

August 25, 2015

Via Email and U.S. Mail

Mr. Todd Morrison
Project Manager
County of Santa Barbara, General Services
105 East Anapamu Street
Santa Barbara, CA 93101

RE: Project No. 8595, County of Santa Barbara Airport Security Enhancements

Dear Mr. Morrison,

As you may recall from my email to you on August 20, 2015, I represent Souza Engineering Contracting, Inc., dba Souza Construction, Inc. ("Souza"). The purpose of this message is to protest the bid of Whitaker Construction Group, Inc. ("Whitaker") for Project No. 8595, commonly known as "County of Santa Barbara Airport Security Enhancements, 900 Airport Road, Santa Ynez, California".

The basis of this bid protest is that the apparent low bidder, Whitaker, failed to meet the DBE contract goal of 11.7% and moreover failed to make and/or document a Good Faith Effort, prohibiting the County of Santa Barbara from awarding the contract to Whitaker.

Clearly, Whitaker's actual DBE participation achieved, 1.6%, is woefully short of the contract goal of 11.7%. Moreover, Whitaker's Good Faith Efforts appear to be "pro forma" in violation of applicable federal regulations. See, 49 CFR Part 26 and related appendices. Note in particular that 49 CFR Part 26, Appendix A ("Guidance Concerning Good Faith Efforts") at section V states that:

"In determining whether a bidder has made good faith efforts, it is essential to scrutinize its documented efforts. At a minimum, you must review the performance of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts. As provided in § 26.53(b)(2)(vi), you must also require the contractor to submit copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract to review whether DBE prices were substantially higher; and contact the DBEs listed on a contractor's solicitation to inquire as to whether they were contacted by the prime. Pro forma mailings to DBEs requesting bids are not alone sufficient to satisfy good faith efforts under the rule." (Emphasis added).

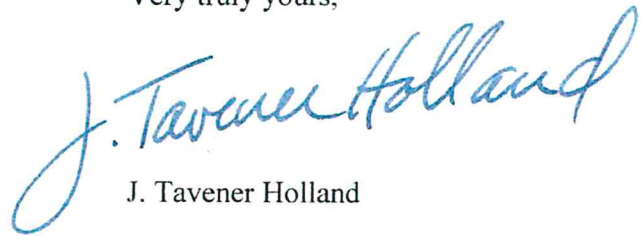
Currently, the DBE participation achieved by all bidders is not known to Souza, but it bears mentioning that both Souza and R. Burke Construction Corp. met or exceeded the DBE goal of 11.7%; 12.58% for Souza and 11.7% for R. Burke. Based on the information presently available, Whitaker is dramatically short of even meeting the average DBE participation actually obtained by other bidders.

Indeed, it seems as though Whitaker made no attempt to solicit DBE participation for trucking, which would easily be considered the "low-hanging fruit" of DBE participation on a project such as this. Moreover, Whitaker did not make available to DBE's large portions of the project work. These actions are not consistent with making a supportable showing of a Good Faith Effort.

I would strongly caution you against making any award of the contract in question to Whitaker. Simply stated, it is going to be very difficult for the County of Santa Barbara to make a supportable determination that Whitaker achieved the Good Faith Effort standard required by federal law, which almost certainly will directly affect your funding on the project.

Please do not hesitate to contact me directly if you have any questions or concerns regarding the contents of this message.

Very truly yours,



J. Tavener Holland

JTH/seh

cc:

Client

Gerald C. Weaver, Esq.

*Copy to be sent to all project bidders



8/28/2015

2752 CONCRETE COURT, PASO ROBLES, CA 93446
PH: (805) 228-4020 FAX: (805) 228-4021 INFO@WCGROUPING.COM

VIA Email and US Certified Mail

County of Santa Barbara
General Services Department
912 West Foster Road
Santa Maria, CA 93455

Attention: Todd Morrison

Subject: **Project No. 8595 Airport Security Enhancements**
Response to Protest by Souza Engineering Contracting, Inc.

Dear Mr. Morrison,

This letter is in response to the formal protest of Whitaker Construction Group, Inc.'s (WCGI), bid for the County of Santa Barbara Project, Airport Security Enhancements Project No. 8595, filed by Souza Engineering Contracting, Inc., dba Souza Construction Inc. The County of Santa Barbara should find that Souza Construction Inc.'s protest is without merit as WCGI successfully demonstrated a Good Faith Effort to meet the stated project goal.

