
STATE OF MINNESOTA

DEPARTMENT OF TRANSPORTATION

Administrative Reconsideration Hearing Request by
Valley Paving, Inc. State Project Number 2781-415
Pursuant to 49 C.F.R. Part 26

TRP/273/DBE/2011

ADMINISTRATIVE RECONSIDERATION PANEL DECISION

PROCESS / PROCEDURAL HISTORY

1. This decision is issued pursuant to 49 C.F.R. Part 26 after a reconsideration hearing held on April 22, 2011 on the request of Valley Paving, Inc. ("VPI").¹
2. Minnesota Department of Transportation Office of Civil Rights ("Mn/DOT OCR") set a DBE participation project goal of 25% for the State Project Number 2781-415 ("Project").²
3. VPI was the apparent low bidder ("ALB") on the Project and submitted documentation to Mn/DOT OCR to demonstrate that it achieved 7.34% DBE commitment for the Project and also summarized its good faith efforts toward achieving the DBE project goal.³ VPI submitted these documents on March 4, 2011.⁴
4. By letter dated April 4, 2011, Mn/DOT OCR informed VPI of its determination that VPI has not demonstrated adequate good faith efforts to meet the project's DBE goal. Federal regulations describe the standards that a recipient of federal funds may use in determining an ALB's good faith efforts.⁵ Mn/DOT OCR used the federal standards for its analysis of the adequacy of VPI's good faith efforts.⁶

¹ Letter dated April 5, 2011 by Edward Matthews.

² Mn/DOT OCR's letter dated April 4, 2011 at 1.

³ Parties dispute this figure. According to the April 4, 2011 bid rejection letter, it is 7.28%. VPI submitted a letter on March 4, 2011 (OCR exhibit 7) stating its DBE commitment as 7.34%. At the hearing, VPI submitted that the correct figure is 6.97%.

⁴ Mn/DOT OCR's letter dated April 4, 2011; VPI's letter dated March 4, 2011.

⁵ 49 C.F.R. Part 26, Appendix A.

⁶ Mn/DOT OCR's letter dated April 4, 2011 at 4-10.

5. VPI requested a reconsideration of Mn/DOT OCR's decision. Mn/DOT Office of Chief Counsel scheduled a reconsideration hearing by a panel of three Mn/DOT officials. The three panel members had no role in the Mn/DOT OCR's decision to reject VPI's bid as non-responsible. The panel informed the parties in writing of the location, time duration, and their rights at the hearing.⁷ Both VPI and Mn/DOT OCR had equal opportunities to present their respective positions at a hearing.
6. The panel made this decision based on the record made available by both parties, arguments made at the reconsideration hearing on April 22, 2011, and the following analysis.

RECONSIDERATION HEARING

1. At the hearing, VPI project manager, Charlie Borene presented VPI's position as follows:
 - A. Mr. Borene introduced a written response dated April 22, 2011 ("VPI Written Response") that addressed the matters raised in the Mn/DOT OCR's bid rejection letter.⁸
 - B. Explaining the rejection of the DBE quotes cited in the Mn/DOT OCR's April 4, 2011 bid rejection letter, VPI stated that some of the DBE quotes that it rejected will be performed by the following DBEs: J & L Steel; E & J Rebar; Minnesota Business Enterprises and M & J Trucking; D' Fence; and Highway Solutions.
 - C. VPI rejected a quote from Erosion Control, Inc. a DBE. Lawn & Driveway and J-MOS, both DBEs, will provide landscape materials for this work.⁹
 - D. After consulting with the Mn/DOT OCR that B2C Construction was not approved for DBE credit, VPI rejected B2C's quote.¹⁰
 - E. The quotes from the following DBEs were rejected because they were much higher than the other quoted bids or the lowest bid: Frontier Construction;

⁷ Notice dated April 6, 2011.

⁸ Tr. 7.

⁹ VPI Written Response at 1-3.

¹⁰ Tr. 75.

