

## **BEP GFE GUIDANCE**

### **GUIDANCE FOR DOCUMENTING GOOD FAITH EFFORTS TO MEET BEP PARTICIPATION GOALS**

In order to show that it has made good faith efforts to meet the *Business Enterprise Program (BEP)* participation goal on a contract, the bidder/offeror must either (1) meet the BEP Goal(s) and document its commitments for participation of BEP Firms, or (2) when it does not meet the BEP Goal(s), document its Good Faith Efforts to try to meet the goal(s).

#### **I. Definitions**

***BEP Goal(s)*** – “BEP Goal(s)” refers to the BEP participation goal

***Good Faith Efforts*** – The “Good Faith Efforts” requirement means that when requesting a waiver, the bidder/offeror must demonstrate that it took all necessary and reasonable steps to achieve the BEP Goal(s), which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient BEP participation, even if those steps were not fully successful. Whether a bidder/offeror that requests a waiver made adequate good faith efforts will be determined by considering the quality, quantity, and intensity of the different kinds of efforts that the bidder/offeror has made. The efforts employed by the bidder/offeror should be those that one could reasonably expect a bidder/offeror to take if the bidder/offeror were actively and aggressively trying to obtain BEP participation sufficient to meet the BEP contract goal. **Mere pro forma efforts are not good faith efforts to meet the BEP contract requirements. The determination concerning the sufficiency of the bidder's/offeror's good faith efforts is a judgment call; meeting quantitative formulas is not required.**

***Identified Firms*** – “Identified Firms” means a list of the BEP certified firms identified by the procuring agency during the goal setting process and listed in the procurement as available to perform the Identified Items of Work. It also may include additional BEPs identified by the bidder/offeror as available to perform the Identified Items of Work, such as BEP firms certified or granted an expansion of services after the procurement was issued. If the procurement does not include a list of Identified Firms, this term refers to all the BEP Firms (if State-funded) the bidder/offeror identified as available to perform the Identified Items of Work and should include all appropriately certified firms that are reasonably identifiable.

***Identified Items of Work*** – “Identified Items of Work” means the bid items identified by the procuring agency during the goal setting process and listed in the procurement as possible items of work for performance by BEP Firms, or a “*Commercially Useful Function*”. It also may include additional portions of items of work the bidder/offeror identified for performance by BEP Firms to increase the likelihood that the BEP Goal(s) will be achieved. If the procurement does not include a list of Identified Items of Work, this term refers to all of the items of work the bidder/offeror identified as possible items of work for performance by BEP Firms and should include all reasonably identifiable work opportunities.

**BEP Firms** – “BEP Firms” refers to a firm certified by the state of Illinois Central Management Services Business Enterprise Program. Only certified BEP Firms can participate in the State’s BEP Program. Firms must be certified at time of the bidder/offeror bid submission.

## ***II. Types of Actions Agency will Consider***

The bidder/offeror is responsible for making relevant portions of the work available to BEP subcontractors and suppliers and to select those portions of the work or material needs consistent with the available BEP subcontractors and suppliers, so as to facilitate BEP participation. The following is a list of types of actions the procuring agency will consider as part of the bidder's/offeror’s Good Faith Efforts when the bidder/offeror fails to meet the BEP Goal(s). This list is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

### **A. Identify Bid Items as Work for BEP Firms**

#### **1. Identified Items of Work in Procurements**

**(a)** Certain procurements will include a list of bid items identified during the goal setting process as possible work for performance by BEP Firms. If the procurement provides a list of Identified Items of Work, the bidder/offeror shall make all reasonable efforts to solicit quotes from BEP Firms to perform that work. **(b)** Bidders/Offerors may, and are encouraged to, select additional items of work to be performed by BEP Firms to increase the likelihood that the BEP Goal(s) will be achieved.

#### **2. Identified Items of Work by Bidders/Offerors**

**(a)** When the procurement does not include a list of Identified Items of Work or for additional Identified Items of Work, bidders/offerors should reasonably identify sufficient items of work to be performed by BEP Firms. **(b)** Where appropriate, bidders/offerors should break out contract work items into economically feasible units to facilitate BEP participation, rather than perform these work items with their own forces. The ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder/offeror of the responsibility to make Good Faith Efforts.

