

Good Faith Effort Review

On April 1, 2010, Prime Contractor Corporation (Prime Contractor) submitted the lowest proposal in the amount of \$7,000,000, for CDOT Project 1, Duncan Lance Road (the Project). Prime Contractor failed to meet the contract goal of 9.0%, submitting only 4% DBE participation.

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. 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

- 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 March 22, 2010 Prime Contractor emailed and faxed an invitation to all DBEs certified in the areas of:

- 237310 - Painting Lines on highways, streets and bridges
- 238120 - Steel Reinforcing Contractors
- 237310 - Asphalt Paving (i.e. highway, road, street, public sidewalk)
- 237310 - Resurfacing, highway, road, street, bridge or airport runway
- 562910 - Environmental remediation services
- 562111 - Trash collection services
- 532412 - Construction machinery and equipment rental or leasing without operator
- 541330 - Construction engineering services
- 339950 - Signs and signboards (except paper, paperboard) manufacturing

It appears that Prime Contractor solicited to some, but not all, DBE firms certified in the areas of advertising (for public involvement) and traffic control/flagging. However, Prime Contractor did receive quotes in these two areas and selected Bob's Info, LLC for public involvement and Walmart Traffic Control, LLC for traffic control/flagging.

In some cases, Prime Contractor identified the wrong code for participation. Instead of 541810 Advertising Agencies, they should have selected 541910 Marketing Research and Public Opinion Polling or 541820 Public Relations Services for public information firms. Instead of, or in addition to, Construction Machine, Prime Contractor should have selected 238910 Demolition contractor or 238910 Site Preparation Contractors (Wrecking, Demolition, and Excavation). Instead of, or in addition to 339950 Signs and signboards (except paper, paperboard) manufacturing, they should have selected 237310 Sign erection, highway, roads street or bridge. They could have also included 541730 Land Surveying Services.

On March 23, 2010 Prime Contractor posted a notice in the online small business network and on March 24, 2010 posted in the Denver Tribune. On March 24, Prime Contractor distributed its solicitation to the Asian Chamber Association, Hispanic Chamber of Commerce, Colorado Women's Chamber of Commerce, and Office of Economic Development. On March 25, 2010, Prime Contractor followed up with the DBE firms via phone. Prime Contractor also states that on March 28, 2010 the estimator made direct calls to those that had expressed interest in the project, though this is not documented in the phone log.

- 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 included the following bid items for which Prime Contractor was seeking subcontractor participation:

Removal of Asphalt Mat	Field Office
Removal of Pavement Marking	Sanitary Facility
Removal of Bridge Railing	Construction Surveying
Hot Mix Asphalt	Public Information
Reinforcing Steel	Pavement Marking
Bridge Rail	Traffic Control

In their GFE documentation, Prime Contractor included a list of the areas they identified for DBE participation titled "GFE Documentation Initial Scope Breakdown". This listing included "guardrail" for the removal of bridge railing (approximately \$20,000), an area for which Prime Contractor did not solicit DBEs. The final subcontracting plan shows that all together the areas identified for a guardrail subcontractor total \$180,000. Billy's Construction Company (a non-DBE) was selected to perform "Signs, Sign Installation and Guardrail" for a total of \$120,500.00.

According to the GFE Documentation Initial Scope Breakdown, Prime Contractor expected the total amount of the subcontracted items to be \$630,000 which equates to 9.00% of Prime Contractor's actual bid, but only 8.00% of their projected bid. Prime Contractor's final subcontracting plan shows that they are self-performing removal of portions of structures, place polyester overlay, and furnish polyester overlay. All other areas, approximately 12.00%, will be subcontracted.

Prime Contractor did not solicit DBEs for bridge construction or trucking. Via a phone conversation, Prime Contractor explained to the CRBRC that due to its work in other states, it is not accustomed to soliciting DBEs for trucking and had been directed to solicit according to line items in the advertisement.

- 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 included the name of the project, the requested bid items, and contact information for CDOT and Prime Contractor. The solicitation states that Prime Contractor will assist DBE firms in obtaining plans and contract requirements.

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.*

According to the Form 1413, Prime Contractor received ten bids. Of these twelve, four were from DBEs. Three of the DBEs were selected. One DBE was not selected because it presented a higher bid than another DBE.

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

There is no indication that Prime Contractor rejected DBE bids.

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. However, the solicitation by Prime Contractor offers to provide this kind of assistance to interested DBEs.

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. However, the solicitation by Prime Contractor offers to provide this kind of assistance to interested DBEs.

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 reached out to the CDOT CRBRC for contact information for solicitations. As noted above, the solicitation was distributed to minority and women's organizations in the Denver area.

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

Of the four bidders who bid on the contract, the initial bids indicated that two met the contract goal and two did not. The bids were as follows:

Prime Contractor	\$7,000,000.00	4% DBE
Tom's Construction	\$7,300,000.00	8% DBE
D&D Construction	\$7,360,499.00	8.5% DBE
Tech Construction, LLC	\$9,990,000.00	2.7% DBE

The average of the DBE participation as presented is 5.8%. All four bidders selected the same three areas for DBE participation: traffic control/flagging, surveying and public information. In order to meet the goal, Tom's Construction Form 1414 also includes commitments for trucking (approximately \$330,000, of which most comes from California to Colorado supply hauling) and sweeping (approximately

\$25,000), while D&D Construction's 1414 includes a commitment for the supply of polyester concrete (approximately \$400,000). The commitments presented by D&D include a supplier for which the proper deduction was not taken. D&D participation would have been reduced by approximately \$160,000 or 2.0%. Regardless, Prime Contractor falls below the average of the other bidders.

10. Other demonstrations of good faith efforts.

Prime Contractor provided no other evidence of good faith efforts.

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. 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 demonstrated sufficient good faith efforts to meet the contract goal. Through soliciting by indirect and direct methods, Prime Contractor demonstrated that they were actively and aggressively attempting to obtain DBE participation. However, the following deficiencies have been identified in Prime Contractor's approach and will not be accepted in future reviews:

- Prime Contractor states in its documentation, that only areas "not normally performed" by Prime Contractor were identified for participation. As stated in Appendix A, good faith efforts include "where appropriate, breaking out work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces." In this case, Prime Contractor only identified somewhere between 8.0% and 12% participation for subcontractors, including DBEs. The CRBRC has accepted Prime Contractor's efforts in spite of this plan only because of the limited bid items and similar DBE commitments by the other primes. However, such a plan that does not provide for alternatives to meet the goal will not be considered acceptable in other cases where clear subcontracting opportunities or unbundling is possible. It is the prime's responsibility to establish an approach that can be reasonably expected to meet the contract goal. If it cannot do so, it must clearly establish that there were no other possible opportunities.
- Prime Contractor failed to solicit for trucking and bridge rail which are two areas in which the Colorado UCP has ready, willing and able DBEs. Had the bridge rail subcontract gone to a DBE, Prime Contractor would have increased their DBE participation significantly, though they still would not have met the goal. Additionally, Prime Contractor needs to improve the accuracy of its search for DBE firms. The CRBRC acknowledges that the directory can be difficult to navigate, but as noted above Prime Contractor improperly identified the work codes for a number of areas. Proper identification of work codes would have likely resulted in more interested DBEs to participate in the project.