
STATE OF MINNESOTA

DEPARTMENT OF TRANSPORTATION

**Administration Reconsideration Hearing Request by
Ottertail Aggregates, Inc.
State Project Number 056-591-005**

MnDOT # TRP/299/DBE/2015

ADMINISTRATIVE RECONSIDERATION PANEL DECISION

Minnesota Department of Transportation Office of Civil Rights (“OCR”) set a disadvantaged business enterprise (“DBE”) goal of 5.1% for the State Project Number 056-591-005 – Safe Routes to School project near Battle Lake School (“Project”). Ottertail Aggregates, Inc. (“Ottertail”) was the apparent low bidder. By letter dated September 2, 2015, (“OCR Letter”) OCR informed Ottertail that because it neither achieved the DBE goal nor demonstrated good faith efforts to meet the DBE goal, Ottertail’s bid was not responsible.

Ottertail requested a reconsideration of the OCR decision.

Minnesota Department of Transportation assigned a panel of three (“Panel”) to conduct a reconsideration hearing. James Cownie (Assistant Chief Counsel and Director, Contract Management), Thomas O’Keefe (Director, Metro Program Delivery) and Nandana Perera (Associate Legal Counsel) were assigned to the Panel. The three panel members did not take part in the original determination that Ottertail did not meet the goal or make adequate good faith efforts to meet the goal.

The Panel informed the parties in writing of the location, time duration, and their rights at the hearing. The hearing was conducted on September 14, 2015 commencing at 1 p.m. in conference room 421 of the Transportation Building in St. Paul. At the hearing, Erik Johnson, Assistant Attorney General advised the Panel. Natasha Karn, Assistant Attorney General represented the OCR. Tom Ahlfs represented Ottertail.

PANEL’S FINDINGS, CONCLUSIONS, AND REASONS

1. This is a Safe Routes to School project that included work such as grading, aggregate base, bituminous surfacing, concrete sidewalk and concrete curb and gutter.¹
2. The bid letting date on the Project was July 17, 2015. Ottertail submitted the lowest bid of \$356,186.15. By letter dated July 17, 2015, Parkers Prairie City Engineer

¹ Letter dated July 17, 2015 from Parkers Prairie City Engineer to Ottertail.

Jeremy Anderson informed Ottertail to submit the DBE good faith efforts documentation to OCR within five business days.²

3. The DBE goal was 5.1% of the total Project cost. Ottertail obtained 3.1% (\$10,907.87) DBE commitments and submitted its good faith efforts documentation to OCR on July 23, 2015.³
4. On September 2, 2015, OCR determined that Ottertail did not make adequate good faith efforts for the following reasons: Ottertail did not solicit DBEs in a timely manner; Ottertail did not negotiate with JD Donovan, an unsolicited DBE, and TranSignal, a solicited DBE who submitted an incomplete traffic control bid; and Ottertail rejected the concrete paving quote from DBE F&S Concrete because of the price.⁴
5. Ottertail solicited four DBEs as follows: Central Minnesota Sawing by phone on 7/17/2015; F& S Concrete by email on 7/16/2015; TranSignal by email on 7/15/2015; and Constructions Services Diversified by phone on 7/17/2015.⁵ Ottertail does not dispute the fact that these solicitations occurred very close to the bid date, but stated at the hearing it did so because anyway the sub-contractors send in their bids hours before bid letting. According to Ottertail, the sub-contractors resort to this practice because they do not want the prime contractors to go bid shopping using their quotes.⁶
6. JD Donovan, a DBE, submitted a quote to Anderson Brothers Construction Company ("Anderson") to supply AC Oil. Ottertail had picked Anderson Paving, a non-DBE firm, to do the paving on the Project and added 60% of the value of JD Donovan's supplies to Anderson.⁷ The DBE Special Provisions permit a credit of 60% for supply of materials.⁸
7. TranSignal, a DBE, submitted a quote dated July 16, 2015 for traffic control. This quote however, did not contain a price for flashing beacon system and road marking work. The TranSignal traffic control quote was \$19,522.50 without the above two items.⁹

² OCR Letter, 1.

³ Ottertail's letter dated July 23, 2015 and good faith efforts documentation.

⁴ OCR Letter.

⁵ Part D of Ottertail's good faith documents.

⁶ Tr. 6, 18 – 19, 29.

⁷ Tr. 14-15.

⁸ MnDOT DBE Special Provisions at p 3.

