



Minnesota Department of Transportation

395 John Ireland Boulevard
Saint Paul, MN 55155

Via E-mail and Certified Mail

September 24, 2013

LeWayne Pigman
Chief Executive Officer
Tri-State General Contracting, Inc.
PO Box 367
Windom, MN 56101

Natasha Karn
Assistant Attorney General
Office of the Attorney General
445 Minnesota Street
St. Paul, MN 55101

Administrative Reconsideration Hearing on September 18, 2013 – Request by Tri-State General Contracting, Inc. (S.P. 5305-69)

Dear Ms. Karn and Mr. Pigman:

I have enclosed the Administrative Reconsideration Panel decision on the above matter. Please feel free to call me with questions.

Yours truly,

A handwritten signature in black ink, appearing to read 'Nandana Perera', written over a horizontal line.

Nandana Perera
Staff Attorney, Office of Chief Counsel
M.S. 130
Phone: 651-366-3144

Enclosures: Administrative Reconsideration Hearing panel decision

cc: Richard Varco, Assistant Attorney General

An Equal Opportunity Employer



STATE OF MINNESOTA

DEPARTMENT OF TRANSPORTATION

**Administrative Reconsideration Hearing Request by
Tri-State General Contracting, Inc. (Tri-State)
Pursuant to 49 C.F.R. Part 26
Worthington TIC ADA Correction and
Rehab Project (S.P. 5305-69)**

TRP/290/DBE/2013

ADMINISTRATIVE RECONSIDERATION PANEL DECISION

INTRODUCTION

This decision is issued pursuant to 49 C.F.R. Part 26 after a reconsideration hearing held on September 18, 2013, on the request of Tri-State General Contracting ("Tri-State").¹ Minnesota Department of Transportation Office of Civil Rights ("OCR") set a Disadvantaged Business Enterprise ("DBE") participation goal of 6.6% for the State Project Number 5305-69 also known as the Worthington TIC ADA Correction and Rehab Project ("Project"). Tri-State was the apparent low bidder ("ALB") on the Project. By letter dated, August 26, 2013 ("Bid Rejection Letter"), MnDOT's Chief Counsel informed Tri-State that it had neither obtained the 6.6% DBE goal nor demonstrated adequate good faith efforts to do so. Tri-State requested a reconsideration of the OCR's decision.

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 Tri-State failed to meet the goal or make adequate good faith efforts to do so. The three panel members were Greg Ous, P.E. (MnDOT District Engineer, District 7, Mankato), Erica Erhard (Staff Attorney, Office of Freight and Commercial Vehicle Operations), and James Cownie, Esq. (Director of Contract Management Section, Office of Chief Counsel). The Panel informed the parties in writing of the location, time duration, and their rights at the hearing.² Natasha Karn, Assistant Attorney General represented the OCR. LeWayne Pigman, CEO of Tri-State appeared at the hearing and was not represented by counsel. Both Tri-State and OCR had equal opportunities to present their respective positions at the hearing on September 18, 2013. A transcript of the proceedings was prepared by a court reporter.

¹ Letter requesting reconsideration of Chief Counsel's determination from LeWayne Pigman dated August 28, 2013.

² Notice of Hearing dated September 11, 2013.

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 question or made adequate good faith efforts to meet the DBE contract goal.³ 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.⁴

2. The MnDOT Disadvantaged Business Enterprise Special Provisions ("Special Provisions") that were part of the bid package for the Project in relevant part state:

The Submission Due Date is the fifth business day after the bid letting date, unless the Mn/DOT Director of the Office of Civil Rights grants a written extension for good cause known. The five day period starts the business day following the bid letting date. Information sent by fax or personal delivery must be received by the Mn/DOT Office of Civil Rights no later than 4:30PM central time on the Submission Due Date.

Information sent by U.S. mail must be postmarked no later than the Submission Due Date. FAILURE TO SUBMIT ALL REQUIRED INFORMATION WITHIN THE ALLOWED FIVE BUSINESS DAY PERIOD WILL RESULT IN REJECTION OF YOUR BID ON THE BASIS THAT YOU ARE NOT A RESPONSIBLE BIDDER. PARTIAL SUBMISSIONS WILL NOT BE ALLOWED.⁵

3. The bid letting date was June 25, 2013.⁶ According to the terms of the Special Provisions, the Submission Due Date was July 2, 2013 (4:30 p.m.). Tri-State submitted bid documentation to the OCR, without Exhibit A (DBE Description of Work and Field Monitoring Report), on July 10, 2013 – five business days after the Submission Due Date.⁷ That submission was not timely and did not meet the requirements of the Special Provisions. In addition, according to OCR exhibit 1 submitted at the hearing and other documents in the record, communications took place between OCR officials and Tri-State from July 15 to August 12, 2013.⁸ The record also contains a letter dated July 2, 2013, from Robert Williams, MnDOT Safety Rest Area Program Manager, directing Tri-State to return the "completed forms" within three

³ 49 C.F.R. Part 26 (2012).

