

# REYES CONSTRUCTION, INC.

2805

September 22, 2021

✓21-1790

Port of Los Angeles  
Construction – 3<sup>rd</sup> Floor  
425 South Palos Verdes Street  
San Pedro, CA 90731  
Attn: Shaun Shahrestani, Chief Harbor Engineer

**RE: LETTER OF PROTEST - PIER 400 CORRIDOR STORAGE TRACKS EXPANSION (SPECIFICATION NO. 2805)**

Dear Mr. Shahrestani:

Reyes Construction, Inc. hereby submits this protest to the bid proposal submitted on the above-referenced project. This protest is submitted pursuant to Section 22.17 of the Information for Bidders. The protest is based on the fact that the bid by Herzog/Stacy and Witbeck, a JV, the apparent low bidder, failed to establish that it made a good faith effort to achieve the DBE hiring goal on this project of 20%. As explained below, either the effort to achieve the goal was inadequate or the documentation of that effort is deficient. Either way, the bid package by Herzog/Stacy and Witbeck does not meet the good faith effort requirements for this project and as a result, its bid should be rejected as non-responsive.

## **Background**

On August 17, 2021, the Port of Los Angeles (POLA) received bids from multiple bidders in response to their Notice Inviting Bids for Specification Number 2805 (Pier 400 Corridor Storage Tracks Expansion). A component of the bid submittal process included enforcement of the Federal Regulation Guidelines to utilize Disadvantaged Business Enterprises (DBE) to ensure full and equitable participation by DBEs in the provision of goods and services. Specifically, Section 00030.11 of the Bidding Documents stated that, "bidder's efforts to obtain participation by DBEs of this Contract could reasonably be expected by the Awarding Authority ('POLA') to provide a level of participation of 20 percent."

To demonstrate their DBE participation efforts, all bidders were required to undertake and document a Good Faith Effort (GFE). Section 00030.11 subparagraph F of the Bidding Documents provided detailed requirements for the information and supporting documentation necessary to demonstrate a GFE. Ultimately, guidance in the Bidding Documents only required that the apparent low bidder, second low bidder, and the third low bidder submit their GFE package for consideration/evaluation by POLA.

Bid results for this project suggested that Herzog/Stacy and Witbeck, a JV was apparent low bidder. Second and third low bidders were Reyes Construction, Inc. ('RCI') and Flatiron West, Inc., respectively. Given the importance of the GFE to the overall bidding process, RCI submitted a Public Record Request to POLA on August 31, 2021 requesting copies of the GFE packages for both Herzog/Stacy Witbeck, a JV and Flatiron West, Inc. GFE packages were released by POLA to RCI on September 14, 2021.

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**TRANSMITTAL 7**

Based on our review of the GFE submitted by Herzog/Stacy and Witbeck, a JV against the corresponding guidance in the Bidding Documents, RCI discovered and highlights below significant deficiencies in the information and documentation provided. Taken together, these deficiencies demonstrate that Herzog/Stacy and Witbeck did not make a good faith effort to achieve the DBE hiring goal which renders the Herzog/Stacy and Witbeck bid non-responsive. The following narrative provides a detailed analysis of the deficiencies in the good faith effort package and the ineffective outreach to and use of potential DBE bidders.

### **Analysis**

Section 00030.11 of the Bidding Documents provides a sequence of steps and supporting documentation a GFE must include to evidence each bidder's efforts in obtaining participation by DBEs on the Pier 400 Corridor Storage Tracks Expansion project. Based on our review of the Herzog/Stacey and Witbeck GFE package, we have found several deficiencies in the required steps of this process. The following analysis seeks to highlight those deficiencies against the corresponding guidance from POLA's own Bidding Documents:

1. "Items of Work Bidder has made available to DBE firms. Identify those items of Work Bidder might otherwise perform with its own forces and those items that have been broken down into economically feasible units to facilitate DBE participation. For each item listed, show dollar value and percentage of the total contract. It is Bidder's responsibility to demonstrate that sufficient work to meet the goal was available to DBE firms."
  - a. Exhibit 15-H C of the Herzog/Stacy Witbeck GFE package included a detailed schedule with all information required by this step of the process. Noteworthy from our review, however, was that two items of work (2 of 3 most significant in dollar value) identified as 'not normally being performed by bidder' had no supporting DBE and/or non-DBE quotes in the GFE package.

