

**OFFICE OF STATE AID ROAD CONSTRUCTION
MISSISSIPPI DEPARTMENT OF TRANSPORTATION**

NOTICE TO BIDDERS NO. 4

DATE: January 2, 2008

**SUBJECT: DISADVANTAGED BUSINESS ENTERPRISES IN FEDERAL-AID
HIGHWAY CONSTRUCTION**

This contract is subject to the "Safe, Accountable, Flexible, Efficient Transportation Equity Act, A Legacy For Users (SAFETEA-LU)" and applicable requirements of "Part 26, Title 49, Code of Federal Regulations." Portions of the Act are set forth in this Notice as applicable to compliance by the Contractor and all of the Act, and the MDOT DBE Program, is incorporated by reference herein.

Copies of this Program may be obtained from:

Office of Civil Rights
Mississippi Department of Transportation
P. O. Box 1850
Jackson, Mississippi 39215-1850

POLICY

It is the policy of the Office of State Aid Road Construction to provide a level playing field, to foster equal opportunity in all federally assisted contracts, to improve the flexibility of the DBE Program, to reduce the burdens on small businesses, and to achieve that amount of participation that would be obtained in a non-discriminatory market place. In doing so, it is the policy of State Aid that there will be no discrimination in the award and performance of federally assisted contracts on the basis of race, color, sex, age, religion, national origin, or any handicap.

ASSURANCES THAT CONTRACTORS MUST TAKE:

State Aid will require that each contract which a County signs with a subrecipient or a contractor (and each subcontract the prime contractor signs with a subcontractor) includes the following assurances:

“The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR 26 in the award and administration of federally assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as State Aid deems appropriate.”

DEFINITIONS

For purposes of this provision the following definitions will apply:

"Disadvantaged Business" means a small business concern: (a) which is at least 51 percent owned by one or more socially and economically disadvantaged individual(s) or in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individual(s); and (b) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individual(s) who own it. It is important to note that the business owners themselves must control the operations of the business. Absentee ownership or title ownership by an individual who does not take an active role in controlling the business is not consistent with eligibility as a DBE under CFR 49 Part 26.71.

CONTRACTOR'S OBLIGATION

The Contractor and all subcontractors shall take all necessary and reasonable steps to ensure that DBE firms can compete for and participate in the performance of a portion of the work in this contract and shall not discriminate on the basis of race, color, national origin, religion or sex. Failure on the part of the Contractor to carry out the DBE requirements of this contract constitutes a breach of contract and after proper notification the County may terminate the contract or take other appropriate action as determined by the County and State Aid.

When a contract requires a zero percent (0%) DBE goal, the Contractor still has the responsibility to take all necessary and reasonable steps to ensure that DBE firms can compete for and participate in the performance of the work in the contract. All work performed by a certified DBE firm is considered to be a "race neutral" measure and the Department will receive DBE credit towards the overall State goals when the DBE firm is paid for their work. If the Prime Contractor is a certified DBE firm, State Aid can receive DBE credit only for the work performed by the Prime Contractor's work force or any work subcontracted to another DBE firm. Work performance by a non-DBE subcontractor is not eligible for DBE credit. DBE credit is received when the DBE firm is paid.

CONTRACT GOAL

The contract goal for participation by DBEs is stated on Section 902, Proposal Sheet 2-DBE. The Contractor shall exercise all necessary and reasonable steps to ensure that participation is equal to or exceeds the contract goal.

The percentage of the contract that the contractor proposes for DBEs shall be so stated on Section 902, Proposal Sheet 2-DBE.

The apparent lowest responsive bidder shall submit to State Aid Form OCR-481-S, signed by the Prime Contractor and the DBE Subcontractors, no later than the 10th day after opening of the bids. Should the apparent lowest bidder be a certified DBE Contractor, Form OCR-487-S shall be submitted to State Aid.

PROMPT PAYMENT

Bidders are hereby advised that the Prime Contractor must pay their subcontractor(s) for satisfactory performance of their contracts as follows:

- (a) Within fifteen (15) calendar days after receiving payment from State Aid for work satisfactorily completed, the Prime Contractor shall make prompt payment to all subcontractors or material suppliers for all monies due.
- (b) Within fifteen (15) calendar days after receiving payment from State Aid for work satisfactorily completed, the Prime Contractor shall promptly return all retainage monies due to all subcontractors or material suppliers.

FORMS ARE AVAILABLE FROM STATE AID

The OCR-481-S Form must contain the following information:

The name and address of each certified DBE Contractor / supplier;

The Reference Number, percent of work and the dollar amount of each item. If a portion of an item is subcontracted, a breakdown of that item (including quantities and unit price) must be attached, detailing what part of the item the DBE firm is to perform and who will perform the remainder of the item.

If the agreed DBE Subcontract percent shown on Sheet 2-DBE of the proposal, does not equal or exceed the contract goal, the bidder must submit, with the proposal, information to satisfy State Aid that adequate good faith efforts have been made to meet the contract goal.

