



KELLY WALLACE
ATTORNEY AT LAW

October 28, 2009

SENT VIA FAX (530) ~~642-9232~~ ²⁹⁵⁻²⁶⁵⁵

Janel Gifford
Office Engineer
El Dorado County Transportation Department
244J Headington Road
Placerville, Ca 95667

Re: Bid Protest
US 50/Missouri Flat Road Interchange Improvements- Phase 1B
Contract No. 71336 ("Contract")

Dear Ms Gifford:

I am the attorney for Nehemiah Construction Inc. ("NCI"). NCI submitted the third lowest monetary bid on the above referenced Contract. NCI hereby submits its protest to the award of this Contract to the apparent low bidder, DeSilva Gates / Viking a joint venture and to the apparent second low bidder, C.C. Meyers, Inc.

For the reasons stated below the County of El Dorado ("The County") must find that the bids of DeSilva Gates/Viking, a joint venture and C.C. Meyers, Inc. are nonresponsive and must be rejected for failing to show a good faith effort in attaining the prescribed underutilized disadvantage business enterprise ("UDBE") goals for this Contract.

On page N-3 of the Notice to Bidders, the County asserts the 7.3 percent Contract goal for UDBE participation. The County then clarifies this goal at pre-bid meeting as stated in the October 2, 2009 Response to Bidders' Inquiries No. 2, item 3, states that "bidders must submit a UDBE commitment form (exhibit 15-G(1) showing that the goal was met and attach written evidence (e.g. copy of quote) that the UDBE(s) acknowledges participation". In addition, page 25 of the proposal, states that the bidder shall submit a good faith effort to protect their eligibility in case there is a "mistake" with the UDBE's certification or if the bidder makes a mathematical error. This clarification makes it clear that it is non-responsive for a bidder to submit a 15-G[1] that does not meet the goal.

Neither DeSilva Gates/Viking JV nor C.C. Myers, Inc. submitted a form 15-G[1] showing they met the 7.3% requirement for this Contract; their 15G[1]s totaled .7% and 2.6% respectively. Unless it was the intent of the County to mislead bidders with the stated clarification in Response to Bidders' Inquiries cited above and unfairly give an advantage to those who do not comply with the above, then for their failure to meet this requirement, the bids submitted by the apparent low bidder and the second apparent low bidder should be deemed non-responsive.

Submitted by Dept
#20
at Board Hearing of 11/3/09

Bid Protest
October 28, 2009

Notwithstanding that the County misled bidders in how they intended to enforce the UDBE provision, Title 49 Part 26 of the CFR contemplates that goals may not always be met and defines clearly the analysis of whether there was a genuine good faith effort made to attain the prescribed goal. Neither DeSilva Gates/Viking JV nor C.C. Myers, Inc. made genuine good faith efforts to attain the prescribed UDBE goal. In fact it could be argued from the resulting totals (.7% and 2.6% respectively) that no effort was made at all. 49 CFR 26.53 defines the good faith efforts that participants (bidders) are to follow where there are Contract goals. 49 CFR 26.53(a) states that the County (as a recipient of Federal funds) must award the contract only to bidder who makes good faith efforts to meet the goal. The County must determine that a bidder has made good faith efforts if the bidder either documents that is has obtained enough UDBE participation to meet the goal or document that it made an adequate good faith efforts to meet the goal. Appendix A to 49 CFR 26 defines the requirements for determining the adequacy of the good faith effort where the goal was not met. 49 CFR 26.53(c) makes is clear that the County is required to make sure all information is complete and accurate and adequately documents the bidder's good faith efforts before committing to the performance of the Contract by that bidder.

The County is required to use the good faith mechanisms of 49 CFR 26 Appendix A as a guide to adequate good faith efforts. The County must make a fair and reasonable judgment on the efforts, considering quality, quantity and intensity of the different kinds of efforts that the bidder has made. **Mere pro forma efforts are not good faith efforts** to meet the UDBE Contract requirements. (49 CFR 26 Appendix A.II.)

49 CFR 26 Appendix A.V. directs that in determining whether a bidder has made good faith efforts, the county should take into account the performance of other bidders in meeting the contract. Where other bidders met the goal and the apparent low did not it reasonably raises the question that with additional efforts the apparent low bidder could have met the goal.

