
STATE OF MINNESOTA

DEPARTMENT OF TRANSPORTATION

Administrative Reconsideration Hearing Request by
Highway Technologies, Inc Pursuant to 49 C.F.R. Part 26
State Project Number 8826-86 T.H. 52

TRP/277/DBE/2011

ADMINISTRATIVE RECONSIDERATION PANEL DECISION

INTRODUCTION

This decision is issued pursuant to 49 C.F.R. Part 26 after a reconsideration hearing held on June 28, 2011 on the request of Highway Technologies, Inc. ("HT").¹ The Minnesota Department of Transportation Office of Civil Rights ("MnDOT OCR") set a DBE participation project goal of 3% for the State Project Number 8826-86 TH 52 ("Project").² HT was the apparent low bidder ("ALB") on the Project and submitted documentation to MnDOT OCR indicating that it achieved 0% DBE commitment for the Project and also submitted documentation of its good faith efforts to MnDOT OCR on April 15, 2011.³

By letter dated May 26, 2011, MnDOT OCR informed HT that it has not demonstrated adequate good faith efforts to meet the project's DBE goal. HT requested a reconsideration of MnDOT OCR's decision.

The MnDOT Office of Chief Counsel scheduled a reconsideration hearing by a panel of three MnDOT officials. The three panel members had no role in the MnDOT OCR's decision to reject HT's bid as non-responsible. The panel informed the parties in writing of the location, time duration, and their rights at the hearing.⁴ Steve LaPierre, Assistant Attorney General represented the MnDOT OCR and Mark L. Johnson, Attorney at Law, Seyfarth Shaw LLP represented HT. Both HT and MnDOT OCR had equal opportunities to present their respective positions at the hearing.

At the hearing, HT marked its memorandum as Exhibit 1 and an affidavit from Tim Lewis as Exhibit 2. MnDOT OCR marked four exhibits: May 26th bid-rejection letter to HT ("bid rejection letter") as exhibit A; DBE Special Provisions as exhibit B; Letters and the information dated

¹ Mike Brewinski's request dated June 13, 2011.

² MnDOT OCR's letter dated June 9, 2011.

³ HT submitted its good faith efforts documentation by the submission due date, April 18, 2011.

⁴ Notice dated June 15, 2011.

August 31, 2010 that MnDOT OCR sent out to contractors; and outline of MnDOT OCR's arguments as exhibit D.

The panel made this decision based on the record made available by both parties, arguments made at the reconsideration hearing on June 28, 2011, and the following analysis.

ARGUMENTS

1. MnDOT OCR objected to HT exhibit 1 and 2 because they presented new facts previously undisclosed, and they were not in clarification of what HT submitted to MnDOT OCR by the submission due date – April 15, 2011. HT did not object to MnDOT OCR's exhibits A – D but stated its lack of objection should not be treated as accepting any facts contained therein. (Transcript pages 7 – 17)

2. HT submitted that the Project involved three categories of work: high tension cable guardrail; providing traffic control services; and providing mobilization services. None of the MnDOT specified guardrail suppliers were DBE's, HT identified two DBE firms that it has done business with in the past, Etranstech and Highway Solutions. HT submits that neither of them are able to serve as material suppliers for the guardrail. Therefore, HT argues it is unreasonable and not practical for HT to utilize DBE participation for Project's guardrail work (HT Memo); (transcript pages 17 - 21).

3. HT submitted that it identified Safety Signs LLC ("Safety Signs") and Transignal LLC ("Transignal") as DBEs who could perform traffic control services but HT did not solicit them because they were direct competitors of HT and they had past disputes with HT about hiring HT employees and had threatened legal action against HT on another matter. Therefore, HT argued at the hearing, neither Transignal nor Safety Signs were viable DBE options and that this conclusion served as a barrier for HT to achieve the DBE participation for traffic control services portion of the Project (HT memo). This information was not included in the materials that were submitted by HT on the April 15th due date and thus was not considered by MnDOT OCR.

4. HT pointed out that because the mobilization component of the work was *de minimis* (\$2000), it was neither reasonable nor practical to subcontract and would not have enabled HT to achieve the DBE participation goal for the Project.

5. MnDOT OCR objected to the memorandum (HT exhibit 1) and the affidavit of Tim Lewis (HT exhibit 2) and submitted that the panel should exclude both from the record as they present new facts that were not presented to MnDOT OCR by the submission due date, April 15, 2011.

6. MnDOT OCR argued that HT made decisions not to solicit for traffic control services based on assumptions that its competitors would not submit bids. Further MnDOT OCR argued that

MnDOT specifications (32.2) did not limit HT's ability to solicit guardrail suppliers to only the three named DBEs because it stated, "shall be one of the following or an approved equal."

7. MnDOT OCR argued that HT has, by not soliciting DBEs, failed to meet the other criteria in the federal regulations. (transcript pg. 32)

PANEL'S FINDINGS AND CONCLUSIONS OF LAW

1. HT admitted that it did not solicit DBE participation for this project. The DBE regulations require a bidder to "actively and aggressively" try to obtain DBE participation. HT's solicitation for DBE's to participate on this project was "passive". HT made two key decisions: (1) HT decided not to solicit quotes from two firms that could have helped it achieve DBE participation, and (2) HT decided not to solicit quotes from other DBE's for work that HT considered *de minimis*. HT's efforts at soliciting DBE's did not even rise to the *pro forma* level, and fell far short of being "active and aggressive".
2. HT, in effect, contends that it should be excused from the solicitation requirements due to its ongoing contractual/legal disputes with two firms that could have helped HT achieve DBE participation. It is not up to this panel to determine whether HT's reasons for not soliciting these firms are valid. Had HT solicited quotes from these firms, which it admittedly did not do, the DBE regulations would have required HT to negotiate in good faith with interested DBE's and would have required a substantial analysis before rejecting the quotes of interested DBE's. In this case, since there was no solicitation, there was also no good faith negotiation.
3. HT, in its presentation to this panel, provided a rationale for not soliciting quotes from DBE's who could have helped HT achieve DBE participation. As MnDOT OCR noted in its objection, however, this material was not part of the record on which the OCR based its decision. This panel, therefore, does not need to address the merits of HT's rationale. The DBE regulations, including Appendix A thereto, place the burden of Good Faith Efforts documentation squarely on the bidder. This panel cannot speculate on how the OCR would have treated this explanation had it been presented to them as part of HT's Good Faith Efforts submission. This panel does believe, however, that this explanation should have been part of that submission, and that its omission, along with other factors, supports a finding that HT failed to meet the burden of documentation as specified in the regulations.
4. Since HT did not make even *pro forma* efforts to solicit DBE participation, it is also unable to show that it took other actions, such as those specified in Appendix A, to achieve DBE participation.

Decision

The Panel concludes that HT was neither responsive nor responsible as required by 49 C.F.R. Part 26. MnDOT OCR's determination dated May 26, 2011, rejecting HT's bid as non-responsible as of the Submission Due Date is affirmed.

Aug 4, 2011

Date

James R. Cowie

James R. Cowie, Esq.

For the MnDOT Administrative Reconsideration Panel of June 28, 2011.