Specifically, Herzog/Stacy Witbeck identified aggregate supply and supply of track materials as work not normally performed by bidder. Despite this, there were no supplier (DBE or non-DBE) quotes for these items. As a result, it's unclear how Herzog/Stacy Witbeck, a JV intends to complete this work. Additionally, lack of DBE quotes indicates that no bids (regardless of price) were obtained from DBE suppliers. This is a glaring issue in the GFE package because there are DBE suppliers that were bidding this project and in fact Reyes listed bids from multiple potential DBE suppliers for this work in its GFE package. This omission in the GFE package is at best indicative of a weakness in the identification/solicitation of certified DBEs and more likely demonstrates that Herzog/Stacy and Witbeck either made little to no effort to solicit available and willing DBE companies for such supply contracts and/or refused to list those efforts for fear they would be questioned for not selecting a DBE supplier to help achieve the 20% goal. At a minimum, the lack of any DBE participation should have prompted an additional/expanded search using other search sources recommended in POLA's own Bidding Documents (i.e. California Unified Certification Program).

2. "Names of certified DBEs and the dates on which they were solicited to bid on Project. Include the items of work offered. Describe the methods used for following up initial solicitations to determine with certainty if DBEs were interested, and the dates of the follow up. Attach supporting documents such as copies of letters, memos, facsimiles sent, telephone logs, telephone billing statements, and other evidence of solicitation. Bidders are reminded to solicit certified DBEs through all reasonable and available means and provide sufficient time to allow DBEs to respond."

- a. Based on our review of Herzog/Stacy and Witbeck's GFE, it appears their original source/query for DBE entities was secured through a third-party service called B2Gnow System. Again, based on our review of the DBE entities included in this original listing, it doesn't appear that many, if any, DBEs were sourced for aggregate supply and/or track material. Additional issues noted with this original query are that only 111 entities were solicited using documented NAICS codes for all available items of work.

Although the quantity of sourced DBEs isn't itself an issue, the deficiency noted by RCI is that Herzog/Stacy and Witbeck doesn't appear to use the recommended source in POLA's Bidding Documents for certified DBEs

[http://www.dot.ca.gov/hq/bep/find\\_certified.htm](http://www.dot.ca.gov/hq/bep/find_certified.htm) 'CUPC'). RCI's use of the CUPC source for similar NAICS codes resulted in the identification/solicitation of 743 DBE entities. RCI also searched by Work Codes, which generated an additional 488 DBE entities. By comparison, RCI identified/solicited a total of 1,231 DBE entities through its original DBE search, while Herzog/Stacy and Witbeck identified/solicited 111. Ultimately, this quantity difference in sourced DBEs helped RCI identify DBEs for all features of work resulting in RCI exceeding the project DBE goal of 20%. This significant disparity demonstrates that Herzog/Stacy and Witbeck did not "solicit certified DBEs through all reasonable and available means."

In correspondence after the bid date (see attached email noted as Exhibit A), a representative of Herzog/Stacy and Witbeck attempts to clarify for the POLA the nature and extent of their outreach to DBE entities. In that correspondence, the Herzog/Stacey representative confirms the number of DBE entities solicited ("approximately 130") and also states the source of their search. This representative goes on to mention a second table included in their GFE of approximately 700 solicited entities. A couple items of interest in these statements include: a) the source of DBE entities is not consistent with the source recommended by the Bidding Documents and used by RCI to achieve the contractual DBE goal; and, b) the second list of 700 entities referenced by the Herzog/Stacy representative includes the original 111 DBE entities while all others appear to be non-DBE. Furthermore, this second listing of approximately 700 entities supports entities that were notified of addendum information (as defined by the listing header) and not entities that were part of Herzog/Stacy's original solicitation. As such, the clarification doesn't substantiate a change or improvement to the deficiency of the GFE package as originally submitted.



