IRTBA WHITE PAPER

Proposed Amendments to "No Cure" Act

Public Act 96-706 became effective in August, 2009. The Act amended the Business Enterprises for Minorities, Females and Persons With Disabilities Act by requiring that "those who submit bids or proposals for State contracts shall not be given a period after the bid or proposal is submitted to cure deficiencies in the bid or proposal under this Act unless mandated by federal law or regulation." The so-called "No Cure" provision was intended, according to proponents, to end a practice called "bid shopping." What the Act did, in reality, was to add costs to the bidding process, decrease in competition, and afforded fewer opportunities for Disadvantaged Business Enterprises to bid on work.

Prior to the adoption of this Act and the IDOT special provision which interpreted the language, contractors had seven days after sealed bids were opened to cure any defects in their bids. The reality is that this period of time was used to ensure that the requisite number of DBE firms were included in a bid so that goals could be better met. In fact, prior to the adoption of P.A. 96-706, 98.8% of all IDOT contracts met the statewide DBE goal amount. Since its adoption, that number has fallen to under 95%.

Under the new paradigm, contractors are required to include every DBE firm, with cost breakdowns in their bids. Current practice is that bids are not put together largely until the night before a letting; many subcontractors simply do not reveal their numbers until such a late date. Obtaining correct figures and signatures on such forms, with so little time, has lead to a number of consequences. Prime contractors bid on fewer projects because of the labor intensive nature of the work. DBE firms bid on fewer jobs because with the inability to cure and possibly drop some work and/or pick up other work, such firms will bid on only such work that they believe they can perform to avoid over-commitment to work. A major impediment in this process it the additional burden of requiring evidence of good faith efforts in the event a contractor seeks a goal modification because of the inability to find firms available to meet the DBE goal for a particular project.

And the frenetic pace has caused minor errors to turn into major taxpayer funded debacles. For example, in 2010 a contractor used information provided by a DBE that was not accurate. As a result, the contractor believed that it had met the goal. IDOT found the error, and because the contractor did not submit a goal modification request (not believing it needed one), IDOT rejected the bid as "non-responsive." Because of the timing requirements, IDOT did not put the contract out to bid again. Instead, it awarded it to the next low bidder, which resulted in an additional $750,000 in cost added to the project.

A similar scenario played out later in the 2010 construction season. That case caused the Federal Highway Administration to intervene. The FHWA required IDOT to make minor modifications to its onerous special provisions concerning the No Cure Act. Those changes addressed the issue of the timing of good faith effort goal modification requests, and only touched upon the underlying problems with the Act.

As an additional unwarranted complication, new ethics rules severely curtail communications concerning procurement matters. SB 51, now Public Act 96-795, requires agency personnel to submit detailed information concerning any communications that relate to a procurement matter. Many IDOT staff have resisted communications because of the new requirements. Thus, a contractor seeking information about a DBE, or a DBE seeking information about obtaining work, has placed an extreme administrative burden on IDOT. The No Cure Act and new rules concerning communications have created a perfect storm of harming DBE entry into the marketplace.

The reality is that the system which once worked well is now effectively broken. Higher costs, less competition, less DBE involvement, and unjust results are all the consequence of the Act and IDOT's interpretation of the Act. IDOT's failure to provide reasons for refusals of good faith effort goal modification requests makes this dark situation even murkier. Contractors attempt to meet the goals, but are not given information on how to more effectively do so.

The proposed amendments would provide relief and certainty to the contracting community. Requiring basic information on DBE's – their name and bottom line dollar amount – is consistent with City of Chicago procurement practices. It would reduce the likelihood for mistakes, and effectively increase competition by allowing contractors more time to bid on more projects. It would also ensure that DBE firms are written into the contract at the beginning, rather than being subject to "bid shopping." IDOT would still gather the information from those contractors who are awarded the bid, but would do so soon after the bid opening rather than prior to that date. That information would include goal modification requests, if needed. Finally, IDOT would be required to do its part to assist contractors to better understand what it takes to make good faith efforts in the future.