As a recipient, the County has the sole responsibility to make a fair and reasonable judgement as to the adequacy of a Good Faith Effort. While there is no method for the use of quantitative formulas in this judgment, 49 CFR, subtitle A, Part 26, subpart F, Appendix A, section II does provide the factors of importance to consider in making your judgement. It states that:

"It is important for you to consider the quality, quantity and intensity of the different kinds of efforts that the bidder has made, based on the regulations and guidelines in this Appendix." In careful examination of the three factors listed; the argument presented by Souza Construction Inc. that WCGI performed a "pro forma" effort is easily refuted. The quality of WCGI's efforts greatly exceed that of the industry standard for DBE solicitations. WCGI does not merely advertise for DBE's and use a service to fax

invitations to a small quantity of DBE enterprises. WCGI begins by placing an advertisement seeking DBE subcontractors and suppliers to participate in the project asking for services or products that relate specifically to the items of work on the project. WCGI performs an exhaustive search of available qualified DBE's using the Caltrans Office of Business and Economic Opportunity DBE query form. To perform our search, we use Work Category Codes that directly relate to the project, (see attached form showing work codes searched for this project), as well as project County and Caltrans District. WCGI then makes personal email and phone contact with each of the DBEs. For the Airport Security Enhancements project a total of 172 DBEs were contacted by WCGI directly. An initial invitation to bid is sent by email to each identified DBE. An initial phone call was placed August 5, 2015 in follow up to our invitation and to extend assistance to each DBE if required or requested and to confirm initial interest in the project. WCGI does not wait to hear back from the DBEs after initial solicitation but is proactive in making personal contact and assistance available to each DBE. Follow up is made with every interested or possibly interested DBE with sufficient time to allow for questions or clarification if needed. It is important to note that in contrast to these extensive efforts, Souza Construction Inc., through an outside service, had fax solicitations sent to a total of 32 DBE firms. Follow up phone contact as indicated in their Good Faith Effort submittal was limited to one series of phone calls placed the morning of the project bid day. 49 CFR, subtitle A, Part 26, subpart F, Appendix A, Section IV, subsection C, states that an effort to be considered is: *"Providing interested DBEs with adequate information about plans, specifications, and requirements in a timely (emphasis added) manner to assist them in responding to a solicitation with their offer for subcontract"*

By the very definition of *pro forma* provided by Souza Construction Inc., their Good Faith Effort would appear to be the type of effort specifically prohibited by Federal Regulation.

The quantity of effort made by WCGI to secure DBE participation is evidenced in our Good Faith effort submittal. Significant, legitimate time and effort are spent by WCGI staff to ensure that each DBE is contacted, offered assistance and receives follow up and any support required. WCGI strives to ensure that a maximum quantity of DBE enterprises are given an opportunity to bid a project. Both the quality of and quantity of WCGI's efforts in DBE utilization speak to the intensity of effort that this task is given. While consideration of the other bidder's DBE participation may be a factor for consideration, 49 CFR, subtitle A, Part 26, subpart F, Appendix A, Section III states *"The Department 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."* The intent is clearly to ensure that each Disadvantaged Business is given an opportunity to participate, not to preclude a responsive bidder who fails to meet the contract goal but makes a sufficient Good Faith Effort from being awarded a contract.

Contrary to the assertion by Souza Construction Inc. WCGI did solicit in excess of 50 truckers in our DBE efforts.

We find it interesting on Souza's submitted page calculating the amount to be claimed for Kritz Excavating and Trucking, that Souza broke out pricing for the material and trucking separately but Kritz Excavating and Trucking's quote does not have a breakdown. We can't determine if Souza's breakdown correctly appropriates the costs of materials and trucking. Although it is interesting to note that the value that Souza Construction Inc. claims for the material matches the quoted price that WCGI received from Granite, a local material supplier that Kritz Excavating and Trucking would likely purchase material from. Additionally, the sum of Souza's cost breakdowns does not equal the quoted price from Kritz Excavating and Trucking. Based on the applicable Federal DBE Regulations stated in 49 CFR Part 26, Appendix D, 26.71(n) (1) which states: "*The types of work a firm can perform (whether on initial certification or when a new type of work is added) must be described in terms of the most specific available NAICS code for that type of work. If you choose, you may also, in addition to applying the appropriate NAICS code, apply a descriptor from a classification scheme of equivalent detail and specificity. A correct NAICS code is one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients. Multiple NAICS codes may be assigned where appropriate. Program participants must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification.*" **Kritz Excavating and Trucking is not appropriately certified to claim material supply as a DBE.** Kritz Excavating and Trucking is certified under the following NAICS codes; 2327110 (water/sewer line construction), 237130 (power and communications lines and related structures), 237310 (highway, street and bridge construction) and 484110 (general freight trucking, local). The NAICS code 237310 is clearly intended to encompass a contractor engaged in the placement of material and not a supplier of construction materials. The regulations clearly state that we "*must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification.*" The available NAICS code 423320 (Brick, stone, and related construction material wholesaler) is evidence that the intent is that the NAICS code 237310 is for a firm certified to place material as a contractor or subcontractor on a highway, street or bridge not a supplier of said materials. A DBE firm's ability to perform such work cannot be a factor in the claimed participation if the DBE is not properly certified by appropriate NAICS code. Kritz Excavating and Trucking is properly certified to allow claimed participation for the trucking of materials only, however as Kritz's supplied pricing does not breakout trucking from the material cost, determining the cost of trucking alone is not possible.

