

Section 102 PROPOSAL SUBMISSION, AWARD AND EXECUTION OF CONTRACT

102.01 Competency of Bidders. Unless otherwise provided, Bidders must be prequalified for the categories of work on which they submit a proposal. A Bidder's net prequalification must be equal to or greater than that required for the proposed contract. When required in the proposal, the Bidder must designate other prequalified or certified Contractors to whom they will subcontract those categories of work for which they lack prequalification, according to subsection 108.01.

102.02 Contents of Proposal Form. The Proposal Form will provide the following information:

- A. Location and description of the contemplated work;
- B. Estimate of the various item quantities and kinds of work to be performed and/or materials to be furnished;
- C. Schedule of items for which proposed unit prices are invited;
- D. Specified days or date in which the work must be completed;
- E. Amount of the proposal guaranty;
- F. Date, time and place for filing and opening of proposals; and
- G. Special provisions, supplemental specifications or other requirements that vary from or are not contained in the standard specifications or on the plans.

If the basis of proposal comparisons is to be other than total cost, the comparison basis to be used will be defined.

The plans, specifications, and other documents designated in the Proposal Form are considered part of the Proposal whether attached or not.

The prospective Bidder will be required to pay the Department's contracted agent at the rate stated in said contract for each copy of the Proposal Form and each set of plans obtained.

102.03 Interpretation of Bid Items in the Proposal Form. The quantities appearing in the listing of Schedule of Items are estimated and will be used in the comparison of proposals. Payment to the Contractor will be for the actual quantities of work performed and accepted or materials furnished according to the contract. The quantities of work and materials as provided in the contract may be increased, decreased, or deleted, as provided herein.

102.04 Examination of Plans, Specifications, and Work Site. Bidders shall carefully examine the Proposal Form, plans, specifications and the work site until the Bidder is satisfied as to all local conditions affecting the contract and the detailed requirements of construction. The submission of a proposal shall be considered prima facie evidence that the Bidder has made such examination and is satisfied as to the conditions to be encountered in performing the work and requirements of the contract. Bidders shall familiarize themselves with all requirements of Federal, State, and

local laws, ordinances, and permits that may directly or indirectly affect prosecution of work and furnishing of necessary materials.

102.05 Preparation of Proposal. The proposal shall be legibly prepared in ink or typed on the form provided or may be computer generated. The Bidder shall specify a unit price for each item, except where a lump sum is called for. Prices for lump sum items shall be entered only in the bid amount column.

The proposal shall be signed by an authorized representative of the Bidder and include the complete address of the Bidder. An authorized representative of the Bidder must be designated in writing by the Bidder by proper completion and submission of the form entitled "Persons Authorized to Execute Contracts" as contained in the MDOT Prequalification Application. This properly completed form must be received by MDOT no less than 15 days prior to the date of the letting at which the Bidder wishes the person to be authorized to sign.

A Bidder may alter a unit or lump sum price entered on the proposal. To make an alteration, the Bidder shall cross out the entry, and enter the new figure above or below the deleted entry. An authorized representative of the Bidder must initial on the line of the change. Any alteration and initials shall be handwritten in ink.

102.06 Irregular Proposals. By submitting a proposal, a Bidder agrees to the procedures and standards for accepting or rejecting irregular proposals. Unless this section is expressly modified by the Department in the Proposal Form, a statement that a proposal may or will be rejected for a specified reason will be acted upon pursuant to the following:

- A. Proposals will be considered irregular and will be rejected for any of the following reasons:
 - 1. The proposal does not contain a unit price for each pay item listed in the Unit Prices column or lump sum price in the bid amounts column, as applicable. While a blank space is unacceptable, the explicit quotation of zero does constitute a price and, if awarded the contract, the Bidder would be bound to perform that item of work for zero payment and to do so to the same extent as if a positive numeric price had been quoted.
 - 2. A unit price under the Unit Price column or lump sum price in the bid amounts column is not capable of being read or deciphered by the Department. In attempting to read or decipher a price, the Department may consider other information in the proposal which tends to confirm what the digit(s) in question represent.
 - 3. The proposal is not signed by an authorized representative of the Bidder who has been designated in writing in accordance with subsection 102.05.
 - 4. The Bidder, except as otherwise provided in this subsection, is not prequalified or has insufficient prequalification for the specified category(s) of work and has not provided the company name of a prequalified subcontractor on the Designated and Specialty Item page in the proposal.
- B. Proposals will be considered irregular and may be rejected for any of the following reasons:

