

## G. Good Faith Effort (GFE) Process

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There are two circumstances in which an application must be submitted for consideration of a vendor's good faith effort toward meeting the DBE participation requirement for a specific project:

- 1) Before a contract can be awarded, when the bidder does not propose to meet the project goal, a pre-award GFE request must be submitted and a determination made on the bidders efforts to meet the DBE requirement.
- 2) During execution of the contract when DBE participation needed to meet the requirement does not materialize or fall shorts, a post-award GFE request must be submitted.

### Good Faith Effort Applications

If either of the two lowest Bidders, regardless of bid status (as checked, if available, or as submitted, if TBA) are unable to meet the DBE participation goal, an Abbreviated Contractor Good Faith Effort Application (MDOT Form 0188A) must be submitted within five calendar days of the bid letting to [mdot-gfe@michigan.gov](mailto:mdot-gfe@michigan.gov). This submission must include the signed DBE Participation Detail Sheets (MDOT Form 0178) that will be used to meet any portion of the DBE goal. Submissions must also comply with the requirements of the Pre-Award Good Faith Efforts process.

Determined low bidders and prime vendors requesting either a pre- or post-award modification of a contract's DBE participation goal must submit a completed Contractor Good Faith Effort Application (MDOT Form 0188). Information showing why the contract goal should be modified, including documentation of efforts made to meet the goal, must be attached to the application. Incomplete applications will be returned.

The Contractor Good-Faith Effort Application (MDOT Form 0188) contains a checklist identifying the types of documents which should accompany the application. Forms 0188 and 0188A are available at [www.michigan.gov/mdotdbe](http://www.michigan.gov/mdotdbe), under "Resources and Forms".

Submit completed applications with supporting documentation, including the DBE Participation Detail Sheets (MDOT Form 0178) that will be used to meet any portion of the DBE goal, to [mdot-gfe@michigan.gov](mailto:mdot-gfe@michigan.gov).

### Efforts to Obtain DBE Participation

Efforts to obtain DBE participation should be intense, aggressive, and sincere for the specific project and should go beyond simple paperwork exercises. Efforts should include written communication, personal contact, follow-up and, where appropriate, earnest negotiation with DBEs. MDOT expects all primes bidding on a project with a DBE contract

goal to be aware of the DBE participation requirement and to make timely and adequate efforts to recruit DBEs.

Types of Actions MDOT will consider as part of the contractor's Good Faith Efforts to meet DBE Participation Goals (examples are taken from Appendix A of 49 CFR Part 26):

- A. (1) Conducting market research to identify small business contractors and suppliers and soliciting through all reasonable and available means the interest of all certified DBEs that have the capability to perform the work of the contract. This may include attendance at pre-bid and business matchmaking meetings and events, advertising and/or written notices, posting of Notices of Sources Sought and/or Requests for Proposals, written notices or emails to all DBEs listed in the State's directory of transportation firms that specialize in the areas of work desired (as noted in the DBE directory) and which are located in the area or surrounding areas of the project.  
  
(2) The bidder should solicit this interest as early in the acquisition process as practicable to allow the DBEs to respond to the solicitation and submit a timely offer for the subcontract. The bidder should determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.
- B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units (for example, smaller tasks or quantities) to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces. This may include, where possible, establishing flexible timeframes for performance and delivery schedules in a manner that encourages and facilitates DBE participation.
- C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation with their offer for the subcontract.
- D. (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional Agreements could not be reached for DBEs to perform the work.  
  
(2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would

take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

E. (1) Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal. Another practice considered an insufficient good faith effort is the rejection of the DBE because its quotation for the work was not the lowest received. However, nothing in this paragraph shall be construed to require the bidder or prime contractor to accept unreasonable quotes in order to satisfy contract goals.

(2) A prime contractor's inability to find a replacement DBE at the original price is not alone sufficient to support a finding that good faith efforts have been made to replace the original DBE. The fact that the contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the contractor of the obligation to make good faith efforts to find a replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.

