

**Michigan Infrastructure and Transportation Association 2010 Annual
Conference
Good Faith Efforts Presentation - January 21, 2010
Answers to Audience Questions**

- 1.) **Question:** How should we react as “primes”, if we know a DBE firm lacks capacity? I.e. DBE bids \$5 million worth of work and only has 2 or 3 pieces of equipment with three employees.
Answer: *A contractor should follow the same process when reviewing any quote from a potential subcontractor. The capacity of the firm to perform the amount of work being quoted should be a factor in determining if their quote will be accepted. If it is necessary to explain this to MDOT, the contractor should document the steps taken to verify the capability of the DBE and steps taken with other subcontractors quoting similar work. The Office of Business Development monitors DBE trucker capacity. Alicia Cisneros (Lansing Office) and Vanessa Bridges (Oak Park Office) monitor DBE trucker capacity. Reidar Keating monitors for supply of liquid asphalt capacity. Both areas can be reached at: Lansing-517-373-2377 and Oak Park – 248-967-0570.*
- 2.) **Question:** In the case of a prime who receives an unreadable DBE bid, what should be the prime’s response?
Answer: *The contractor should contact the DBE quoting the work explaining that the quote was unreadable and asking for a clear copy.*
- 3.) **Question:** Can it be deemed unreasonable if you determine the DBE bid is too low based on your professional experience and/or historical data?
Answer: *Any time a DBE bid is not accepted it is important that the contractor document the steps taken to make the determination. In this instance comparisons with other bids received for the work, and/or specific documentation showing what portion of the bid appears to be unreasonably low. The DBE should also be asked to recheck the bid to ensure there was not some error made in their initial submission.*
- 4.) **Question:** Can a prime contractor back-charge the DBE subcontractor the 1% for bonds and dues which is typically charged to all subcontractors?
Answer: *Yes this can be done, remember the amount subtracted for the bond will reduce the dollar amount allowed for DBE credit.*
- 5.) **Question:** Regarding GFE applications; Does the “Apples to Apples” comparison allow the prime to “package” bid items for comparison and reject/accept DBE’s based on “package” comparison?
Answer: *No. There may be times when combining work items to get the best price are acceptable to the GFE Committee. However, as a general rule the GFE Committee reviews each work item independently to determine whether or not DBE’s bidding specific work items were given a reasonable opportunity to subcontract with a prime contractor.*
- 6.) **Question:** Shouldn’t a DBE be aware of available work that they perform prior to our notification? Isn’t that part of Managing their company independently?

Answer: *The DBE may be aware of work available on projects that are let, but may not know what a particular company intends to self-perform. If the prime does not inform the DBE of work that is actually being considered for subcontract work, then the DBE bid will be irrelevant and the time spent preparing it wasted. Good communication on both sides makes for a better product.*

- 7.) **Question:** Most times a small DBE contractor can not do the job for the same price that a Big Prime contractor. How is this considered with the apples to apples comparison?

Answer: *As a general rule the GFE Committee reviews each work item independently to determine whether or not DBEs bidding specific work items were given a **reasonable** opportunity to subcontract with a prime contractor. It is important to note that it is often reasonable for a smaller contractor's unit prices to be slightly higher than those of a much larger firm. The GFE Committee takes this into consideration when determining whether or not a prime contractor made a good faith effort.*

Additional input from the individual asking the question was obtained at the meeting. The individual wants to know about bidding as a prime on a contract. The answer would be that no apple to apple comparison is done when two primes are bidding on a contract.

- 8.) **Question:** MDOT goes with low bid which forces contractors to do the same so how does the contractor say that a higher price is reasonable when the state doesn't do the same?

Answer: *At the time the Department receives a contractor's bid, contractual DBE participation should be included as part of that bid. This means that the "low bidder" would be bidding based on DBE prices for whatever work they are performing. If all bidders acquire their DBE participation before the letting the low bid includes all contractual requirements including DBE participation.*

- 9.) **Question:** DBE's and subcontractors both generally don't submit quotes until the day before or the morning of the letting, regardless of when quotes are requested. Occasionally a contractor has to work to increase his/her DBE percentage after the letting by negotiating with subs to swap out line items to allow DBE's to pick them up or ask if they can otherwise provide DBE participation. The new pilot solicitation process as set up appears to close this avenue to potentially increased participation.

