

SEATTLE'S NEW WMBE "INCLUSION PLAN"

This past summer Seattle Mayor Mike McGinn announced a new WMBE program for Seattle public works contracts he called an "Inclusion Plan" to increase women and minority owned business participation on City public works projects. Seattle's new Inclusion Plan replaces the City's previous WMBE "Outreach Plan" as a means of implementing Seattle's Equity in Contracting Ordinance. The new law has raised a number of questions among MCA membership and the construction community. This article summarizes the new law.

Overview of Seattle's New "Inclusion Plan"

As of August 24, 2011 bidders competing for Seattle public works exceeding \$300,000 must submit a completed "Inclusion Plan Form" with their bids as a matter of bid responsiveness. In bullet point form, the general terms the Inclusion Plan required to be submitted are as follows:

- Provides that Seattle Purchasing and Contracting Services will reject any bid that does not attach a completed Inclusion Plan form;
- A "completed" Inclusion Plan form is one which includes all the required information **and** which achieves the required award minimum of 10 points;
- Requires that bids for projects with an engineers' base bid estimate over \$2 million also identify a WMBE Expert;
- Contemplates that Seattle Purchasing and Contracting Services will "score" the Inclusion Plan submitted and make responsiveness determinations based on scoring a minimum of 10 points as described in the Inclusion Plan;
- Requires bidders to clearly identify their proposed WMBE goals as a percentage of the total bid amount;
- Requires bidders to clearly identify WMBE subcontractors and suppliers with whom the bidders intend to subcontract, the amount of their bids and the estimated value of their contracts;
- Self-performance is not a substitute for good faith efforts by the bidder to subcontract and utilize WMBE firms for compliance.

WMBE Expert Designation

For projects with an engineer's base bid estimate above \$2,000,000, bidders are required to identify a firm or person as a "WMBE Expert" in the bid. A bidder's failure to name a WMBE Expert for such projects will render the bid non-responsive. The WMBE Expert is to work with the City and the bidder to develop and implement the Inclusion Plan and to provide recruitment and support throughout the contract. The WMBE Expert's required responsibilities and qualifications are set forth on the Inclusion Plan form and include (1) outreach to qualified WMBE firms, work with estimators during bid preparation, work with the City to refine and finalize the plan during the contract award process; (2) "ongoing outreach" to WMBE's during contract performance; (3) assist and resolve concerns, problems and needs of WMBE firms to enhance WMBE subcontractor opportunity and performance, such as assisting with licensing, bonding, and dispute resolution, and (4) be a member of the contractor's "Project Team" and routinely participate in progress meetings with the City and the contractor.

According to the Inclusion Plan form, to qualify as a WMBE Expert he/she must be able to demonstrate:

- Satisfactory working knowledge of the identity, capabilities and capacities of local WMBE subcontractors and suppliers for this project;
- Experience recruiting and working with WMBE subcontractors for construction projects;
- Experience in assisting WMBE firms to develop working relationships with prime contractors;
- Experience in developing sub-contracting plans in ways which provide WMBE opportunities

The Inclusion Plan form requires bidders to specify the number of hours the WMBE Expert spent in pre-bid outreach and to estimate the number of hours and services the WMBE Expert will expend during performance.

Seattle Purchasing and Contracting Services has a Roster of pre-qualified WMBE Experts from which contractors may select their expert. A contractor may elect to identify a person with the bidder's staff that the bidder intends to use for its WMBE Expert. However, the person or firm designated must meet the WMBE Expert qualifications described in the Inclusion Plan, and must be approved by the City. If the City does not approve the proposed WMBE Expert, the bidder may choose to designate another WMBE Expert, subject to the City's approval. If the City does not approve the substitution, the bidder must engage one of the qualified experts identified on the list.

The City's WMBE Definition

Identified and utilized WMBEs do not have to be certified by Washington State's Office of Minority and Women Owned Businesses (OMWBE) to qualify. Instead, under the new law for Seattle projects, WMBE must simply register on the City's Registration and Enrollment system on the City's website. The City defines a WMBE as "at least 51% owned by women and/or minority (including, but not limited to, African Americans, Native Americans, Asians and Hispanics) group members." The City's enrollment system applies to City projects only. Accordingly, in order to qualify as a WMBE for a state or federal project, the entity must be certified by Washington OMWBE.

"Inclusion Plan" Requirements – A Points Based System

In order to be responsive the bidder must submit a properly completed Inclusion Plan form and score a minimum of 10 points. According to the form itself, a "completed" Inclusion Plan form is one that:

"includes all of the required information and achieves the award of a minimum 10 points. . . [b]ids that are not completed either because they lack required information [or] do not achieve the minimum of 10 points will be rejected."

Marketplace Availability

Points are earned by counting proposed WMBE inclusion goals and the bidder's proposed WMBE subcontractors and suppliers against so-called "Marketplace Availability" for participation.

