

## Exhibit 9-G: Sample Procedure for Good Faith Efforts

This sample procedure is recommended based on 49 CFR 26.53(d). It can be used verbatim or modified as necessary to fit the Local Agency's particular requirements and project. If modifications are necessary, please ensure that they are compatible with 49 CFR 26.

### Demonstration of Good Faith Efforts §26.53(a)-(c)

The obligation of the bidder/offeror is to make good faith efforts. The bidder/offeror can demonstrate that it has done so either by meeting the contract goal or documenting good faith efforts.

The administering Local Agency reviews all DBE commitment information submitted as a result of bid when a contract goal is assigned. When reviewing a good faith effort submission, the Local Agency reviews several factors in determining whether a bidder has demonstrated adequate good faith efforts to meet the contract goal.

### **DBE information that bidders must submit within 5 calendar days of bid opening includes but is not limited to:**

1. The bidder/offeror's overall DBE commitment.
2. Items of work the bidder/offeror has made available to DBE firms. The bidder/offeror identifies and describe those items of work the bidder/offeror might otherwise perform with the bidder/offeror's own forces and those items that have been broken down into economically feasible units to facilitate DBE participation. For each item listed, the bidder/offeror must show the dollar value and percentage of the total contract. It is the bidder/offeror's responsibility to demonstrate that sufficient work to meet the goal was made available to DBE firms.
3. Names of certified DBEs, dates on which they were solicited to bid on the project, and the North American Industry Classification System (NAICS) and California Work Category codes that the DBEs are certified in. The bidder/offeror must include the items of work offered. The bidder/offeror must describe the methods used for following up initial solicitations to determine with certainty if the DBEs were interested, and the dates of the follow-up. The bidder/offeror must attach supporting documents such as copies of letters, memos, facsimiles sent, telephone logs, telephone billing statements, and other evidence of solicitation. The bidder/offeror is reminded to solicit certified DBEs through all reasonable and available means and provide sufficient time to allow DBEs to respond.
4. Name of selected firm and its status as a DBE for each item of work made available. The bidder/offeror must include name, address, and telephone number of each DBE that provided a quote and their price quote. If the firm selected for the item is not a DBE, the bidder/offeror must provide the reasons for the selection.

5. Name and date of each publication in which the bidder/offeror requested DBE participation for the project. The bidder/offeror must attach copies of the published advertisements. Names of agencies and dates on which they were contacted to provide assistance in contacting, recruiting, and using DBE firms. If the agencies were contacted in writing, the bidder/offeror must provide copies of supporting documents.
6. List of efforts made to provide interested DBEs with adequate information about the plans, specifications, and requirements of the contract to assist them in responding to a solicitation. If the bidder/offeror has provided information, they must identify the name of the DBE assisted, the nature of the information provided, and date of contact. The bidder/offeror must provide copies of supporting documents, as appropriate.
7. List of efforts made to assist interested DBEs in obtaining bonding, lines of credit, insurance, necessary equipment, supplies, and materials, excluding supplies and equipment that the DBE subcontractor purchases or leases from the bidder/offeror or its affiliate. If such assistance is provided by the bidder/offeror, they must identify the name of the DBE assisted, nature of the assistance offered, and date assistance was provided. Provide copies of supporting documents, as appropriate.
8. Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal.
9. Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the bidder/offeror's commitment.
10. Written documentation of reason(s) for rejecting DBE quotes.
11. Any additional data to support demonstration of good faith efforts.

The bidder/offeror can use Caltrans LAPM Exhibit 15-H: PROPOSER/CONTRACTOR GOOD FAITH EFFORTS, and any agency-approved forms to provide such information listed above. In its determination, the Local Agency ensures the completeness and accuracy of documents such as the contact lists, publication proof, solicitation letters, fax/email transmissions, and quotes from DBEs and non-DBEs.

