

Good Faith Effort Review

On September 12, 2013 Prime Contractor submitted the lowest proposal in the amount of \$3,700,000, for the Project. Prime Contractor failed to meet the contract goal of 6.5%, submitting only 1.5% DBE participation.

Under the DBE Program, CDOT or its subrecipients may not award a federally-assisted contract until it is determined that the bidder made good faith efforts to meet the contract goal. Good faith efforts means taking all necessary and reasonable steps to achieve the contract goal, which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful. When a bidder has not committed to meet the contract goal, CDOT evaluates the bidder's good faith efforts using Appendix A of 49 CFR Part 26.

Evaluation of Good Faith Efforts

- Soliciting through all reasonable and available means the interest of all certified DBEs who have the capability to perform the work of the contract, allowing sufficient time for DBEs to respond to the solicitation, and taking appropriate steps to follow up initial solicitations.*

The Form 1416 and supporting documentation submitted by Prime Contractor shows that on Tuesday, August 19, 2013 Prime Contractor emailed all of the DBEs in the following areas:

Work Code	Number of DBE Firms
238210 Electrical Contractors	28
237310 Asphalt paving (i.e., highway, road, street, public sidewalk)	13
237310 Painting lines on highways, streets and bridges	8
238390 Waterproofing contractors	14
237310 Sign erection, highway, road, street or bridge	20

Prime Contractor states that faxes were also distributed to these contractors, but no fax log was provided. Prime Contractor followed up with two DBEs on August 28 and September 11, 2014: DBE 1 and DBE 2. No other DBEs were contacted.

In reviewing the engineer's estimate, the bid also provided for potential subcontracting in the following areas:

Work Code	Number of DBE Firms
237310 Concrete Paving (i.e. highway, road, street, public sidewalk)	46
541370 Land Surveying Services	17
561730 Erosion Control Services	32
541910 Marketing Research & Public Opinion Polling	68
561990 Flagging (i.e. Traffic Control) Services	32
237310 Culverts, highway, road and street, construction	36
238210 Steel reinforcing contractors	27
238910 Site Preparation Contractors	23

However, Prime Contractor did not solicit for any subcontractors in these areas. The ad sent to DBE firms specifically listed bid items in asphalt, signs, waterproofing and pavement marking.

Prime Contractor states that an ad was placed in the Daily Journal on September 4 and September 11. The ad was provided, but there is no documentation that it ran in the Daily Journal. The ad includes the project name and letting date but does not identify specific areas for subcontracting.

2. *Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved, including breaking out contract work items into economically feasible units to facilitate DBE participation.*

Prime Contractor states that approximately 47% of the bid items were identified as subcontracting opportunities for DBE participation. These amounts are broken down as follows:

Work Code	Approximate Amount	Number of DBE Firms
238210 Electrical Contractors	\$50,000	28
237310 Asphalt paving	\$900,000 (HMA) \$120,000 (Patch) \$400,000 (Detour)	13
237310 Painting lines on highways, streets and bridges	\$135,000	8
238390 Waterproofing contractors	\$55,000	14
237310 Sign erection, highway, road, street or bridge	\$65,000	20

Below are the line items for areas not solicited by Prime Contractor:

Work Code	Approximate Amount	Number of DBE Firms
237310 Concrete Paving <i>(Flatwork Items Only)</i>	\$95,000	46
541370 Land Surveying Services	\$3,000	17
561730 Erosion Control Services	\$55,000	32
541910 Marketing Research & Public Opinion Polling	\$10,000	68
561990 Flagging (i.e. Traffic Control) Services	\$280,000	32
237310 Culverts, highway, road and street, construction	\$28,000	36
238210 Steel reinforcing contractors	\$204,000	27
238910 Site Preparation Contractors	\$95,000	23

3. *Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to the solicitation.*

The solicitation distributed by Prime Contractor to DBE firms identifies the project and the specific bid items for the areas in which Prime Contractor was seeking subcontractors, i.e. asphalt, signs, waterproofing and pavement marking. The solicitation does not include addresses or other information for viewing project plans and specifications. The ad placed in the Daily Journal does not identify subcontracting areas or locations where plans could be accessed.

4. *Negotiating in good faith with interested DBEs, which includes selecting work for DBEs consistent with available DBE subcontractors and suppliers, taking the DBE firm's price and capabilities as well as the contract goal into consideration, and incurring reasonable additional costs to find and use DBEs.*

Prime Contractor received four DBE quotes; three were rejected and one was accepted. DBE 3 was the lowest bidder for waterproofing. That quote was accepted and represents the only DBE commitment made by Prime Contractor. The following quotes were rejected:

DBE Contractor	Work Area	Quote	Accepted Quote
DBE 1	Asphalt Patching	\$189,500	\$55,000
DBE 1	Detour Pavement	\$572,000	\$368,000
DBE 4	Sign Installation	\$74,000	\$57,000

These amounts do not account for mobilization costs. Prime Contractor states that all three rejected quotes were rejected because the difference was “deemed excessive and therefore unreasonable.”