⁹ TranSignal quote dated July 16, 2015; See Part D of the good faith efforts documentation;

8. Ottertail rejected the TranSignal's \$19,522.50 quote and accepted a traffic control bid from Northstar Safety, a non-DBE firm.¹⁰ In the good faith efforts documentation, Ottertail did not include a copy of Northstar Safety's quote. But Part D of the good faith efforts documents indicated that Northstar's quote was for "traffic control, signs, Road markings & Flashing Beacon System." TranSignal's quote was mentioned in Part D as a quote for "traffic control & signs." Also, in Part E — list of non-DBE quotes — Ottertail mentioned Northstar's bid as consisting of "Traffic Control, Signs, Road Markings & Flashing Beacon System."¹¹
9. Ottertail accepted a quote for concrete work from Knife Lake Concrete, Inc. ("Knife Lake") for \$110,596.95 and rejected a concrete quote from another DBE, F&S Concrete Paving, Inc. ("F&S") for \$152,378.00.¹²
10. Representing Ottertail at the hearing, Tom Ahlfs stated the following in support of Ottertail's good faith efforts:
 - Ottertail solicited the subcontractors so close to the bid letting date because anyway 90% of the subcontractors provide their bids 1 hour before letting. Mr. Ahlfs attributed this practice to subcontractors' fear that prime contractors could bid shop if the subcontractors submit their bids early.¹³ Mr. Ahlfs first learned about the DBE list from his engineer just two days prior to bid letting.¹⁴
 - Ottertail did not contact any DBEs after they received the quotes to negotiate because it would amount to, in Mr. Ahlfs' words, "bid rigging" (though the panel assumes he meant "bid shopping").¹⁵
 - Most DBE subcontractors in the DBE directory were trucking companies. Ottertail has 10 trucks and was planning to do trucking on this Project. Ottertail understood that the bid documents required the prime contractor to perform a minimum of 40% of the contract. Ottertail was at 40.1 – 40.2%. Giving out any portion of trucking would have put Ottertail below the required 40% requirement.¹⁶
 - Ottertail did not have the necessary knowledge or training about the DBE requirements. The bid packet came out about two weeks before the bid letting

¹⁰ Part E of good faith documentation at p 2.

¹¹ Parts D and E of good faith efforts documentation; Tr. 23-26.

¹² Parts D and F of good faith efforts documentation.

¹³ Tr. 6, 19.

¹⁴ Tr. 6, 18 – 19, 29.

¹⁵ Tr. 17-18.

¹⁶ Tr. 30.

date. Mr. Ahlfs wished the bid packet was simpler because for a small company like Ottetail, handling the paperwork and working on the project becomes hard.¹⁷

- The decision to reject Ottetail's bid came two months after the good faith efforts documents were submitted. Ottetail did not plan for this void and is laying off eight employees because Ottetail did not get the job.¹⁸
- Mr. Ahlfs contacted TranSignal by cell phone after the OCR rejected Ottetail's bid and discussed the requirement of flashing beacon system and road markings. After Ottetail agreed to do the concrete work required for traffic control work, and realizing that the flashing beacon system did not require any electrical work, TranSignal came up with a new bid that included the flashing beacon system. TranSignal's second bid was \$19,552.50. Ottetail is now ready to accept the new bid; doing so will take its DBE commitments over the 5.1% mark.¹⁹
- Ottetail called the OCR "two days prior" and got a response from them on July 17. Another MnDOT person Ottetail was supposed to call in Detroit Lakes was on vacation. Ottetail's future DBE efforts will be different because now Mr. Ahlfs has a better understanding.²⁰

11. Both the federal law and MnDOT DBE Special Provisions state that the prime contractor must solicit the certified DBEs "within sufficient time to allow the DBEs to respond to the solicitation."²¹ Ottetail cannot use the alleged subcontractor practice of submitting bids at the last minute to justify its failure to solicit them in a timely manner. Ottetail did not present any specific evidence to prove that there is such a standard practice. The record however, clearly demonstrates that Ottetail solicited two of the four DBEs it solicited on the bid letting date, and one a day before and the other, two days before the bid letting date.²² Both the federal law and MnDOT DBE Special Provisions also require that the prime contractor should find out "with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitation."²³ In this case, there was not question of follow-up because Ottetail solicited too late. The Panel finds that the evidence supports OCR's conclusion that

¹⁷ Tr. 5, 10, 31.

¹⁸ Tr. 10.

¹⁹ Tr. 19, 20, 22, 24.

²⁰ Tr. 9.

²¹ 49 C.F.R. Pt. 26, App. A IV A.

