

## **Good Faith Effort Review**

On May 15, 2014, Prime Contractor submitted the lowest proposal, \$9,500,000 for the Project. Prime Contractor failed to meet the contract goal of 10.5%, submitting only 6% DBE participation. The Civil Rights and Business Resource Center (CRBRC) has reviewed Prime Contractor's good faith efforts and determined that Prime Contractor failed to make good faith efforts to meet the contract goal.

Under the DBE Program, CDOT may not award a 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. CDOT evaluates good faith efforts using Appendix A of 49 CFR Part 26 (Appendix A).

The CRBRC used the following guidelines outlined in Appendix A to determine whether Prime Contractor made good faith efforts:

1. 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 April 30, 2014 Prime Contractor faxed a notice to approximately 50 DBE firms, on May 1, 2014 Prime Contractor emailed over 150 DBE firms, and between May 2 and May 3, 2014 Prime Contractor called over 150 firms to follow up.

According to the narrative from Prime Contractor, the categories identified by Prime Contractor for DBE participation included demolition, sign erection, guardrails, construction site clean-up, erosion control, hydroseeding, potholes, bridge and bridge deck construction, land surveying, resurfacing, traffic control, flagging, line painting, public relations, and curb and gutters. The CRBRC compared the list of the DBEs solicited to those available in these areas, and determined that DBEs certified in 237310 – Curbs and street gutters, highway, road and street construction were not solicited for participation. In all other areas listed above, Prime Contractor identified at least one relevant work code to search.

The email and fax solicitation by Prime Contractor also included waterproofing and reinforcing steel. Prime Contractor did not solicit DBEs certified in these work codes: 238390-Waterproofing and 238120-Steel Reinforcing Contractors. Prime Contractor did not provide any evidence of indirect solicitations (i.e. newspaper or other solicitations).

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.

The fax and email solicitations included a list of all bid items that Prime Contractor intended to subcontract. The list included all bid items on the contract except aggregate base course, hot mix asphalt, emulsified asphalt, unclassified excavation, embankment material, structure backfill, topsoil, field offices, sanitary facilities, and mobilization costs. The approximate value of the solicited items was 30-35% of the bid amount. The amounts of the solicited items varied in dollar value.

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 fax and email solicitations included the name of the project, the requested bid items, and two addresses where plans could be reviewed. These addresses were CDOT's headquarters location and Prime Contractor's office.

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's bid summary shows the selection of one DBE that bid slightly higher than a non-DBE. DBE Firm #1 was selected in lieu of ABC Co. even though DBE Firm #1's estimate was approximately \$600 more than Jenco's.

In two instances, Prime Contractor chose not to select a higher bidding DBE firm over a non-DBE firm. Prime Contractor chose XYZ Co. (\$380,000) instead DBE #2 (\$415,000) for guardrail. The difference between the bid amounts was \$35,000. Prime Contractor chose Paving Co. (\$159,000) instead of DBE #3 (\$189,000) for curbs. The difference between the bid amounts was \$30,000.

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

DBEs provided bids for seal bridge joints, bridge expansion joints, and waterproofing membrane. Prime Contractor's documentation says they were not selected because they were not the lowest bidder. However, no other bidder was listed for these areas.

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.

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

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.

There is no evidence or assertion that Prime Contractor reached out to these organizations.

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

Of the four bidders who submitted proposals on the contract, two met the contract goal and two did not. The bids were as follows:

Prime Contractor	\$9,800,000	5.56% DBE
Bidder 2	\$10,500,000	10.00% DBE
Bidder 3	\$12,700,000	6.02% DBE
Bidder 4	\$12,900,000	10.00% DBE

The average amount of DBE participation submitted was 7.9%. The average of the other three bidders was 8.67%.

10. Other demonstrations of good faith efforts and past history.

Prime Contractor provided no other evidence of good faith efforts.

Prime Contractor's three year history indicates that they have been awarded \$17,000,000 in prime contracts over the past three years. They have achieved \$1,055,168 DBE participation, which is approximately \$70,000 less than what was required to meet the DBE goals. However, this deficiency may be attributed to the fact that CDOT did not previously amend goals for awards based upon good faith efforts.

In 2013 Prime Contractor was awarded a \$5,600,000 contract with a 10% goal, based upon good faith efforts. Prime Contractor had submitted 7.02% participation. Although awarded the contract, Prime Contractor was notified that it did not appear to solicit all DBE firms and needed to make better efforts to follow up with DBEs.

CDOT must 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's determination that Prime Contractor failed to make good faith efforts is based primarily upon Prime Contractor's failure to select DBEs to participate on the project. As stated in Appendix A, negotiating with DBEs in good faith includes incurring reasonable costs to obtain DBE participation. "[T]he fact that there may be additional costs involved in finding and using DBEs is not in itself sufficient reason for [failure] to meet the [contract goal] so long as such costs are reasonable."

In this instance, Prime Contractor could have exceeded the DBE goal by incurring approximately \$66,000 in additional costs, which equates to less than seven tenths of a percent of the contract. Additionally, Prime Contractor provided no documentation to show why the DBE proposers were not selected for bridge seal and expansion joints or waterproofing membrane.

While not the determinative factor, it should also be noted that Prime Contractor did not identify all DBEs that could potentially participate on the project. Prime Contractor could have increased its solicitations by including DBEs certified in work codes that were clearly tied to the items of work to be subcontracted. These items are 237310 –Curbs and street gutters, highway, road and street construction, 238390- Waterproofing contractors and 238120-Steel Reinforcing Contractors.

Therefore, based upon the information provided, it is the determination of the CRBRC that Prime Contractor did not actively and aggressively try to meet the contract goal. Award should be denied based upon Prime Contractor's failure to make good faith efforts.