### **B. Identify BEP Firms to Solicit**

#### **1. BEP Firms Identified in Procurements**

**(a)** Certain procurements will include a list of the BEP Firms identified during the goal setting process as available to perform the items of work. If the procurement provides a list of Identified BEP Firms, the bidder/offeror shall make all reasonable efforts to solicit those BEP firms. **(b)** Bidders/offerors may, and are encouraged to, search the BEP Directory to identify additional BEPs who may be available to perform the items of

work, such as BEPs certified or granted an expansion of services after the solicitation was issued.

## 2. BEP Firms Identified by Bidders/Offerors

**(a)** When the procurement does not include a list of Identified BEP Firms, bidders/offerors should reasonably identify the BEP Firms that are available to perform the Identified Items of Work. **(b)** Any BEP Firms identified as available by the bidder/offeror should be certified to perform the Identified Items of Work.

## C. Solicit BEPs

1. Solicit all Identified Firms for all Identified Items of Work by providing written notice. The bidder/offeror should:

**(a)** provide the written solicitation at least 10 days prior to bid opening to allow sufficient time for the BEP Firms to respond; **(b)** send the written solicitation by first-class mail, facsimile, or email using contact information in the BEP Directory, unless the bidder/offeror has a valid basis for using different contact information; and **(c)** provide adequate information about the plans, specifications, anticipated time schedule for portions of the work to be performed by the BEP firm, and other requirements of the contract to assist BEP Firms in responding. (This information may be provided by including hard copies in the written solicitation.

2. "All" Identified Firms includes the BEP firms listed in the procurement and any BEP Firms you identify as potentially available to perform the Identified Items of Work, but it does not include BEP Firms who are no longer certified to perform the work as of the date the bidder/offeror provides written solicitations.

3. "Electronic Means" includes, for example, information provided via a website or file transfer protocol (FTP) site containing the plans, specifications, and other requirements of the contract. If an interested BEP cannot access the information provided by electronic means, the bidder/offeror must make the information available in a manner that is accessible to the interested BEP.

4. Follow up on initial written solicitations by contacting BEPs to determine if they are interested. The follow up contact may be made: **(a)** by telephone using the contact information in the BEP Directory, unless the bidder/offeror has a valid basis for using different contact information; or **(b)** in writing via a method that differs from the method used for the initial written solicitation.

5. In addition to the written solicitation set forth in C.1 and the follow up required in C.4, use all other reasonable and available means to solicit the interest of BEP Firms certified to perform the work of the contract. Examples of other means include: **(a)** attending any pre-bid meetings at which BEP Firms could be informed of contracting and subcontracting opportunities; and **(b)** if recommended by the procurement, advertising with or effectively using the services of at least

two minority focused entities or media, including trade associations, minority/women community organizations, minority/women contractors' groups, and local, state, and federal minority/women business assistance offices.

#### **D. Negotiate with Interested BEP Firms**

Bidders/Offerors must negotiate in good faith with interested BEP Firms.

1. Evidence of negotiation includes, without limitation, the following:

- (a)** the names, addresses, and telephone numbers of BEP Firms that were considered;
- (b)** a description of the information provided regarding the plans and specifications for the work selected for subcontracting and the means used to provide that information; and **(c)** evidence as to why additional agreements could not be reached for BEP Firms to perform the work.

2. A bidder/offeror using good business judgment would consider a number of factors in negotiating with subcontractors, including BEP subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration.

3. The fact that there may be some additional costs involved in finding and using BEP Firms is not in itself sufficient reason for a bidder's/offeror's failure to meet the contract BEP goal(s), as long as such costs are reasonable. Factors to take into consideration when determining whether a BEP Firm's quote is excessive or unreasonable include, without limitation, the following:

- (a)** the dollar difference between the BEP subcontractor's quote and the average of the other subcontractors' quotes received by the bidder/offeror;
- (b)** the percentage difference between the BEP subcontractor's quote and the average of the other subcontractors' quotes received by the bidder/offeror;
- (c)** the percentage that the BEP subcontractor's quote represents of the overall contract amount;
- (d)** the number of BEP firms that the bidder/offeror solicited for that portion of the work;
- (e)** whether the work described in the BEP and Non-BEP subcontractor quotes (or portions thereof) submitted for review is the same or comparable; and
- (f)** the number of quotes received by the bidder/offeror for that portion of the work.

4. The above factors are not intended to be mandatory, exclusive, or exhaustive, and other evidence of an excessive or unreasonable price may be relevant.

5. The bidder/offeror may not use its price for self-performing work as a basis for rejecting a BEP Firm's quote as excessive or unreasonable.