If the County awards the Contract to a bidder that did not meet the goal and cannot show a good faith effort to do so then to the extent the County is not implementing the UDBE program in good faith the County is subject to penalties.

The County must consider that as a result of NCI's good faith effort the 7.3% UDBE participation requirement was exceeded, therefore, the County must make a finding that neither Desilva/Gates Viking, J.V. nor C.C. Meyers, Inc. made a good faith effort or they would have achieved the goal as well. NCI will have almost 2 million dollars of UDBE participation on this project, including a local woman owned business located in El Dorado Hills, which alone comprises over 1.2 million dollars of NCI's participation. The apparent low and second lowest bidders had every opportunity to use the same UDBEs as NCI if they were truly going to make a good faith effort to achieve the UDBE goal. For example both contractors elected to list Selby's Soil Erosion Control in lieu of a UDBE (Nitta) although the price difference was minimal. There were numerous UDBE's that

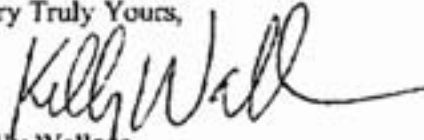
Bid Protest
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could have been used by either the apparent low or second lowest bidders if their efforts were truly in good faith.

The requirements for UDBE participation are taken seriously by NCI and thus our effort and success in meeting the goal shows our commitment. NCI submitted the lowest responsive bid satisfying all the requirements stated in the Contract documents and thus should be awarded this Contract.

For the reasons discussed above, NCI respectfully requests that the bids of Desilva/Gates / Viking, J.V. and C.C. Meyers, Inc. be rejected as non-responsive and the Contract be awarded to Nehemiah Construction, Inc.

Very Truly Yours,



Kelly Wallace
Attorney for Nehemiah Construction, Inc.

cc: Jay Zoellner, President – Nehemiah Construction, Inc.

NEHEMIAH CONSTRUCTION, INC.
801 1ST STREET STE G
BENICIA, CA 94510
707-746-6870
FAX: 707-746-6815

FACSIMILE TRANSMITTAL SHEET

TO: JANEL GIFFORD

FROM: JAY ZOELNER

COMPANY: EL DORADO
COUNTY TRANS. DEPT.

DATE: OCTOBER 30, 2009

FAX NUMBER: 530-295-2655

TOTAL NO. OF PAGES INCLUDING
COVER: 3

PHONE NUMBER: 530-642-4987

SENDER'S REFERENCE NUMBER:

RE: US 50/MISSOURI FLAT
CONTRACT NO. 71336

YOUR REFERENCE NUMBER:

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

NOTES/COMMENTS:

Please review attached letter.

Thank you,

Jay Zoellner - President
Nehemiah Construction, Inc.

Confidential - This material is intended only for the individual or entity to which it is addressed. It contains information from Nehemiah Construction, Inc. which may be privileged, confidential and exempt from disclosure under law. If the reader of this material is not the intended recipient, or the employee or agent responsible for delivering the material to the intended recipient, please be aware that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this material in error, please notify us immediately. We will be happy to arrange for the return of this material at no cost to you.



Janel Gifford
 Office Engineer
 El Dorado County Transportation Department
 2441 Headington Road
 Placerville, Ca 95667

Re: Bid Protest
 US 50/Missouri Flat Road Interchange Improvements- Phase 1B
 Contract No. 71336

Dear Ms. Gifford:

Nehemiah Construction Inc. (NCI) has received the County Of El Dorado's notice of a hearing to discuss the bid protest that was submitted by our company. NCI would like to address a few items based upon reviewing further information received from the county regarding the actual "good faith" effort the apparent low and 2nd low bidders have stated they performed in the documents that each submitted. This information, per the contract specifications, is to adhere to the strict guidelines of the federal government which are different than State guidelines. These guidelines are the following:

There are certain immutable requirements to making "**Good Faith Efforts**". Though they may be similar in most aspects, there are some differences between the requirements for **Federally** funded Projects and **State** funded Projects.