5. *Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities.*

Prime Contractor's 1413 also shows that DBE quotes were received in the following areas:

- Traffic Control (3*)
- Landscape and Erosion Control (1)
- Clearing, Demolition, Excavation & Earthwork (1)

* This includes DBE 4, which was listed as a traffic control quote in the 1413.

The rejection of these quotes is not explained in Prime Contractor's GFE documentation.

6. *Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.*

There is no evidence or assertion that Prime Contractor provided this assistance.

7. *Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.*

Prime Contractor states that they have provided the following assistance to DBEs on past CDOT projects:

- Cash flow assistance by preparing weekly paychecks for subcontractors' employees.
- Credit assistance by providing joint checks to subcontractors' suppliers.
- Technical assistance in field and office on projects.
- Lending equipment, personnel and administrative support to subcontractors.
- Waiving bond requirements.
- Acceptance of lower insurance limits.
- Granting lower retention percentages and early retention release.

Prime Contractor does not claim that any of these services were provided or offered in relation to this contract.

8. *Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.*

Prime Contractor did not utilize minority or women community organizations.

9. *The performance of other bidders in meeting the contract goal.*

There was one other bidder on the contract. The DBE participation of each bidder is as follows:

Prime Contractor Inc.	\$3,600,000	1.5% DBE
Second Contracting Inc.	\$3,700,000	7.50% DBE

Second Contracting committed 7.5% to DBE 4 for traffic control. Second Contracting received DBE bids for traffic control, striping, waterproofing, potholing, culverts, and public information.

10. *Other demonstrations of good faith efforts.*

Prime Contractor stated the following as demonstrations of good faith efforts:

- Meeting contract goals on 49 out of 50 bids.
- Attending networking events and minority contractor meetings. One of these events was held in March 2013, all others were held in 2012.

CRBRC Determination

It is up to CDOT to make a fair and reasonable judgment whether a bidder that did not meet the contract goal made adequate good faith efforts. We consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made and the efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the contract goal. Mere pro forma efforts are not good faith efforts. However, the sufficiency of the firm's good faith efforts is a judgment call and meeting quantitative formulas is not required.

The CRBRC has determined that Prime Contractor failed to demonstrate good faith efforts to meet the contract goal. As presented, Prime Contractor did not prove that it created a feasible approach to meet the contract goal or that it actively and aggressively tried to obtain DBE participation.

The DBE regulation requires that the prime contractor seek out opportunities that could reasonably lead to securing DBE participation. This includes looking at both the size of the subcontract as well as the available DBE capacity. Prime Contractor relied on a few large work items, which do not have high DBE capacity, in order to meet the contract goal.

Prime Contractor identified 47% of the contract for DBE participation, yet 39.74% of this work was in asphalt. If the asphalt work was not fulfilled by a DBE, as it was not, Prime Contractor's strategy left only

7.5% potential DBE participation in remaining work items. As listed above, there were many other opportunities for which Prime Contractor could have sought DBE participation.

When Prime Contractor's strategy to obtain DBE participation in limited areas proved to not be working, Prime Contractor should have expanded its search and/or followed up with DBEs to obtain participation. Prime Contractor followed up with only two DBEs. Prime Contractor did not seek out additional subcontracting areas or make any other efforts to obtain DBE participation.

Additionally, Prime Contractor did not fully consider all quotes received by DBEs. From the 1413, it appears that Prime Contractor may have received DBE quotes in traffic control, landscape/erosion control, and demolition/clearing. Prime Contractor did not discuss these quotes in its good faith effort documentation. Prime Contractor also dismisses the two quotes from DBE 1 and DBE 4 as excessive because of the difference between quotes. However, quote differences must be looked at in light of the percentage to other quotes and as well as the overall percentage of the contract. While the DBE 1 quotes are both significantly higher in dollar amount and percentage differences, the DBE 4 quote was not.

In making its argument that good faith efforts were made for this project, Prime Contractor cites outreach events and meetings from 2012 and one from 2013. Most of these events focus on RTD-related projects. There are no direct efforts identified for this project and Prime Contractor makes no connection of the outreach events to its DBE strategy or outreach.

Prime Contractor also discuss strategies to assist DBEs in performing on CDOT projects. Again, these strategies have not been tied to this project. More importantly, however, while Prime Contractor's efforts to assist DBEs are appreciated, they must be done within the permitted limits of the regulation. A number of the strategies presented by Prime Contractor present commercially useful function issues and should be avoided. Primes should not be lending DBEs equipment or personnel to complete specific projects, nor should they be paying subcontractor employees directly. These activities compromise the independence of the DBE and may ultimately lead to the DBE not counting for credit on the project.

Finally, Prime Contractor mentions obstacles for this project such as night work and limited capacity. However, due to the lack of outreach for this project, these have not been clearly demonstrated to be defining issues that prevented DBE participation.