It is worth noting in regards to third place bidder R. Burke Corporation's claimed DBE participation utilizing Sam's Equipment and Supplies, that page 11 of R. Burke's Good Faith Effort submittal is correspondence from Sam's Equipment to R. Burke Corporation indicating that Sam's Equipment and Supplies simply added 5% mark up to the quoted products. 49 CFR Section 26.55, subpart c(2) clarifies that a DBE does not perform a commercially useful function "*if its role is limited to that of an extra participant in a transaction, contract or project through which funds are passed in order to obtain the appearance of DBE participation.*" R. Burke Corporation may have achieved the appearance of DBE utilization but the lack of any project specific advertisement or DBE solicitations supports the conclusion that no effort was made. To engage in a pass through arrangement where no useful function of the DBE participant can be asserted is in direct opposition to the spirit of the federal program to assist Disadvantaged Businesses.

Both Souza Construction Inc. and R. Burke Corporation also appear to have submitted bid packets that lack portions of information required by the County of Santa Barbara Project Specification Section "FAA General Provisions" Section 20-02.

The conclusion that award of the contract to WCGI would affect the County's ability to secure their Federal AIP grant funds from the FAA may be advantageous for Souza Construction Inc. It is not only false but in direct conflict with the FAA's AIP sponsor guide in respect the DBE participation and Good Faith Efforts. Indeed Section 240 of the FAA AIP sponsor guide states "*Sponsors may not deny award of contract to an apparent low bidder who fails to achieve the advertised DBE goal but does demonstrate a good faith effort in trying to obtain DBE participation.*"

In summary it appears that there were not enough appropriately certified DBE contractors performing a commercially useful function to meet the contract goal. Comparing WCGI's legitimate Good Faith Effort to Souza Construction Inc or R. Burke Corporation's perfunctory efforts or disguised pass through arrangement for material supplies should not warrant dismissing WCGI's bid.

Sincerely,

A handwritten signature in black ink, appearing to read 'Matthew Bousman', with a long horizontal flourish extending to the right.