1. A unit price or a lump sum has been altered and has not been revised as provided in subsection 102.05.
 2. The form is altered or any part of the form is detached.
 3. There is an unauthorized addition, deletion, or alteration to the proposal.
 4. There is an unauthorized alternate proposal or conditional proposal.
 5. There is an irregularity of any kind which tends to make the proposal incomplete, indefinite, or ambiguous as to its meaning.
 6. The proposal fails to comply with any other proposal requirement.
 7. Any provision is added to the proposal reserving the right, for the Bidder, to accept or reject an award of the contract.
- C. It is the intention of the Department to waive irregularities in subsection 102.06.B and accept the lowest qualified proposal whenever the considerations set forth in this subsection do not justify rejection of the proposal. In determining whether to waive an irregularity and accept a proposal, the Department will consider whether the nature or extent of the irregularity is such that acceptance of the proposal might confer on the Bidder an unfair advantage or possibility for proposal manipulation; jeopardize funding for the project; impose unreasonable administrative burdens on the Department; or, otherwise undermine the integrity of a fair, open and honest competitive bidding process. Where to do so would not be contrary to those considerations, the Department may allow a Bidder to remedy a proposal irregularity but in no event will a Bidder be permitted to do so by increasing or decreasing its proposal price for the project as specified in the proposal documents. The authority to waive irregularities is not intended to allow the Department to choose among multiple prices improperly quoted for the same item of work where only one of those choices would make that proposal the lowest accepted proposal.
- D. Only a Bidder whose proposal has been rejected pursuant to subsection 102.06 and who would otherwise be the lowest Bidder has an opportunity to appeal a proposed rejection under Subsections 102.11 and 102.12. Once all administrative appeals are exhausted under Subsections 102.11 and 102.12, the decision of the Department or the Commission is final and binding on all Bidders.

102.07 Delivery of Proposal. The proposal shall be submitted in a sealed envelope provided by the Department. The envelope must plainly show the proposal item number from the cover page of the Proposal Form and the name and address of the Bidder. All proposals must be received by the Department prior to the time and place specified in the advertisement.

102.08 Withdrawal or Revision of Proposal. A proposal may be withdrawn or revised prior to the time set for opening proposals. A request to withdraw the unopened proposal may be done in person or writing. An authorized representative of the Bidder must appear in person to revise the proposal.

102.09 Public Opening of Proposals. Proposals will be opened publicly and the total amount of each proposal will be read aloud at the time and place specified in the advertisement.

102.10 Proposal Review. All proposals will be reviewed for mathematical errors by appropriate Department staff to determine the apparent low Bidder. The proposal of the apparent low Bidder will then be reviewed to verify compliance with all proposal requirements. If the apparent low bid is determined to be subject to possible rejection due to bidding irregularities, this process of verification will be repeated until a proposal meeting all requirements is found. Apparent low bids which are found to be subject to rejection will be referred to the Proposal Review Committee for review and decision. After an acceptable low bid is determined, the proposal prices will be published.

102.11 Proposal Rejection. Contractors, whose proposals are rejected after review by the Proposal Review Committee, will be notified by the Administrator, Financial Services Division, or designee, of the intended rejection, the reasons for that action, the availability of an appeal to the Proposal Appeal Committee, and the appeal procedure. Where circumstances warrant and permit, the Administrator, Financial Services Division, or designee, may meet with the Contractor or have a telephone discussion to facilitate an understanding of the problem and the Contractor's position. Only a Bidder whose proposal has been rejected pursuant to subsection 102.06 and who would otherwise be the lowest Bidder, has a right to file an appeal. Where successive rejections of the proposals of low Bidders occur pursuant to section 102.06, each such Bidder may file an appeal.