For: FEDERALLY Funded Projects

YOU MUST:

1. Advertise for Disadvantaged Business Enterprise (DBE) participation in newspapers, trade papers, and minority focus papers and provide the names of said papers and the date(s) on which the advertisement(s) ran.
2. List the names (of certified DBE's) and dates when notices were sent to certified DBE's soliciting bids for the project. List dates and methods used for following up initial solicitations to determine with certainty whether the DBE's were interested.
3. Show the items of work which you made available to DBE firms, and the information furnished to DBE's such as plans, specifications, and requirements for the work.
4. Give the names(s) of DBE(s) who submitted bids which were not accepted, a summary of the bidder's discussions and/or negotiations with them, the name of the firm selected for that portion of the work and the reasons for the bidder's choice of firm(s).

- 5. List efforts made to assist DBE's in obtaining bonding, lines of credit or insurance, and any technical assistance related to the plans, specifications, and requirements for the work which was provided to the DBE's.
- 6. Provide any additional data to support a demonstration of good faith effort, such as contacts with DBE assistance agencies.

The required standard:

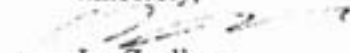
• When an apparent low bidder does not meet the contract goal established for a federally-funded project, prior to contract award, that bidder must demonstrate that a Good Faith Effort was properly conducted. Federal law describes such an effort as actions "one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal." **The CFR guidance requires an evaluation as to the "quality, quantity, and intensity" of the bidder's effort to meet the contract goal.**

The "good faith" effort submitted by DeSilva Gates/Viking joint venture, who met a mere .7% of the 7.3% goal, shows that although they presented paperwork showing a basic attempt to meet the goal it is nothing but superficial. There were numerous qualified "UDBE's" who submitted quotes on bid day that were not selected by this contractor. There were quotes for traffic control, erosion control, concrete pumping and various material suppliers that were ignored. Statewide Concrete pumping (a black owned company) quoted prices to perform the concrete pumping to all the bidding contractors including DeSilva/Viking JV and CC Myers. Their prices were competitive with other non-UDBE's yet they were not used. To solicit UDBE bids and not use them is nothing more than a flagrant abuse of the intent of the UDBE requirements.

CC Myers also performed a partial attempt to achieve the goal as their paperwork shows a minimal attempt to solicit UDBE's and fails to meet the above Federal requirements. They also failed to use UDBE's that submitted quotes. Their submitted list of the rejected UDBE firms (D) they did not select also does not include Statewide Concrete pumping who did submit a quote.

NCI, by meeting the required goal, has shown that all the bidding contractors could have met the requirements on this project if a serious attempt was made to meet the goal. Soliciting bids from UDBE's and not using them does not qualify as a "good faith effort". If the County of El Dorado is to follow the intent of the contract requirements regarding UDBE participation then NCI should be awarded the above referenced contract.

Sincerely,


Jay Zoellner
President

CC: Kelly Wallace, Attorney at Law

October 30, 2009

County of El Dorado
Department of Transportation
2441 Headington Road
Placerville, CA 95667
ATTN: Janet Gifford, P.E.

Supervising Civil Engineer
Office Engineer Unit

Re: **U.S. 50/Missouri Flat Road Interchange Improvements – Phase 1B**
Contract No. 71336

Dear Ms. Gifford:

We are writing in response to your letter dated October 29, 2009.

In your letter, you state that “[u]pon a preliminary review of your UDBE information submittal we are concerned whether or not you have made a good faith effort and documented it appropriately,” and then request that we provide, by 2:00 p.m. today, “whatever information you deem appropriate and necessary to substantiate you did make and did demonstrate a good faith effort.”

We take the UDBE requirements of the Contract very seriously, and expended enormous time and effort trying to meet the UDBE goal, as reflected in the good faith efforts documentation which we previously submitted (the “GFE Submittal”).

In your letter, you fail to state any specific concern you have with regard to the efforts we made to obtain UDBE participation or the documentation of our efforts. Accordingly, we have no idea what additional information may address your concern(s). We therefore respectfully request that you specifically state any concerns you have, so that we can specifically address these concerns.