Matthew Bousman
President

Enclosure

Work Code	Category	Description	License Requirement	NAICS Code(s)
C0625	SAND & GRAVEL SUPPLIER (BULK ITEM)	This industry comprises establishments primarily engaged in the merchant wholesale distribution of stone, cement, lime, construction sand, and gravel; brick; asphalt and concrete mixtures; and/or concrete, stone, and structural clay products.	NO LICENSE REQUIRED - Must own and operate distribution equipment to supply bulk materials. Supplementing of own equipment to be on long term lease, not ad hoc.	423320 - Brick, Stone, and Related Construction Material Merchant Wholesalers
C0639	ASPHALT SUPPLIER(BULK ITEM)	This industry comprises establishments primarily engaged in the merchant wholesale distribution of stone, cement, lime, construction sand, and gravel; brick; asphalt and concrete mixtures; and/or concrete, stone, and structural clay products.	NO LICENSE REQUIRED - Must own and operate distribution equipment to supply bulk materials. Supplementing of own equipment to be on long term lease, not ad hoc.	423320 - Brick, Stone, and Related Construction Material Merchant Wholesalers
C0651	CONCRETE & CEMENT SUPPLIER(BULK ITEM)	This industry comprises establishments primarily engaged in the merchant wholesale distribution of stone, cement, lime, construction sand, and gravel; brick; asphalt and concrete mixtures; and/or concrete, stone, and structural clay products.	NO LICENSE REQUIRED - Must own and operate distribution equipment to supply bulk materials. Supplementing of own equipment to be on long term lease, not ad hoc.	423320 - Brick, Stone, and Related Construction Material Merchant Wholesalers
C0671	DRAINAGE SYSTEMS SUPPLIER	This industry comprises establishments primarily engaged in the merchant wholesale distribution of drain pipes, storm drain pipes, gravity sewerage pipes, highway drains, bridge drains, curb drains.	NO LICENSE REQUIRED - Must possess a warehouse and have inventory (not just token amounts or catalogued) and be open to public.	423990 - Other Miscellaneous Durable Goods Merchant Wholesalers
C0672	STORM WATER SYSTEMS SUPPLIER	This industry comprises establishments primarily engaged in the merchant wholesale distribution of filtration systems, volumetric separation systems, screening products, catch basin inserts, hydrodynamic systems,	NO LICENSE REQUIRED - Must possess a warehouse and have inventory (not just token amounts or catalogued) and be open to public.	423990 - Other Miscellaneous Durable Goods Merchant Wholesalers
C1200	CONSTRUCTION AREA SIGNS	Prepares or removes lane closures, flagging, or traffic diversions, utilizing portable devices, such as cones, delineators, barricades, sign stands, flashing beacons, flashing arrow trailers, and changeable message signs, on roadways.	C-31Construction Zone Traffic Control Contractor - CSLB	561990-All other Support Services
C1531	PLANE ASPHALT CONCRETE	Cold planning is the controlled milling of pavement to restore the surface to a specified profile. Bumps, ruts and other surface irregularities are removed.	A-General Engineering, C-8 Concrete or C-61/D-06 Concrete Related Services Contractor -CSLB	
EROSION CONTROL & HIGHWAY PLANTING				
C2020	SOIL AMENDMENTS	Shall be a wood or bark product, treated to absorb water quickly, or a relatively dry organic compost derived from sewage sludge, plant material or rice hulls.	C-27 Landscaping OR A-General Engineering Contractor- CSLB	561730 – Landscaping Services
C2021	HYDROSEEDING	Applies seeds through any liquid media to any type of surface that has been prepared or contoured by others.	D-59 Hydro-seed Spraying Contractor - CSLB	561730-Landscaping Services
C2030	EROSION CONTROL	Used in natural areas, agricultural settings or urban environments. Often implemented in conjunction with sediment controls such as sediment basins and silt fences.	C-27 Landscaping OR A-General Engineering Contractor- CSLB	561730-Landscaping Services
C2066	TEMPORARY EROSION CONTROL	Firms that provide fiber rolls, gravel berms, check dams, Drainage inlet protection, Slope control blankets, concrete washout systems, temp construction entrances, staw bale barriers, during the construction phase (not the final product)	C-27 Landscaping OR A-General Engineering Contractor- CSLB	561730-Landscaping Services
C3940	PLACE ASPHALT CONCRETE DIKE & MISC.	Embankment used on roadways for controlling or holding back water and erosion control.	C-12 Earthwork & Paving OR A-General Engineering Contractor-	237310-Highway, Street, and Bridge Construction

Work Code	Category	Description	License Requirement	NAICS Code(s)
C3990	RECYCLE, RECLAIM ASPHALT CONCRETE	Common method of utilizing the left over rubble when structures made of concrete are demolished or renovated. Smaller pieces of concrete are used as gravel for new construction projects.	C-12 Earthwork & Paving OR A-General Engineering Contractor- CSLB	237310-Highway, Street, and Bridge Construction
CONCRETE STRUCTURE				
C5100	CONCRETE STRUCTURE	Forms, pours, places, finishes and installs specified mass, pavement, flat and other concrete work; and places and sets screeds for pavements or flatwork.	C-8 Concrete Contractor- CSLB	238110-Poured Concrete Foundation and Structure Contractors
C5105	MINOR CONCRETE STRUCTURE	Plywood formations with concrete poured in to them.	C-8 Concrete Contractor- CSLB	238110-Poured Concrete Foundation and Structure Contractors
REINFORCEMENT				
C5201	REINFORCING STEEL	Fabricates, places and ties steel mesh or steel reinforcing bars (rods), of any profile, perimeter, or cross-section, that are or may be used to reinforce concrete structures.	C-50 Reinforcing Steel Contractor- CSLB	238120-Structural Steel and Precast Concrete Contractors
MISCELLANEOUS FACILITY				
C7006	CORRUGATED STEEL PIPE INLET & RISER	Riser pipes sieve out debris and allow passage of water. They also allow accumulation of bedload sediments released.	C-42 Sanitation System Contractor - CSLB	237110- Water and Sewer Line and Related Structures Construction
CONCRETE CURB AND SIDEWALK				
C7301	CONCRETE CURB & SIDEWALK-MISC	Constructing concrete curbs, sidewalks, gutter depressions, island paving, curb ramps (wheelchair ramps) and driveways of the form and dimensions shown on the plans.	C-8 Concrete Contractor - CSLB D-6 Concrete Related Services- CSLB	238110-Poured Concrete Foundation and Structure Contractors
FENCE				
C8000	FENCING	Constructs, erects, alters or repairs all types of fences, corrals, runs, cribs, guard rails & barriers; excludes masonry walls.	C-13 Fencing Contractor- CSLB	238990-All Other Specialty Trade Contractors
TRAFFIC STRIPES AND PAVEMENT MARKING				
C8406	PAINTED TRAFFIC STRIPING & MARKING	Applying traffic stripes and pavement markings,	C-32 Parking & Highway Improvement Contractor- CSLB	237310-Highway, Street and Bridge Construction
C8852	SWPPP PLANNING	Develops and implements a storm water pollution prevention plan on construction sites to prevent storm water runoffs from being contaminated	QSP/QSD Certification	541620 - Environmental Consulting Services
TRUCKING				
C9602	BOTTOM DUMP TRUCKING	A trucking business primarily involved in unloading their payload by opening gates on the bottom of the bed. Internal bed walls are sloped to direct the entire payload out through the opened gates.	NO LICENSE REQUIRED	484220 - Specialized Freight Trucking, Local 484230 - Specialized Freight Trucking, Long Distance
C9603	TRANSFER DUMP TRUCK	A trucking business that owns a 10 wheel end dump truck and transfer trailer	NO LICENSE REQUIRED	484220 - Specialized Freight Trucking, Local 484230 - Specialized Freight Trucking, Long Distance
C9604	SUPER 10 DUMP TRUCK	A trucking business that owns one Super 10 wheel (4 axle) end dump truck	NO LICENSE REQUIRED	484220 - Specialized Freight Trucking, Local 484230 - Specialized Freight Trucking, Long Distance

