

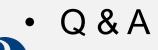
Departmental Office of Civil Rights (DOCR) Federal Aviation Administration (FAA) Federal Highway Administration (FHWA) Federal Transit Administration (FTA)

Good Faith Efforts (GFE)

Disadvantaged Business Enterprise (DBE) Program

Good Faith Efforts (GFE) Training Topics

- GFE Basics
- Determining GFE: Pre-Award
- GFE: Meeting a DBE Goal
- GFE: When Goals are Not Met
- GFE: When Efforts are Not Sufficient
- GFE: Post-Award
- Additional Resources





GFE in the DBE Program

- Preserves the constitutionality of the DBE Program
- Critical component of oversight and compliance
- Protects the DBE program's integrity



Good Faith Efforts (GFEs)

- **All bidders** must make good faith efforts to meet a contract goal. GFE are achieved when:
 - The bidder commits to subcontracting with DBEs in a sufficient amount to meet the goal or
 - In the event a bidder falls short of the goal with DBE subcontracting commitments, it submits documentation that demonstrates it made sufficient good faith effort to meet the goal



Timing of Submission

- Information must be submitted either:
 - At time of bid (Responsiveness)
 - 5 days after bid opening (Responsibility)
 - Extensions are not permitted
 - Must choose one method which should be in the program plan
- For a design-build procurement, the bidder/offeror may make a contractually binding commitment to meet the goal at the time of bid or with its response to a request for proposals



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Pre-award Commitments

Bidders must include the following DBE information for contracts with DBE goals:

- Name and address of DBE
- Description of the work
- Dollar amount of participation
- Written documentation of the bidder's commitment to use each listed DBE
- Written confirmation from each listed DBE



Pre-award GFE Documentation

- If a bidder is unable to meet the contract goal with sufficient DBE subcontracting, it MUST provide the recipient with documentation supporting its GFEs
- The documentation of GFEs must include copies of each DBE and non-DBE subcontractor quotes submitted to the bidder when a non-DBE subcontractor was selected over a DBE for the same work item



Good Faith Efforts Basics

- Documented GFEs must demonstrate that the bidder "took all necessary and reasonable steps to achieve a DBE goal... which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful."
- Fair and reasonable judgment considering the **quality**, **quantity**, **and intensity** of the different kind of efforts



Good Faith Effort Basics

- The efforts...should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal.(49 CFR Appendix A)
- No "extra points" for exceeding goals
- Do not rank bids based on amount of DBE participation



Good Faith Effort Basics (part 2)

- Proposed DBEs must be certified in NAICS code(s) of work to be performed
- Must ONLY award to bidder who made GFE to meet goal
- Goals are targets, NOT quotas; failure to meet goal not automatic disqualifier
- Must award to bidder if GFEs are determined sufficient, even if insufficient subcontracting



Good Faith Effort Actions

- The Recipient must evaluate the commitments and documentation submitted by all bidders
- NO quantitative formula or point system should be used
- Emphasize holistic nature of review



Good Faith Effort Actions (part 2)

Appendix A provides EXAMPLES of actions a recipient may consider as part of a contractor's Good Faith Effort to obtain DBE Participation

- This is NOT a mandatory checklist
- This is NOT an all-inclusive list
- Performing all these examples of actions does NOT automatically ensure a GFE has been made
- Would you hire a job applicant just because they answered all the questions?



Good Faith Effort Actions (part 3)

- Conducting research to identify small business contractors and suppliers
- Soliciting DBEs through all reasonable and available means
- Examples:
 - Phone calls
 - Emails
 - Advertisements (radio, tv, news/trade papers, website)
 - Pre-bid meetings
 - DBE networking events
- Ensure the solicitation to DBEs is early enough to allow time for a proper response!!



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Good Faith Effort Actions (part 4)

- Did bidder break out contract work items into economically feasible units (for example, smaller tasks or quantities) to facilitate DBE participation?
- Did bidder consider items that it normally selfperforms
- Was bidder flexible in delivery schedule (if possible)
- Did bidder provide meaningful follow up with DBEs after initial contact?



Good Faith Effort Actions (part 5)

- Bidder must negotiate with interested DBEs in good faith
 - Use good business judgment and document the negotiation
 - Evaluate a DBE's price and capabilities in consideration to achieving the contract's goal
 - Lowest price alone not a sufficient reason to reject DBE if price is reasonable
 - Regulations purposely refrain from identifying what percentage differential between DBE and non-DBE quotes is considered "unreasonable" (Most common question asked!)



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Examples of Insufficient Good Faith Efforts

- Examples that could be considered **insufficient** Good Faith Efforts include:
 - Rejecting DBEs without having a sound reason based on the DBE's capability
 - Rejecting DBEs based on their:
 - Standing in the industry
 - Memberships in organizations or groups
 - Political and social affiliations
 - Soliciting DBEs that do not perform work relevant to the subcontracting opportunities (suggest *pro forma* efforts)



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Examples of Insufficient Good Faith Efforts (part 2)

- Including firm(s) not DBE certified in your state prior to bid due date
- Including firm(s) not certified in the applicable program
- Including firm(s) not certified in the NAICS code of the work to be performed
- Promises to obtain DBE participation after contract award



GFE Administrative Reconsideration

Should the recipient determine bidder's GFEs are insufficient, the bidder must be given an opportunity for reconsideration

- Oral argument or written documentation, or both
- Decisionmaker must be one with knowledge of DBE Program regulations (GFE) and did not take part in the original determination
- A recipient must send the bidder a written determination
- The determination is not appealable to the USDOT



Good Faith Efforts: After Award

- No DBE removal (termination) without good cause
 - Good cause defined in rule
 - Recipient's prior written consent required
 - Violation makes prime ineligible for payment of the substitute firm's work
- After recipient approves a DBE removal
 - Prime must make GFE to obtain another DBE if necessary to meet goal (same or other work item)
 - GFE documentation to be provided on request



Conclusion

- Good Faith Efforts required if there is a contract goal
- All bidders must submit GFE documentation
- If goal is met, no further GFE documents required
- Evaluate GFE in totality; Appendix A is not a checklist
- If DBE removed, GFE required to extent needed to meet contract goal
- Contact Operating Administration for technical assistance in GFE review process



Additional Resources

- <u>49 CFR Part 26, §26.53</u>
- <u>Appendix A</u>
- DBE Program ACM Handbook
- USDOT Community of Practice Training Sessions



Questions