⁴ 49 C.F.R. 26, Appendix A I (2012).

⁵ Disadvantaged Business Enterprise (DBE) Special Provisions issued in May 2011.

⁶ OCR exhibit 1 at p. 3; Tr. 8.

⁷ OCR exhibit 1 p. 3.

⁸ *Id.*

days (the "Williams Letter").⁹ Mr. Pigman stated at the hearing that he received this letter by e-mail on or about July 5, 2013.¹⁰

4. The parties did not offer any evidence that the Submission Due Date was extended in accordance with the Special Provisions. According to the Special Provisions, the Submission Due Date was July 2, 2013. Based on the record, the Panel concludes that as of the Submission Due Date, Tri-State failed to provide any evidence of its good faith efforts. Tri-State submitted, and the OCR evaluated, the good faith efforts documentation that the OCR received on July 10, 2013.¹¹ At the hearing, the OCR stated that it considered Tri-State's submission on July 10, 2013, timely.¹² The Panel declines to infer that the Submission Due Date was extended beyond July 2, 2013, given the absence of evidence in the record, arguments from the parties to do so, and the plain and unambiguous language in the Special Provisions. Because this hearing was held to reconsider the OCR's evaluation of Tri-State's good faith efforts, the Panel proceeds to do so.

5. On July 10, 2013, Tri-State did submit its documentation without Exhibit A, in violation of the Special Provisions. Mr. Pigman admitted at the hearing that he failed to distinguish between the DBEs and Targeted Business Groups and he checked the Department of Administration list for businesses.¹³ Even assuming the Submission Due Date was extended to July 10, 2013, by the Williams Letter, Tri-State's July 10 submission fails: it lacked Exhibit A that was required by the Special Provisions; Tri-State made no effort to recruit DBEs. Instead, the July 10 submission contained documentation relating to three bids from Feder Mechanical, Steffl Drilling and Pump, Inc., and American Artstone Company. All three were Targeted Businesses and none was a DBE firm. The Panel concludes that the MnDOT's Chief Counsel's evaluation of Tri-State's July 10 submission was correct. Tri-State failed to demonstrate adequate good faith efforts in its July 10, 2013 submission. Again, assuming that the Submission Due Date was extended to July 10, 2013, the Panel notes that the OCR's communications with Tri-State after July 10 "to discuss why TRI-STATE has no DBE participation,"¹⁴ appear to be contrary to the Special Provisions. Also, the Panel refuses to evaluate Tri-State's documentation of its efforts to recruit the DBEs, submitted along with its request for reconsideration on August 30, 2013. This hearing was a reconsideration of the OCR's evaluation of Tri-State's good faith efforts submitted on July 10, 2013. Tri-State has not shown valid reasons for the Panel to consider evidence that was not made available to the OCR.

6. 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. Tri-State has simply not presented any evidence that it undertook any of those types of activities during the allowable

⁹ The William's Letter addressed to Tri-State.

¹⁰ Tr. 22.

¹¹ OCR exhibit 1 p. 3; Bid Rejection Letter

¹² Tr. 27.

¹³ Tr. 26-27.

¹⁴ OCR submission and OCR exhibit 1 p. 3.

time period. As noted in paragraph five above, Tri-State's solicitation was utterly deficient. In fact, Mr. Pigman's testimony reflects Tri-State's efforts to recruit the DBEs: "Now my standard procedure for subcontractors is that they call me. I don't have to go searching for someone that's interested in the job. If they're interested, my name is on the list, they call me."¹⁵ While he went on to explain how he "tried to track these people down" by calling DBEs on the Minnesota Unified Certification Program list, he did not begin most of these efforts until the end of July.

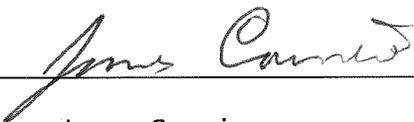
7. The Panel agrees with MnDOT's Chief Counsel's determination dated August 26, 2013 that Tri-State's documentation and information failed to demonstrate that it met the DBE goal or made adequate good faith efforts to do so. Given the absence of any documented activities of the type listed in Appendix A, there is no basis to conclude that the OCR's review of Tri-State's good faith efforts was unfair or unreasonable.

Decision

Based on the record and presentations of the parties, the Panel concludes that Tri-State 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 Tri-State has not demonstrated adequate good faith efforts to recruit DBE commitments and that Tri-State was not a responsible bidder. Accordingly, MnDOT must reject Tri-State's bid for failure to meet the adequate good faith effort requirement in 49 C.F.R. Part 26.

Sept. 24, 2013

Date



James Cownie
Director, Contract Management
Office of Chief Counsel

For the MnDOT Administrative Reconsideration Panel of
September 18, 2013.

¹⁵ Tr. 18.