Although we did not meet the UDBE goal on this project, we did make the requisite good faith efforts to meet the goal and timely provided the County the documentation of these good faith efforts. When the County reviews this

County of El Dorado
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ATTN: Janet Gifford, P.E.
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documentation, it will see that we clearly made the requisite good faith efforts, as follows:

1. We sent letters to over 100 certified UDBEs, soliciting their bids for this project. In these letters, we solicited quotations for work and materials, including the following:

AC DIKE, ASBESTOS COMPLIANCE PLAN, BRIDGE WORK, CLEARING & GRUBBING, COLD PLANE, CONSTRUCTION AREA SIGNS, ELECTRICAL, EROSION CONTROL, FABRIC, FENCE, METAL BEAM GUARD RAIL, MINOR CONCRETE, PORTABLE CHANGEABLE MESSAGE SIGN, PREPARE STORM WATER POLLUTION PREVENTION PLAN, PREPARE FUGITIVE DUST PLAN, ROADSIDE SIGNS, SLURRY SEAL, STRIPING, STRUCTURAL CONCRETE, TRAFFIC CONTROL, UNDERGROUND AND TRUCKING.

We further specifically advised each of the UDBEs to "[p]lease call if you need assistance in obtaining bonding, insurance, equipment, materials and/or supplies for this project." We also offered to make the plans and specifications available for review by the UDBEs. In addition, in each letter, we asked each UDBE to fax back a response, stating whether the UDBE needed "any information or assistance" from us.

We followed up each of the letters we sent to UDBEs, with a phone call to each of the UDBEs, unless the UDBE had previously advised us, in writing, whether it was interested in bidding to us. We then further followed up, yet again, with a second phone call after our first telephone call to UDBEs when there was still uncertainty. Copies of the letters we sent to UDBEs, plus the fax transmission verifications for these letters, was included in Exhibit B to our GFE Submittal. In addition, we included a telephone log in Exhibit B documenting the telephone calls made to the UDBEs.

2. We made more than enough work available to UDBE firms (40.2%), including work that we normally perform with our forces, and we broke this work into

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economically feasible units to facilitate UDBE participation. See, Exhibits A, B and C of our GFE Submittal.

3. We provided a Select/Reject list showing all UDBE quotes that we received and, if we did not use them, the reasons for rejection. See, Exhibit D of our GFE Submittal.

4. In addition to all of the letters we sent out, and all of the phone calls we made, to solicit UDBE participation, we also advertised in Trade Publications requesting UDBE participation for this project. See, Exhibit A of our GFE Submittal. In these advertisements, we solicited quotations for all of the various types of work and materials, which we also solicited quotations for in our letters. We further stated: "Please call if you need assistance in obtaining bonding, insurance, equipment, materials and/or supplies," and offered to make the plans and specifications available to all UDBEs.

5. As discussed above, we made bonding, insurance and other assistance available to interested UDBEs, in both our letters and our advertisements. See, Exhibits A and B of our GFE Submittal.

6. We also contacted agencies to obtain assistance in contacting UDBEs. See, Exhibit E of our GFE Submittal.

As verified by our GFE Submittal, we made very extensive good faith efforts to obtain UDBE participation.

We note that in your letter dated October 29, 2009, the third lowest bidder, Nehemiah Construction, Inc. ("Nehemiah"), has protested our bid, as well as the bid of the second low bidder. Because you have not identified the concerns you have with respect to our good faith efforts, we suspect that these concerns may have arisen from Nehemiah's protest. Accordingly, we will address the claims made in Nehemiah's protest.

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First, Nehemiah claims (in the third and fourth paragraphs of its letter) that bidders were required to meet the UDBE goal. This is a frivolous claim.

The bid solicitation documents clearly provide that a bidder may either: "Meet the UDBE goal shown in the Notice to Bidders or demonstrate that you made good faith efforts to meet this goal." [Emphasis added]. See, Section 2-1.04 DISADVANTAGED BUSINESS ENTERPRISE (DBE). Nehemiah conveniently ignores this clear and explicit language and instead cites Response to Bidders' Inquiries No. 2.

The language in this Response simply indicates that if bidders claim to have met the goal, they are required to submit a UDBE Commitment form showing that the goal was met. It further states: "In the event an error in the UDBE Commitment documentation is found, it is recommended that the top three bidders submit the Good Faith Efforts form (Exhibit 15-H) and documentation even if the UDBE Commitment form shows the goal was met." There would of course be no reason to submit Good Faith Efforts if, as Nehemiah claims, bidders were required to meet the goal and could not, instead, demonstrate that they had made good faith efforts to meet the goal.