F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

H. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, State, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

This is not intended to be a mandatory checklist nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

In determining whether a bidder has made good faith efforts, it is essential to scrutinize its documented efforts. At a minimum, MDOT must review the performance of other bidders in meeting the contract goal. As provided in §26.53(b)(2)(vi), MDOT must also

require the contractor to submit copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract to review whether DBE prices were substantially higher; and contact the DBEs listed on a contractor's solicitation to inquire as to whether they were contacted by the prime. Pro forma mailings to DBEs requesting bids are not alone sufficient to satisfy good faith efforts under the rule.

A promise to use DBEs after contract award is not considered to be responsive to the contract solicitation or to constitute good faith efforts.

## Pre-Award Good Faith Efforts

Requirements for all Projects with Race-Conscious (RC) DBE Goals will include the following contract requirements:

1. The two lowest Bidders, regardless of bid status (as checked, if available, or as submitted, if TBA) must submit signed DBE Participation Sheets (MDOT Form 0178) within five calendar days of the bid letting to [mdot-awards@michigan.gov](mailto:mdot-awards@michigan.gov).
2. If either of the two lowest Bidders, regardless of bid status (as checked, if available, or as submitted, if TBA) are unable to meet the DBE participation goal, an Abbreviated Contractor Good Faith Effort Application (MDOT Form 0188A) must be submitted within five calendar days of the bid letting to [mdot-gfe@michigan.gov](mailto:mdot-gfe@michigan.gov). This submission must include the signed DBE Participation Detail Sheets (MDOT Form 0178) that will be used to meet any portion of the DBE goal.

Contractors unable to obtain a signed 0178 from the DBE within five calendar days of the bid letting must submit one of the following, with a completed form 0178:

- A. Quote from the DBE's verified email or fax number (including any attachments), or
- B. Quote on the DBE's company letterhead (including a signature of the DBE firm).
  - Quotes must be dated and include the price(s) and description of work to be performed.
    - Quotes received from truckers or suppliers must be for a specific project, letting, or time period.

If either of the two lowest bidders fails to meet Steps 1 or 2 of this process, MDOT may award the contract to the next low bidder, or otherwise exercise its discretion in accordance with subsection 102.13 of the Standard Specifications for Construction. Should MDOT reject the bid, the determined low bidder can appeal the bid rejection in accordance with Subsections 102.11 and 102.12 of the Standard Specifications for Construction.

Prior to award, if the DBE is performing Trucking or Supply work, the determined low bidder must submit form(s) 4101 (DBE Heavy Construction Trucking Credit Worksheet) and/or 0193 (DBE Supplier Participation Affidavit), respectively, to Contract Services

Division as specified on form 0178.

Contracts will not be awarded without completed form(s) 0178 with all appropriate signatures and, if necessary, trucking and supplier attachments.

## Timeline of Good Faith Efforts Process

- Within **28** calendar days of the Department's:
  - 1) Transmittal of the contract and bond forms to the determined low bidder for a construction contract, or
  - 2) Final cost negotiations for a consultant contract,the determined low bidder/prime consultant who cannot meet the DBE participation goal must submit either:
  - 1) MDOT Form 0188 with all supporting documentation, or
  - 2) All GFE documentation to fully support a previously submitted MDOT Form 0188A.

Supporting documentation must include all signed DBE Participation Forms (Form 0178) where acceptable alternate documentation was previously submitted and, as applicable, completed DBE Trucking and/or DBE Supplier forms (forms 4101 and 0193, respectively).

- Within **12** calendar days of the Department's receipt of a completed GFE request, the determined low bidder/prime consultant will be notified of the GFE Committee's determination.
- Within **2** calendar days of their receipt of an adverse determination the determined low bidder/prime consultant may, in writing, appeal that determination.
- Within **7** calendar days of receipt of the determined low bidder's/prime consultant's appeal, the GFE Appeals Panel will meet and issue their determination. The determination of the Appeal Panel is administratively final (not appealable to the U.S. Department of Transportation).

