

Good Faith Effort Review

On February 25, 2013, Prime Contractor submitted the lowest proposal, \$3,500,000, for CDOT Project 1 (the Project). On Form 1414, Prime Contractor stated they would exceed the contract goal using two DBE subcontractors. Upon review of the Form 1414 and Form 1415, the Civil Rights and Business Resource Center (CRBRC) discovered that Firm X, one of the firms submitted on the Form 1414, is not a certified DBE. Therefore, Prime Contractor failed to meet the contract goal and is subject to a review of their other good faith efforts. The CRBRC has reviewed Prime Contractor's narrative and supporting documentation and determined that Prime Contractor did not 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.

The CRBRC reviews the following activities, as 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 February 12, 2013 Prime Contractor emailed potential subcontractors and on February 13, 2013 faxed a similar, but not matching, set of potential subcontractors. Neither solicitation was directed solely at DBEs and the lists provided are not organized by DBEs and non-DBEs. The lists also incorrectly label all trucking firms as wildlife biologists and includes other inconsistencies in the RFQ Groups column.

In the narrative provided with the Form 1416, Prime Contractor states that Traffic Control, Concrete, Public Information, Seeding, Erosion Control, Guardrail, Signage, Surveying and Trucking were identified for DBE participation. The CRBRC generated a list for DBEs for each work area. Including solicitations from both the email and fax lists, the CRBRC determined that Prime Contractor contacted the following firms in each area.

561990 Flagging (i.e., traffic control) services – 29/31

541910 Marketing Research and Public Opinion Polling – 8/69

561730 Erosion Control Services – 27/29
237310 Guardrail Construction – 20/23
237310 Sign Erection, highway – 16/19
541370 Land Surveying Services – 3/16
484220 Gravel Hauling – 25/81
484220 Dump Trucking – 24/98
561730 Hydroseeding – 17/17
237310 Concrete Paving – 42/45

Prime Contractor made follow up phone calls to potential subcontractors on February 23, 2013. The phone calls were directed to all subcontractors. The listing is not organized by DBE or non-DBEs.

Prime Contractor provided no evidence of indirect 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.*

Excluding trucking, the categories identified for DBE participation by Prime Contractor represent approximately 22% of the project. This is consistent with Prime Contractor's narrative that states they expected to self-perform 65% of the work. The other 25% was expected to go to subcontractors and 10% to trucking firms. Prime Contractor did not provide a copy of the solicitation distributed by email or fax to the subcontractors.

- 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 were distributed approximately 12 days in advance of the project. Phone calls were made throughout the day on Tuesday prior to the Thursday letting. CDOT did not receive a copy of the solicitation distributed to the subcontractors.

- 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 that they received quotes from nine DBEs. According to Prime Contractor's narrative, they had determined on the morning of

February 25 that they would exceed the contract goal by submitting the following DBE participation totaling \$502,000:

DBE #7- Pavement Marking: \$258,000

DBE #2 – Traffic Control: \$244,000

Upon receiving Firm X's quote, they changed the Form 1414 to include:

Non-DBE – Concrete: \$92,000

DBE #5 – Public Information: \$12,700

DBE #1- Traffic Control: \$316,000

DBE #1 – Signage: \$14,000

In its notes, Prime Contractor stated that DBE #2 was not preferred because of their service and because the bid was high. The difference between the firm that was selected for pavement marking and DBE #7 was \$104,000. Therefore when Firm X's quote for concrete came in, Prime Contractor removed DBE #7 and added DBE #5. Additionally, Prime Contractor replaced DBE #2 with DBE # 1 to meet the contract goal.

Prime Contractor noted in its phone log that on February 23, 2013, the Firm X was not in the DBE directory. After receiving the quote on February 25, 2013 at 8:50am, Prime Contractor emailed Firm X and asked for their DBE number, but did not mention the directory. Firm X provided a DBE number 6496 and stated that their certification expiration date is August 2013. Prime Contractor proceeded to submit the bid with Firm X listed as a DBE.

After being designated the lowest apparent bidder, Prime Contractor submitted the Form 1415 for Firm X and the other DBEs. The Form 1415 stated that Firm X intended to purchase concrete from Prime Contractor, which does not count toward the DBE goal. However no deduction was made from the commitment to reflect this amount.

Firm X has not been certified as a DBE January 2011. They are not listed on the DBE directory and do not have a current renewal letter from CDOT. Neither Firm X nor Prime Contractor contact CDOT regarding Firm X's certification.

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

There is no evidence that Prime Contractor rejected any DBEs without sound reason.

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.*

There were two bidders on this contract: Prime Contractor and Bidder #2. Both asserted they would meet the contract goal.

10. *Other demonstrations of good faith efforts.*

Prime Contractor provided no documentation of other good faith efforts made prior to submitting its proposal.

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's determination that Prime Contractor failed to make good faith efforts is primarily based upon Prime Contractor's reliance on a non-certified firm to meet the contract goal. Additionally in the DBE Requirements, a Disadvantaged Business Enterprise (DBE) is defined

as “A Colorado-certified Disadvantaged Business Enterprise listed on the Colorado Unified Certification Program (UCP) DBE Directory at www.coloradodbe.org.”

Prime Contractor knew as of February 23, 2013, the Firm X was not listed on the directory. The CRBRC recognizes that Prime Contractor contacted Firm X to confirm their certification and that Firm X misrepresented their status to Prime Contractor. While Prime Contractor requested a DBE number from Firm X, CDOT stopped using certification numbers in 2011. Moreover, Prime Contractor received no documentation from Firm X in spite of knowing that they were not listed on the directory.

According to the USDOT, “Good faith efforts are efforts to obtain participation by certified DBEs on the contract. Efforts to include firms not certified as DBEs in the state where the contract is being let are consequently not good faith efforts to meet a DBE contract goal.” The USDOT guidance originates from a question regarding the use of out of state DBE to meet contract goals, however, it is similarly applicable to firms that are no longer certified. Unless certified by the UCP, a firm cannot count toward the contract goal and it is the responsibility of the contractor to ensure that a firm is certified.

In reviewing Prime Contractor’s documents, the solicitation and ultimate selection of a non-DBE appears to be attributable to a system which does not identify currently certified DBEs for participation on the project. In the solicitation record, all efforts are directed at subcontractors in general, there is not clear indication or tracking of DBE firms. Additionally, work areas are not properly identified, firms that have long been out of business are still included in the list, and the list is not consistent with the current directory. Therefore, while Prime Contractor was diligent in contacting firms, their efforts were not properly targeted.

Prime Contractor did demonstrate that it considered all bids from DBEs and did make efforts to meet the contract goal. Prime Contractor also appears committed to remedying their mistake with efforts to replace Firm X after notification from CDOT. While recognizing these efforts, the CRBRC has determine that the responsibility lies with the contractor to ensure accuracy of the DBE commitments prior to submitting a proposal. Within the hour before bid, knowing that Firm X was not listed on the directory as a DBE, Prime Contractor should have contact CDOT, questioned Firm X or requested documentation of certification. Regarding both the listing of a non-certified firm and not properly counting eligible participation, Prime Contractor must take greater care in reviewing the DBE Requirements to ensure accuracy in its commitments to meet the contract goal.