they did not document these bids in their GFE package nor explain why non-DBE firms were selected over DBEs submitting bids. Although the effectiveness/completeness of a GFE can often include levels of subjectivity, the omission of required information in the GFE package, and particular information that reveals DBEs were ignored, alone is significant enough to render the Herzog/Stacy and Witbeck GFE deficient.

4. "Name and date of each publication in which a request for DBE participation for Project was placed by Bidder. Attach copies of the published advertisements."
  - a. The GFE packages shows Herzog/Stacy and Witbeck used only one (1) publication source to advertise for DBE participation on this project. Although the quantity of sources may not appear to be an issue, it seems logical that falling short of the DBE goal for this project and not receiving DBE participation for all advertised features of work should have prompted the use of additional sources. A robust and effective GFE would have identified this shortfall and explored other common publications regularly used to increase visibility to the potential work opportunities and, therefore, DBE participation.
5. "Names of agencies and dates on which agencies were contacted to provide assistance in contacting, recruiting, and using DBE firms. If the agencies were contacted in writing, provide copies of supporting documents."
  - a. Based on our review of their GFE package, it appears Herzog/Stacy and Witbeck emailed various agencies to provide assistance in contacting, recruiting, and using DBE firms. There is no evidence, however, of any follow up with these agencies other than the original email correspondence. In this case as in others described here above, it appears that Herzog/Stacy and Witbeck fails to adequately satisfy the underlying intent of the GFE by not actively seeking to increase DBE participation.

## **Conclusion**

Reyes Construction, Inc. is fully aware that the DBE goal of 20 percent attached to the bid of the Pier 400 Corridor Storage Tracks Expansion project is simply that, a goal. In the absence of achieving the goal, however, Section 000030.11 - 'Disadvantaged Business Enterprise Program' of the Bidding Documents provides detailed guidance of the documentation and procedural requirements each bidder must undertake to demonstrate a good faith effort to obtain DBE participation.

Based on an objective review of the GFE submitted by Herzog/Stacy and Witbeck, and as described in more detail here above, we believe the deficiencies in the Herzog/Stacy and Witbeck GFE are significant enough to deem their bid submittal non-responsive. While each deficiency on its own is enough to call Herzog/Stacy and Witbeck's GFE into question, combined, the deficiencies show a callous disregard for the DBE goal and GFE process. There can be no question that a GFE that did not contain these shortcomings would have yielded more DBE bids and likely have achieved the project DBE goal. Certainly, the GFE would have been valid and indicated a good faith effort was made to achieve the goal. The GFE submitted by Herzog/Stacy and Witbeck falls well short of an effective and complete GFE.

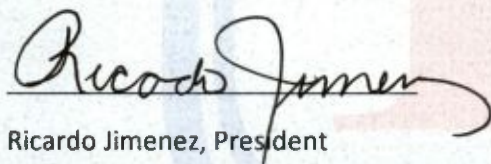
In addition, guidance concerning GFEs issued by the United States Department of Transportation is particularly relevant here:

“...when evaluating a GFE, the Awarding Authority ('POLA') should consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere proforma efforts are not good faith efforts to meet DBE requirements.”

Given the GFE documentation provided by Herzog/Stacy and Witbeck, and the corresponding deficiencies noted therein, their GFE falls well short of an actual good faith effort striving to increase DBE participation. Instead, it documents “proforma” efforts that were intended to try and check boxes rather actively and aggressively seeking to increase DBE participation on this project. This is further evidenced by the emails (3 separate exchanges) requesting clarification and/or additional information of their GFE package sent by the POLA to Herzog/Stacy and Witbeck post-bid.

