

STATE OF MINNESOTA

DEPARTMENT OF TRANSPORTATION

**Administration Reconsideration  
Hearing Request by  
A-1 Excavating, Inc.  
State Project Number 013-624-007**

**MnDOT # TRP/302/DBE/2015**

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**ADMINISTRATIVE RECONSIDERATION PANEL DECISION**

The Minnesota Department of Transportation (“MnDOT”) Office of Civil Rights (“OCR”) set a disadvantaged business enterprise (“DBE”) goal of 17.5% for the State Project Number 013-624-007 (the “Project”). The Project is located in Chisago County in MnDOT’s metro district. A-1 Excavating, Inc. (“A-1”) was the apparent low bidder (“ALB”). By letter dated February 19, 2016, (“OCR Letter”) OCR notified A-1 that it was not a responsible bidder because A-1 neither achieved the DBE goal nor demonstrated good faith efforts to meet the DBE goal.

A-1 requested a reconsideration of the OCR decision.

MnDOT assigned a panel of three MnDOT officials (the “Panel”) to conduct a reconsideration hearing. James Cownie (Assistant Chief Counsel for Construction and Contract Management), Thomas O’Keefe, P.E. (Director, Metro Program Delivery) and Nandana Perera (Associate Legal Counsel) were assigned to the Panel. The three panel members did not take part in the original determination that A-1 did not meet the goal or make adequate good faith efforts to meet the goal.

The Panel informed the parties in writing of the location, time, duration, and their rights at the hearing.<sup>1</sup> The Panel conducted a hearing on March 9, 2016 commencing at 1:00 p.m. in conference room G22 of the Transportation Building in St. Paul. At the hearing, Mathew Ferche, Assistant Attorney General represented OCR. Tara Adams, Attorney-at-law represented A-1. Erik Johnson, Assistant Attorney General advised the Panel. A court reporter prepared a transcript (“Tr.”) of the hearing.

**PANEL’S FINDINGS, CONCLUSIONS, AND REASONS**

1. The Project included work such as milling/aggregate, trucking, traffic control, paving, landscaping, fencing, and electrical work.<sup>2</sup>
2. The bid letting date was January 14, 2016.<sup>3</sup> A-1 submitted the lowest bid of \$2,549,791.65. The DBE goal was 17.5% of the total Project cost. A-1 obtained

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<sup>1</sup> Notice of Hearing dated February 24, 2016.

<sup>2</sup> See Advertisement for Bids by Chisago County Department of Public Works.

<sup>3</sup> *Id.*

12.6% DBE commitments and submitted its good faith efforts documentation to OCR on January 19, 2016.<sup>4</sup>

3. On February 19, 2016, OCR determined that A-1 did not make adequate good faith efforts because A-1:
  - a.) Solicited only seventeen DBE firms although there were 150 certified DBE firms listed in the DBE directory to perform the scopes of work on the Project.
  - b.) Did not solicit any DBE firm as a supplier.
  - c.) Did not negotiate with the rejected DBEs.
  - d.) Did not select portions of work from the quoted items to increase the DBE participation.
  - e.) Did not state in its solicitation letter what portions of work were selected for DBE participation or provide adequate information about plans, specifications or requirements of the contract to increase DBE participation.
  - f.) Did not submit information that it made efforts to provide financial assistance, equipment and supplies, materials or related assistance or services.
  - f.) Achieved only 12.6% DBE commitment while two other bidders achieved the contract goal of 17.5%.<sup>5</sup>
  
4. Before the hearing, OCR submitted to the Panel, a list of all DBE firms that are certified to perform the work on the Project and could have been solicited. The list contained not 150 but 194 DBEs.<sup>6</sup> A-1 solicited only seventeen DBE firms. Five of the solicited seventeen DBEs had been decertified in 2014 and 2015.<sup>7</sup> A-1 admitted at the hearing that its list of DBEs was not up to date and stated that as soon as it became aware of the outdated list of DBEs, it took action to update the list and ask for bids from the DBEs in the new list that OCR provided to them.<sup>8</sup> DBE directory is available on line to any member of the public free of charge.<sup>9</sup> A-1 did not have an acceptable explanation as to why it did not review the online DBE directory before sending out the solicitation letter. The Panel cannot consider A-1's efforts made after the submission due date for two reasons: First, MnDOT DBE Special Provisions require the ALB to submit documentation of good faith efforts by the submission due date. Second, to do so would give the ALB an undue advantage over the other bidders who solicited and accepted DBE quotes without the knowledge if their bid would be the low bid or not. The Panel finds that the evidence supports OCR's conclusion that A-1 did not make reasonable DBE solicitation efforts — an important element of good faith efforts.