For trucking bid items, the Local Agency will verify the DBE trucking firm is certified to perform the work. The Local Agency will contact the bidder to determine how it used the DBE's quote to arrive at its commitment amount. The Local Agency will question the bidder on how many and what types of trucks are needed to do the work and the number of trucks owned by the DBE trucker. The Local Agency will get copies of the current registration(s) or non-operating permit(s) for each truck. The Local Agency will ask the bidder if the DBE trucker will be brokering any trucks, if so, verify the certification, registration(s) and non-use permit(s) and brokerage fee credit for non-DBE trucks.

For DBE bulk suppliers the Local Agency will verify the DBE has enough trucks or existing lease agreements for enough trucks to perform the work. The Local Agency will also have the DBE sign a written declaration declaring their drivers will be driving the leased trucks if the DBE operates any leased trucks. The Agency will get clarification on the origin and destination of the materials to be supplied. The Agency will question the bidder on who will be paying for the material.

Once a determination is made the Local Agency writes a letter with its findings and supporting data to the bidder. Should the good faith effort of a bidder be rejected the Local Agency will include in their decision letter the areas of deficiency by the bidder. This may include, but not limited to, bidder comparison of DBE quotes accepted by another bidder/proposer, list of available DBEs based on the work codes and work area in the California Unified Certification Program (CUCP) database.

Per Chapter 9.8 (Good Faith Efforts) of the Local Assistance Procedure Manual (LAPM), Caltrans provides review and feedback on the Local Agency's determinations of the bidder/proposer's GFE for consultant contracts greater than \$500,000 and construction contracts greater than \$2 million. Caltrans' Office of Civil Rights (OCR), Contract Evaluation Branch (CEB) can assist the local agencies by reviewing their evaluations. The CEB reviews the GFE determination of the Local Agency and analyzes the bidders/proposer's GFE submittal to the Local Agency. The CEB will draft a memo either concurring or not concurring with their determination. The CEB will provide feedback on improving the local agencies GFE evaluation when applicable.

Design-Build (DB) and Construction Manager General Contractor (CMGC) contracts require a slightly different Good Faith Effort documentation process. Instructions to Proposers of the RFP directs all proposers to submit a DBE Performance Plan which includes the following DBE information:

1. An estimated dollar amount to be awarded to DBE firms.
2. Identification of the areas of work to be subcontracted to DBE firms, specifying the areas DBE firms have been selected and the areas DBE firms are anticipated to be used. It is the proposer's responsibility to demonstrate sufficient work to facilitate DBE participation was made or will be made available to DBE firms.
3. A description of the good faith efforts the proposer has made as of the date of the proposal and good faith efforts the proposer will make in the future to meet the DBE goals.

The DBE Performance Plan, (must at minimum demonstrate the proposer's intent to meet the contract goal) when fully implemented, results in the proposer meeting the DBE goal, unless the proposer can demonstrate afterwards that they made good faith efforts throughout the contract period. In addition to the DBE Performance Plan, proposers submit good faith efforts documentation demonstrating their efforts to achieve the DBE goal up to the proposal due date.

### **Administrative Remedies for noncompliance §26.53(f)(3)**

The following is the applicable process if the contractor fails or refuses to comply with the substitution process in the specified time. The Local Agency must provide a warning to the contractor. If the first warning is provided verbally, the resident engineer or contract manager must document the warning in their daily contract reports.

If the prime contractor replaces a listed DBE without written approval from the resident engineer, payment for the items of work committed to the DBE must be temporarily withheld from the next progress payment. The Local Agency will send the prime contractor written notice of the improper substitution and payment withhold. In addition, if the DBE is also a subcontractor required to be listed at bid time by the Fair Practices Act, the substitution process must comply with Sections 4100 through 4114 of California Public Contract Code, "Subletting and Subcontracting Fair Practices Act".

