

## **COMMITMENT TO GOOD FAITH EFFORTS IN ATTAINING PARTICIPATION OF MINORITY OR DISADVANTAGED BUSINESS ENTERPRISES (“MBE/DBE”)**

On March 24, 2014 the Commission directed that, to the fullest extent permitted by law, a program to facilitate the participation of minority owned firms and economically and socially disadvantaged businesses in the Commission’s contracts. The Commission’s objective is to provide the fullest possible opportunity for all firms, including firms owned and controlled by minorities and females and otherwise socially and economically disadvantaged individuals, to obtain and perform its contracts.

The Commission does not have established goals for the participation of Minority or Disadvantaged Business Enterprises (“MBE/DBEs”) on the Project. However, the Commission expects Bidders to agree to utilize and demonstrate Good Faith Efforts to engage qualified and willing MBE/DBEs in the opportunities available for performing Work on the Project. The Bidder commits to use its Good Faith Efforts to utilize MBE/DBE entities, and demonstrate those efforts. The final determination of Good Faith Effort shall be made by the Commission based upon the Bidders’ actions as documented in the required forms.

In addition to submitting a detailed Demonstration of Good Faith Efforts (GFE-1 and GFE-2) within two (2) calendar days of the Bid Opening, the Bidder agrees that if awarded the Contract, it shall provide to the Commission the Statements of Intent to Contract and Perform for each MBE/DBE participating on the Project as a condition precedent for execution of the Contract under IB 7.3.6.

By signing the Bid Form Certification, the Bidder acknowledges that it understands the requirement to complete and submit a detailed Demonstration of Good Faith Effort (see GFE-1 and GFE-2) form describing its activities undertaken to engage MBE/DBE entities on this Project, and full documentation to substantiate those efforts. The Commission will utilize the following guidelines in evaluating whether the Bidder demonstrated its use of Good Faith Efforts:

### **GOOD FAITH EFFORTS DETERMINATION GUIDELINES**

#### **A. INTRODUCTION**

In accordance with Resolution No. 18-2014, adopted March 24, 2014, the Commission instituted a requirement that each bidder on a public improvement project and each respondent to request for proposals (“RFP”) to perform services utilize Good Faith Efforts to ensure the fullest possible opportunity for firms owned and controlled by minorities and females or otherwise disadvantaged individuals (“MBE/DBEs”) to participate in the opportunities available under the prospective contract. As part of the evaluation of the bids or proposals received, the Commission evaluates the Good Faith Efforts as part of the responsibility of the bidder or respondent and responsiveness bid or proposal. The bidder or respondent must satisfactorily demonstrate its Good Faith Efforts to attain MBE/DBE participation.

Pending the results of the forthcoming disparity study, the Commission has yet to establish specific MBE/DBE participation goals on its contracts. However, the use and demonstration of Good Faith Efforts are required. The level of MBE/DBE participation should correspond with the Availability of such firms in the marketplace to perform Commercially Useful Functions under the Opportunities each

contract presents. These guidelines are intended for use in making the determination whether a particular bidder or respondent demonstrated its Good Faith Efforts when submitting its bid or proposal.

## **B. DEFINITIONS**

“Good Faith Efforts” means performing necessary and reasonable actions that, by their scope, intensity, and appropriateness, would reasonably be expected to attain MBE/DBE participation. The determination of Good Faith Efforts is based on consideration of the quality, quantity, and intensity of the different kinds of actions taken. The activities or efforts undertaken to when making a Good Faith Effort must be those that one could reasonably expect to deploy when seriously, actively and aggressively attempting to obtain MBE/DBE participation in relative proportion to those that are Available to capably perform Commercially Useful Functions under the Opportunities presented in given contract.

“Commercially Useful Function” means responsibility to perform a component of the contract obligations by actually performing, managing and supervising the work involved. An MBE/DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of MBE/DBE participation. If a MBE/DBE Subcontractor (as distinguished from a Material Supplier) does not perform or exercise responsibility for at least thirty percent of the total cost of its subcontract with its own workforce, there is a rebuttable presumption that it is not performing a commercially useful function.

The analysis for determining whether the bidder or respondent fulfilled its obligation to use Good Faith Efforts, the Commission will consider the demonstration of the following:

1. **“Opportunities”** means the subcomponents of the project that are identifiable as economically viable scopes of work that may interest subcontractors in responding to the respondent’s solicitations to participate in the Project. The unique opportunities each project presents is determined based on the nature of the project using in-house expertise and the aggregation of those that the bidders or respondents may identify in their bids or proposals.
2. **“Availability”** means the degree of ready, willing and able MBE/DBEs available to capitalize on the opportunities presented under each project. The availability consideration examines the amount of MBE/DBEs in the relevant marketplace using (1) the Commission’s list of certified MBE/DBEs (available at <http://www.ohioturnpike.org/business/doing-business-with-us/mbe-fbe>); (2) the Unified Certification Program’s DBE Directory (<http://www.dot.state.oh.us/DBE/pages/DBE-Directory.aspx>); (3) Ohio Department of Administrative Services’ search results for MBE (<http://eodreporting.oit.ohio.gov/searchMBE.aspx>) and Edge Certified Service Providers (<http://eodreporting.oit.ohio.gov/searchEDGE.aspx>); (4) the City of Cleveland’s MBE and FBE Registry (<https://cleveland.diversitycompliance.com/FrontEnd/VendorSearchPublic.asp?TN=cleveland&XID=1290>); (5) the Northeast Ohio Regional Sewer District’s Certification Directory for MBEs and WBEs

