

COUNTY COUNSEL
LOUIS B. GREEN

CHIEF ASS'T. COUNTY COUNSEL
EDWARD L. KNAPP

PRINCIPAL ASS'T COUNTY COUNSEL
PATRICIA E. BECK

DEPUTY COUNTY COUNSEL
JUDITH M. KERR
REBECCA C. SUDTELL
PAULA F. FRANTZ
MICHAEL J. CICOZZI

**EL DORADO COUNTY
OFFICE OF
THE COUNTY COUNSEL**



COUNTY GOVERNMENT
CENTER
330 FAIR LANE
PLACERVILLE, CA
95667
(530) 621-5770
FAX# (530) 621-2937

DEPUTY COUNTY COUNSEL
DAVID A. LIVINGSTON
SCOTT C. STARR
TERI M. MONTEROSSO
LESLEY B. GOMES

November 6, 2009

Board of Supervisors
County of El Dorado
330 Fair Lane
Placerville, CA 95667

Board Date: Special Meeting, Monday November 9, 2009
Re: Award and Bid Protest – U.S. 50/Missouri Flat Road Interchange Improvements
Phase 1B Project - Staff Recommendations

Honorable Chairman and Members of the Board of Supervisors:

This matter was first heard at the Board of Supervisors meeting on November 3, 2009. At that time the Board continued the action on award to November 9, 2009, and expressly delegated to the County's Department of Transportation (DOT), in accordance with its past practice, the responsibility to review and make the determination of whether a good faith effort on the part of the lowest bidder DeSilva Gates/Viking Joint Venture was made and to provide the administrative remedy, if necessary, to DeSilva Gates/Viking Joint Venture. The Board also directed DOT to review the remaining bids together with their respective UDBE submissions, and to return to the Board with recommendations for award.

One bid protest, from Nehemiah Construction Inc, had been received at that time and the Board heard testimony from representatives of both Nehemiah Construction Inc. and DeSilva Gates/Viking Joint Venture. As part of the November 3, 2009 action, the Board requested that any other submissions from bidders relative to that bid protest or any other bid issues be submitted by Thursday November 5, 2009. The following additional correspondence relative to bid protests was received: Bid protest of DeSilva Gates/Viking Joint Venture to bidders two through four, C.C. Myers, Nehemiah Construction Inc. and A. Teichert & Son, Inc.

In its separate report to the Board included within the Board's agenda packet, DOT has outlined its review of the DeSilva Gates/Viking Joint Venture bid, inclusive of a thorough review of that bidder's UDBE good faith effort submission. DOT has set forth key findings from its UDBE review and based therein DOT has concluded that the bidder met the federal requirements and made an adequate good faith effort showing. As a result, DOT has recommended award to DeSilva Gates/Viking Joint Venture as the lowest responsible responsive bidder.

09-1101.3C

Prior to making a determination for award, the Board should now hear any further testimony on the bid protest submitted by Nehemiah Construction Inc. Set forth below is a summary on the federal requirements that staff applied in its review of the good faith efforts of DeSilva Gates/Viking Joint Venture's bid for the Board's consideration of the UDBE issues raised by the protest by Nehemiah Construction Inc.

I. Summary of the Federal Requirements for UDBE Good Faith Efforts.

The County is required, as a participant for Federal Highway Administration funds, to administer a Disadvantaged Business Enterprise ("DBE") program. A DBE is a for-profit small business concern that is at least 51 percent owned and controlled by one or more socially and economically disadvantaged individuals. [49 C.F.R. 26.5] An Underutilized Disadvantaged Business Enterprise (UDBE) is a firm meeting the definition of a DBE as specified in 49 Code of Federal Regulations and is one of the following groups: African American, Asian-Pacific American, Native American, or women. [LAPM @9-9] As required by federal law, Caltrans establishes a statewide overall DBE goal and includes the level of DBE participation that local agencies could contribute to. Local agencies use the UDBE contract goals only on those federally-assisted contracts that have subcontracting, supplier or trucking opportunities. Here the goal for participation for UDBE for this contract was set at 7.3 percent.

When a local agency sets forth a UDBE contract goal for a U.S. Department of Transportation-assisted contract, the bidder must, in order to be responsive, make good faith efforts to meet the goal. Those good faith efforts may be met in one of two ways: (1) The bidder can meet the goal and document commitments of participation of the UDBE firms sufficient to meet the goal; **or** (2) The bidder can document adequate good faith efforts. [49 C.F.R. 26.53]

In any situation in which a contract goal has been established, the use of good faith efforts must be allowed by the local agency. Title 49 Code of Federal Regulations, part 26 specifically prohibits U.S. DOT financial recipients from ignoring bona fide good faith efforts. [49 C.F.R. 26.53 appendix A, III]

Determining the sufficiency of a bidder's good faith efforts is a **judgment call by the local agency**. The statutory scheme requires that we make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. To do so, we consider the "quality, quantity, and intensity of the different kinds of efforts" that the bidder made. [49 C.F.R. part 26, appendix A, II] While "mere pro forma efforts" are not alone sufficient, meeting "quantitative formulas" is not required and in fact would not meet the requirements of Appendix A of the regulations. The legislative history pertaining to the regulations [64 Fed. Reg. 5114 (1999)] contains the following guidance for the local agency in exercising their judgment:

Certainly a one-size-fits-all checklist is neither desirable nor possible. What constitutes a showing of adequate good faith efforts in a particular procurement is an intrinsically fact-specific judgment that recipients must make. Circumstances

of procurements vary widely, and good faith effort determinations must fit each individual situation as closely as possible.