Work Code	Category	Description	License Requirement	NAICS Code(s)
C9606	WATER TRUCK	A trucking business specializing in operating a water truck at a construction site on dirt, providing assistance during fires and replenishing fountains or ponds.	NO LICENSE REQUIRED	484220 - Specialized Freight Trucking, Local 484230 - Specialized Freight Trucking, Long Distance
C9607	END DUMP TRUCK	A trucking business that specializes in hauling and dumping their payload by raising the front end and letting the payload slide down the bottom of the bed and out the back through the tailgate.	NO LICENSE REQUIRED	484220- Specialized Freight Trucking, Local 48423 - Specialized Freight Trucking, Long Distance
C9609	STREET SWEEPING TRUCK	A trucking business that owns a truck with a water tank, sprayer and broom that specializes in removing and loosening debris from roadways.	NO LICENSE REQUIRED	488490 - Other Support Activities for Road Transportation
BUILDING CONSTRUCTION				
C9829	RETAINER WALLS	Walls built to keep a bank of earth from sliding or water from flooding.	C-12 Earthwork & Paving Contractor- CSLB	238110-Poured Concrete Foundation and Structure Contractors
C9859	Commercial Electrical	Places, installs, erects or connects any electrical wires, fixtures, appliances, apparatus, raceways, conduits, solar photovoltaic cells or any part thereof, which generate, transmit, transform or utilize electrical energy in any form or for any purpose for commercial operations.	C-10 Electrical Contractor - CSLB	238210 - Electrical Contractors
MISCELLANEOUS CONSTRUCTION SERVICES				
C9905	CUTTING	Excavating or lowering a grade.	C-12 Earthwork & Paving Contractor- CSLB	238910- Site Preparation Contractors

September 9, 2015

Via Email and U.S. Mail

Mr. Todd Morrison
Project Manager
County of Santa Barbara, General Services
105 East Anapamu Street
Santa Barbara, CA 93101

RE: Project No. 8595, County of Santa Barbara Airport Security Enhancements

Dear Mr. Morrison,

This letter is sent in response to Whitaker Construction Group, Inc.'s ("Whitaker") letter of August 28, 2015, wherein Whitaker responded to Souza Construction, Inc.'s ("Souza") previous letter protesting the bid of Whitaker. I'd like to take this moment to address the arguments advanced by Whitaker because I believe the County of Santa Barbara could be acting to its own significant detriment if it was to follow or accept the contentions laid out by Whitaker. Simply stated, Whitaker is not in conformance with the law on this issue and has displayed a gross misunderstanding of the manner in which federal law treats the Good Faith Effort evaluation of bidders pursuant to 49 CFR, Part 26 and its related appendices.

Let's begin where we should in this situation—with the law. 49 CFR, Part 26, Appendix A provides "Guidance Concerning Good Faith Efforts". It states:

I. When, as a recipient, you establish a contract goal on a DOT-assisted contract for procuring construction, equipment, services, or any other purpose, a bidder must, in order to be responsible and/or responsive, make sufficient good faith efforts to meet the goal. *The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part 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.*

II. In any situation in which you have established a contract goal, Part 26 requires you to use the good faith efforts mechanism of this part. *As a recipient, you have the responsibility to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made, based on the regulations and the guidance in this Appendix.*

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 DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call. Determinations should not be made using quantitative formulas.