Failure of the lowest bidder to furnish acceptable proof of good faith efforts, submitted with the bid proposal, shall be just cause for rejection of the proposal. Award may then be made to the next lowest responsive bidder or the work may be readvertised.

The following factors are illustrative of matters State Aid will consider in judging whether or not the bidder has made adequate good faith effort to satisfy the contract goal.

- (1) Whether the bidder advertised in general circulation, trade association, and minority-focus media concerning the subcontracting opportunities;
- (2) whether the bidder provided written notice to a reasonable number of specific DBEs that their interest in the contract is being solicited;
- (3) whether the bidder followed up initial solicitations of interest by contacting DBEs to determine with certainty whether they were interested;
- (4) whether the bidder selected portions of the work to be performed by DBEs in order to increase the likelihood of meeting the contract goal;
- (5) whether the bidder provided interested DBEs with adequate information about the plans, specifications and requirements of the contract;

- (6) whether the bidder negotiated in good faith with interested DBEs and did not reject them as unqualified without sound reasons based on a thorough investigation of their capabilities; and
- (7) whether the bidder made efforts to assist interested DBEs in obtaining any required bonding or insurance.

DIRECTORY

A list of "Certified DBE Contractors" which have been certified as such by the Mississippi Department of Transportation and other Unified Certification Partners (UCP) can be found on the Mississippi Department of Transportation website at www.gomdot.com.

The DBE firm must be on the Department's list of "Certified DBE Contractors" that is posted online at the time the job is let and approved by MDOT to count towards meeting the DBE goal. DBE credit is received only when the DBE firm has been paid for the work they performed on the project.

REPLACEMENT

If a DBE Subcontractor cannot perform satisfactorily, and this causes the OCR-481 commitment to fall below the contract goal, the Contractor shall take all necessary reasonable steps to replace the DBE with another certified DBE Subcontractor or submit information to satisfy the Office of State Aid Road Construction that adequate good faith efforts have been made to replace the DBE. All DBE replacements must be approved by State Aid.

Under no circumstances shall the prime or any subcontractor perform the DBE's work (as shown on the OCR-481-S) without prior written approval from State Aid. See "Sanctions" on Page 7 for penalties for performing DBE's work.

When a Contractor proposes to substitute/replace/terminate a DBE that was originally named on the OCR-481-S, the Contractor must obtain a release (in writing) from the named DBE explaining why the DBE Subcontractor cannot perform the work. A copy of the original DBE's release must be attached to the Contractor's written request to substitute/replace/terminate along with appropriate Subcontract Forms for the substitute/replacement/terminated Subcontractor, all of which must be submitted to the DBE Coordinator and approved, in advance, by State Aid.

GOOD FAITH EFFORTS

To demonstrate good faith efforts to replace any DBE that is unable to perform successfully, the Contractor must document steps taken to subcontract with another certified DBE Contractor. Such documentation shall include no less than the following:

- (a) Proof of written notification to certified DBE Contractors by certified mail that their interest is solicited in subcontracting the work defaulted by the previous DBE or in subcontracting other items of work in the contract.

- (b) Efforts to negotiate with certified DBE Contractors for specific items shall include as a minimum:
 - (1) The name, address, and telephone number of each DBE contacted;
 - (2) A description of the information provided about the plans and specifications for those portions of the work to be subcontracted; and
 - (3) A statement of why agreements were not reached.
- (c) For each DBE contacted that was rejected as unqualified, the reasons for such conclusion.
- (d) Efforts made to assist each DBE that needed assistance in obtaining bonding or insurance required by the Contractor.

Failure of the Contractor to demonstrate good faith efforts to replace a DBE Subcontractor that cannot perform as intended with another DBE Subcontractor, when required, shall be a breach of contract and may be just cause to be disqualified from further bidding for a period of up to 12 months after notification by certified mail.

PARTICIPATION / DBE CREDIT

Participation shall be counted toward meeting the goal in this contract as follows:

- (1) If the Prime Contractor is a certified DBE firm, only the value of the work actually performed by the DBE Prime can be counted towards the project goal, along with any work subcontracted to a certified DBE firm.
- (2) If the Contractor is not a DBE, the work subcontracted to a certified DBE Contractor will be counted toward the goal.
- (3) The Contractor may count toward the goal a portion of the total dollar value of a contract with a joint venture eligible under the standards of this provision equal to the percentage of the DBE partner in the joint venture. The joint venturer must submit a Joint Venture Eligibility Form provided by State Aid.
- (4) Expenditures to DBEs that perform a commercially useful function may be counted toward the goal. A business is considered to perform a commercially useful function when it is responsible for the execution of a distinct element of the work and carries out its responsibilities by actually performing, managing, and supervising the work involved.
- (5) The Contractor may count 100% of the expenditures for materials and supplies obtained from certified DBE suppliers and manufacturers that produce goods from raw materials or substantially alters them for resale provided the suppliers and manufacturers assume the actual and contractual responsibility for the provision of the materials and supplies. The Contractor may count 60 percent of the

expenditures to suppliers that are not manufacturers, provided the supplier performs a commercially useful function in the supply process. Within 30 days after receipt of the materials, the Contractor shall furnish to the DBE Coordinator invoices from the certified supplier to verify the DBE goal.