102.12 Proposal Rejection Appeal. The appeal process shall proceed very quickly to a final decision so that the process does not impede the award of a contract. The Contractor's written appeal of a proposal rejection must be received at the office of the Administrator, Financial Services Division, within five calendar days (or a shorter time period, if so designated by the Administrator, Financial Services Division, or designee,) after the Contractor has been notified of the decision to reject the proposal. The appeal shall state why the Contractor disputes the decision and shall supply pertinent information. If circumstances are deemed to warrant a time period less than five calendar days for filing the appeal, the Administrator, Financial Services Division, or designee, will notify the Contractor of the shortened period within which to file the appeal.

- A. **Proposal Appeal Committee.** The Administrator, Financial Services Division, or designee, will assemble and submit all relevant information, including the decision of the Proposal Review Committee, along with material and information submitted by the Contractor, to the Proposal Appeal Committee.

The Proposal Appeal Committee will review the information provided by the Administrator, Financial Services Division, or designee, conduct any further inquiry or review it deems appropriate, and decide the issue. Although the Committee will usually decide the issue on the basis of written appeal by the Contractor and other information supplied by the Administrator of the Financial Services Division, or designee, the Committee may request that the Contractor meet with the Committee to review the issue.

The Deputy Director, Bureau of Finance and Administration, or designee, will notify the Contractor, and other appropriate persons, in writing, of the decision by the Proposal Appeal Committee. If the contract must be approved by the Commission, the Contractor will also be notified of the right to file an appeal with the Commission and appeal procedure. Only a Bidder whose proposal has been rejected pursuant to subsection 102.06 has a right

to file an appeal. If the contract does not require approval of the Commission, the decision of the Proposal Appeal Committee is final and binding on all Bidders.

B. Appeal to the Commission. A Contractor's written appeal of a bid rejection by the Proposal Appeal Committee, on a contract which must be approved by the Commission, must be filed not later than five calendar days after the decision of the Proposal Appeal Committee, or by 3:00 p.m. on the day immediately preceding the date on which the Commission is scheduled to consider approval of the contract, whichever is sooner. If the Contractor has less than 24 hours notice (verbal or written) of the decision of the Proposal Appeal Committee, before the appeal submission deadline, the Contractor may file the written appeal not later than 9:00 a.m. on the day of the Commission meeting.

The Commission will review the information provided by the Department and the Contractor and decide the issue. The decision of the Commission is final and binding on all Bidders.

102.13 Consideration of Proposals. To determine the lowest Bidder, the proposals will be compared on the basis of the sum of products of quantities and unit bid prices. In case of discrepancy between this calculated total and the total shown in the proposal, unit prices as written in the proposal shall govern and all errors found in said computations will be corrected.

A Bidder may be considered eligible for award, even though the bid exceeds the Bidder's prequalification, when the Bidder was properly issued the Proposal Form and is determined to be the lowest Bidder on only one proposal. If a Bidder is the determined lowest Bidder on more than one proposal, and the total amount of proposals exceeds the Bidder's net prequalification, the Department will award the contract(s) in a manner best suited to the Department's interest.

The Department may reject proposals, waive irregularities according to subsection 102.06, advertise for new proposals, or proceed to do the work in other ways as it determines to be in its best interest. These actions will not entitle Bidders to payment for costs of preparation of the proposal or anticipated profits.

102.14 Construction Progress Schedule. In addition to any progress clause in the proposal form, the successful Bidder will be required to submit a progress schedule (see subsection 108.02). When approved, the progress schedule, or updated progress schedule, will become part of the contract. A critical path network schedule may be required and, upon approval, will replace the progress schedule.

The progress schedule will include, as a minimum, the controlling operations for the completion of the project and the planned dates (or days, for workday projects) that these contract items will be controlling operations. The Engineer may require that specific non-controlling operations be listed to adequately detail the work necessary to complete the project.

Any controlling dates specified in the proposal, including open-to-traffic dates or project completion dates, will be included in the progress schedule. Overlapping or concurrent controlling operations may be allowed if explained, in writing, by the Contractor for the associated overlap or concurrent controlling operation for each occurrence. The explanation will be submitted with the progress schedule.

Unless otherwise specified, the progress schedule may be submitted on Department Form 1130 *Progress Schedule* or using a diagraming method such as critical path network schedule, bar chart, or linear schedule in which all work activities to be accomplished are described with their associated interdependencies. If a diagraming method is used and is submitted as the progress schedule, Form 1130 must be attached for obtaining signatures and approvals.

