
STATE OF MINNESOTA

DEPARTMENT OF TRANSPORTATION

Administrative Reconsideration Hearing Request by
Hoover Construction Company
Pursuant to 49 C.F.R. Part 26

TRP/275/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 9, 2011 at the request of Hoover Construction Company (Hoover).¹
2. Hoover Construction Company was the apparent low bidder (ALB) for State Project Number 069-604-060, which is a contract being let by St. Louis County. St. Louis County has requested federal-aid funds for the project. In order to receive the federal-aid funds, the county must comply with applicable federal laws and regulations, including the Disadvantaged Business Enterprise (DBE) requirements. For federal-aid projects, the Mn/DOT Office of Civil Rights (OCR) is required to set a DBE goal and then to determine whether the recipient's apparent low bidder met the goal, or made an adequate "good faith effort" to meet the goal. The DBE goal for the project was set at 2%. Hoover's bid contained a 1.5% DBE commitment. As required under 49 C.F.R. 26 and the DBE Special Provisions provided by St. Louis County as part of its bid package, Hoover 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 in the federal regulations.
3. Mn/DOT OCR, by letter dated May 25, 2011 informed Hoover of its determination that Hoover had not demonstrated adequate Good Faith Efforts to meet the project's 2% goal and was therefore considered a non-responsible bidder.³
4. Hoover 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 Hoover's GFE or OCR's determination that Hoover'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. Hoover was represented by Peter Johnson, President and Craig Spry.

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

² Good Faith Efforts Affidavit, Signed by Peter G. Johnson, dated April 5, 2011.

³ Letter from OCR, dated May 25, 2011.

FINDINGS

1. The Panel based its findings and conclusions on OCR's and Hoover'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 findings below.
2. Hoover requested the Panel accept, as part of the Good Faith Efforts submission, a letter submitted from Precision Testing, Inc to OCR and Hoover (PTI) on May 27, 2011.⁴ This letter was not part of Hoover's GFE documentation submitted to the OCR by the established deadline of April 11, 2011. The Panel determined that Hoover had the opportunity to disclose the PTI information prior to the deadline and failed to do so.⁵ To allow such documentation would effectively obliterate the five-day deadline and would invite abuse of the reconsideration process by making it simply an extension of time. The panel notes that OCR's five-day deadline is more lenient than in many other states, where bidders are required to submit this documentation at the time of bid.
3. Hoover argued that Udeen Trucking, a DBE trucking company, wasn't on the certified DBE directory the time Hoover solicited bids and therefore was not included in the Good Faith Efforts submission.⁶ The Panel determined that it cannot resolve the factual dispute as to whether Udeen Trucking was in the DBE directory at the time of solicitation. The panel believes that even if Hoover is correct on this point, it is not material to Hoover's good faith efforts, nor to OCR's evaluation of those efforts. Hoover has already included a bid from a DBE (Deer River Trucking) for trucking as part of its DBE percentage.⁷

CONCLUSIONS

1. The Mn/DOT DBE Special Provisions are required on all federally funded projects and require the ALB to either meet the DBE goal or (2) show that it has made adequate good faith efforts to meet the DBE goal.⁸ 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 that it made adequate good faith efforts is deemed 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."⁹ Appendix A to 49 CFR 26 as well the DBE Special Provisions lay out 10 factors to provide guidance to bidders.

⁴ Tr. 10.

⁵ Disadvantaged Business Enterprise (DBE) Special Provisions for State Project 069-604-060.

⁶ Tr. 65-66.

⁷ May 25, 2011 OCR letter.

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

⁹ DBE Special Provisions and 49 CFR Pt. 26, App.A. (II)

Mn/DOT OCR also weighs 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” and further says bidders must “determine with certainty” if the DBEs are interested by taking appropriate steps to follow up initial solicitation.¹⁰ Hoover argued that it made 394 solicitation attempts to various DBE contractors.¹¹ OCR presented a spreadsheet concluding that Hoover failed to conduct any follow-up with the 13 DBEs that expressed interest in bidding as well as failing to make follow-up phone calls to 51 DBEs to whom Hoover left an initial message.¹² Hoover provided no documentation of any additional follow up with the interested DBEs in order to meet the 2% goal. This failure to follow-up or provide documentation or make additional efforts to solicit or negotiate with DBEs does not persuade the panel that Hoover “determined with certainty” whether DBEs were interested. One could reasonably argue that if Hoover had “actively and aggressively” tried to make up the additional .5% to meet the DBE goal, as required under the regulations, it would have followed up with its initial DBE solicitations, especially with those DBE's who indicated an interest in the work but did not provide a quote. While widely publicizing an invitation to quote is a necessary component of good faith efforts, bidders cannot simply stop there. To do so would constitute "mere pro forma" action by the bidder.