- (6) Any work that a certified DBE firm subcontracts or sub-subcontracts to a non-DBE firm will not count towards the DBE goal.
- (7) Only the dollars actually paid to the DBE firm may be counted towards the DBE goal.

AWARD

Award of this contract to the low bidder will be contingent upon the following conditions:

- (1) Concurrence from Federal Highway Administration, when applicable.
- (2) Bidder must submit to State Aid for approval, Form OCR-481-S (DBE Commitment) no later than the 10th day after opening of the bids, or submit information with the bid proposal to satisfy State Aid and that adequate good faith efforts have been made to meet the contract goal.
- (3) DBE Bidders must submit to State Aid for approval, Form OCR-487-S for each non-DBE sub to be used on the project. This is being required by FHWA to determine race conscious/race neutral goals.
- (4) Bidder must submit to State Aid a list of all firms that submitted quotes for material supplies or items to be subcontracted as part of the bid proposal. This information must be submitted on form OCR-485-S. Failure to do this will cause the Contractor's bid to be considered **irregular**.

Prior to the start of any work, the bidder must notify the County Engineer, in writing, of the name of the designated "DBE Liaison Officer" for this project. This notification must be posted on the bulletin board at the project site.

DEFAULT

In the event the Contractor defaults on this project and the Surety Company is called upon to complete the contract, the DBEs named on the original OCR-481-S Forms must be given the opportunity to perform the work subcontracted to them by the original contractor unless the DBE requests, in writing, to be released. The agreed DBE subcontract percentage entered on sheet 2-DBE of the proposal shall remain in force as a provision of the contract, but only the contract goal established by State Aid. Any changes made to DBE subcontracts must be made as required in the "REPLACEMENT" Section on Page 4.

DBE REPORTS

- (1) OCR-481-S: Refer to "CONTRACT GOAL" section on Page 2 of for information regarding this form.
- (2) OCR-482-S: At the conclusion of the project the Contractor will submit to the County Engineer for verification of quantities and further handling Form OCR-482-S whereby the Contractor certifies to the amounts of payments made to each DBE Contractor/Supplier to satisfy the contract goal. The County Engineer shall submit the completed Form OCR-482-S to State Aid. Final acceptance of the project is dependent upon State Aid's receipt of completed Form OCR-482-S.
- (3) OCR-483-S: The County Engineer/Inspector will complete Form OCR-483-S, the Commercially Useful Function (CUF) Performance Report. Evaluations reported on this form are used to determine whether or not the DBE firm is performing a CUF. The Prime Contractor should take corrective action when the report contains any negative evaluations. DBE credit may be disallowed and/or other sanctions imposed if it is determined the DBE firm is not performing a CUF. This form should also be completed and returned to State Aid.
- (4) OCR-484-S: No later than the 20th day of each month, the Contractor will submit to the County Engineer Form OCR-484-S certifying payments to all subcontractors. This form should be submitted showing all DBE Firms even if the Contractor has paid no monies to the firm during that estimate period (negative report). The County Engineer will attach this form to the monthly estimate before forwarding the estimate to the Office of State Aid Road Construction for processing.
- (5) OCR-485-S: This form tracks the subcontractor firms who have submitted quotes for material supplies or items to be subcontracted. This form is to be completed by ALL BIDDERS submitting a bid proposal and **must be included in the bid proposal package**. Failure to include Form OCR-485-S in the bid proposal package will cause the Contractor's bid to be considered irregular.
- (6) OCR-487: Only used by Prime Contractors that are Certified DBE firms. This form is used in determining the exact percentage of DBE credit for the specified project. It should be returned with the Permission to Subcontract Form (FAS-SA) SC-1.

SANCTIONS

State Aid has the option to enforce any of the following penalties for failure of the prime Contractor to fulfill the DBE goal as stated on the Form OCR-481-S or any violations of the DBE program guidelines:

- (1) Disallow credit towards the DBE goal
- (2) Withhold progress estimate payments
- (3) Deduct from the final estimate an amount equal to the unmet portion of the DBE goal

- (4) Recover an amount equal to the unmet contract goal
- (5) Debar the Contractor involved from bidding on Office of State Aid Road Construction projects.
- (6) Deduct from the Contractor's final estimate all or any combination of the following.

<u>Offense</u>	<u>Percentage of the monetary amount disallowed from (1) above</u>	<u>Lump Sum</u>
# 1	10%	\$ 5,000 or both
# 2	20%	\$ 10,000 or both
# 3	40%	\$ 20,000 & debarment