As a result, the Port of Los Angeles should deem the GFE process and Herzog/Stacy and Witbeck bid to be non-responsive and instead, declare RCI's bid to be the responsive/low bid resulting in award that not only is based on a GFE, but one that achieves the DBE 20% goal. To conclude otherwise shortchanges the DBE process and denies an opportunity to confirm to the contracting community that bids with pro forma GFE efforts will be (and should be) rejected.

Respectfully Submitted,

A handwritten signature in black ink that reads "Ricardo Jimenez". The signature is written in a cursive style with a long, sweeping tail on the "z".

Ricardo Jimenez, President

" EXHIBIT A "

**Randy Olmstead**

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**From:** Randy Olmstead  
**Sent:** Tuesday, September 7, 2021 4:18 PM  
**To:** Mallakis, Kosta  
**Subject:** 5-day document Clarification - Pier 400

Kosta –

Per your request for clarification; we are clarifying the 2 contact tables provided in our 5-day document submittal.

In our submitted 5-day documents we provided 2 tables of potential subcontractors and vendors, the firms listed on these tables were solicited by the Herzog and Stacy Witbeck Joint Venture for the Pier 400 Project.

- The first table contains approximately 130 firms. This outreach list was generated by searching the CUCP database (<https://metro.gob2g.com/>) for current registered DBE firms, we specifically searched by NAICS Commodity Codes for the scopes and services needed for this project. This list is limited to current DBE firms.
- The second table contains approximately 700 firms. This outreach list was generated jointly by the JV team (Herzog Contracting and Stacy and Witbeck) utilizing our current outreach databases for the project area. This list is not limited to just DBE firms it also contains non-DBE's. The list contains contact information for subcontractors, service providers, material suppliers, and other vendors needed for the project.

Please let me know if additional clarification is needed

Thank you  
Randy Olmstead  
Herzog / Stacy Witbeck, a JV



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*Commissioner*

Lucia Moreno-Linares  
*Commissioner*

Anthony Pirozzi, Jr.  
*Commissioner*

Eugene D. Seroka

*Executive Director*

October 12, 2021

Reyes Construction, Inc.  
1383 S. Signal Drive  
Pomona, CA 91766

Attention: Ricardo Jimenez

**SUBJECT: RESPONSE TO LETTER OF PROTEST FOR THE BID OF HERZOG/  
STACY AND WITBECK, A JOINT VENTURE  
PIER 400 CORRIDOR STORAGE TRACKS EXPANSION  
SPECIFICATION NO. 2805**

The City of Los Angeles Harbor Department (Department) has reviewed your bid protest letter dated September 22, 2021 (Bid Protest) regarding Specification 2805 for the Pier 400 Corridor Storage Tracks Expansion project (Specification). The Bid Protest requested the bid submitted by Herzog/ Stacy and Witbeck, A Joint Venture (JV) should be deemed non-responsive, because the JV did not make adequate good faith efforts to meet the Disadvantaged Business Enterprise (DBE) project requirements.

In accordance with Specification Section 00030.11F, bidders shall make good faith efforts to meet contract DBE participation goals, and shall submit the Contractor Good Faith Efforts form (Exhibit 15-H) and supporting documentation when the bidder does not meet the DBE goal. The JV submitted a completed Exhibit 15-H and supporting documentation in compliance with this requirement. Department staff performed a comprehensive review of the JV's good faith efforts, including all documentation, in accordance with the requirements of the Specification, and our review has found that the JV has complied with the Specification's good faith effort to meet the DBE goal. The Department is administering the Code of Federal Regulations, Title 49, Subtitle A, Part 26, Subpart C, which states that bidders will not be penalized or considered in noncompliance if DBE participation falls short of the project's goal. The State of California Department of Transportation (Caltrans) conducted an independent good faith effort compliance review and concurs with the Department's determination that the JV demonstrated adequate good faith efforts to meet the contract DBE goal. The Department and Caltrans both independently found that the JV fulfilled the contract good faith effort requirement. Therefore, Department staff will proceed to recommend that the Board of Harbor Commissioners award the contract to the JV.