III. 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.

IV. *The following is a list of types of actions which 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.

A.

(1) *Conducting market research to identify small business contractors and suppliers and soliciting through all reasonable and available means the interest of all certified DBEs that have the capability to perform the work of the contract.* This may include attendance at pre-bid and business matchmaking meetings and events, advertising and/or written notices, posting of Notices of Sources Sought and/or Requests for Proposals, written notices or emails to all DBEs listed in the State's directory of transportation firms that specialize in the areas of work desired (as noted in the DBE directory) and which are located in the area or surrounding areas of the project.

(2) The bidder should solicit this interest as early in the acquisition process as practicable to allow the DBEs to respond to the solicitation and submit a timely offer for the subcontract. The bidder should determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units (for example, smaller tasks or quantities) to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces. This may include, where possible, establishing flexible timeframes for performance and delivery schedules in a manner that encourages and facilitates DBE participation.

C. 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 a solicitation with their offer for the subcontract.

D.

(1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional Agreements could not be reached for DBEs to perform the work.

(2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

E.

(1) Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal. Another practice considered an insufficient good faith effort is the rejection of the DBE because its quotation for the work was not the lowest received. However, nothing in this paragraph shall be construed to require the bidder or prime contractor to accept unreasonable quotes in order to satisfy contract goals.

(2) A prime contractor's inability to find a replacement DBE at the original price is not alone sufficient to support a finding that good faith efforts have been made to replace the original DBE. The fact that the contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the contractor of the obligation to make good faith efforts to find a replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.

F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

H. 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.

V. *In determining whether a bidder has made good faith efforts, it is essential to scrutinize its documented efforts. At a minimum, you must review the performance of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.* As provided in § 26.53(b)(2)(vi), you must also require the contractor to submit copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract to review whether DBE prices were substantially higher; and contact the DBEs listed on a contractor's solicitation to inquire as to whether they were contacted by the prime. Pro forma mailings to DBEs requesting bids are not alone sufficient to satisfy good faith efforts under the rule.

VI. A promise to use DBEs after contract award is not considered to be responsive to the contract solicitation or to constitute good faith efforts.

(Emphasis added in italics; additional emphasis added via underlining).

With the applicable law in mind, we will now move forward to address the contentions made by Whitaker.

First and foremost, one thing needs to be made absolutely clear. Whitaker is attempting to compare its good faith efforts to those of both Souza and R. Burke Corp.'s ("Burke") good faith efforts. This is inappropriate. As § I of Appendix A indicates, there are two paths of relevance to this analysis: 1) a bidder has met the goal; or 2) a bidder has not met the goal and their good faith efforts are then scrutinized. It is not inappropriate to consider, in the context of a bidder who has not met the goal, whether other bidders met the goal or the degree to which they met the goal (*see*, Appendix A, § V). That said, it is another matter entirely to compare a bidder's good faith efforts to another bidder's good faith efforts where that other bidder has met the goal. From an attorney's perspective, my job is made very easy in the event I have to seek a Writ of Mandate compelling the lawful performance of an agency's duties where the agency has done something along the manner of what Whitaker is suggesting in comparing its good faith efforts to those of a bidder who *actually met the contract goal*. It is akin to comparing apples to oranges. While we are on the subject, however, it bears mentioning that Souza engages the services of third party DBE solicitation firms *as a redundant back-up, not a primary means of securing DBE*

participation. This is, in part, how Souza avoids engaging in the type of “pro forma” efforts that the federal regulations prohibit. For instance, contacting a DBE contractor from, say, Redding, California to perform a small bit of work on a project is in reality a “pro forma” exercise—obviously, no DBE is traveling from Redding to the Central Coast to perform a \$5,000.00 job—its not reasonable and documenting contacts with that DBE provider is not likely to result in anything other than documentation of a “pro forma” effort. Souza has, at great cost, time and effort created its own database of DBE contractors, their various skills, abilities, licensures and the parameters of what they are willing to do in terms of travel distance and job type. Souza’s maintenance of this database is why they rarely find themselves in the situation where they could not meet stated contract goals. What it reflects is that Souza 1) recognizes and accepts the rules, 2) has developed meaningful, substantive ways and means of securing the minimum amount of DBE participation or more; and 3) executes these methodologies in their bidding and work so that they are not only in compliance, but that they actually are meaningfully following the spirit and letter of the law regarding DBE’s. I represent many public works contractors, but none have ever displayed the constant commitment to securing DBE participation on public works contracts that I have consistently seen from Souza, whether it be local, state or federal projects. I don’t say this to stroke Souza’s ego (it’s big enough all on its own); I mention it to illustrate the folly of trying to compare a bidder’s documented good faith efforts who has not met the contract goal to the *submitted documentation* of good faith efforts from a bidder or bidders who *have met the contract goal.*