Moreover, this response clearly states, in bold, as follows: "**Responses to bidder inquiries, unless incorporated into formal addenda to the contract, are not part of the contract. . .**" These responses were not incorporated into an addendum.

Moreover, the County would be in violation of 49 Code of Federal Regulation section 26.53 if it required bidders to meet the goal, rather than to be able to demonstrate that they had made good faith efforts to meet the goal. For example, 49 Code of Federal Regulation section 26.53(a)(2) provides: "If the bidder/offeror does document adequate good faith efforts you must deny award of the contract on the basis that the bidder/offeror failed to meet the goal." See, also, 49 C.F.R. section 26, Appendix A.

Nehemiah's protest letter also claims that we failed to make a good faith effort to meet the UDBE goal, but incredibly fails to even discuss any of the extensive efforts we made to meet the goal, which are documented in our GFE Submittal.

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Presumably, Nehemiah fails to even discuss our good faith efforts, because we made far more extensive efforts to obtain UDBE participation than Nehemiah made. For example, we solicited far more UDBEs by letter than Nehemiah did. Moreover, we followed up by making telephone calls to each of the UDBEs, while Nehemiah's good faith documentation does not indicate that it made any follow-up telephone calls to UDBEs.

Instead of discussing our good faith efforts, Nehemiah simply claims that because Nehemiah allegedly met the UDBE goal, any bidder who failed to meet the goal must not have made good faith efforts to meet the goal. Yet, just because one bidder may have met the goal would not be a legitimate basis for ignoring and discounting all of the good faith efforts we made to meet the goal. Moreover, as discussed below, we believe that Nehemiah's claim that it met the goal is erroneous.

In its protest letter and on its UDBE commitment form, Nehemiah claims \$1,292,400 in UDBE participation for a small trucking company, West Coast Water & Truck ("West Coast"). This number is grossly inflated. There is not this amount of trucking on the project. As set forth in Exhibit C of our GFE Submittal, we included only around \$500,000 for trucking in our bid. Moreover, not all of West Coast's trucking can legitimately be counted towards the UDBE goal. See, 49 C.F.R. section 26.55 (which applies to this contract, as stated in Section 2-1.04 of the Contract). West Coast only owns a few trucks, and therefore cannot provide all of the trucks that will be needed to do all of the trucking on the project. There is no indication in the documentation submitted by Nehemiah of the extent to which West Coast would be performing the trucking with its own trucks, or by leasing trucks from a UDBE firm.

We did list and will use West Coast for trucking work. However, we had legitimate reasons for not listing West Coast for all of the trucking work. As noted above, West Coast is a small company, with limited trucks available. We are committed to using West Coast on two other local projects; the Caltrans Route 50 Widening project in Rancho Cordova and the City of Rancho Cordova International Drive Extension Project, which will run concurrently with this project, and therefore we are aware that West Coast's ability to provide trucks that can count to fulfill the UDBE requirement is even more limited. Moreover, West Coast failed to quote tonnage rates to us, and the

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bulk of the trucking will be performed using tonnage rates. As our experience has demonstrated, there are too many unknowns to properly bid the trucking portion of transporting materials to and from the project on an hourly basis, rather than on a tonnage basis. Moreover, West Coast did not provide us a quote for bottom dumps, which are the types of trucks used for such transport.

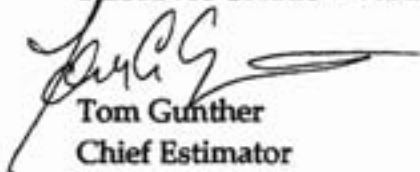
Nehemiah also claims that we should have used Nitta Erosion Control ("Nitta") instead of Selby's Soil Erosion Control Co. ("Selby"). Yet, Selby's bid of \$223,614 was over 20 percent lower than Nitta's bid of \$272,897.60. This is hardly a minimal price difference. Please find enclosed copies of Selby's and Nitta's bid proposals.

