

KD Construction Alert: D/M/WBE Waiver Requests - Know Your Rights and Be Prepared

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By now many contractors are familiar with goals set for a designated percentage of disadvantaged, minority and/or woman business enterprises (“D/M/WBE” or “certified firms”) to participate on certain contracts. The rules pertaining to certified firm hiring typically apply to public contracts and depend on the funding source. For example, federally funded contracts apply federal rules/laws and call for the use of DBE firms, while New York State (“state”) funded contracts apply state rules/laws and call for use of MBEs and/or WBEs. For any such contract, a bidding contractor must provide a plan for utilization/participation of D/M/WBE firms (as applicable) toward meeting the contract goal. If a bidder believes that it will not be able to meet a goal, the bidder may request a full or partial waiver of the goal by submitting to the bidding agency the good faith efforts it made to meet the contract goal and the reason why it could not be reached. We recently encountered a disturbing potential policy move by a prominent public utility to refuse consideration of waivers and good faith efforts, and to consider the goals in its contracts to be requirements.

A review of the applicable federal and state rules and statutes (collectively “applicable laws”) establishes, however, that any such policy by an agency is a violation of applicable laws and is arguably unconstitutional. Applicable laws expressly recognize goals to be targets not requirements or quotas. The federal rules are explicitly clear that recipients (agencies) are not to use quotas for DBEs in contracts. Moreover, the “Guidance Concerning Good Faith Efforts” (Appendix A) in the federal rules “strongly cautions” agencies against requiring that a bidder meet a goal in order to be awarded a contract. The state rules similarly recognize goals to be the percentage of aggregate agency expenditures targeted for the participation of certified firms.

Because the goals are not required quotas, a bidding contractor is entitled to submit a waiver request if it cannot meet a contract goal despite good faith efforts to do so. In this regard, detailed rules and procedures requiring the consideration of waivers based on good faith efforts are established in the federal and state rules and under the New York State Executive Law. The federal rules prohibit an agency from ignoring bona fide good faith efforts and explain that an agency must not deny a contract award for failure to meet a goal if a bidder documents adequate good faith efforts. The state law and rules similarly require that the state provide for circumstances and a procedure by which a bidder can be granted a waiver from an agency relating to M/WBE participation based upon a consideration of good faith efforts.

A bidder’s good faith efforts to be considered generally include actions such as identifying and soliciting certified firms to perform contract work; breaking out subcontract opportunities to maximize certified firm participation; and good faith bidding /negotiating with certified firms to provide a realistic opportunity for certified firm involvement. Specific examples of good faith efforts are laid out in the federal and state rules. It is crucial and necessary rules for a bidder to document the good faith efforts made and to submit such documented efforts as part of a waiver request.

Agencies also have responsibilities with respect to contract goals which may play into whether a waiver is granted. At the outset there are bases in the federal and state rules that must be followed as to how an agency’s overall goals are to be established. Assuming that an agency’s overall capital program goals are properly set, that does not mean that such goals should be imposed without variation across every contract an agency puts out to bid. The federal and state rules expect that variables such as size, scope, location, and time frames/schedule will be accounted for in determining contract specific goals. For example, a contract primarily requiring a specialized scope of work or sole source materials not available from certified firms may not contain the same goal as a contract offering more opportunities for certified firm participation. In fact, under the state rules an agency reviewing a waiver request is required to consider factors such as the number and types of certified firms available to perform contract work; dollar value of the contract; project size; project term; the other qualified businesses in the project region available to do the work; and the ability of certified firms outside the project region to perform the contract work. Agencies under the federal and state rules are also expected to take good faith measures to maximize opportunities for utilization of certified firms such as providing, where possible, a contract scope of work in procurements that will allow for more certified firm participation.

Finally, to the extent that a waiver request is denied, the applicable laws provide that a bidder can seek reconsideration and obtain a written decision on any such reconsideration request. In such a case the bidder must be mindful of the actions that may be needed to maintain rights to a contract award pending waiver reconsideration; the procedural time frames involved; and any rights to litigate beyond a final administrative determination.

As noted above, it is important to make sure that good faith efforts are documented. This means that contractors must establish policies not just to engage in, but also to record good faith efforts. In this regard a checklist of outreach, solicitation and bidding activities (i.e. advertising, networking, fair bidding and contract opportunities) should be created so that good faith efforts are listed and can be recorded by staff. Seeking a waiver will get nowhere if good faith efforts have not been made and documented.

It can be a costly error for a contractor to blindly assume that an agency has properly refused or denied a waiver request or set a realistic contract goal. As outlined above, a contractor is entitled to submit a waiver request and there are requirements in place as to how such requests should be fairly considered and determined. Overall it is important for a bidding contractor to “do its homework” and know its waiver rights and the procedures as laid out in the applicable law, rules, agency policies and bid documents. Putting measures in place to most effectively document good faith efforts, establish and submit grounds for waiver, and enforce waiver request rights can be the difference in whether a bidder obtains a contract award.