Answer: *The purpose of a GFE review is to ascertain that the Prime conducted a good faith effort to obtain DBE's prior to the letting. We recognize that a Prime may have to finish/award a contract after the letting because of some contractual issues. However, with that said a Prime should be tracking their progress as they put together the bid and conduct extra efforts if the initial efforts have not resulted in meeting the contract goal. Another consideration under this scenario is the timeliness' of the issues. Remember in our presentation we stated that you should be letting the subcontractor's know ahead of time that you expect them to work with DBE's. Provided a prime contractor is submitting a viable bid (meaning that they have DBE participation reported at the time of their bid), they may continue to add DBE subcontracts up to the point of submission of any GFE modification request.*

- 10.) **Question:** Can a DBE subcontractor purchase material from the prime contractor or a sister company of the prime contractor? Can the value of the material be considered as part of the DBE dollar amount?
Answer: *Purchases from prime contractors or their affiliates are not eligible to be counted toward the DBE goal.*
- 11.) **Question:** Regarding getting individual project goals: Doesn't the committee meet before the project scope is known? How does the process incorporate the 'current' status of DBE capabilities, availability, capacity, etc. that exist in the region at the time the project is actually let?
Answer: *The Contract Selection Team reviews projects more than once. The second review occurs just prior to the advertisement and includes the project scope and anticipated work categories as identified in the engineer's estimate. The designations are then submitted to the MDOT Region office for comments and concurrence prior to advertisement.*
- 12.) **Question:** Did MDOT meet or exceed their goals with the DBE pilot projects? I.e. [sic] 25% goal, did projects achieve the 25% goal or were there a lot of modifications below the 25%? Where is DBE pilot program headed?
Answer: *Ten of Thirteen Small Pilot Project contracts awarded by December 7, 2009 met the goal at time of award, including one contract which was awarded to a DBE prime. The final 5 small project pilot jobs let have not been awarded at this time. Three jobs had pre-award goal modifications. The Small Pilot Project initiative focused on metro region projects only. Once the final projects are let the Small Pilot Project will end.*
- 13.) **Question:** Can use of a DBE on a race-neutral basis apply to a prime's requirements on other projects?
Answer: *No, requirements for DBE participation are project specific.*
- 14.) **Question:** What documentation will be required to prove RN (race-neutral) participation on other projects? Is RN participation only counted for work on other MDOT projects?
Answer: *Any race-neutral participation is counted toward the project on which the work was performed. Race-neutral participation is an indicator of a contractors normal Good Faith Efforts when they are falling short of a project goal. Prime contractors wishing to make the GFE Committee aware of any race-neutral participation on other projects should include a listing of the project numbers, DBE contractor names and DBE participation achieved beyond any identified DBE goal requirements.*
- 15.) **Question:** If race-neutral (RN) participation is given by a contractor on a project and the RN goal attainment is short at the end of the project, does the contractor need to do a GFE waiver?
Answer: *A Good Faith Effort (GFE) Request is required whenever a race conscious goal is not met – even if the project is complete.*
- 16.) **Question:** Is RN participation tracked (reported) like RC?
Answer: *Yes, it is tracked and reported to FHWA as part of the Departments overall goal attainment each fiscal year. There is an area on the Blue-sheet (Form 0178) for contractors to report all race-neutral (RN) participation and all contractors should complete this form if a DBE firm is used on a project with*

no DBE participation. On contracts with DBE participation, any DBE work in excess of the Contract Goal is recorded as RN.

17.) **Question:** Is it legal to, provide a line of credit, insurance, material or Supplies DBE and meet CUF?

Answer: *No. DBE firms should obtain their own lines of credit, insurance materials and supplies. Primes can provide assistance to DBE firms. An example would be introducing the DBE to a bonding agent or referring the DBE firm to a supplier. Arranging for the purchase of materials and supplies on behalf of a DBE firm is an example of a Commercially Useful Function (CUF) violation.*

17.) **Question:** What is considered adequate time to be provided to a DBE to respond to a request from a prime for a quote – I need number of days?

Answer. *MDOT gives prime contractors several weeks to bid depending on the type of work and length of advertisement. The amount of time to be given a DBE will vary depending on how long the prime had to put together a bid. This makes it difficult to provide a number of days.*

18.) **Question:** With regard to CUF standards and violations, who makes the final determination if a violation occurs? Does MDOT, OBD? Does FHWA?

Answer: *It could be any of the above depending on how the CUF violation is discovered. MDOT and the Office of Business Development (OBD) will always be involved when we become aware of a CUF violation. Under certain circumstances the Federal Highway Administration (FHWA) may also be involved. For example, if the FHWA discovers the violation during an audit of projects they may notify MDOT and would continue to monitor the project until the situation is properly addressed.*