

---

STATE OF MINNESOTA

DEPARTMENT OF TRANSPORTATION

**Administrative Reconsideration Hearing Request by  
Rocon, Inc. Pursuant to 49 C.F.R. Part 26  
Hayward and Oakland Woods ADA  
Corrections and Rehab Project (S.P. 2482-72 and 2482-73)**

TRP/291/DBE/2013

---

**ADMINISTRATIVE RECONSIDERATION PANEL DECISION**

This decision is issued pursuant to 49 C.F.R. Part 26 after a reconsideration hearing held on October 15, 2013 on the request of Rocon, Inc. ("Rocon"). Minnesota Department of Transportation Office of Civil Rights ("OCR") set a Disadvantaged Business Enterprise ("DBE") participation goal of 9.3% for the State Projects 2482-72 and 2482-73 also known as Hayward & Oakland Woods ADA Correction and Rehab Project ("Project"). Rocon was the apparent low bidder ("ALB") on the Project. By letter dated August 26, 2013 ("Bid Rejection Letter"), MnDOT's Chief Counsel informed Rocon that it had neither obtained the 9.3% DBE goal nor demonstrated adequate good faith efforts to do so.<sup>1</sup> Rocon requested a reconsideration of the OCR's decision.<sup>2</sup>

A panel of three ("Panel") was assigned to conduct a reconsideration hearing. The three panel members and the staff attorney in the Office of Chief Counsel assisting the Panel in this case did not take part in the original determination that Rocon failed to meet the goal or make adequate good faith efforts to do so. The three panel members are Thomas O'Keefe, P.E. (MnDOT Metro District Director of Program Delivery), Ericca Erhard (Staff Attorney, Office of Freight and Commercial Vehicle Operations), and James Cownie, Esq. (Director of Contract Management, Office of Chief Counsel). The Panel informed the parties in writing of the location, time duration, and their rights at the hearing.<sup>3</sup> Natasha Karn, Assistant Attorney General represented the OCR. Robert Seykora, President of Rocon appeared at the hearing and was not represented by counsel. Richard Varco, Assistant Attorney General and Nandana Perera, Staff Attorney, Office of Chief Counsel, advised the Panel. Both Rocon and OCR had equal opportunities to present their respective positions at the hearing on October 15, 2013. A transcript of the proceedings was prepared by a court reporter.

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

1. Federal law requires the recipients of federal-aid highway funds to award contracts to only those bidders who establish that they either met the DBE contract goal for the project in

---

<sup>1</sup> Letter dated August 26, 2013 addressed to Mr. Robert Seykora from Elizabeth Parker, Chief Counsel.

<sup>2</sup> Letter dated September 5, 2013 requesting reconsideration of Chief Counsel's determination from Robert Seykora.

<sup>3</sup> Notices of Hearing dated September 24 and October 14, 2013.

question or made adequate good faith efforts to meet the DBE contract goal.<sup>4</sup> The federal regulations establish two ways of determining whether an ALB's bid is responsive and/or responsible. First, the ALB can meet the goal, documenting commitments for participation by DBE firms. Second, even if it does not meet the goal, the ALB can document that it made adequate good faith efforts to meet the goal.<sup>5</sup>

2. The bid letting date was June 20, 2013.<sup>6</sup> Rocon submitted its good faith documentation to the OCR on July 12, 2013.<sup>7</sup> According to the DBE Special Provisions, the submission due date would have been June 27, 2013. The record does not show that the submission due date was extended. Because the OCR did not assert Rocon's submission was untimely, and parties do not dispute it, the Panel does not address the timeliness of Rocon's submission of good faith efforts documentation.

3. Rocon sent solicitation letters to 47 DBEs by fax, 11 DBEs by e-mail, and solicited one DBE by phone.<sup>8</sup> Sun Up Construction, Inc. – the only DBE solicited by phone – submitted a quote. Rocon accepted Sun Up Construction's quote of \$27,410.50 for fencing.<sup>9</sup> Two DBEs, namely Helen M. Nagel, Inc. and O'Malley Construction, Inc., informed Rocon in writing that they were not bidding. Rocon did not follow up with any of the remaining 56 DBEs.

