

# Meeting Diversity Goals in Government Contracts

By: Robert Alfert, Jr., Esq.  
Broad & Cassel



*As there are far too many examples of contractors losing significant awards where they were low bid, but failed to meet the diversity goals or failed to fill out the applicable forms properly, this column will attempt to simplify the process.*

**D**iversity programs in government construction contract procurement have gained prominence in recent times in an attempt by governmental entities to foster greater diversity in the award of contracts in a manner more reflective of the local demographics. The programs have an equally important goal of creating mentoring opportunities between larger general contractors and smaller businesses that have much to learn from their established colleagues. The idea is to create opportunities for minority and women owned businesses and smaller, disadvantaged businesses, that if used wisely, can help grow these smaller businesses into primes.

These diversity programs are here to stay, at least for some time, and therefore it is essential that contractors interested in procuring government contracts familiarize themselves with the applicable policies and embrace the programs. As there are far too many examples of contractors losing significant awards where they were low bid, but failed to meet the diversity goals or failed to fill out the applicable forms properly, this column will attempt to simplify the process. While onerous at first blush, the programs in truth are not that complicated.

## The Basics

Many of the significant governmental entities in Central Florida have diversity programs. Many local entities utilizing state or local funds set goals for participation of minority and women owned business, and separate goals for local developing businesses. Federal projects, or local projects funded in whole or in part by federal dollars, require a disadvantage business enterprise goal, usually in a comparable percentage.

Minority and women owned businesses, within the meaning of the diversity programs, are subcontractors in which a majority ownership interest is vested in women or minorities. Local developing businesses are generally smaller, newer business enterprises in the local community that have a revenue stream typically less than \$2,500,000.00, and the assets of the majority owner are less than \$250,000.00 (figures vary per governmental entity). The federal government has moved

toward a more gender and race neutral characterization, creating the DBE acronym which embodies women, minority and developing (i.e., "disadvantaged") business enterprises. Most governmental entities with a diversity program require certification requirements before the entity can be considered in the specific goal established by the governmental entity. That means the mere fact that a subcontractor is owned by a woman or minority does not mean that the value of its subcontract can be considered in meeting the goal.

## Meeting the Goal

Most governmental entities have differing goals and differing standards under which those goals can be met. Never assume that all programs are the same; also never assume that a specific governmental entity handles the goals similarly for each project. For example, some entities may require the goal to be attained by subcontractor participation only (i.e., first tier), but for certain jobs that do not lend themselves to breaking work out into economically feasible units, may

*Most governmental entities have differing goals and differing standards under which those goals can be met. Never assume that all programs are the same; also never assume that a specific governmental entity handles the goals similarly for each project.*

permit sub-subcontractor participation (i.e., second tier) to be counted. The best way to learn the requirements of any specific governmental entity is to attend pre-submittal conferences and read the policies. Also ask questions.

Most governmental entities permit ex parte communications on minority program questions.

Some of the principal questions to ask include:

- What exactly is the goal in terms of total percentage and breakdown within programs (for example, is there a total within multiple programs such as minority and women owned businesses and local developing businesses)?
- If the bidder or proposer is a certified business within one of these programs, does that count toward the goal?
- Are there limitations on counting the participation beyond the subcontractor level?

continued from page 11.

- Are there limitations on counting the participation of suppliers (some entities place limitations to ensure the goals are not met simply by buying a product from one minority supplier)?
- Does the governmental entity maintain a current list of certified companies whose participation can be counted?
- Does the governmental entity count participation of companies that have been certified by other governmental entities (Florida Department of Transportation for example)?
- Are there any special forms that a contractor must fill out to prepare a compliant bid or proposal?

With this information in hand, the contractor should prepare a plan to break the project into components manageable for smaller firms, then actively solicit the necessary participation through advertisements, direct mailings and phone contact. Sometimes the best place to locate the necessary team members is at the pre-submittal conference; many minority and women owned firms are encouraged to attend these conferences to market their business.

#### **Failure to Meet the Goal**

It is important for contractors to understand that the goals are just that – goals; they are not mandates. A contractor's failure to attain the established percentage goal does not automatically disqualify that contractor's bid or proposal. Most programs have standards for "good-faith efforts"; meaning, a contractor's good-faith attempt to meet the goals may excuse the contractor's failure to meet the goal.

Since the good-faith standards of most governmental entities are fairly detailed, and require demonstrative proof, it is critical for contractors to understand in advance what efforts are expected of them. Using the more universal federal standards for good-faith efforts, the following list sets forth the more notable efforts expected of bidding contractors:

- Selecting portions of the work to be performed by minority firms in order to foster greater chances of participation, including breaking work into smaller components.
- Actively solicitate participation through minority publications, direct mailings and phone contact. Clearly document all efforts made at solicitation, including a detail

phone log and mailing records.

- Providing plans and specifications to minority firms or other information about the project.
- Making efforts to assist minority firms to obtain bonds and insurance.
- Activity negotiating with minority firms in good-faith.
- Not rejecting minority firms as being unqualified without sound reasons based on a thorough, documented investigation.
- Not rejecting the bid of minority firm solely because there are higher costs associated with selecting that firm. Note, however, that contractors are not required to accept higher quotes from minority firms if the price differential is excessive or unreasonable as compared to the bids of the non-minority firms.

It is imperative that contractors document all of their efforts in seeking minority participation just in case the goals are not met. The importance of this process merits that contractors develop an approach to bidding on all government jobs so that the process followed each time is consistent, and therefore, less onerous.

The governmental entity will evaluate these efforts comprehensively based on a totality of the factors. No one factor will carry the day; conversely, no one factor will fail the bid. Moreover, in determining good-faith efforts, the governmental entity may take into account whether other bidders met the goal. If the "successful" bidder failed to meet the goal, but the other bidders did, it raises the reasonable question whether the bidder made sufficient good-faith efforts. As the federal government notes, "[t]he efforts employed by the bidder should be those that one would expect a bidder to take if the bidder were actively and aggressively trying to obtain participation to meet the contract goal. Mere pro forma efforts are not good faith efforts. . . ."

#### **Conclusion**

The government bidding process is replete with countless examples of lost multi-million dollar contracts solely because of failure to meet minority goals, make good-faith efforts, or simply fail to fill out related forms correctly. These failures are entirely avoidable. Hopefully this column will take the reader

one large step down the path of consistently compliant bids.

*Robert Alfert, Jr., is a partner at the Orlando office of Broad and Cassel, a statewide general practice law firm with an established Construction Litigation Practice Group. Mr. Alfert has a general construction practice, with a heavy emphasis on construction and design defect litigation. He has a bachelor of arts in Architecture from the University of Florida, and related work experience, which affords him unique insight and experience in this complex area of the law.*