The Contractor must update the progress schedule within 14 days of the occurrence of any of the following events. Failure to do so may result in biweekly pay estimates being withheld.

- A. The project falls behind the schedule detailed in the approved progress schedule.
- B. Extra work, changes in quantities, or adjustments to the contract, when ordered by the Engineer, impact a controlling operation identified in the approved progress schedule.
- C. There is a revised sequence of operations that impacts the approved progress schedule.
- D. The reasons for the overlap of controlling operations change.

Failure on the part of the Contractor to carry out the provisions of the approved progress schedule may be considered sufficient cause to prevent bidding future projects until a satisfactory rate of progress is again established.

102.15 Execution and Award of Contract. The Department will provide the contract and bond forms to the determined lowest Bidder, at the address given on the proposal. Within 28 days of transmittal, the fully executed contract, bond forms, and all other documents required by the Department must be returned. An extension of the deadline may be requested during the 28 days which will not be denied without cause. If the required documents are not returned to the Department within 28 days, the Department may award the contract to the second lowest Bidder. If the contract is not executed by the Department within 49 days of opening of proposals, plus all approved extension of the Bidder's deadline, a determined lowest Bidder may withdraw the proposal without penalty. The contract will be awarded and binding on the signers only when it has been fully executed by both the determined lowest Bidder and the Department.

102.16 Requirements of Contract Bond. The determined lowest Bidder shall furnish performance and lien bonds each for not less than 100 percent of the total contract price. The bonds shall be on the forms provided by the Department. The bonds shall meet the requirements of Michigan law and of the Department and include other items such as the powers of Attorney and Endorsement as specified by the Department.

102.17 Proposal Guaranty Payment. Failure on the part of the determined lowest Bidder to execute the contract form and file satisfactory bonds and other required documents necessary for the award of the contract within the 28 day period provided, or within such extended period as may be approved by the Department, will result in the payment of the proposal guaranty to the awarding authority.

Each Bidder has a positive duty to carefully prepare its proposal and to check its accuracy. A non-payment proposal guaranty will be returned in this subsection only if the Bidder clearly demonstrates that:

- A. It made a substantial error such that acceptance of the contract would impose a substantial and unjustified hardship on the Bidder, given the size and nature of the project, or
- B. There exist extraordinary circumstances beyond the control of the Bidder in which acceptance of the contract would impose a substantial and unjustified hardship on the Bidder, given the size and nature of the project.

A mistake in judgment in preparing the proposal will not warrant non-payment of the proposal guaranty absent a compelling showing that enforcing payment of the guaranty would be unconscionable under all circumstances. The burden is on the Contractor to clearly and convincingly satisfy the criteria for non-payment of the proposal guaranty.

A request for non-payment of a proposal guaranty under this section shall be made in writing to the Administrator, Financial Services Division, or designee, and will be considered and decided upon by the Proposal Appeal Committee. The Committee may require that the Bidder produce original bid documentation and submit other information to enable the Committee to decide the matter. The Committee may also request that Department staff review the documentation and other information and make a recommendation to the Committee. Where the Committee, in its sole determination, finds the documentation and other information provides a partial justification, the Committee may make a correspondingly partial reduction of the proposal guaranty. The decision by the Committee is final and binding on the Bidder.

Bidding practices, competitive considerations and last minute price changes commonly result in item prices which, in isolation, could be mischaracterized as proposal errors. Payment of the proposal guaranty is intended to deter Bidders from manipulating the competitive process by mischaracterizing such item prices as proposal errors to justify withdrawal of low proposals, after all proposals have been publicly opened. Payment of the proposal guaranty also constitutes liquidated damages for failure to accept award of the contract, since it is difficult to determine the actual damages for the breach as they are uncertain in nature and impossible to estimate with certainty. The damages include the various administrative costs as well as other losses, damages, and costs resulting from the failure of the Bidder to accept award of the contract.

102.18 Subletting Contract Work to Disadvantaged Business Enterprises (DBE). The DBE portion of work set for a project, as specified in the notice of advertisement, shall be made available to Department certified Disadvantaged Business Enterprises (DBEs). Compliance with the designated DBE participation goal must be met by the utilization of DBEs to perform commercially useful functions as required by 49 CFR § 26.55 of the Federal Register.