4. Rocon admitted to its practice of not contacting subcontractors unless they respond to Rocon's solicitation letters. Mr. Seykora stated at the hearing that since he did not get responses from the other 56 DBEs he assumed that they were not interested in bidding.<sup>10</sup>

5. Appendix A to 49 CFR Part 26 contains a list of the types of actions a recipient should consider in determining whether a bidder made good faith efforts. Solicitation is one of them. The good faith efforts to recruit the DBEs should start with solicitation. It is the gateway to all the other efforts required by the federal regulations. Describing solicitation efforts, the federal regulations state: "[t]he bidder must determine with certainty if the DBEs are interested by taking appropriate steps to *follow up initial solicitations*."<sup>11</sup> (*Emphasis added.*) Mere *pro forma* efforts do not constitute good faith efforts.<sup>12</sup> Rocon's efforts in this case were insufficient. The Panel concludes that Rocon only made mere *pro forma* efforts by faxing and e-mailing solicitation letters to 58 out of 59 DBEs that it wanted to solicit with no follow up.<sup>13</sup> The lack of

---

<sup>4</sup> 49 C.F.R. Part 26 (2012).

<sup>5</sup> 49 C.F.R. 26, Appendix A I (2012).

<sup>6</sup> Exhibit 1 at p. 3; Transcript ("Tr"). 17.

<sup>7</sup> Exhibit 2 – Rocon's submission of good faith efforts documentation dated July 12, 2013.

<sup>8</sup> Exhibit 2, Part D

<sup>9</sup> Exhibit 2, Part E.

<sup>10</sup> "Tr." 7 - Mr. Seykora: "So as far as someone saying that, you know, I didn't contact them, they are right. I assumed it was no bid; no word, no bid."

<sup>11</sup> 49 C.F.R. Part 26, Appendix A IV B (2012).

<sup>12</sup> 49 C.F.R. Part 26, Appendix A II (2012).

<sup>13</sup> The record shows that Rocon initially solicited Sun Up by phone. It is not clear whether it was Rocon's initial contact or its follow up efforts that resulted in a successful quote. Either way, it does not affect the outcome of this case.

active and aggressive solicitation efforts necessarily deprives the prime contractor the opportunity to make further good faith efforts.

6. Mr. Seykora stated at the hearing that Rocon's inability to recruit DBEs was partly due to unavailability of DBEs within a 50-mile radius of the project site. He stated that there are only 6 DBE firms within a 50-mile radius of the site.<sup>14</sup> The Panel is not convinced that unavailability of DBEs within a 50-mile radius had any material impact on Rocon's good faith efforts or its ability to achieve the DBE goal. In fact, on Rocon's own submission, it has received and accepted 6 non-DBE subcontractors who are well outside of a 50-mile radius. Among them, one non-DBE firm in North Dakota is located about 300 miles and another in Waite Park, Minnesota, is located about 160 miles from the project site. Out of 7 non-DBE firms that Rocon received quotes from, only one is located within a 50-mile radius.

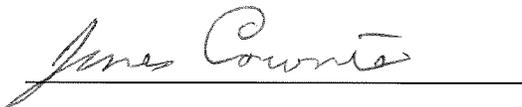
7. The Panel agrees with MnDOT Chief Counsel's determination dated August 26, 2013 that Rocon failed to demonstrate that it met the DBE goal or made adequate good faith efforts to do so. Rocon's efforts to recruit DBEs lacked in scope, intensity and appropriateness to the objective. There is no basis to conclude that the OCR's review of Rocon's good faith efforts was unfair or unreasonable.

### Decision

Based on the record and presentations of the parties, the Panel concludes that Rocon did not demonstrate that it made the efforts that a reasonable bidder would have made if it were actively and aggressively trying to obtain DBE participation. Therefore, the Panel concludes that Rocon has not demonstrated adequate good faith efforts to recruit DBE commitments and that Rocon was not a responsible bidder. Accordingly, MnDOT must reject Rocon's bid for failure to meet the adequate good faith effort requirement in 49 C.F.R. Part 26.

Oct 17, 2013

Date



James Cowrie  
Director, Contract Management  
Office of Chief Counsel

For the MnDOT Administrative Reconsideration  
Panel of October 15, 2013.

---

<sup>14</sup> Tr. 6.