²² Part D of the good faith efforts documentation; Email dated July 15, 2015 from Ottetail to TranSignal.

²³ 49 C.F.R Pt. 26, App. A IV A.

Ottertail did not make reasonable DBE solicitation efforts — an important element of good faith efforts.

12. OCR responded to Ottertail's assertion that contacting a subcontractor after receiving bids would amount to "bid rigging." As OCR pointed out, "negotiations" can involve topics other than bid shopping. For example, when Ottertail received the TranSignal's first bid that did not include the flashing beacon system, it could have followed up and inquired as to why TranSignal did not include two items. In fact, Ottertail's later negotiations with TranSignal clearly demonstrate that TranSignal misunderstood some elements of the flashing beacon system. It was only later that TranSignal realized the system did not require electrical work because it works on solar power. Making inquiries to clarify the scope of the project and other requirements without bargaining about the price are negotiations that do not amount to bid rigging or bid shopping.
13. The DBE quote for concrete work from F & S was \$41,781.05 more than the quote from Knife Lake Concrete, a non-DBE firm. Again, this was an opportunity for Ottertail to have initiated a conversation to find out if F & S properly understood the scope of the work. Instead, Ottertail simply rejected the F & S quote based on the price. The reason for F & S's higher price might have been due to a misunderstanding of what they were supposed to perform. Ottertail's refusal to accept the DBE quote that was \$41,781.05 higher than a non-DBE quote in itself does not influence the Panel's decision. Ottertail's failure to find out with certainty that F & S properly understood the scope of work, or explore the possibility of breaking out contract items weighs against Ottertail. The federal regulations and MnDOT DBE Special Provisions do not require the prime contractor to accept DBE quotes that are excessive and unreasonable. But a prime contractor cannot make this assessment without first clarifying that the DBE understood the scope of work that it was quoting for.
14. The OCR found that there was no evidence to demonstrate that Ottertail negotiated with JD Donovan after JD Donovan submitted a bid.²⁴ JD Donovan did not submit an unsolicited bid to Ottertail. It submitted a quote to supply materials to Anderson who was performing paving on the Project. So it was not possible for Ottertail to negotiate with JD Donovan. The Panel however, finds Ottertail's failure to *solicit* JD Donovan in its solicitation efforts was relevant in evaluating the good faith efforts.

²⁴ OCR letter at p 2.

15. Contrary to what Ottertail stated, the MnDOT Standard Specifications only require the prime contractor to self-perform 30% of the contract (not 40% as Mr. Ahlfs stated).²⁵ To support Ottertail's argument that subcontracting any trucking on the Project to a DBE would have put Ottertail below the required minimum percentage, Mr. Ahlfs introduced to the record a copy of "Federally Funded Construction Contracts Special Provisions Division A – Labor." That document in relevant part states, "The prime contractor's organization shall perform work amounting to not less than 40 percent of the total original contract cost. However, contracts [*sic*] with Disadvantaged Business Enterprise (DBE) . . . the contractor's organization shall perform work amounting to *not less than 30 percent* of the total original contract cost." (*Emphasis added.*) Because the Project is a DBE contract, Ottertail's reading of the minimum percentage is incorrect. This means, Ottertail could have solicited and potentially used a DBE trucking company to fulfill the DBE goal. In the least, Ottertail could have made efforts to solicit the DBE trucking companies. The record does not indicate what percentage of the project involved trucking. Irrespective of the amount of trucking needed, Ottertail simply did not solicit the DBE trucking firms based on a misreading of the MnDOT Contract Provisions. The Panel finds this failure as indicating lack of solicitation efforts required by MnDOT Special Provisions and the federal law.
16. The federal regulations require the prime contractor to break out contract work items into economically feasible unites to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.²⁶ Ottertail could have done this in the area of trucking. The record is silent as to what percentage of project work consisted of trucking. If not for Ottertail's misreading of the MnDOT contract specifications, it could have solicited at least part of the trucking needs for site preparation.
17. Bid packages for government projects are undoubtedly complex. While low price is important, it is not the only goal in government contracting. Congress and the legislature use government contracting to promote various societal goals, such as ensuring that underrepresented businesses have a chance to participate in projects, sound environmental practices are employed during construction, and workers are paid the prevailing wage. For any contractor bidding on federal-aid projects, it is important to become familiar with the DBE Special Provisions and the associated solicitation, negotiation, and documentation requirements. These "difficulties" are not unique to Ottertail. All contractors are similarly positioned.