<https://neorsd.sbcompliance.com/FrontEnd/VendorSearchPublic.asp?TN=neorsd&XID=9328>); and (5) any other Ohio-centric database that the Commission recognizes as using standards that are substantially similar to the requirements for certification with the Commission, UCP or DAS as an MBE, DBE or EDGE program participant.

3. **“Efforts”** means the documented attempt to meaningfully and earnestly solicit the interest of available MBE/DBE to fulfill the opportunities presented to perform on the Project, including making a sufficient number of contacts to follow up with any available but non-responsive MBE/DBEs and negotiating in good faith with available MBE/DBEs to reach reasonably agreeable terms for their participation.
4. **“Commitments”** means the bidder or respondent represents to have successfully achieved commitment(s) to utilize verified MBE/DBEs to perform a Commercially Useful Function on the project.

The determination that a given respondent or bidder satisfactorily used and demonstrated its Good Faith Efforts is based on the holistic review of the Opportunities, Availability, Effort and Commitment documented in the bid or proposal documents.

## **C. PROCEDURE**

Each bidder on a public improvement contract and respondent submitting a proposal on a professional services contract are required to submit a form titled, “Demonstration of Good Faith Efforts.” The form is designed to elicit responses documenting the Good Faith Efforts that each bidder or respondent utilized when formulating its bid or proposal to perform work for the Commission. A blank Demonstration of Good Faith form provided to interested parties in the bid and RFP package is attached as Exhibit A.

### **1. Opportunity and Availability**

Upon the opening of the bids or proposals (or LOIs commencing in 2016), the MBE/DBE Program Manager reviews the completed Demonstration of Good Faith Efforts to identify the opportunities and availability presented under the particular procurement. This assessment of opportunities and availability compiles those the bidders or respondents may identify in their completed Demonstration of Good Faith Efforts forms, but also goes outside the form to consult with in-house subject matter experts to identify additional possible opportunities and recognized certification registries for possible untapped available firms.

The MBE/DBE Program Manager then examines the response from the apparent low bidder or top-ranked respondent to examine whether the materials document that the respondent or bidder used Good Faith Efforts.

A bidder or respondent can demonstrate fulfilling the Opportunity component is documenting that the bidder or respondent performed actions that include the following:

- a. Selected and packaged portions of the work in order to increase the likelihood that the MBE/DBEs will respond to solicitations expressing interest in participating on the project. This includes, where appropriate, breaking out contract work into economically feasible units to facilitate participation through subcontracting.
- b. Soliciting the interest of all MBE/DBE entities available to perform on the project through reasonable, meaningful and available means and providing a reasonable and meaningful time to respond.

The means for a bidder or respondent to fulfill the Availability component of demonstrating good faith efforts includes the following:

- a. Searching recognized registries identifying certified MBE/DBEs that potentially could fulfill the opportunities under the project.
- b. Identifying other possible ready, willing and able MBE/DBEs through the effective use of the services of available from plan rooms, community organizations, 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 utilization of MBE/DBE entities.

## **2. Efforts and Commitment**

Once the MBE/DBE Program Manager has identified the possible opportunities and availability for project, and those Opportunities and Availability that the apparent low bidder or top ranked respondent has documented in its completed Demonstration of Good Faith Efforts form, the low bidder or top ranked respondent's efforts and commitments will examine the documented level of exertion used to engage the Availability pool on the Opportunities presented under the project.

The Efforts component considers the active attempts to successfully reach terms with interested MBE/DBE firms, which may include the following:

- a. Negotiating in good faith with interested MBE/DBE entities so as to facilitate their participation on the Project.
- b. Not rejecting DBE entities without sound reasons based on a thorough investigation of their capabilities.
- c. Assisting DBE entities in obtaining bonding, lines of credit, or insurance as required by the Bidder.

The Commitment component provides a cross-check on the accumulation of the identification of Opportunities, Availability and Efforts. Unless the analyses under the Opportunities, Availability and Efforts prongs demonstrate otherwise, the utilization of Good Faith Efforts is expected to result in the bidder or respondent successfully representing its achievement of MBE/DBE participation on the project. The bidder or respondent must provide justification for any lack of Commitment by showing that the failure occurred despite its Good Faith Efforts through the demonstration under the Opportunity, Availability and Efforts prongs of the test.