Ace Hydro Seeding; BFV; Lucas Company; Kusske; Standard Contracting; Honda Electric; and Reiner Contracting.¹¹

- F. VPI's solicitation consisted of emails to 157 DBEs, faxes to 10 DBEs and advertisements placed in the Construction Bulletins on February 14 and February 21, 2011.¹²
 - G. Mn/DOT OCR has failed to identify the 2 DBEs who did not receive the VPI solicitations and therefore, VPI cannot comment on that matter.¹³
 - H. VPI's final figure of its DBE participation is 6.97%. VPI's good faith efforts documentation indicated a DBE participation of 7.34. This was because it included two DBE quotes that could not be counted: Central MN Sawing; and Rivard Contracting. These two quotes were valued at 0.4% of the total contract.¹⁴
 - I. VPI listed its de-bundling efforts that resulted in a total of \$833,643.63 of DBE participation.¹⁵
2. Mn/DOT OCR, in addition to reiterating the reasoning in the April 4, 2011 bid rejection letter, presented the following to support its position:
- A. Mn/DOT OCR did not object to the introduction of the new documents that responded to Mn/DOT OCR's bid rejection letter or synthesizing the information already in the record but objected to anything beyond that.¹⁶
 - B. Special Provisions required the ALB to list all bidders in its good faith effort documentation but VPI only listed the DBEs.¹⁷
 - C. VPI's explanation for rejection of DBE quotes that were higher than the non-DBE quotes is unacceptable. VPI's calculations of excess percentage should

¹¹ VPI Written Response at 2-3.

¹² OCR exhibits 8 and 2; VPI Written Response at 5.

¹³ Mn/DOT OCR April 4, 2011 bid rejection letter stated "of the 18 [DBEs that provided quotes, two stated they were rejected" but did not identify the two DBEs. See VPI Written Response at p. 5.

¹⁴ VPI Written Response at 6; When VPI submitted its good faith efforts documentation to Mn/DOT OCR, the DBE participation was stated as 7.34%. Mn/DOT OCR's April 4, 2011 bid rejection letter stated it as 7.28%. The difference is a mere 0.37% and did not affect the panel's determination in this case.

¹⁵ VPI Written Response at 7-8.

¹⁶ Tr. 66-67.

¹⁷ Tr. 36.

be done in the context of the entire contract and not by the individual bid amount.¹⁸

- D. The paper work and explanations that VPI provided at the hearing clears up some of the issues but VPI failed to provide the same degree of explanation or documentation on the submission due date - March 4, 2011.¹⁹
- E. Federal regulations and Mn/DOT Special Provisions require the ALB not only to make good faith efforts but also to thoroughly document those efforts. VPI's documentation of its good faith efforts was inaccurate and incomplete. This supports a lack of good faith efforts.²⁰
- F. The dispute that 2 DBEs did not receive the VPI's solicitation illustrates the importance of the follow up. Had VPI followed up with the DBEs that it initially solicited, it could have found out who they were.²¹
- G. VPI's efforts fell short of adequate good faith efforts because it failed to offer assistance in the relevant areas. VPI also failed to break out the work ahead of time and adequately inform the interested DBEs about them.²²

PANEL'S FINDINGS AND CONCLUSIONS OF LAW

1. Federal law requires the recipients of federal-aid highway funds ("Recipients") to award contracts to only those bidders who could 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.²³
2. Federal regulations governing the DBE program allow the Recipients to use their discretion to evaluate good faith efforts as a matter of responsibility.²⁴ A "responsible" bidder is one who could make available to the contracting agency the DBE information subsequent to the opening of the bid and prior to the time the contract is awarded and demonstrate that it has made adequate good faith efforts.²⁵ The Mn/DOT OCR has evaluated VPI's DBE good faith efforts as a matter of responsibility in this case. This approach is consistent with the federal

¹⁸ Tr. 41-44.

¹⁹ Tr. 66-67.

²⁰ Tr. 33-34.

²¹ Tr. 35.

²² Tr. 46-47.

²³ 49 C.F.R. Part 26 (2008).

²⁴ 49 C.F.R. §26.53, b 3 (2008).

²⁵ *City of Rochester v. U.S. Environmental Protection Agency*, 496 F. Supp. 751 (D. Minn.1980).

law that prohibits a recipient from denying an award of the contract when the bidder has failed to meet the DBE contract goal but demonstrated adequate good faith efforts.²⁶