²⁵ Tr. 20, 30-31. The applicable MnDOT Standard Specifications in relevant part states, "on contracts with Disadvantaged Business Enterprise (DBE) . . . goals...the Contractor shall perform work amounting to not less than 30 percent of the total original contract amount." MnDOT Standard Specifications, 1801 (2014 edition).

²⁶ 49 C.F.R. Pt. 26, App. A IV B.

18. It is unfortunate that Ottertail laid off eight employees after they did not get the award.²⁷ The two-month period that OCR took to issue to bid rejection letter did not however, cause the lay-off. It was Ottertail's own failure to adhere to the MnDOT Special Provisions and the federal DBE law that resulted in losing the contract award.
19. It appears that Ottertail entered into negotiations with TranSignal after the OCR rejected the bid. These negotiations resulted in a new bid from TranSignal that Ottertail is now willing to accept. Using the TranSignal's new bid would also satisfy the Project's DBE goal of 5.1%. Unfortunately, Ottertail's efforts of negotiations with TranSignal occurred after the OCR rejected the bid. Although the quote date of TranSignal's second bid appears as July 16, 2015, Mr. Ahlfs stated at the hearing that this was obtained after OCR rejected the bid. Mr. Ahlfs stated that after their negotiation, TranSignal simply added the flashing beacon system to the earlier quote and resent it.²⁸ In this case, the Submission Due Date was July 24, 2015. The Panel cannot consider any efforts made after the Submission Due Date. Reconsideration is an opportunity to explain in person why the submission made to OCR should have been accepted, not an opportunity to make a different or an improved submission.²⁹ Ottertail produced a copy of the email dated July 15, 2015 that it sent to TranSignal. The email stated, " [w]e were wondering if we could possibly get a quote from you on the Battle Lake Safe Routes to School project."³⁰ Ottertail had no reason to believe that TranSignal would have understood the full scope of the traffic signal work involved. Therefore, the Panel concludes that Ottertail's failure to have any discussion with TranSignal before submitting its good faith efforts documentation weighs heavily against Ottertail.
20. When the apparent low bidder does not meet the DBE goal, but the other bidders do meet it, the responsible government agency may reasonably raise the question of whether, with additional efforts, the apparent low bidder could have met the DBE goal.³¹ In this case, only three contractors — including Ottertail — submitted bids.³² Two of them but not Ottertail, met the DBE goal of 5.1. As previous panels have held, the other bidders' average DBE commitment alone is not determinative. Rather, all the information, considered in totality, supports the OCR's conclusion that Ottertail did not demonstrate adequate good faith efforts as required by MnDOT DBE Special Provisions and the federal law.

²⁷ Tr. 10.

²⁸ Tr. 20-22.

²⁹ MnDOT DBE Special Provisions, at p 4.

³⁰ Email submitted along with Ottertail's good faith effort documentation.

³¹ 49 C.F.R. Pt. 26, App. A, V.

³² OCR Letter at pp 2-3.

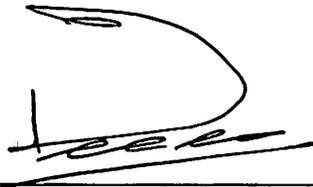
21. Ultimately, making “adequate good faith efforts” to achieve a DBE goal does not mean that the bidder made some efforts with “good intentions.” Instead, the governing federal regulations states, “[t]he bidder must show that it took all necessary and reasonable steps to achieve a DBE goal . . . by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient BE participation, even if they were not fully successful.”³³ In this instance, as discussed above, there were some reasonable steps that Ottertail could have taken, but did not take. In fact, the record demonstrates that if Ottertail has taken all reasonable steps, it would have likely met or exceeded the Project’s DBE goal.
22. The decision in this case is based on the facts and evidence presented to the Panel and application of the federal regulatory scheme and MnDOT DBE Special Provisions to the facts of this case.

DECISION

Based on all the foregoing findings and reasons, and on consideration of the relevant evidence made available at the hearing on October 14, 2015, the Panel concludes that Ottertail has not demonstrated adequate good faith efforts to meet the DBE goal and that Ottertail is non-responsible. The Panel finds that OCR was fair and reasonable in its review of Ottertail’s Good Faith Efforts. The Panel affirms OCR’s determination that Ottertail’s bid is non-responsible for failing to make good faith efforts.

October 21, 2015

Date



A. Nandana Perera

For the MnDOT Administrative Reconsideration Panel of
October 14, 2015

³³ 49 C.F.R. Pt. 26, App. A, I