
STATE OF MINNESOTA

DEPARTMENT OF TRANSPORTATION

Administrative Reconsideration Hearing Request by
Duininck, Inc.
Pursuant to 49 C.F.R. Part 26

TRP/274/DBE/2011

ADMINISTRATIVE RECONSIDERATION PANEL DECISION

INTRODUCTION

1. This decision is issued pursuant to 49 C.F.R. Part 26 after a reconsideration hearing held on June 13, 2011 at the request of Duininck, Inc. (Duininck).¹
2. Duininck, was the apparent low bidder (ALB) for State Project Number 4712-17. On federal-aid projects, the Mn/DOT Office of Civil Rights (OCR) is required to set a DBE goal and then determine whether the recipient's apparent low bidder either met the goal, or made an adequate "good faith effort" to meet the goal. The DBE goal for the project was set at 4%. Duininck's bid contained a 1.5% DBE commitment. As required under 49 C.F.R 26 and the DBE Special Provisions provided by Mn/DOT as part of its bid package, Duininck submitted documentation of its good faith efforts to the Mn/DOT OCR in a timely manner.² Mn/DOT OCR reviewed the good faith efforts documentation using the standards established under the federal regulations.
3. Mn/DOT OCR, by letter dated May 25, 2011, informed Duininck of its determination that Duininck had not demonstrated adequate Good Faith Efforts to meet the project's 4% goal and was therefore considered a non-responsible bidder.³
4. Duininck requested reconsideration of the OCR's decision via letter dated May 27, 2011. The reconsideration was conducted by a panel consisting of three Mn/DOT officials with no role in the OCR's review of Duininck's GFE or OCR's determination that Duininck's bid is non-responsible. Each party was given the opportunity to present their positions in writing and via oral argument. Mn/DOT OCR was represented by Steve LaPierre, Assistant Attorney General. Duininck was represented by Ted Roberts of Fabyanske, Westra, Hart & Thomson, PA.

FINDINGS

1. The Panel based its findings and conclusions on OCR's and Duininck's respective submissions prior to the hearing and each party's oral presentations and arguments during the hearing. Panel determined that all the facts presented are undisputed except as noted in the

¹ Letter from Duininck dated May 27, 2011 to Deputy Commissioner Arseneau.

² Exhibit A (3). Good Faith Efforts Affidavit, Signed by Chris Duininck, dated March 25, 2011

³ Exhibit B. Letter from OCR, dated May 25, 2011

findings below.

2. Duininck requested the Panel accept, as part of the Good Faith Efforts submission, a fax transmission log showing a record of faxes to potential DBE bidders.⁴ Duininck argues that the Panel allowed into evidence, similar supporting documentation in prior decisions and should do so in this case.⁵ The Panel does not dispute that in the past the Panel allowed evidence “so long as they responded to or explained matters” raised in the original bid rejection letter.⁶ However, Panel has determined that because the OCR did not receive the fax log by the submission deadline of April 1, 2011 and because the fax log does nothing to “respond to or explain” the information regarding the number of DBE solicitations already received by the OCR, the Panel will not consider the fax transmission log as part of the evidence.

CONCLUSIONS

1. The Mn/DOT DBE Special Provisions are required on all federally funded projects and require the ALB to either (1) meet the DBE goal or (2) show that it has made adequate good faith efforts to meet the DBE goal.⁷ The DBE Special Provisions, which are part of the bidding/contract documents, require all documentation of good faith efforts to be submitted no later than 5 days after the bid-opening date. An ALB that did not meet the goal and that cannot demonstrate it made adequate good faith efforts must be considered a non-responsible bidder. According 49 CFR 26 Appendix A, the ALB must show that it took all “necessary and reasonable steps to achieve a DBE goal...which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation.” Mn/DOT OCR must make a “fair and reasonable judgment” in its decision and consider that “the efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to meet the DBE contract goal.”⁸ Appendix A to 49 CFR 26 as well the DBE Special Provisions lays out 10 factors to provide guidance to bidders. Mn/DOT OCR reviews all “necessary and reasonable steps” taken by the bidder in light of these 10 factors when making its good faith effort determination.