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<sup>4</sup> OCR Letter, p 1.

<sup>5</sup> OCR Letter, p 2-5.

<sup>6</sup> Tr. 5, 8-10, 15, and 18.

<sup>7</sup> OCR Letter.

<sup>8</sup> Tr. 5, 8-10, and 18.

<sup>9</sup> Available at <http://www.dot.state.mn.us/civilrights/dbedirectory.html> (last visited on 3/14/2016).

5. A-1's solicitation letter simply described the Project as "CHISAGO COUNTY – CSAH 24 RECONSTRUCTION PROJECT." The letter did not state the project number or any other details of the work involved.<sup>10</sup> A-1 left it to the solicited DBEs to go online and find out what the project number was and the scopes of work involved. A-1 did not offer any explanation as to why it did not provide sufficient details to the solicited DBEs. The Panel agrees with OCR that A-1's solicitation did not provide sufficient information to the DBEs.
6. The federal regulations and MnDOT DBE Special Provisions do not require the prime contractor to accept DBE quotes that are excessive and unreasonable.<sup>11</sup> What is excessive and unreasonable can become a difficult determination. Like all other factors considered in good faith efforts evaluation, this requires a case-by-case approach. 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.<sup>12</sup> While low price is important, it is not the only goal in government contracting. Congress and the legislature use government contracting to promote various societal goals, such as ensuring that underrepresented businesses have a chance to participate in projects, requiring sound environmental practices during construction, and requiring the payment of prevailing wages. It is important for any contractor bidding on federal-aid projects to become familiar with the DBE Special Provisions and the associated solicitation, negotiation, and documentation requirements. This "burden" is not unique to A-1 — all contractors carry it.
7. A-1 received two DBE quotes that it rejected. A-1 rejected O'Malley Construction ("O'Malley") quote of \$402,262.46 for concrete work and accepted a non-DBE quote of \$290,110.00 from Sampson Concrete ("Sampson").<sup>13</sup> The Panel finds that Sampson's and O'Malley's quotes are not for identical work. For example, O'Malley quoted for concrete inlet pad that Sampson did not quote. A-1 did not initiate any negotiations or discussions with O'Malley to find out if O'Malley could be more competitive. A-1's explanation was simple: O'Malley's bid was 28% higher than Sampson's and therefore it was rejected. Similarly, A-1 rejected DBE Safety Signs quote and accepted Geyer Signal's quote that was 30% lower. Again, A-1 did not attempt to negotiate or discuss with the DBE Safety Signs about the quote or the possibility of making its bid more competitive. The Safety Signs' quote was \$15,607.50 higher than Geyer Signal's quote. This difference is not unreasonable in the context of a 2.5 million bid.

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<sup>10</sup> A-1's solicitation letter dated December 16, 2015.

<sup>11</sup> 49 C.F.R. Pt. 26, App. A IV D2; MnDOT's DBE Special Provisions, p 6.

<sup>12</sup> 49 C.F.R. Pt. 26, App. A IV D2.

<sup>13</sup> Part G of A-1's good faith efforts documentation and attached quotes.

