discovers that First Construction used a DBE for landscaping, striping and trucking but rejected the bids of the safety hardware DBEs. Instead, First Construction chose to perform the work itself.

Why did they reject the bid? Was it unreasonable?



To answer this question, the evaluator looks into the documentation of Solid Construction, the second low bidder.

It turns out that Solid Construction used Safety R US. Had First Construction done the same, they would have met or exceeded the contract goal of 10 percent.

The evaluator concludes that First Construction’s good-faith efforts were inadequate.

When an agency determines that the low bidder did not make adequate good-faith efforts, then it must provide the low bidder an opportunity to seek reconsideration. During the reconsideration process, the low bidder provides arguments to an impartial official, one not involved in the original decision. The official either upholds or overturns the initial decision and may determine which prime contractor is awarded the contract.

Your State department of transportation is an excellent source for procedures and guidance. Additionally, your State’s database of DBE firms is an essential tool for conducting an evaluation.

Make sure your evaluation team knows how to access these resources.

Web Resources

- Federal regulation that includes Appendix A to Part 26, Guidance Concerning Good Faith Efforts
<http://www.ecfr.gov/cgi/t/text/text-idx?c=ecfr&sid=db367ac566eb4573914c71cf580ebaae&rgn=div6&view=text&node=49:1.0.1.1.20.6&idno=49>
- Federal regulation concerning good-faith efforts procedures when there are contract goals
<http://www.ecfr.gov/cgi/t/text/text-idx?c=ecfr&sid=3f69a1003468f04292e7fe864899b8b7&rgn=div5&view=text&node=49:1.0.1.1.20&idno=49#49:1.0.1.1.20.3>

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This companion resource is the script content for the video production of the same name.