2. Appendix A of the CFR recommends “soliciting through all reasonable and available means...the interest of all certified DBEs who are capable of performing the work.”⁹ The OCR argued at the hearing and in its May 25th rejection letter that Duininck failed to meet the good faith effort requirement by failing to “actively and aggressively” pursue DBE participation sufficient to meet the goal. Some of the facts used to support the OCRs decision include failing to put together a “project specific plan” to maximize DBE participation, failing to identify and solicit specific DBEs in the DBE directory who might have been interested in bidding on the project, and failing to solicit Metro Area DBEs when the project was only 75 miles away.¹⁰

⁴ Exhibit A (D) and Transcript (Tr.) at page 6.

⁵ Hearing Transcript at 9.

⁶ Valley Paving, Inc Reconsideration Decision, April 22, 2011. Exhibit A (B).

⁷ DBE Special Provisions and 49 CFR Pt.26, App.A. (II).

⁸ DBE Speical Provisions and 49 CFR Pt. 26, App.A. (II).

⁹ 49 C.F.R. Pt.26, App. A, (IV) A.

¹⁰ Exhibit A (E) and Exhibit C.

In this case, Duininck sent a mass solicitation letter to 44 DBEs on March 3, 2011, 20 of these letters went to trucking companies.¹¹ The sample solicitation letter provided to OCR listed three different state projects Duininck planned to bid on and listed every subcontracting work-type that a DBE might be interested in. Use of a letter like this does not represent a 'targeted' effort towards gathering DBE participation, it is simply a wide spread request. Duininck argued in its defense at the hearing, that Duininck generally does not get good responses from Metro DBEs, that it is unreasonable for DBEs to travel 75 miles to perform a small amount of work., and that there is no project-specific plan required in the guidelines. Whether this is true of Metro area DBEs or not, it is important to emphasize that it is not necessarily how many DBEs might respond, or how many DBEs would be inconvenienced by driving outside of the Metro Area for work, the DBE program is about giving DBEs the maximum opportunity to compete for and participate in contracts.¹² If Duininck had "actively and aggressively" attempted to solicit DBEs it would have added some metro-area DBEs to its solicitation efforts, or perhaps tailored the solicitations to "project-specific" work types. . Given the wide range of Duininck's solicitation letter, the contractor typically solicits for jobs more than 75 miles away from potential DBEs. Adding in a Metro distribution would broaden their audience.

3. Appendix A of the CFR also recommends bidders to "negotiate in good faith with interested DBEs" and "not reject DBEs as unqualified without Sound Reasons based on a thorough investigation of their capabilities"¹³ First, Duininck received bids from five different DBEs while only accepting two of them. One of the rejected bids - DBE Reiner Road Milling, was only \$504 dollars higher (3%) than the non-DBE accepted bid¹⁴. Duininck argued in its brief and during the hearing that although this is a small percentage, the primary reason for rejecting the bid was that Duininck didn't have any prior experience working with Reiner and after "asking around" the industry Duininck had learned that Reiner was already at a maximum workload and had stopped bidding work.¹⁵ The regulations allow for "good business judgment" and for "sound reasons" when rejecting DBE quotes, however, Duininck failed to present any evidence that they contacted or attempted to negotiate directly with Reiner about their capacity to do the work. Duininck simply rejected the bid because Duininck preferred working with the selected non DBE subcontractor for milling work. The argument that Duininck simply hadn't worked with them before, and then 'asked around' the industry is not enough justification under the federal regulations. There must be active and aggressive attempts to negotiate with and investigate DBEs before their bid is rejected

4. The regulations also recommend that bidders select "portions of the work to be performed by the DBEs in order to increase the likelihood that the DBE goals will be achieved." In addition, the contract work items must be broken out into "economically feasible" units. Duininck argued during the hearing that they intended to "unbundle" the work, and break each scope of work into smaller units. As evidence, Duininck argued that its solicitation listed over 20 separate work types that might be available and Duininck's "unbundling" amounted to DBE bids for 8 different

¹¹ Exhibit A (Exhibit 8)

¹² Exhibit A (Exhibit B).

¹³ 49 CFR Pr 26, App.A (IV) D (1) and App.A (IV). E.

¹⁴ Exhibit B.