If the determined low bidder does not adhere to the timeline above, MDOT may award the contract to the next low bidder, or otherwise exercise its discretion in accordance with subsection 102.13 of the Standard Specifications for Construction.

If a determined low bidder is unable to fulfill the DBE participation goal and submits a pre-award request to modify the goal, the contract will not be awarded until a decision is made by the department.

Once a decision is rendered no additional efforts will be considered.

If the GFE Committee denies the request to modify the DBE participation goal, the determined low bidder will be notified by MDOT and will have two calendar days from the

date of the notification to appeal. If the bidder fails to appeal the decision within two calendar days, MDOT may award the contract to the next low bidder, or otherwise exercise its discretion in accordance with subsection 102.13 of the Standard Specifications for Construction.

## Post-Award Good Faith Efforts and DBE Substitution Requests

Post-award good faith efforts can be defined as efforts taken by the prime vendor to meet the DBE goal after the contract has been awarded and an approved DBE firm will not or cannot perform their work. These provisions only apply to Projects with Race-Conscious (RC) DBE Goals.

Once DBE participation commitments are approved by MDOT (including approved substitute DBEs), prime contractors are prohibited from terminating a DBE for convenience and then substituting with the prime contractor's own forces. The prime contractor is required to make good faith efforts to replace a DBE that could not complete its contract with another DBE firm, to the extent needed to meet the contract goal.

Before the identified substitute DBE(s) can begin work:

1. The DBE Substitution Request (MDOT form 0196) must be approved by the Project Engineer and OBD, and
2. The DBE Participation form(s) (MDOT form 0178) for the substitute DBE firm(s) must be submitted and approved by Contract Services Division.
  - a. If a substitute DBE is performing trucking or supply work, forms 4101 and/or 0193, respectively, must be included with the 0178.

Per 49 CFR Part 26.53, if written approval by MDOT, using forms 0196 and 0178 (as applicable), is not granted, the prime contractor shall not be entitled to any payment or credit toward contract goal for work or material committed or originally contracted to the DBE firm.

DBE firms can be terminated or replaced for good cause only with prior approval by MDOT per form 0196. In all cases, DBE's must be given written notice and provided 5 calendar days to respond prior to form 0196 being sent to MDOT's OBD for approval.

Good cause includes:

- DBE fails or refuses to execute a written contract;
- DBE fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE firm to perform its work of the subcontract results from the bad faith or discriminatory action of the prime contractor;
- DBE fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements;
- DBE becomes bankrupt, insolvent, or exhibits credit unworthiness;

- DBE is ineligible to work on Federally-assisted contracts because of suspension and debarment proceedings;
- DBE is determined by MDOT that it is not a responsible vendor;
- DBE voluntarily withdraws from the project and provides written notice to MDOT of its withdrawal;
- DBE is ineligible to receive DBE credit for the type of work required;
- DBE owner dies or becomes disabled and is unable to complete its work;
- Or other documented good cause that MDOT determines to require the termination of the DBE firm.

Note: If required in a particular case as a matter of public necessity (*e.g.*, safety), MDOT may require a response period shorter than five days.

In addition to post-award terminations, the provisions of this section apply to preaward deletions of or substitutions for DBE firms put forward by offerors in negotiated procurements (Consultant contracts; Design-Build, etc.).

If during the course of completing an awarded MDOT project a prime vendor is unable to fulfill its DBE participation requirements, a good faith effort application must be submitted. To request a post-award reduction of the DBE goal, the prime vendor must submit a completed Good-Faith Effort Application (MDOT Form 0188) with supporting documentation. Post-award applications must be submitted within 14 days of the prime vendor being made aware of their inability to meet the DBE participation goal.