3. Appendix A to 49 C.F.R. Part 26 provides federal guidelines for evaluation of good faith efforts. These guidelines are not intended as a mandatory checklist. Nor are they exclusive or exhaustive.²⁷ The Mn/DOT OCR used the criteria listed in Appendix A to evaluate VPI's good faith efforts and reached the conclusions on each one of them after the investigator examined the facts and circumstances of this case.²⁸
4. According to the Mn/DOT DBE Special Provisions, "[t]he reconsideration process is a review of only the good faith efforts made by the ALB as of the Submission Due Date. Good faith efforts made subsequent to that date will not be considered." Mn/DOT OCR did not object to the new documents so long as they responded or explained matters raised in the April 4, 2011 bid rejection letter.²⁹ The panel excludes from the record VPI exhibit 7 dated April 13, 2011 because it provides evidence of an effort made after the submission due date – March 4, 2011. The panel also excludes from the record VPI exhibits 19 – 24 because they relate to other contracts and are irrelevant to this case.
5. At the hearing, VPI argued that the past Mn/DOT OCR practice gave rise to detrimental reliance. VPI supports this argument by referring to Mn/DOT OCR's good faith effort evaluations in June 2010 and before that.³⁰ Mn/DOT OCR issued the new Special Provisions in August 2010 emphasizing the need to thoroughly document the good faith efforts. Mn/DOT OCR issued communications and training regarding the requirements of the new Special Provisions. VPI knew that the standard or degree of detail required for demonstrating the good faith efforts changed in August 2010. Therefore VPI cannot claim it relied on Mn/DOT OCR's prior practices to its detriment.
6. In the absence of supporting legal authority, the panel is unable to accept Mn/DOT OCR's suggestion that the excess bid percentages for DBEs must be viewed strictly in light of the prime contractor's overall project bid, and not just in light of other quotes for the particular item of subcontracted work. The

²⁶ 49 C.F.R. §26.53.

²⁷ 49 C.F.R. § 26 Appendix A.

²⁸ Tr. at 86.

²⁹ Tr. 66-67.

³⁰ Tr. 68.

federal regulations undoubtedly require the ALB to accept at least some DBE quotes that are higher than non-DBE quotes in order to carry out the remedial intent of the program. The panel believes, however, that at least some consideration must be afforded to the ALB's assessment of the competitiveness of its bid when it accepts or rejects DBE quotes that exceed non-DBE quotes. If the ALB routinely rejected all DBE quotes that were higher than non-DBE quotes, that would be an indicator of lack of good faith efforts. The record before the panel, however, does not support a finding that VPI routinely rejected all higher DBE quotes. While the panel believes that VPI could have accepted more DBE quotes than it did without harming the competitiveness of its bid, the panel believes that OCR should not look at these DBE vs. non-DBE quotes in isolation, but should also take overall competitiveness of the bid into account. Accordingly, the panel concludes that VPI's rejection of the excessive and unreasonably high DBE quotes in this case was permissible under the federal regulations.

7. Because VPI's Written Response and exhibits 1-6, 8-18 and 25-30 introduced evidence of its good faith efforts before (not subsequent to) the submission due date, and they explain matters raised in the Mn/DOT OCR's bid rejection letter, they are incorporated in to the administrative record.
8. VPI sent 157 emails, 10 faxes, placed 2 advertisements in the Construction Bulletin available to the construction industry. The solicitation letter included contact information for DBEs who needed assistance in preparing quotes and provided the web addresses for accessing the bidding documents and the Mn/DOT e-plan room.³¹
9. VPI obtained one half of its total 6.97% DBE participation through de-bundling efforts (\$ 833,643.63 out of \$ 1,664,170.70) with 6 DBEs.³² De-bundling efforts necessarily involve some degree of negotiation with the DBEs.³³
10. VPI's DBE commitment falls 1.4% short of the average DBE participation obtained by the other bidders on the project but is within the range of 6% - 10% that the other bidders obtained.³⁴
11. VPI failed to proactively follow up with the DBEs that it solicited. VPI followed up with one DBE (Erosion Control).³⁵ Other than this isolated attempt, VPI made

³¹ OCR Ex. 8; Tr. 22

³² VPI Written Response at 7-8.

³³ Tr. 20-23.