Whitaker has made much of their good faith efforts and nothing herein is meant to criticize those efforts to the extent they are genuine; but actually meeting the good faith effort standard where the contract goal is not achieved and the actual DBE participation achieved by the low bidder is so dramatically short of what the other bidders actually achieved is a nearly impossible task. I have never seen, nor heard of a bidder securing as little DBE participation as Whitaker has in this matter relative to the other bidders who successfully secured the actual DBE participation goal that then went on to secure a finding that they made adequate good faith efforts. Stated another way; this just isn’t even a close case, Whitaker is substantially short of the showing that is required to secure that particular finding.

One of the primary problems that Whitaker faces is that they made much too little of the contract work available to DBE contractors. Whitaker made about 62.96 % of the contract work available to DBE’s. (See, Exhibit B and C attached hereto). There are huge categories of work that they failed to even make available to DBE’s. This is not consistent with federal regulations regarding valid good faith efforts. What it really comes down to is the concept described in § I of Appendix A. Documenting adequate good faith efforts means that the “bidder took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation” Whitaker’s problem in this regard is that they failed to make the “scope” of work available to DBEs such that they could reasonably have expected to achieve the

contract goal. One can sympathize with Whitaker; it is generally more profitable to self-perform these tasks; however, the rules that everyone must follow place a premium on securing DBE participation at the expense of self-performance, so long as the additional cost is reasonable. *See*, Appendix A at §§ IV (B), IV(D)(2).

Whitaker's criticism of Souza's use of Kritz Trucking is also misplaced, and demonstrates Whitaker's lack of understanding of the process. Kritz's 237310 "NAICS" code encompasses multiple "work codes", including C3910 "Paving Asphalt." The Department determined when granting the 237310 code that Kritz (an "A" licensed General Contractor) had the capabilities of performing all or portions of the work contained within the 237310 code. Furnishing, delivering, and unloading AC material is an integral part of the paving operation. The broadness of the 237310 code doesn't preclude material acquisition, nor is its intent to require sub-codes for that work. Kritz's "commercially useful function" in the purchase of AC is to determine the source, negotiate pricing, acquire submittals/mix designs, coordinate and schedule with the plant and their own trucks accordingly. It is worth noting here that Kritz's furnishing and delivering of AC materials was approved by Tartaglia Engineering for DBE participation on the Rehabilitate Taxiway A & F at the Paso Robles Airport project recently completed.


While on the subject of Kritz, it is curious that Whitaker has claimed to have made efforts to make trucking available to DBEs (apparently without success, despite the fact that trucking is a very common and easy way to secure BE participation), yet they apparently did not solicit the participation of Kritz. Clearly Kritz is willing and able to perform, as Souza secured their performance. What is particularly questionable about Whitaker's failure to do so is that Kritz Trucking and Whitaker are virtually neighbors (*see*, Exhibit A, attached hereto). Whitaker's words simply do not match their deeds in this instance.

Finally, issue must be taken with Whitaker's ultimate conclusion in their letter of 8/28/2015, wherein they state that "it appears that there were not enough appropriately certified DBE contractors performing a commercially useful function to meet the contract goal." If that were actually true, then certainly Souza and Burke would not have secured the actual participation that they did secure. Moreover, comparing the participation actually achieved by Whitaker to that actually achieved/secured by Souza and Burke, as § V of Appendix A directs your agency to do, shows clearly that Whitaker not only failed to make a good faith effort, they failed to do so by a considerable margin. Again, this is not what I would consider a "close case."

I would strongly caution you against making any award of the contract in question to Whitaker. Simply stated, it is going to be very difficult for the County of Santa Barbara to make a supportable determination that Whitaker achieved the Good Faith Effort standard required by federal law, which almost certainly will directly affect your funding on the project and could lead to burdensome and needless litigation.

Please do not hesitate to contact me directly if you have any questions or concerns regarding the contents of this message.