Modification requests shall be reviewed by the GFE Committee. MDOT will notify the prime vendor of the committee determination.

GFE investigators may request additional documentation to clarify or supplement information provided by the prime vendor. Additional documentation received prior to the meeting will be discussed at the meeting. Once a decision is rendered, no additional efforts will be considered.

If the GFE Committee determines the vendor demonstrated sufficient good faith effort to achieve the goal, MDOT will modify the goal as requested. If MDOT denies the request or modifies the goal in a manner other than that requested, MDOT will notify the prime vendor within 17 calendar days of receipt of the request.

If quantities for items subcontracted to DBE firms are decreased or completely deleted by MDOT, the prime vendor should consider subcontracting other work to DBE firms to meet the DBE goal. All efforts to meet the DBE participation goal should be documented. On the date the prime vendor becomes aware that the DBE goal will not be met, the amount of contract work left at that point must be carefully reviewed to determine available work which may be subcontracted to DBE firms.

## Composition of the GFE Committee

Note: Each committee member will have an alternate:

- DBE Administrator, OBD (Chair)
- Bureau of Highway Development designee
- Contract Services Division Administrator or designee
- Construction Field Services Division Administrator or designee
- One Region Engineer or designee

Two-thirds of the members must be present in order to have a quorum and conduct business. When scheduling conflicts occur, committee members may submit their decision and any additional questions or comments electronically. Final GFE application decisions require a majority of consenting votes.

The GFE applicant will be notified of the date and time of the GFE Committee meeting at which the request will be considered. The applicant is allowed to appear before the GFE Determination Committee and make an oral presentation to supplement the written request. The oral presentation cannot take the place of the written request, and documentary evidence must be submitted to show the efforts undertaken by the requestor. Request for oral presentations must be submitted to the appropriate GFE investigator in advance of the meeting.

The committee will consider the merit of the request, the sufficiency of the evidence and documentation supporting the request, and make a decision. The committee may grant the modification, or deny the request.

## Good Faith Effort Appeals

Vendors whose request for waiver or modification of the DBE participation goal has been denied may appeal the decision. The GFE Appeals Committee will not consider information or documentation which was not included in the original GFE application package.

Written appeals must be submitted within two calendar days of the vendor's receipt of the GFE Committee's decision via email to [mdot-gfe@michigan.gov](mailto:mdot-gfe@michigan.gov).

The composition of the GFE Appeals Committee (each member will have an alternate) is as follows:

- MDOT Chief Operations Officer (Chair)
- MDOT Chief Administrative Officer
- Bureau of Finance and Administration Director

The GFE Appeals Committee meets as needed.



The GFE Appeals Committee's decision will be provided by the Chair of the Appeals Committee to the prime vendor. Two-thirds of the members or a representative must be present in order to have a quorum and conduct business.

Decisions of the GFE Appeals Committee are administratively final.

This material has been prepared to provide contractors with an explanation of MDOT's minimum requirements for considering a request for waiver or modification of the contract goals. Since every situation is considered unique, depending on the pertinent facts, each request is evaluated on its own merit.

Simply submitting the documentation in the format specified and following the necessary steps does not guarantee that a waiver or modification will be approved. MDOT must be convinced that the contractor exercised diligence in seeking DBE firms for subcontracting in order to meet the contract goals.

## Federally Required Potential Sanctions

Per 49 CFR Part 26.53, MDOT must include in each prime contract the contract clause required by §26.13(b) stating that failure by the contractor to carry out the requirements of this part is a material breach of the contract and may result in the termination of the contract or such other remedies set forth if the prime contractor fails to comply with the requirements of this section.

MDOT must apply the requirements of this section to DBE bidders/offerors for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, MDOT counts the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.

MDOT must require the contractor awarded the contract to make available, upon request, a copy of all DBE subcontracts. The prime, and all subcontractors, suppliers and service providers shall ensure that all contracted work be performed in accordance with this part's provisions.