Staff's recommendation to the Board of Harbor Commissioners to award the contract will be presented at the Board meeting on November 4, 2021. Thank you for submitting a bid for this project and we hope that you consider bidding on future Port projects. If you have any additional questions or concerns, please contact Kosta Mallakis, Project Construction Manager at (310) 732-3967.

Sincerely,



Shaun Shahrestani  
cn=Shaun Shahrestani,  
email=sshahrestani@portla.org, c=US  
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**SHAUN SHAHRESTANI**  
Chief Harbor Engineer

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28738.doc  
File No.: Spec No. 2805-4.11

# REYES CONSTRUCTION, INC.

2005  
V#21-2110

November 2, 2021

Port of Los Angeles  
Construction – 3<sup>rd</sup> Floor  
425 South Palos Verdes Street  
San Pedro, CA 90731  
Attn: Shaun Shahrestani, Chief Harbor Engineer

**RE: Response to Herzog/Stacy and Witbeck Letter dated September 29, 2021 for Pier 400 Corridor Storage Tracks Expansion (Specification No. 2805)**

Dear Mr. Shahrestani:

## Introduction

As you know, Reyes Construction, Inc. ("RCI") filed a Letter of Protest (the "Protest") dated September 22, 2021 on the above referenced project based on the fact Herzog/Stacy Witbeck ("HSW") failed to establish that it made a good faith effort to achieve the DBE hiring goal on this project of 20%. The Port of Los Angeles ("POLA") responded to the Protest in a letter dated October 12, 2021. In that letter, POLA states that separate independent reviews by both POLA and The State of California Department of Transportation (Caltrans) concluded HSW fulfilled the contractual good faith effort requirement. However, this same letter did very little to provide a response on specific assertions made by RCI in the Protest. As a result, RCI submitted a request for public record on October 20, 2021. POLA responded to that request on October 28, 2021.

Among other things, one of the documents provided by POLA was a response from HSW to the Protest filed by RCI. Based on RCI's review of the response, we noted false allegations and other inaccurate statements made by HSW regarding the good faith effort ("GFE") submitted by RCI on the above-referenced project. Given that Reyes' bid met the DBE goal, its GFE submittal is not relevant and has not been questioned by POLA. However, we find it curious that HSW spent much of its response addressing the Reyes GFE rather than attempting to justify its own alleged GFE that failed to achieve the DBE goal or even the goals of the GFE requirements. We will refrain from addressing the inaccurate statements made by HSW in this letter about the Reyes GFE and instead we feel it is appropriate to highlight additional items based on claims made in HSW's response for POLA's and Caltrans' consideration.

## Analysis

### ***DBE Listing – Original Solicitation and "Appropriate Filtering"***

In its response to RCI's Protest, HSW claims that RCI contends its GFE efforts were superior because its initial search resulted in a total of 1,231 DBE entities while HSW's search resulted in 111 DBE entities.

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First, RCI never claimed its own GFE efforts were “superior” due to the numerical difference in DBEs solicited, but rather that the difference should be a consideration in evaluating HSW’s effectiveness of actively and aggressively identifying DBEs for all features of available work. Second, HSW goes on to contend that the disparity in the initial solicitation searches is a “mirage.” Specifically, HSW provides a numerical analysis to support their search results and also describes this concept of an “appropriate filter” that they applied in performing their initial solicitation. A couple noteworthy items to consider in these statements by HSW include:

