



UNITED STATES
DEPARTMENT OF TRANSPORTATION

**Office of the Secretary (OST)
Departmental Office of Civil Rights (DOCR)
Disadvantaged Business Enterprise Program (DBE) Division**

**DBE Program
Good Faith Efforts**

(§26.53 of 49 C.F.R. 26)

Introduction



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Bottom Line

A prime contractor who does not demonstrate adequate Good Faith Efforts (GFEs) to meet a DBE contract goal is ineligible to participate in federal contracting opportunities.



Presentation Focus

Pre-Contract Award GFE Obligations



Learning Outcomes

- Understand when GFEs apply
- Identify bidder and recipient GFE obligations
- Understand low bid and design-build scenarios
- List key elements of a well-written GFE decision



GFE Definition

- A bidder's efforts to achieve a recipient's (*e.g.*, State DOT) DBE contract goal
- Prime contractor must submit its GFE plan (DBE commitments and /or documented efforts) to the recipient during the bidding process
(Exception: design-build contracts)



GFE Fulfillment

Bidder **must** first use GFEs to obtain adequate DBE participation to meet the contract goal

*If **not** possible, then, and only then:*

Bidder documents and submits adequate GFEs that it tried to meet the contract goal even though it was unsuccessful

Not a choice!



GFE Submission Timing

- All bidders for **design-bid-build (low-bid)** contracts must submit GFE plan either:
 - With sealed bid/proposal (**RESPONSIVENESS** approach)
 - No later than 5 days after bid opening (**RESPONSIBILITY** approach)

(EXCEPTION: design-build contracts)

State DOT mandates which approach bidders must use



GFE Documentation Components

- Names and addresses of DBEs that will participate as subcontractors;
- Description of the work that each DBE will perform and dollar amount;
- Bidder confirms DBEs listed are certified under NAICS that corresponds with the work DBE intends to perform;
- Written documentation of the bidder's commitment to use the DBEs listed; and
- Written confirmation from each DBE listed



Bidder's GFE Guidelines₁

- Sent written solicitations to appropriate certified DBEs?
- Documented solicitation?
- Did not solicit DBEs that do not perform relevant work (*i.e., pro forma* efforts)?
- Allowed adequate time for DBE to respond?



Bidder's GFE Guidelines₂

- Identified sufficient work items to meet the goal?
- Solicited available DBEs for work items?
- Followed-up with specific DBEs?
- Negotiated with specific DBEs in good faith?



Recipient GFE Obligations

- Thoroughly evaluate the GFE plans submitted by all bidders
- Award contract *only* to bidder who shows GFE to meet the DBE contract goal



Bidder Meets Goal

Beware of Faulty Assumptions

- DBE(s) have capacity to perform the work
- DBE material suppliers will act as regular dealers and an automatic 60% is credited to the goal
- Prime commitments are commensurate with the availability of work and quantities estimated under the prime contract



Bidder Does Not Meet Goal

- Recipient must consider the quality, quantity, and intensity of the different kind of efforts the bidder made
- Must evaluate overall effort of the bidder's documented good faith efforts (holistic)



GFE Evaluation₁

Responding to all GFE listed in 49 CFR Part 26, Appendix A does not , in and of itself, demonstrate adequate good faith efforts



GFE Evaluation₂

- Bidder took all reasonable steps to achieve DBE goal:
 - Necessary
 - Appropriate
 - Active
 - Aggressive



GFE Evaluation₃

- No quantitative formula or point system
- Judgment call
- Fact-specific to the procurement



GFE Evaluation₄

- Lowest price not sufficient reason to reject DBE (most primes do not award on low bid alone)
- No percentage for determining if DBE's bid is unreasonable
- When another bidder use a DBE quote that the low bidder rejected, the price is probably not unreasonable



GFE Evaluation₅

- MUST review performance of other bidders
- When apparent low bidder fails to meet the contract goal, but the second low bidder meets it, recipients may reasonably raise the question of whether, with additional efforts, the apparent low bidder could have met the contract goal



GFE Written Decisions₁

- Draft well-reasoned and thorough analyses for all Good Faith Efforts decisions
- Applies whether recipient determines Good Faith Efforts sufficient or insufficient
- Reasonable Good Faith Efforts decisions are difficult to challenge because the decision maker is given latitude to weigh a variety of factors in reaching their conclusion



GFE Written Decisions₂

Key Components of a Comprehensive Written Decision

- Description of Project; Contract Number; Location
- Prime Contractor: ABC Prime
- Bid Amount: \$934,772.50
- Contract Goal: \$ 56,086.35 (6%)
- Amount Achieved \$ 31,782.27 (3.4%)
- Difference: \$ 24,304.08 (2.6%)
- **List DBE quotes accepted by price/work item**
- **List DBE quotes rejected by price/work item**
- **List Non-DBEs quotes accepted by price/work item**



GFE Written Decisions₃

Analysis: What evidence did bidder submit of addressing all GFE requirements?