"Marketplace Availability" is the average of two WMBE availability percentage figures – "Past Performance" on similar type Seattle projects and so-called "Bid Pool" availability which is ascertained from the bidders themselves. The Past Performance availability figure is calculated by the City averaging actual WMBE utilization rates for various types of completed projects over the immediate past three calendar years. The 2010 three year average is available at www.seattle.gov and is summarized below:

2010 THREE YEAR AVERAGES:

Roadway 10 %
Facility 23 %
Park Development 25 %
Electrical 4 %
Sewer/Water 21 %
Remote Location 0 %

"Bid Pool" data is calculated from the bids themselves after the bids have been submitted and the City has determined the "average of the proposed WMBE goals of all bidders."

The average is the sum of the two figures divided by two. For example, on a recent Seattle Community Center project with a Past Performance Percentage of 23% and the bidder's pool data percentage of 36.25% WMBE goals, when the two figures are averaged the "Market Availability" figure is $36.25\% + 23\% = 59.25\% \div 2$ or 29.62%.

Apparently the City's thinking is that competitive bidders who receive points for setting high WMBE goals express a reliable "perception" of market place availability and that competitive environment perception should receive the same relative weight as actual past WMBE performance fostered by the City's previous WMBE "Outreach Plan."

The City's decision to average in the bidders' bid pool data perception figure is interesting, since it is not based on actual, achieved WMBE participation and is instead based on what bidders who are competing against each other for the greatest participation advise the City they "hope to achieve."

The First Section of the Bid Form – Proposed Subcontracting WMBE Goals

The Inclusion Plan form itself is divided into four sections, three of which are measured against so-called “Marketplace Availability” which, as discussed in the preceding paragraph, is based in part on the bidders’ proposed WMBE subcontracting goal rather than what the bidders were actually able to achieve.

The first section entitled “Proposed Subcontracting WMBE Goals” is worth a maximum of six points and requires the bidder to state its proposed subcontracting WMBE inclusion goals. While the form states that the goals are “aspirational” – representing the WMBE utilization that the Bidder intends to achieve during contract performance, and not mandatory utilization goals – only bidders who set goals that are consistent with the reasonable Marketplace Availability of WMBE contractors as described above will receive all 6 points. Other bidders are to be awarded points in proportion to how close their goals come to Marketplace Availability of WMBEs. For example, bidders who set goals that are half of the Marketplace Availability receive 3 points. Bidders who set no goals will receive no points.

The Second Section of the Bid Form – WMBE Expert Identification

As discussed above, for projects over \$2,000,000, the bidder must list a WMBE Expert who is a part of the proposed project team, the number of hours spent for pre-bid outreach efforts, and the number of hours and specific services that are anticipated by the expert during the performance of the contract. Failure to identify a WMBE Expert for a project over \$2 million renders the bid non-responsive.

The Third Section of the Bid Form – WMBE “Scopes of Work and Supply Opportunities”

The third section labeled “Scopes of Work and Supply Opportunities” is worth a maximum of six points and requires the bidder to identify its intended work scopes of WMBE subcontractors and suppliers that the bidder intends to contract with and the estimated dollar value of their subcontract or purchase order. The bidder will receive 6 points if the total estimated subcontractor and supplier dollar values meet or exceed the Marketplace Availability. Points between one and five will be awarded for responses that identify an intent to subcontract work or supply opportunities that have WMBE availability, relative to how closely the opportunities match the WMBE Marketplace Availability for the project. For example, bids that identify opportunities which total half of the WMBE Marketplace Availability will receive 3 points. No points will be awarded where no opportunities are listed, and only 3 points will be awarded if the estimated dollar values total half of the Marketplace Availability.

The Fourth Section of the Bid Form – WMBE Contract Log

The fourth section, “WMBE Contract Log” – requires the bidder to “List those WMBE firms with whom the bidder intends to contract if awarded the contract” together with their scope of work, individual WMBE contract personnel, and the WMBE firm’s bid amounts. As with the other two point categories (Proposed Subcontracting WMBE Goals and Scopes of Work and Supply Opportunities), the bidder will receive 6 points for this section if the total subcontractor and supplier bid values (presumably as a percentage of the bid price) meet or exceed the “Marketplace Availability.” Bidders not meeting or exceeding the “Marketplace Availability” are awarded points in proportion to how close the total value of “Will Contract With” as a percentage of their bid price comes to the Marketplace Availability for the project.

Help with the Form or Questions Regarding the City’s Bid Evaluation

Time will tell whether the City’s new “Inclusion Plan” is in fact more effective than the City’s previous WMBE “Outreach Plan” as a means implementing Seattle’s Equity in Contracting Ordinance. If you have question regarding the City’s form or evaluation process, feel free to contact the MCA.

PRESS TIME CHANGE

As of press time the City has developed a “new” version of the new Inclusion Plan. The “new” Inclusion Plan will remove the two-elements used to determine marketplace availability discussed above -- (1) the average of “Past Performance” on similar type Seattle projects, and (2) the so-called “Bid Pool” availability which is ascertained from the bidders themselves -- and instead use past performance alone.

The City has adjusted their point system to focus on aspirational goals and WMBE commitments. The City will also post the results of the Inclusion Plan scores on Ebid for each applicable project next to the bid results and take steps to ensure that the “Past Performance” category applicable to the project (i.e, Facilities) is clearly stated within the IFB and the Specifications. The City’s “new” new Inclusion Plan will be posted at the City’s website www.seattle.gov/purchasing/wmbe.htm in the near future.

Stay tuned. . .