- 1) *Appropriate Filtering* – RCI is not aware of “filtering” guidance and/or recommendations in the GFE guidelines found in 49 CFR Part 26. In fact, based on RCI’s own experience with a prior GFE submittal to the City of Los Angeles, RCI learned that Caltrans does not recommend a filtering strategy to a DBE list produced in a search using the CUCP. And furthermore, in a case where filtering is used, Caltrans has previously requested that supporting documentation of a listing (pre-filter) be provided with evidence of the analysis used by a contractor to arrive at its shortened list of DBE entities. RCI requests that POLA and/or Caltrans employ this same approach with HSW’s filtered listing.
- 2) *Effectiveness of Filtering Process* – HSW admittedly utilized a filtering process in its initial search of DBE entities. That filtering process, which was deemed “appropriate” by HSW, resulted in 111 DBE entities. Based on RCI’s review of DBE quotes received by HSW, it appears this initial search only resulted in the receipt of two (2) quotes (Endemic Environmental Services and Deltech Engineering). Said differently, of the 111 DBE entities originally solicited by HSW, only 2 DBE entities responded with a quote. This being the case and given the amount of work identified for potential DBE participation on this project, one can hardly conclude that HSW’s filtering process was “appropriate,” and it clearly falls short of the standard of good faith.

#### ***DBE Listing – HSW Transmittal No. 2 to POLA***

HSW’s original DBE listing included 111 entities that were presumably solicited on June 24, 2021 per HSW’s original GFE submittal. However, in post-bid correspondence, POLA requested that HSW provide a list of DBEs solicited including dates of original solicitation and dates of additional correspondence such as addendum and Q&A notification (See Transmittal Number 2 from HSW to POLA dated September 3, 2021). After reviewing the schedule provided by HSW in response to this request, it appears there are additional DBEs added to the listing which weren’t part of the original 111 DBE entity list. Given that the schedule implies such new/added DBE entities were also solicited on June 24, 2021, RCI urges POLA to request “invitation to bid” documentation from HSW confirming the solicitation date of these additional/added DBE entities. Request, receipt, and review of this documentation is necessary to confirm that HSW isn’t trying to claim good faith by retroactively adding DBEs. Specifically, the following DBE entities were added to the DBE list provided by HSW in their response associated with Transmittal No. 2 to POLA:

- Hunsaker & Associates
- Hafco Services
- Monzon & Sons
- Fehoko Concrete

- Miranda Logistics
- Ace Fence
- Siege Electric
- Highball Signal
- Triumph Geosynthetics
- Morgner Construction Management

#### ***Final Listed DBEs by HSW***

Adding to the assertion that HSW didn't actively and aggressively identify and solicit DBEs as part of their GFE, RCI also notes that HSW listed thirteen (13) DBEs in their final DBE commitment form (Exhibit G). Of the 13 entities listed, only 1 (Endemic Environmental Services) was originally solicited by HSW while 9 of HSW's listed DBEs were originally solicited by RCI as part of its own GFE. The remaining 3 listed DBEs appear to be unsolicited quotes. Ultimately, RCI contends that HSW benefitted from the good faith effort performed by RCI and other firms bidding this project rather than from their own inadequate effort.

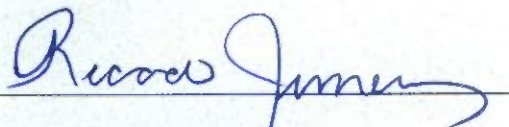
#### **Conclusion**

We all agree that GFE requirements must be complied with both in the spirit and letter of the law. That said, we strongly urge POLA to request and review supporting documentation provided by HSW in response to items highlighted here above as this information is necessary to accurately conclude on the adequacy of HSW's GFE submittal and the merit of RCI's Protest. Also, based on our experience with various other projects, the GFE determination by POLA on this project is not consistent with the standards typically applied to measure good faith efforts. Specifically, we reference 49 CFR Appendix A to Part 26, which states in part:

*"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."*

As you can imagine, it is important that the application of the GFE test be consistent across the State to assure contractors know what is required of them. Applying different standards leads to inequitable results and undermines the objectives of DBE hiring. RCI looks forward to POLA's response.

Respectfully Submitted,



Ricardo Jimenez, President