

REGULATIONS REGARDING THE DETERMINATION OF GOOD FAITH EFFORTS REGARDING MBE/WBE/DBE PARTICIPATION AT CONTRACT CLOSE-OUT

Pursuant to Section 2-92-450 of the Municipal Code of Chicago, the Chief Procurement Officer ("CPO") is required to issue rules setting forth the standards to be used in determining whether or not to grant a contractor's request for waiver of MBE and/or WBE participation commitments. In addition, under Section 2-92-740 of the Municipal Code of Chicago, if the CPO determines that a contractor has failed to make good faith efforts to fulfill its MBE and/or WBE goals on a City construction contract, the CPO may impose remedies or sanctions upon that contractor.

General Rule

A contractor shall not be entitled to a reduction or waiver of MBE or WBE goals during the performance of the contract, or after substantial completion of the contract at the time of contract close-out, unless the contractor, by a written request to the CPO for reduction or waiver of its MBE or WBE goals, can demonstrate to the satisfaction of the CPO that it has made good faith efforts to meet its MBE and WBE utilization goals.

Scope of Rule

The rules promulgated below set forth the process for contract close-out and the basis upon which the CPO will determine if a contractor has made good faith efforts sufficient to allow a waiver or reduction of its MBE and/or WBE participation commitments on both the City's construction and non-construction contracts.

THE CLOSE-OUT PROCESS

- A** Prior to contract close-out, the City shall submit to the contractor a preliminary report of the contractor's MBE and WBE participation rates based on the contractor's prior submissions. The preliminary report shall notify the contractor of any shortfall(s) in its MBE and/or WBE participation commitments. If, after receipt of this preliminary report, the contractor wishes to obtain a reduction or waiver of its MBE and/or WBE participation goals, it must, within 10 business days of receipt of the preliminary report, file a written request for such reduction or waiver with the CPO, providing sufficient documentation to show that it made good faith efforts to comply with its MBE and/or WBE participation commitments as evidenced by the contractor's compliance with the factors specified below. Reasonable extensions to the 10 business day response time may be granted if made in writing prior to the expiration of the first 10 business day period.
- B** The CPO will utilize the factors listed below to determine if the contractor made good faith efforts to meet its MBE and WBE utilization goals. The CPO will take into consideration any information submitted by the contractor in response to the preliminary report and will render a final written decision regarding any MBE and/or WBE reduction or waiver request after a final report of the contractor's MBE and WBE participation rates has been completed.
- C** Requests for Reconsideration of a final determination may be submitted to the CPO if:
 - 1. Information becomes available that was not previously known; or
 - 2. The CPO's decision contains an error of law or regulation.

- D** If the contractor's waiver request is denied, and the contractor disagrees with the CPO's determination that it did not make good faith efforts to meet its MBE and/or WBE commitments and wishes to appeal, the contractor shall have fifteen (15) days after receipt of the CPO's final decision to submit to the CPO a written request for a hearing to be conducted by the City's Department of Administrative Hearings. Upon receipt of a timely hearing request, the City shall institute an action with the Department of Administrative Hearings, which shall appoint an administrative law officer who shall conduct a hearing on the contractor's MBE and/or WBE reduction or waiver request within thirty (30) days of receiving the request.

DETERMINING GOOD FAITH EFFORTS IN CONTRACTS WITH MBE/WBE PARTICIPATION FOR CONTRACT CLOSE OUT

- A** In evaluating whether the contractor has made such good faith efforts, the CPO, or his or her designee, shall consider, if there is evidence, that during the course of the project, the contractor was:
- 1** Soliciting through reasonable and available means the interest of City-certified MBEs or WBEs that have the capability to perform the work of the contract. The contractor must solicit this interest within sufficient time to allow the MBEs or WBEs to respond. The contractor must take appropriate steps to follow up initial solicitations with interested MBEs or WBEs.
 - 2** Providing interested MBEs or WBEs with adequate information about the plans, specifications and requirements of the contract, including addenda, in a timely manner to assist them in responding to the solicitation.
 - 3** Negotiating in good faith with interested MBEs or WBEs that have submitted bids. Documentation of negotiation must include the names, addresses and telephone numbers of MBEs or WBEs that were solicited; the date of each such solicitation; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why agreements could not be reached with MBEs or WBEs to perform the work. That there may be some additional costs involved in soliciting and using MBEs and WBEs is not a sufficient reason for a contractor's failure to meet the goals, as long as such costs are reasonable.
 - 4** Not rejecting MBEs or WBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The MBEs' or WBEs' standing within its industry, membership in specific groups, organizations, or associations, and political or social affiliations are not legitimate causes for rejecting or not soliciting bids to meet the goals.
 - 5** Making a portion of the work available to MBE or WBE subcontractors and suppliers and selecting the portions of the work or material consistent with the available MBE or WBE subcontractors and suppliers, so as to facilitate meeting the goals.
 - 6** Making good faith efforts to utilize MBEs and WBEs, despite the ability or desire of a contractor to perform the work of a contract with its own organization.

A contractor who desires to self-perform the work of a contract must demonstrate good faith efforts unless the goals have been met.

7. Selecting portions of the work to be performed by MBEs or WBEs in order to increase the likelihood that the goals will be met. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate MBE or WBE participation, even when the contractor might otherwise prefer to perform these work items with its own forces.

8. Making efforts to assist interested MBEs or WBEs in obtaining bonding, lines of credit or insurance as required by the City or contractor.

9. Making efforts to assist interested MBEs or WBEs in obtaining necessary equipment, supplies, materials or related assistance or services, including participation in a City-sponsored mentor-protégée program.

10. Effectively using the services of the City; minority or women community organizations; minority or women contractors' groups; local, state and federal minority or women business assistance offices; and other organizations to provide assistance in the recruitment and placement of MBEs or WBEs.

11. Affected by City action that caused the shortfall (e.g., a change in the scope of work that eliminated MBE/WBE budget line items, or an increase in the scope of work covered by line items being performed by non-MBE/non-WBE contractors; a change in specifications).

12. Unable to obtain MBE or WBE participation without requiring the introduction of extra participants not performing a commercially useful function.

13. Making efforts to utilize the Department of Procurement Services' M/WBE forum for purposes of advertising subcontracting opportunities appropriate for MBEs and WBEs. The M/WBE forum is located at:
<https://webapps.cityofchicago.org/MWBEForum/forums/list.page>.

DETERMINING GOOD FAITH EFFORTS IN CONTRACTS WITH DBE PARTICIPATION FOR CONTRACT CLOSEOUT

In evaluating whether the contractor has made such good faith efforts on federally-funded projects that provide for goals for Disadvantaged Business Enterprises, the CPO, or his or her designee, shall consider the factors contained in 49 CFR 26 Appendix A—Guidance Concerning Good Faith Efforts, a copy of which is attached hereto as Exhibit A.

Appendix A to Part 26 -- Guidance Concerning Good Faith Efforts

- I. When, as a recipient, you establish a contract goal on a DOT-assisted contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part 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.
- II. In any situation in which you have established a contract goal, part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, it is up to you to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder 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. Mere *pro forma* efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call: meeting quantitative formulas is not required.
- III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (i.e., obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring *bona fide* good faith efforts.
- IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It 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.
 - A. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must 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 to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.
 - 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.
 - D.
 1. (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. 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 employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.
 - 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.
- V. In determining whether a bidder has made good faith efforts, you may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.