8. Both the federal law and MnDOT DBE Special Provisions also require that the prime contractor should find out “with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitation.”<sup>14</sup> OCR Letter did not comment on A-1’s failure to follow up with the DBEs that it solicited. The Panel finds that A-1’s failure to follow up with the solicited DBEs weighs heavily against A-1. This is pertinent because A-1’s solicitation lacked sufficient information to identify the Project and it only solicited seventeen out of possible 194 DBEs that it could have solicited. At the hearing, A-1 explained that it did not follow-up with the solicited DBEs because in practice, the subcontractors almost always send in their bids on the day of letting or the day before.<sup>15</sup> The Panel cannot accept this as a valid excuse not to follow-up with the DBEs that A-1 solicited.
9. When the ALB fails to achieve the DBE contract goal, the inquiry is solely on the ALB’s efforts to increase the DBE participation. According to the solicitation log that A-1 provided to OCR and to the Panel, it did not solicit the DBEs, Boys Water Products, Highway Solutions and JD Donovan.<sup>16</sup> A-1 explained at the hearing that A-1 did not solicit these DBE suppliers because in A-1’s experience, supply firms have always submitted bids on projects without being solicited.<sup>17</sup> In other words, A-1 admitted that the DBE commitments from the three suppliers did not result from A-1’s efforts. At the hearing, Mr. Storing also admitted that JD Donovan, an asphalt supplier is in fact supplying the materials to A-1’s subcontractor, North Valley Paving.<sup>18</sup> When evaluating the good faith efforts of the ALB, the Panel only considers the efforts of the ALB and not its subcontractors, unless there is evidence that the prime contractor has in some way encouraged or asked its subcontractors to obtain DBE participation. The DBE participation of the prime’s subcontractors becomes relevant only when counting the percentage of DBE participation. The percentage becomes irrelevant when evaluating the good faith efforts. The inquiry in this case is focused on how much efforts A-1 made, and not what percentage of participation it achieved – either on its own or by its subcontractors. A-1 did not produce any evidence that it urged or encouraged its subcontractors to obtain DBE participation. A-1’s solicitation letter does not mention anything to encourage the subcontractors to solicit DBEs. In fact, the solicitation letter even lacked specificity and important details about the project. Therefore, the Panel does not count A-1’s subcontractors’ efforts to obtain DBEs in A-1s favor. A-1 made no effort whatsoever to solicit these three DBE suppliers.

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<sup>14</sup> 49 C.F.R Pt. 26, App. A IV A.

<sup>15</sup> Tr. 34, 39.

<sup>16</sup> A-1’s solicitation log attached to Part D of its good faith efforts documentation.

<sup>17</sup> Tr. 11.

<sup>18</sup> Tr. 17.

10. OCR found that A-1 failed to provide any evidence of efforts to offer the interested DBEs assistance to obtain bonding, lines of credit, or insurance.<sup>19</sup> The Panel agrees that A-1 did not mention this explicitly in its solicitation letter. This alone however, does not weigh heavily against A-1. The Panel did not hear any evidence that more DBEs would have participated had A-1 offered such assistance. Neither was there evidence to suggest that any of the DBEs were interested in obtaining that assistance.
11. OCR's Letter also implies that it used the DBE commitment obtained by two other bidders.<sup>20</sup> The federal regulations state that when the apparent low bidder fails to meet the contract goal, but others meet it, one may reasonably raise the question of whether, with additional reasonable efforts, the apparent low bidder could have met the goal.<sup>21</sup> In this case, only two out of five other bidders met the goal. The regulations also state, "[i]f the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, [the recipient of federal funds] may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts."<sup>22</sup> The record does not contain information about the average DBE participation of the other bidders. Therefore, the Panel is unable to consider the performance of other bidders in this case.
12. Ultimately, making "adequate good faith efforts" to achieve a DBE goal does not mean that the bidder made some efforts. Instead, the governing federal regulations state, "[t]he bidder must show that it took all necessary and reasonable steps to achieve a DBE goal . . . by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient BE participation, even if they were not fully successful."<sup>23</sup> In this instance, as discussed above, A-1 could have done much more than it did to actively and aggressively solicit the DBEs. The Panel hopes A-1 will use the Panel's analysis to its advantage in bidding for future projects.
13. The decision in this case is based on the facts and evidence presented to the Panel and application of the federal regulatory scheme and MnDOT DBE Special Provisions to the facts of this case.

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<sup>19</sup> OCR Letter, p 4.

<sup>20</sup> OCR Letter, p 4.

<sup>21</sup> 49 C.F.R. Pt. 26, App. A IV.

<sup>22</sup> *Id.*

<sup>23</sup> 49 C.F.R. Pt. 26, App. A, I.

## DECISION

Based all the foregoing findings, conclusions, reasons, and on consideration of the relevant evidence made available, the Panel concludes that A-1 has not demonstrated adequate good faith efforts to meet the DBE goal and that A-1 is non-responsible. The Panel finds that OCR was fair and reasonable in its review of A-1's Good Faith Efforts. The Panel affirms OCR's determination that A-1's bid is non-responsible for failing to make good faith efforts.

March 15, 2016

Date



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A. Nandana Perera  
Associate Legal Counsel

For the MnDOT Administrative  
Reconsideration Panel of  
March 9, 2016