If the substitution is found to be in violation of the Fair Practices Act, the Local Agency's hearing officer may assess the prime contractor a penalty of up to 10 percent of the subcontract amount. Any temporary withholds become permanent when a violation is confirmed. Federally funded contracts require the contractor to report a DBE firm that becomes certified or decertified during the course of the project. A DBE subcontractor that becomes decertified during the course of the project must notify the contractor in writing with the date of decertification. In the same manner, a subcontractor that becomes a certified DBE during the course of the project must notify the contractor in writing with the date of certification. The prime contractor must notify the resident engineer if the contractor becomes aware of a DBE obtaining or losing its certification during construction.

The contractor must still honor contractual commitments with a DBE firm performing work on the contract even if the DBE loses its certification during construction. No substitution is required. For reporting purposes only, DBE credit for the Local Agency will be limited to payments made while the firm was certified.

### **Good Faith Efforts when a DBE is replaced on a contract §26.53(f)(g)**

The Local Agency will require a contractor to make good faith efforts to replace a DBE that is terminated or otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. Contractors are required to notify the contract's resident engineer or contract manager immediately of the DBE's inability or unwillingness to perform or provide reasonable documentation.

The contractor is required to obtain prior written approval of the substitute DBE from the contract administrator. These approvals come from either the resident engineer or contract manager for the agency's contracts. Should the contractor be unsuccessful in replacing the committed DBE with another DBE, then it is the responsibility of the resident engineer or contract manager to ensure the contractor has submitted sufficient documentation of good faith efforts. If the contractor is able to replace the committed DBE with another DBE, the resident engineer or contract manager must collect copies of the new or amended subcontracts.

The contractor is required to notify the original DBE of their intent to use other forces or material sources and provide the reasons. The contractor needs to provide the DBE with 5 business days to respond to their notice and advise the contractor and the Local Agency of the reasons why the use of other forces or sources of materials should not occur. The contractor's request to use other forces or material sources must include:

- One or more of the reasons listed in the preceding paragraph;
- Notices from the contractor to the DBE regarding the request; and
- Notices from the DBE to the contractor regarding the request.

If the Local Agency authorizes the termination or substitution of a listed DBE, make good faith efforts to find another DBE. The substitute DBE must (1) perform at least the same dollar amount of work as the original DBE under the contract to the extent needed to meet the DBE goal and (2) be certified as a DBE with the work code applicable to the type of work the DBE will perform on the contract at the time of the contractor's request for substitution. The contractor needs to submit their documentation of good

faith efforts within 7 days of the contractor's request for authorization of the substitution. The Local Agency may authorize a 7-day extension of this submittal period at the contractor's request. Refer to 49 CFR 26 app A for guidance regarding evaluation of good faith efforts to meet the DBE goal.

Unless the Local Agency authorizes a request to terminate or substitute a listed DBE, the Local Agency does not pay for work unless it is performed or supplied by the DBE listed on the DBE Commitment form. The contractor may be subject to other sanctions under 49 CFR 26.

It is the responsibility of the Local Agency's construction staff to either approve or deny any good faith efforts submitted in an attempt to substitute a DBE on a contract. A copy of the GFE and all relevant documentation, including the approval or denial of the GFE are to be kept in the contract file and reported to the contract administration branch or staff for tracking.

#### **DBE Prime Credit §26.53(i)**

If the bidder is a DBE firm, the Local Agency will review the firm's DBE certification. The Local Agency will review the work codes assigned to the DBE firm and compare the codes to the bid items on the contract. The DBE bidder must be certified to perform/provide at least 30 percent of the work on the project. On average the DBE prime most likely has met the DBE goal with their own forces.

#### **Subcontracts §26.53(j)**

The Local Agency's contracts will require the contractor awarded a federal-aid contract to make a copy of all DBE subcontracts available upon request. The subcontractor shall ensure that all subcontracts or an agreement with DBEs to supply labor or materials require that the subcontract and all lower tier subcontractors be performed in accordance with this part's provisions.