The names of the DBEs and the description of work to be performed by each will be submitted by the apparent low Bidder to the Financial Services Division of the Department within fourteen (14) days after the furnishing of the contract and bond forms to the apparent low Bidder. This information will be submitted on the forms provided by the Department and signed by an authorized signer for each certified DBE and the prime Contractor.

A Bidder who fails to submit the names of certified DBEs and the description and value of work to be performed by each DBE, sufficient to meet the DBE participation goal, will be deemed ineligible for award of the contract unless the Bidder submits a request for consideration of waiver or modification of the DBE participation goal on the form and in the format required by the Department or is granted additional time to correct an inadvertent error.

- A. **Pre-Award Waivers or Modifications.** If an apparent low Bidder submits a request for waiver or modification of the DBE participation goal the contract will not be awarded until a determination is made by the Department. The Contractor must submit evidence of good faith efforts to meet the DBE participation goal. The Department will advise the Contractor of its decision by certified mail.

If the Department denies the request, the Department will notify the Bidder of the determination by certified mail. The determination will include a statement of any additional good faith efforts that the Bidder may take in order to effect compliance. The Bidder will have ten (10) calendar days from the date of the Bidder's receipt of such determination to comply or appeal. If the Bidder fails to comply with the Department's determination within the ten (10) calendar day period, the Bidder will be deemed ineligible for award of the contract.

- B. **Post-Award Waivers or Modifications.** 49 CFR § 26.53 provides that prime Contractors may not terminate for convenience an approved DBE working on a federally-assisted contract, and then perform the work of the terminated DBE. Additionally, the Department will be notified immediately of a DBE's inability to perform any or all of its work and the Contractor's intent to obtain a substitute DBE. Contractors are required to make a good faith effort to replace a DBE that is unable to perform with another DBE. The substitute DBE must be approved by the Department prior to starting work.

The Contractor may, after award, request a waiver or modification of the DBE participation goal. The Contractor must submit evidence of good faith efforts to meet the DBE participation goal and include proof that on the date the Contractor became aware the DBE goal would not be met, the amount of contract work remaining was carefully reviewed to identify other work which could be subcontracted to DBE firms.

If the Department determines the Contractor has demonstrated a sufficient good faith effort to achieve the goal, the Department will modify or waive the goal as requested. If the Department denies the request or modifies the goal in a manner other than that requested, the Department will notify the Contractor by certified mail within twenty (20) calendar days of receipt of the request.

Requests for waiver or modification of the goal for DBE participation will be submitted to the Office of Equal Opportunity (OEO). The Department will evaluate the good faith efforts of the Contractor based on the direction provided by 49 CFR, Appendix A to Part 26 - Guidance Concerning Good Faith Efforts of the Federal Register. Where deemed appropriate and/or required, the concurrence of the Federal Highway Administration will be sought.

- C. **Appeals.** A Contractor receiving an adverse determination, related to their request for waiver or modification of the DBE participation goal, may appeal the determination. Written appeals must be submitted to the Office of Equal Opportunity (OEO) within ten (10) calendar days of the Contractor's receipt of the Good Faith Determination Committee's decision. The Appeal Panel's determination will be provided by certified mail to the Contractor within fifteen (15) calendar days of the determination. Determination of the Appeals Panel are administratively final.

The Department reserves the right to modify any requirement or shorten any time period where the need to place the project under contract is such that the public interest warrants such action and would be impaired by further delay. If the Department waives any of these requirements, except the length of a time period, it will assure that no Bidder is given a material competitive advantage by these actions.

- D. **Reports.** The prime Contractor is required to submit to the Engineer a complete "Prime Contractor Statement of DBE Subcontractor Payments" (MDOT Form 164) once every three months according to the form schedule.

A final statement will be submitted within thirty (30) days after the Engineer's submission of the final pay estimate.

- E. **Penalties.** Failure to fulfill the DBE subcontracting requirement may result in the Department exercising the rights and remedies available in accordance with the provisions of the contract and may be considered a breach of contract. These may also include suspension, reduction, or removal of the Contractor's prequalification as stated in the "Administrative Rules Governing the Prequalification of Bidders for Highway and Transportation Construction Work."