³⁴ See Tr. 28-29; Mn/DOT OCR April 4, 2011 bid rejection letter at p. 11.

undocumented phone calls but did not produce any evidence of them.³⁶ VPI also failed to offer assistance to interested DBEs to obtain bonding, lines of credit, insurance, necessary equipment, and supplies. VPI's explanation that none of the DBEs requested for assistance is unsatisfactory. The federal regulations (and Mn/DOT Special Provisions) impose an affirmative obligation on the ALB to offer this assistance to the "interested DBEs."³⁷ In the solicitation letter, VPI only offered to assist the DBEs to prepare quotes.³⁸

12. The good faith efforts must be determined based on the totality of the ALB's conduct, and viewing the appendix A factors as a whole, and not in isolation or as a "checklist". The panel, after much deliberation and taking the totality of the circumstances into consideration, concludes that although VPI failed to take certain measures set forth in the federal regulations and Mn/DOT Special Provisions, its efforts demonstrate adequate good faith efforts. The panel is concerned about the marginal quality of the documentation submitted by VPI on March 4th. If VPI had initially submitted some of the additional documentation provided at the reconsideration hearing, we believe the need for this administrative reconsideration may have been avoided.
13. The panel urges Mn/DOT OCR to improve its communications with the ALB prior to the submission deadline. This could include, for example, talking to the ALB immediately after the bid opening to establish expectations for the type of documentation to be submitted, and to gain some insight as to how accepting higher DBE quotes would affect the competitiveness of its bid. Good faith efforts and the documentation of those efforts are two different things. An ALB could actually make good faith efforts but have inadequate documentation to substantiate the efforts. Mn/DOT can avoid this unfortunate occurrence by having a prior meeting with the ALB. Mn/DOT OCR might also want to compile a sample of what it thinks an acceptable record of good faith efforts should look like.
14. Having concluded that VPI demonstrated adequate good faith efforts, the panel cautions VPI against the statement, "We had to be low bid to get in this room and get before this body."³⁹ If all bidders adhere to this policy it could result in a

³⁵ VPI Ex. 8 & 9; Tr. 16.

³⁶ Tr. 17.

³⁷ 49 C.F.R Part 26 Appendix A IV F – G; Mn/DOT Special Provisions p. 7.

³⁸ OCR Ex. 8; Tr. 28.

³⁹ Tr. 80.

duplicative process and inefficient implementation of the DBE program. An approach like the one expressed above will frustrate the Congressional intent expressed in 49 C.F.R. Part 26. Bidders who are subject to the DBE requirements must take every effort to aggressively solicit the DBEs. They must also follow-up, de-bundle the work where necessary, and negotiate in good faith with the interested DBEs and follow the federal guidelines in offering assistance to the interested DBEs. A bidder's duties do not end there. They must also make reasonable efforts to document all their efforts to recruit the DBEs and present them to Mn/DOT OCR.

15. This case is a classic example of an ALB almost losing a contract due to poor documentation of its good faith efforts and not being careful of its obligations under the DBE program. The panel realizes that providing the documentation similar to what VPI presented at the administrative reconsideration hearing requires considerable effort. But that effort is timely if made prior to the DBE reconsideration hearing. While the panel accepted a significant amount of material that it deemed relevant as explanatory in response to Mn/DOT OCR's April 4, 2011 bid rejection letter, the panel was somewhat uncomfortable accepting this documentation. An administrative reconsideration is not intended to be a forum for a bidder to present a deluge of paperwork that should have been submitted in the 5-day period as provided in the Special Provisions. This practice is strongly discouraged.
16. Based on the facts of this case, the panel believes that VPI could have offered assistance to the interested DBEs to obtain bonding, lines of credit, insurance, necessary equipment, and supplies. Panel interprets "interested DBEs" to mean those DBEs that have either submitted a quote or communicated either with the ALB or Mn/DOT OCR and expressed an interest in bidding for the Project. It follows that simply inserting some language in the initial solicitation letter offering financial or other assistance would not be enough. This duty requires a more targeted approach, namely making this offer to the interested DBEs. The federal regulations do not require the DBEs to ask for assistance. Instead, they require the bidder to offer assistance to the interested DBEs.
17. VPI could have also followed-up with the DBEs that it initially solicited. One follow-up with Erosion Control coupled with VPI's de-bundling efforts that resulted in more DBE participation tipped the scales in VPI's favor. This however, is not a risk that bidders should take if they are serious about their obligations under the federal regulations.

18. The panel hopes the above recommendations will serve as guidelines to contractors who still have doubts about the obligations imposed by the federal regulations governing the DBE program.

Decision

The Panel concludes that VPI has demonstrated adequate good faith efforts as required by 49 C.F.R. Part 26 (2008). Mn/DOT OCR's determination dated April 4, 2011 rejecting VPI's bid as non-responsible is reversed. Accordingly, Mn/DOT must award the Project contract to VPI.

April 29, 2011

Date


James Cownie

For the Mn/DOT Administrative Reconsideration
Panel of April 22, 2011.