¹⁵ Tr. 22.

work types (5 DBEs).¹⁶ OCR notes in its May 25th letter that bundling traffic control, mailbox, and guidepost, which is a common practice, results in a DBE Trans-signal quote for \$5,205.00. This is less than the non-DBE combined quote for the same scopes of work. De-bundling and then re-bundling to achieve a different cost percentage is not the purpose of unbundling. Both Duinick and the OCR added the de-bundled quotes together in different combinations, achieving a different participation and therefore a different view of the work that could have been provided by DBE Trans-signal. The purpose of unbundling different work types isn't to bid them all separately and then add similar work types together after the bids are opened to show good faith efforts. The point of unbundling work-types is to break them out into work types that are typically can reasonably be performed by a DBE. The use of Trans signal would have helped the ALB get closer to the goal for this project without causing them to lose the low bid margin.

5. Duinick argued several times during the hearing and its submissions that the Panel's April 22, 2011 Valley Paving, Inc (VPI) reconsideration hearing decision should have precedential value. The Panel disagrees. 49 C.F.R. § 26.53 provides an opportunity for "administrative reconsideration" to an ALB who is deemed to have fallen short of the DBE requirements. It allows the ALB to provide "written documentation or argument" and affords the "opportunity to meet in person with [a] reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts." Accordingly, the panel's function is administrative, not judicial. It sits to reconsider the decision made by OCR based on the record before it in light of the requirements of 49 C.F.R. Part 26. OCR's review process is discussed on page two of the letter dated May 25, 2011 from Mary A. Prescott to Chris Duinick.¹⁷ Essentially, the panel's job is to re-review the materials listed on page two of that letter, together with the record produced during the reconsideration hearing, in light of the controlling federal regulations. Each reconsideration is reviewed based on its own merits.

Furthermore, even if the Panel were to use VPI as a precedent, these cases are factually different. The panel concluded in VPI, that VPI 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."¹⁸ At the hearing, VPI provided a "significant amount of material that it deemed relevant as explanatory in response to the OCR letter."¹⁹ The case at hand is distinguishable in that this is not a case of a poor documentation of good faith efforts. Duinick did not provide additional information related to its good faith efforts in soliciting DBEs for this contract. It is true that the panel in Valley Paving urged the OCR to improve its communications with ALBs to reduce the possibility of inadequate documentation; but it was not the panel's intention to shift the burden of compliance to the OCR. The federal regulations make it absolutely clear that it is the ALB that must be able to show it met the DBE goal or made adequate good faith efforts. The OCR can serve as a resource in the process but compliance is the ALB's responsibility.

6. Lastly the Panel would like to emphasize that while the Panel is making its decision, all

¹⁶ Ex. A (S)

¹⁷ Ex. A (E)

¹⁸ VPI decision, April 22, 2011

¹⁹ VPI decision

reasonable efforts are taken into consideration and weighed in light of the particular project. The panel agrees, as Duinick argued at the hearing, that a bidder doesn't have to be perfect, but they need to be "active and aggressive" in trying to meet the goal.²⁰ Every project is different and can't necessarily be compared to another but the primary goal of the bidder should always be to meet the project goal. It is the bidder's burden, not the OCR's burden, to make a good faith effort. Despite what the Panel may have stated in prior cases, the OCR does not have an affirmative duty to help the low-bidder. The OCR is there as a resource and is able to help the ALB meet their goal if asked, but it is not OCR's responsibility to tell the ALB what reasonable good faith effort is, to do so would defeat the purpose of the good faith efforts process.

DECISION

Duinick failed to show that it took all necessary and reasonable steps to achieve the DBE goal of 4% set by Mn/DOT OCR for State Project No. 4712-17. Although Duinick did take steps to solicit DBE participation, its efforts lacked the required intensity and aggressiveness that could potentially have helped them meet the goal. Duinick could have made greater efforts to solicit more DBEs, negotiated with DBEs when the price difference between quotes was reasonable, and selected portions of work to be performed by DBEs in order to make up the \$26,000 in DBE participation and meet the 4% DBE goal yet failed to do so.

Based on the record made available by both parties and the foregoing reasons, the Panel concludes that Duinick failed to demonstrate adequate good faith efforts as required by 49 C.F.R., Part 26 and Mn/DOT OCR correctly determined that Duinick's bid was non-responsible.

Date

6/20/2011


For the Administrative Reconsideration Panel of
June 13, 2011

²⁰ Tr. 61