The salient inquiry is whether the bidder showed that it took all necessary and reasonable steps to achieve a DBE 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. In evaluating the effort, the County may consider the following factors, but it is important to note that the federal regulations provide that this list is neither all-inclusive nor mandatory. 49 Code of Federal Regulations part 26, appendix A, section IV specifically states at the outset: “The following is a list of types of actions you should consider as part of the bidder’s good faith efforts to obtain DBE participation. ***It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases***” (emphasis added). [49 C.F.R. 26.53, appendix A, I, IV] Factors to be considered include:

- Did the bidder sufficiently solicit, through reasonable and available means, the interest of all certified DBEs who can perform the work?
- Did the bidder select appropriate portions of work to be performed by DBEs in order to increase the likelihood that DBE goals will be achieved? Did the bidder make sufficient work available to DBEs?
- Did the bidder provide interested DBEs with adequate information about the project in a timely manner to assist interested DBEs in responding to the solicitation?
- Did the bidder make efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance? Did the bidder make efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services?
- Did the bidder negotiate in good faith with interested DBEs and, to the extent agreement could not be reached, did the bidder provide evidence why? If the bidder rejected a DBE based on price, was the bidder’s decision reasonable (i.e., was the price difference “excessive or unreasonable”)? If the bidder rejected a DBE as being unqualified, did it have sound reasons for doing so?

Other factors the County may consider in evaluating good faith efforts include the following:

- The performance of other bidders in meeting the contract goal.
- The bidder’s history of UDBE compliance on other projects [see U.S.DOT Official Questions and Answers DBE Program Regulations].

II. Consideration of Nehemiah Construction Inc. Bid Protest

Nehemiah Construction Inc.'s protest is not sustainable. The crux of Nehemiah's allegations is that the County must deem the lowest bidder unresponsive for failing to show a good faith effort in attaining the UDBE goals in that: (i) the bidder was non-responsive since it did not meet the goal; and (ii) the bidder was non-responsive because their effort was mere pro forma as evidenced by the fact that Nehemiah allegedly met the goal and the lowest bidder did not.

In accordance with federal regulations, bidders were required to show adequate good faith efforts to meet the goal which could be shown by either meeting the goal and adequately documenting the commitments, or documenting a good faith effort showing by providing certain specified information to the County. Bidders were not required solely to meet the goal nor could they be as that would result in a violation of federal law. 49 Code of Federal Regulations part 26, appendix A to subpart 25, section III, clearly provides as follows: "The Department also strongly cautions you against requiring that a bidder meet a contract goal (i.e. obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring bona fide good faith efforts." Here, Nehemiah's bid protest would require the County to read its response to bidders in a way that violated federal law.

Further, the plain meaning of the response to bidder reflects that it may not be read in the fashion suggested. The response to bidders was to a question on the Notice to Bidders, not the Specifications, and clarified that forms for UDBE commitments had changed from previous County projects. Specification 2-1.04 entitled Disadvantaged Business Enterprise provided the bidder with two and one-half pages of instructions on UDBE compliance requirements, forms to be used, and so on and clearly stated: "Meet the UDBE goal as shown in the Notice to Bidders *or demonstrate that you made adequate good faith efforts to meet the goal.*" (emphasis added) That specification was not the subject of the response to bidders, and was not changed or modified by it.

The second allegation of the bid protest centers on other bidders' UDBE showing. Nehemiah suggests that because they allegedly met the goal, and the low bidder and the second low bidder show substantially less participation, that it must only be a "pro forma" effort. However, other higher bidders UDBE participation were lower as well. Seven of the nine bidders turned in UDBE commitments – only two bidders allegedly met or exceeded the goal on the face of the commitment. The remaining five bidders UDBE participation ranged from 0.7 percent to 2.6 percent, or an average of 1.23 percent. Copies of the full breakdown of bidders participation is attached to the DOT report. Of the two bidders who were higher, DOT found in a spot check of the UDBE trucking bids, inclusive of West Coast Water and Truck, that trucking is, in all probability, substantially over-stated in each of these two bids and that, in turn, over-inflated the UDBE commitment percentage of these two bidders.

In addition, based upon the findings made by DOT in its thorough review of all of the documentation of DeSilva Gates/Viking Joint Venture, as well as documentation turned in by

other bidders, and its own independent investigation of track record and other factors, DeSilva Gates/Viking Joint Venture adequately met good faith efforts within the intent, meaning and requirements of the federal regulations, and is therefore responsive.

III. Recommendation on Nehemiah Bid Protest

Staff recommends that the Board:

(1) Ratify DOT's findings that DeSilva Gates/Viking Joint Venture made adequate good faith efforts to obtain UDBE participation in accordance with federal regulations and bid specifications and demonstrated same to the satisfaction of the County;

(2) Reject the bid protest by Nehemiah Construction Inc. on the grounds stated herein and on the basis of the findings and conclusions set forth by DOT in its review of DeSilva Gates/Viking Joint Venture's bid and UDBE submission; and

(3) Award the contract to DeSilva Gates/Viking Joint Venture in accordance with DOT's recommendations.

IV. Recommendation on DeSilva Gates Bid Protest

DeSilva Gates/Viking Joint Venture has protested bidders two through four bids as non-responsive. The Board need not reach this protest in view of the fact that the lowest bidder, DeSilva Gates/Viking Joint Venture, has been determined to be responsive and has been awarded the contract as the lowest, responsive responsible bidder. Therefore, staff further recommends that the Board:

(4) Dismiss the bid protest by DeSilva Gates/Viking Joint Venture as moot based upon the award to DeSilva Gates/Viking Construction Joint Venture.

Very truly yours,

LOUIS B. GREEN
COUNTY COUNSEL

By: Patricia E. Beck, Principal Assistant County Counsel
David A. Livingston, Deputy County Counsel