- Selected portions of work for DBEs to perform?
- Timely solicited and followed-up with DBEs?
- Negotiated in good faith with interested DBEs?
- Made plans available, assisted with bonding, etc.?
- Contacted the State for assistance in locating DBEs?



GFE Written Decisions₄

If bidder did **not** meet goal but **GFE adequate**:

- **Still need** detailed memo to support decision
- Note if other bidders also unable to meet goal
- Identify bidder's best practices: effective solicitation, outreach, negotiations, etc.
- Compare how facts differ from other GFEs with different outcome



Reconsideration of GFE

- If bidder's GFE are inadequate, offer bidder opportunity for administrative reconsideration (must be in writing)
- Written documentation or oral argument
- Recipient official from original determination may not participate in reconsideration
- Not administratively appealable to USDOT



Case Study 1 (a)

- Contract is \$5M. Contract goal is 6%. Low bidder submits 3.4% DBE commitment. GFE documentation reveals:
 - Bidder identified enough work items that, if subcontracted, would meet goal
 - After soliciting DBEs, bidder uses non-DBE over DBE for landscaping, concrete, and electrical supplies due to price difference
 - Bidder uses non-DBE over a DBE for guardrail because, even though the DBE submitted a lower quote, the prime heard the DBE was difficult to work with
 - After soliciting trucking from DBEs, bidder chooses to self-perform \$50,000 trucking services because its drivers have had a slow season



Case Study 1 (b)

- **Electrical Supplies (Wire)**

DBE \$15,660.00

Non-DBE \$13,746.30

- **Landscaping**

DBE \$6,828.50

Non-DBE \$4,350.80

- **Concrete**

DBE \$ 85,599.29

Non-DBE \$ 70,918.64

- **Guardrail**

DBE \$27,500.00

Non-DBE \$30,000.00



Case Study 1 (c)

Question:

How could the prime contractor have improved its GFE?



Design-Build Contracts₁

- Prime submits DBE commitment as detailed plan in response to RFP or prior to award
- Commitments to specific DBEs, for specific types of work, for specific dollar amounts—Design and Construction
- Commitment to use unspecified DBEs for specific work for an estimated dollar amount for types of work in which DBEs are available
- Identifies DBE work to be performed in each year of the contract



Design-Build Contracts₂

- Good Faith Efforts receive on-going analysis and evaluation
- Deadlines in plan met?
- Is the prime making GFE to follow the plan?
- Does prime have a strict low bid policy?
- Is prime erecting barriers for DBEs?
- Is prime self-performing work that could be subcontracted to DBEs?



Design-Build Case Study 2 (a)

- 5-yr Design Build Contract for \$1B. Prime commits to meeting 8% goal with its response to RFP
- Prime hires a full-time employee to identify DBEs and host “meet and greet” and “matchmaking” events
- Prime has strict low bid policy—its corporate headquarters will not allow it to deviate from policy
- State was unaware of prime’s complex procurement practices
- At the beginning of year 3, prime reports it has attained 1.5% of the 8% goal



Design Build Case Study 2 (b)

- Prime assures recipient that goal will be met by end of contract period
- Recipient begins to receive complaints from DBEs that they have not been hired, *i.e.*, passed over for lower bid



Design Build Case Study 2 (c)

- **Which of the following practices will help meet a DBE goal or GFE?**
 - a. Low bid policy
 - b. Prime hires employee to locate DBEs
 - c. Routine monitoring of DBE participation
 - d. State relies on prime's assurance to meet DBE goal
 - e. State's awareness of prime's procurement practices
- **What are the recipient's responsibilities?**



Bottom Line Revisited

A prime contractor who does not demonstrate adequate GFE to meet a DBE contract goal is ineligible to participate in federal contracting opportunities.



Questions