Nehemiah's protest is completely without merit. Indeed, it is Nehemiah's bid which appears nonresponsive, because Nehemiah failed to meet the UDBE goal (despite its claim to the contrary), and made less in the way of good faith efforts than we made. Apparently, Nehemiah hopes by improperly inflating West Coast's participation, and by making its frivolous protest, Nehemiah can be awarded the contract even though its bid is nearly \$2.3 million higher than ours. The County should not be fooled.

We respectfully request that Nehemiah's protest be denied, and that award be made to us, the low responsive and responsible bidder.

Sincerely,

DESILVA GATES - VIKING



Tom Gunther
Chief Estimator

10-21-2009 09:33

SELBY'S SOIL & EROSION

Post-It® Fax Note	7671	Date	10/29	# of pages	2
To	Tom Gunther		From	Randy	
Co./Dept	DGS		Co.	Viking	
Phone #			Phone #	(916) 852-5530	
Fax	(925) 803-4263		Fax #		



Selby's Soil Erosion Control Co. Inc.

October 21, 2009

272,898 - 223,614

223,614

= 22% low

To: All Planholders Requesting Sub-Bids
 Attn: Estimating Department
 Re: US 50/Missouri Flat Road Interchange Improvements Phase 1B

Bids: October 21, 2009

Certified by Department of General Services, Office of Small Business Certification and Resources SBE #18762 Expiration 07/31/2010

Members of Laborers Local #185 Union

Item No.	Item	Unit of Measure	Estimated Quantity	Price	Total
3	Temp Fence (Type ESA)	M	2,505.00	6.85	\$ 14,654.25
7	Temp Fiber Roll	M	18,200.00	7.50	\$136,500.00
10	Temp Check Dam	EA	300.00	75.00	\$ 22,500.00
68	Erosion Control (Type D)	M2	60,200.00	0.80	\$ 48,160.00
67	Move-In/Move-out	EA	6.00	300.00	\$ 1,800.00
Total:					\$223,614.25

Proposal Conditions

- 1) Price includes all Labor, Materials, Equipment, Taxes, Etc.
- 2) Prime Contractor to supply Water Meter and Traffic Control.
- 3) Initial Move-on included, Additional Move-Ons will be \$750.00 each
- 4) Stand-by time will be billed at \$250.00 per hour.
- 5) Price does not include any soil preparation.
- 6) Bond Rate is 2%; California Contractors License expiration date: 7/31/2011
- 7) Quotation is valid for (90) calendar days.
- 8) Project Area/Quantity to be verified by customer upon order to start work.
- 9) Although extreme erosion will be to minimize dust, subject fires will be the owners responsibility.

OK To Delete Items 3,7,10

ACCEPTED and AGREED:

Buyer/Company: _____ Selby's Soil Erosion Control Co., Inc.

By: _____ /Date: _____ By: *Eric van der White*
 Eric van der White

Sent By: Nitta EROSION CONTROL;

8524378;



Nitta Erosion Control

a division of Nitta, Inc.

- HYDROSEEDING
- EROSION CONTROL
- STRAW MULCHING
- PNEUMATIC MULCH SPREADING
- BONDED FIBER MATRIX
- SILT FENCE
- DRILL SEEDING
- FIBER ROLLS / WATTLES
- BLANKETS

STATE LICENSE #401640 • C-12, C-27, C-61/D-59

3778 DEL MAR AVENUE • LOOMIS, CA 95650-9051 • PH (916) 652-7459 • FAX (916) 652-4376

ncc@covad.net • www.nittainc.com

Bid - Proposal

October 16, 2009

To All Planholders Requesting Sub-Bids.

Re: County of El Dorado, Department of Transportation, US 50/Missouri Flat Road Interchange Improvements, Phase 1B, Contract No. 71336, 03-ED-50-22.9/25.1. Bid Date: October 21, 2009 (2:00 p.m.).

Certified as DVBE #0011303 (exp. 08/31/10), as SBE #0011303 (exp. 08/31/11) & as UDBE #217 (exp. 04/01/10). CCL #401640 C-12, C-27, C-61/D-59 (exp. 03/31/11).