6. The "average of the other subcontractors' quotes received" by the bidder/offeror refers to the average of the quotes received from all subcontractors. Bidder/offeror should attempt to receive quotes from at least three subcontractors, including one quote from a BEP and one quote from a Non-BEP.

7. A bidder/offeror shall not reject a BEP Firm as unqualified without sound reasons based on a thorough investigation of the firm's capabilities. For each certified BEP that is rejected as unqualified or that placed a subcontract quotation or offer that the bidder/offeror concludes is not acceptable, the bidder/offeror must provide a written detailed statement listing the reasons for this conclusion. The bidder/offeror also must document the steps taken to verify the capabilities of the BEP and Non-BEP Firms quoting similar work.

**(a)** The factors to take into consideration when assessing the capabilities of a BEP Firm, include, but are not limited to the following: financial capability, physical capacity to perform, available personnel and equipment, existing workload, experience performing the type of work, conduct and performance in previous contracts, and ability to meet reasonable contract requirements.

**(b)** The BEP Firm's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the efforts to meet the project goal.

### **E. Assisting Interested BEP Firms**

When appropriate under the circumstances, the decision-maker will consider whether the bidder/offeror:

1. made reasonable efforts to assist interested BEP Firms in obtaining the bonding, lines of credit, or insurance required by the procuring agency or the bidder/offeror; and
2. made reasonable efforts to assist interested BEP Firms in obtaining necessary equipment, supplies, materials, or related assistance or services.

### **III. Other Considerations**

In making a determination of Good Faith Efforts the decision-maker may consider engineering estimates, catalogue prices, general market availability and availability of certified BEP Firms in the area in which the work is to be performed, other bids or offers and subcontract bids or offers substantiating significant variances between certified BEP and Non-BEP costs of participation, and their impact on the overall cost of the contract to the State and any other relevant factors. The decision-maker may

consider whether a bidder/offeror decided to self-perform subcontract work with its own forces, especially where the self-performed work is Identified Items of Work in the procurement.

The decision-maker also may consider the performance of other bidders/offerors in meeting the contract. For example, when the apparent successful bidder/offeror fails to meet the contract goal, but others meet it, this reasonably raises the question of whether, with additional reasonable efforts, the apparent successful bidder/offeror could have met the goal. If the apparent successful bidder/offeror fails to meet the goal but meets or exceeds the average BEP participation obtained by other bidders/offerors, this, when viewed in conjunction with other factors, could be evidence of the apparent successful bidder/offeror having made Good Faith Efforts.

#### **IV. Documenting Good Faith Efforts**

At a minimum, a bidder/offeror seeking a waiver of the BEP Goal(s) or a portion thereof must provide written documentation of its Good Faith Efforts. The written documentation shall include the following:

##### ***A. Items of Work (Complete Good Faith Efforts checklist)***

A detailed statement of the efforts made to select portions of the work proposed to be performed by certified BEP Firms in order to increase the likelihood of achieving the stated BEP Goal(s).

##### ***B. Outreach/Solicitation/Negotiation***

1. The record of the bidder's/offeror's compliance with the outreach efforts.
2. A detailed statement of the efforts made to contact and negotiate with BEP Firms including:
  - (a) the names, addresses, and telephone numbers of the BEP Firms who were contacted, with the dates and manner of contacts (letter, fax, email, telephone, etc.) (submit letters, fax cover sheets, emails, etc. documenting solicitations); and
  - (b) a description of the information provided to BEP Firms regarding the plans, specifications, and anticipated time schedule for portions of the work to be performed and the means used to provide that information.

##### ***C. Rejected BEP Firms***

1. For each BEP Firm that the bidder/offeror concludes is not acceptable or qualified, a detailed statement of the reasons for the bidder's/offeror's conclusion, including the steps taken to verify the capabilities of the BEP and Non-BEP Firms quoting similar work.
2. For each certified BEP Firm that the bidder/offeror concludes has provided an excessive or unreasonable price, a detailed statement of the reasons for the bidder's/offeror's conclusion, including the quotes received from all BEP and Non-BEP firms bidding on the same or comparable work. ***(Include copies of all quotes received.)***

3. A list of BEP Firms contacted but found to be unavailable.

**D. Other Documentation**

1. Submit any other documentation requested by the Procurement Officer to ascertain the bidder's/offeror's Good Faith Efforts.

2. Submit any other documentation the bidder/offeror believes will help the Procurement Officer ascertain its Good Faith Efforts.