3. Appendix A of the CFR also recommends “negotiating in good faith” with interested DBEs, using “good business judgment” in negotiating with subcontractors, and notes that “additional costs involved” in finding and using DBEs is not a sufficient reason for failure to meet a contract goal.¹³ In addition, the Panel has noted in past reconsideration hearings that the “risk of losing a contract by accepting a higher bid from a DBE over the lower bid of a non-DBE.....is inherent in the bidding process, and consequential to the obligations imposed by federal law.”¹⁴

For this project, Hoover only accepted 2 quotes from DBEs and rejected 13 because those DBE's were not the low-bidder in their particular scope of work.¹⁵ In its defense, Hoover noted that under D(2) Prime Contractors are not required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.¹⁶ Hoover, however, provided no documentation or justification as to why a particular DBE quote was excessive or unreasonable other than it was not the low-bid. The DBE special provisions require the ALB to document the reasons for rejecting those quotes. Because there was no attempt to negotiate with any of the DBEs to lower their price, the panel can't agree with Hoover's assertion that the DBE bids were unreasonable, particularly when some of the bids were mere percentages and relatively minor dollar amounts apart. There was no good faith effort made to negotiate with DBEs once Hoover was named the ALB, and there is nothing to support Hoover's argument that the DBE bids were unreasonable, leading the panel to conclude that Hoover did not “actively and aggressively” try to meet the DBE goal.

¹⁰ 49 C.F.R. Pt.26, App. A, (IV) A.

¹¹ Tr. 9.

¹² OCR May 25, 2011 letter and OCR Exhibit 3.

¹³ 49 C.F.R. Pt. 26, App. A, (IV) D (1) & (2).

¹⁴ Panel Reconsideration Decision for Knife River Materials, February 14, 2001

¹⁵ OCR May 25, 2011 letter.

¹⁶ Tr. 71.

4. During the hearing, Hoover expressed concerns about the fairness of the DBE program and offered its opinion that a strict “low bid” selection system should be used by a public owner to award contracts (and by the prime contractor to award subcontracts).¹⁷ The Panel notes that historically governments have awarded public works construction contracts to the lowest responsive and responsible bidder to prevent favoritism, collusion, and other perceived problems. A bid was considered responsive if the bidder’s proposal substantially responded to the bid specifications and contained no irregularities or deviations which would affect the amount of the bid or otherwise give the bidder a competitive advantage.

With respect to contracts financed in whole or in part with public funds provided by the United States Department of Transportation, the concept of “responsible and/or responsive bidding” includes meeting Disadvantaged Business Enterprise (DBE) goals. DBE goals are set by OCR, the Mn/DOT office tasked with establishing and implementing Mn/DOT’s DBE program. Under the program, a successful bidder must meet the DBE goal set for a project or it must document its good faith efforts to meet the goal. It is important to note that the DBE program is a federal requirement. It was not devised by the State Legislature or by Mn/DOT. However, Mn/DOT is required to administer the program when federal funds are used for construction projects. Accordingly, the fairness and wisdom of the DBE program was debated and decided by Congress when it passed the legislation containing the DBE requirements.

Lastly, the DBE program is remedial in nature and requires bidders to take some actions that they might not otherwise take. The primary requirement is that bidders must take “active and aggressive” efforts to obtain DBE participation. According to the federal regulations “Mere pro forma efforts are not good faith efforts”.¹⁸ Active and aggressive efforts would include, for example, accepting some quotes from DBE subcontractors that are higher than quotes from non-DBE subcontractors, provided that the price difference is not “excessive or unreasonable” (see Appendix A to 49 CFR 26).

5. Hoover stated, in response to the panel's questions during the hearing, that it had not read the regulations, attended any DBE trainings, or contacted OCR or other community organizations to assist them in devising methods of meeting the DBE goal.¹⁹ Since those bidders who choose to submit bids for federally-funded projects must comply with the DBE requirements, it is important for each prospective bidder to familiarize itself with the DBE program in general and with the particular goals set for a specific project. All prospective bidders are strongly encouraged to read the pertinent federal regulations (including the Appendix A) and Mn/DOT “Special Provisions.” We note that training on the program is widely available and that OCR holds itself out as a resource to contractors

DECISION

Hoover has failed to show that it took all necessary and reasonable steps to achieve the DBE goal

¹⁷ Tr. 58-58, 71-22

¹⁸ 49 CFR, Pt 26, App A, (II).

¹⁹ Tr. 55-57 and 49 CFR Pt. 26 (IV) H.

of 2% set by Mn/DOT OCR for State Project 069-604-060. Although Hoover did take steps to solicit DBE participation, its efforts lacked the required intensity and aggressiveness. Hoover had ample opportunity to follow-up and negotiate with DBEs in order to make up the \$26,000 in DBE participation and meet the 2% DBE goal yet failed to do so.

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

June 15, 2011
Date


For the Administrative Reconsideration Panel of
June 9, 2011