<u>Item No.</u>	<u>Item</u>	<u>Unit of Measure</u>	<u>Estimated Quantity</u>	<u>Item Price</u>	<u>Total</u>
3	Temporary Fence (Type ESA)	M	2505	\$ 7.52	\$ 18,837.60
7	Temporary Fiber Roll	M	18200	\$ 7.30	\$ 132,860.00
10	Temporary Check Dam	EA	300	\$ 93.00	\$ 27,900.00
66	Erosion Control (Type D)	M2	59500	\$ 1.50	\$ 89,250.00
67	Move-In/Move-Out (Erosion Control)	EA	6	\$675.00	\$ 4,050.00
Totals					\$ 272,897.60

- Notes:
- 1) Total price includes submittals, certified payrolls, standard certificates of insurance, materials, labor, equipment (air pollution control (CARB PRRP-compliant)), taxes on materials, incidentals and installation as per specifications.
 - 2) Total price excludes wood posts, commercial quality nails or staples for Temporary Fence (Type ESA), removal and disposal of Temporary Fence (Type ESA), backfilling of holes caused by the removal of Temporary Fence (Type ESA), maintenance (repair or replacement of damaged Temporary Fence (Type ESA)), re-installation of Temporary Fence (Type ESA), clearing bedding area of obstructions (debris greater than one inch in diameter prior to installation) for Temporary Fiber Roll and for Temporary Check Dam, re-installation of Temporary Fiber Roll (Type 1), soil surface preparation, Type 2 method of Temporary Fiber Roll installation ("type-restraint"), removal and disposal of Temporary Fiber Roll, repair of ground disturbances, maintenance (repair and replacement of Temporary Fiber Roll, replacement of broken or split stakes, correct rills and evidence where concentrated runoff has occurred), re-installation of Temporary Check Dam, removal and disposal of Temporary Check Dam, maintenance (sediment removal and disposal, repair and replacement of

DeSILVA GATES/VIKING
A Joint Venture of DeSilva Gates Construction, L.P. and
Viking Construction Company, Inc.

11555 Dublin Blvd.
Dublin, CA 94568
Tel. 925.829.9220 – Fax –925.803.4267

October 30, 2009

County of El Dorado
Department of Transportation
2441 Headington Road
Placerville, CA 95667
ATTN: **Janet Gifford, P.E.**

Supervising Civil Engineer
Office Engineer Unit

Re: U.S. 50/Missouri Flat Road Interchange Improvements – Phase 1B
Contract No. 71336

Dear Ms. Gifford:

We have received your letter dated October 29, 2009, in which you state that a hearing on the bid protest of Nehemiah Construction, Inc. ("Nehemiah") is set for the November 3, 2009 Board of Supervisors meeting.

It is not clear from your letter what the purpose of this hearing is. We note that one of the grounds of Nehemiah's protest is its claim that bidders were required to meet the UDBE goal, and that bidders who failed to meet the goal cannot be awarded the contract even if they made adequate good faith efforts to meet the goal. As pointed out in the letter we sent you earlier today, Nehemiah's claim is frivolous, and the County would be in violation of the Code of Federal Regulations if it upheld Nehemiah's protest on this basis.

The other basis for Nehemiah's protest is Nehemiah's claim that CC Meyer's, Inc., and DeSilva Gates-Viking allegedly did not make good faith efforts to meet the UDBE goal. This should not be the subject of the Board of Supervisors meeting on November 3, 2009, because the required administrative process has not yet taken place with regard to the good faith efforts of DeSilva Gates-Viking (or CC Meyers). First, the County staff must make a decision with regard to whether we made adequate good faith efforts. Then, if it were determined that we failed to make adequate good faith efforts, the County is required to provide us an opportunity for administrative reconsideration. See 49 Code of Federal Regulations section 26.53. Accordingly, only if the

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County staff decides, prior to the Board of Supervisors meeting, that we made adequate good faith efforts, can Nehemiah's bid protest regarding our good faith efforts be heard on that date.

Please provide us clarification as to what portion(s) of Nehemiah's protest will be heard at the Board of Supervisors meeting.

Thank you for your courtesy in connection with this matter.

Sincerely,

DESILVA GATES - VIKING

Michael A. Kloos / for
Tom Gunther
Chief Estimator