Very truly yours,



J. Tavener Holland

JTH/sjh

cc:

Client

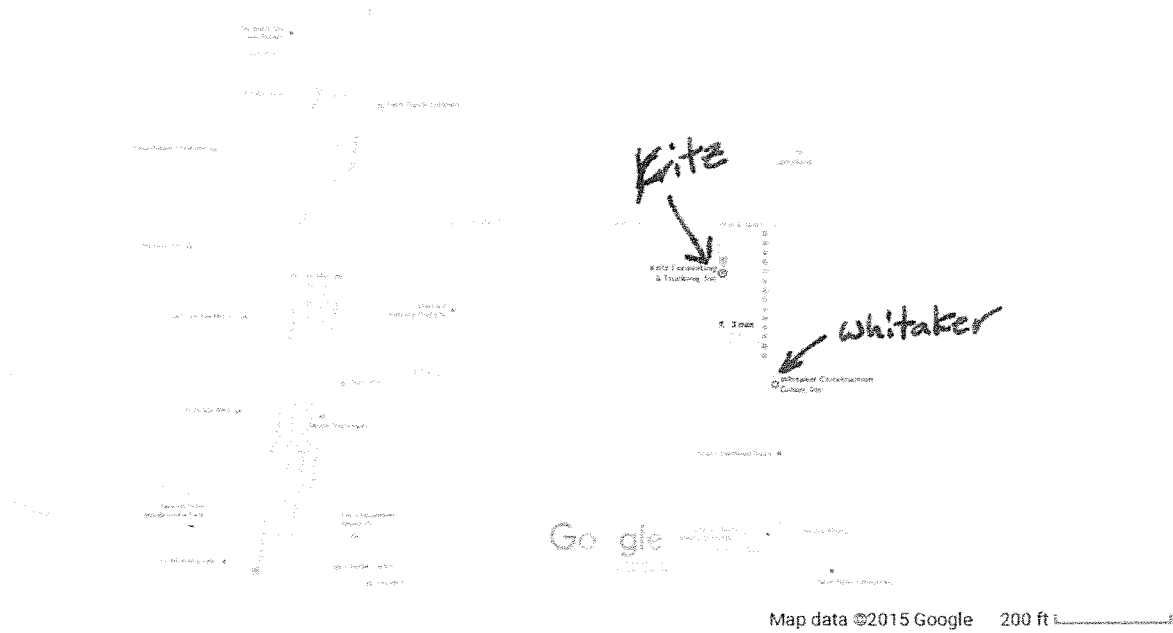
Gerald C. Weaver, Esq.

Exhibit "A"

Google Maps

Whitaker Construction Group, Inc. to Kritz Excavating & Trucking, Inc

Walk 0.2 mile, 3 min



via Concrete Ct

3 min

Show terrain

0.2 mile

Details

ITEMS MADE AVAILABLE TO DBE FIRMS by Whitaker
See Attachment "C"

PROJECT BID SCHEDULE

Documents

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ITEM NO.	DESCRIPTION	ESTIMATED QUANTITY	UNIT	UNIT PRICE (Figures)	EXTENDED TOTAL (Figures)
1	Mobilization	LS	1.0	\$	\$
2	Safety and Security	LS	1.0	\$	\$
3	Sawcut	LF	900.0	\$	\$
4	Clearing, Grubbing, and Removals	LS	1.0	\$	\$
5	Excavation	CY	1,520.0	\$	\$
6	Embankment	CY	2,300.0	\$	\$
7	Subgrade Preparation	SY	10,200.0	\$	\$
8	Unsuitable Subgrade Allowance	T&M	1.0	\$ 50,000.00	\$ 50,000.00
9	PCC Curb and Gutter	LF	390.0	\$	\$
10	PCC High Side Curb and Gutter	LF	75.0	\$	\$
11	PCC Modified Curb and Gutter	LF	290.0	\$	\$
12	Utility Work Area Improvements	LS	1.0	\$	\$
13	Aggregate Base	TON	3,800.0	\$	\$
14	Asphalt Pavement	TON	1,200.0	\$	\$
15	Asphalt Dike	LF	360.0	\$	\$
16	Lower Water Line	LS	1.0	\$	\$
17	Storm Drain Pipe	LF	910.0	\$	\$
18	Drainage Improvements	LS	1.0	\$	\$
19	Perimeter Fence	LF	750.0	\$	\$
20	Vehicle Access Gate	EA	1.0	\$	\$
21	Pedestrian Gate	EA	1.0	\$	\$
22	Electrical	LS	1.0	\$	\$
23	Pavement Marking	SF	360.0	\$	\$
24	Hydro-Mulch Erosion Control	ACRE	2.5	\$	\$
25	SWPPP	LS	1.0	\$	\$
26	Storm Water Sampling (Allowance)	T&M	1.0	\$ 5,000.00	\$ 5,000.00
TOTAL, BID SCHEDULE (Items 1 through 26):					\$

