

STATE OF MINNESOTA  
DEPARTMENT OF TRANSPORTATION

**Administrative Reconsideration  
Hearing Request by  
Warning Lites of Minnesota, Inc.  
State Project Number 2771-106**

**MnDOT # TRP/304/DBE/2016**

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**ADMINISTRATIVE RECONSIDERATION PANEL DECISION**

The Minnesota Department of Transportation (“MnDOT”) Office of Civil Rights (“OCR”) set a disadvantaged business enterprise (“DBE”) goal of 15.9% for the State Project Number 2771-106 (the “Project”). The Project is located in MnDOT Metro District. Warning Lites of Minnesota, Inc. (“Warning Lites”) was the apparent low bidder (“ALB”) on the Project. By letter dated March 17, 2016, (“OCR Letter”) OCR notified Warning Lites that it was not a responsible bidder because Warning Lites neither achieved the DBE goal nor demonstrated adequate Good Faith Efforts (“GFE”) to meet the DBE goal.

Warning Lites requested a reconsideration of the OCR decision.<sup>1</sup>

MnDOT assigned a panel of three MnDOT officials (“Panel”) to conduct a reconsideration hearing: James Cownie (Assistant Chief Counsel for Construction and Contract Management), Thomas O’Keefe (Director, Metro Program Delivery) and Nandana Perera (Associate Legal Counsel). The three panel members did not take part in making the original determination that Warning Lites did not meet the goal or demonstrate adequate GFE to meet the goal.

The Panel informed the parties in writing of the location, time, duration, and their rights at the hearing. The Panel conducted a hearing on April 12, 2016 commencing at 1:00 p.m. in conference room G22 of the Transportation Building in St. Paul. At the hearing, Mathew Ferche, Assistant Attorney General represented OCR. Stephen Melchionne, Assistant Attorney General advised the Panel. Ken Johnson, Guard Rail – Operations Manager and Tim Lewis represented Warning Lites.

A court reporter prepared a transcript (“Tr.”).

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<sup>1</sup> Warning Lite’s letter dated March 21, 2016.

## PANEL'S FINDINGS, CONCLUSIONS, AND REASONS

1. This project involves constructing high tension cable and plate beam guardrail on trunk highway 610 on a stretch of 4.433 miles in MnDOT Metro District.<sup>2</sup>
2. The bid letting date was January 29, 2016. Warning Lites submitted the lowest bid of \$862,949.23. The DBE documentation was due to OCR on February 5, 2016. The DBE goal was 15.9% of the total Project cost. Warning Lites committed to 10.5% DBE participation and submitted its GFE documentation to OCR on February 4, 2016.<sup>3</sup>
3. On March 17, 2016, OCR determined that Warning Lites did not make adequate GFE because Warning Lites:
  - a.) Did not demonstrate adequate solicitation and follow up efforts with the DBEs.
  - b.) Did not select scopes of work such as surveying and paving for soliciting DBEs and increasing DBE participation.
  - c.) Rejected one DBE quote—All Phase—for grading and erosion control work without making efforts to negotiate in good faith with All Phase.
  - e.) Did not submit information that it made efforts to provide assistance such as financial assistance, equipment and supplies, materials or related assistance or services to interested DBEs.
  - f.) Achieved only 10.5% DBE commitment while two other bidders committed to meeting the 15.9% DBE goal and the average DBE of the other bidders was 14.6%.<sup>4</sup>
4. Both federal regulations and MnDOT Special Provisions (“Special Provisions”) require an ALB to solicit “through all reasonable and available means . . . certified DBEs who have the capability to perform the work of the contract.”<sup>5</sup> The ALB’s efforts to obtain DBE participation become important only when the ALB does not achieve the DBE contract goal. Special Provisions also require the ALB to submit information to demonstrate its adequate GFE to achieve the DBE goal. Further, “[a]ll required information must be submitted by the Submission Due Date.”<sup>6</sup>
5. By the submission due date, Warning Lites provided documentation to OCR to demonstrate that it solicited 4 DBE firms: TranSignal, Safety Signs, JL Theis, and All Phase. TranSignal and Safety Signs are traffic control firms. JL Theis quoted

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<sup>2</sup> MnDOT proposal for State Project Number 2771-106.

<sup>3</sup> OCR Letter; Warning Lites’ GFE Submission.

<sup>4</sup> OCR Letter.

<sup>5</sup> 49 C.F.R. Pt. 26, App. A IV A.

<sup>6</sup> MnDOT Special Provisions, p 5.

for erosion control work and All Phase quoted for earthwork, grading, and erosion control work.<sup>7</sup> OCR found that there were three DBE firms certified to perform traffic control, three DBEs certified to perform erosion control, seven DBE firms certified to perform surveying and one DBE firm certified to perform paving. Warning Lite's documentation on the submission due date, viewed together with the DBE Directory information, showed that of the fourteen DBE firms certified to perform the scopes of work on the Project, Warning Lites only solicited four.<sup>8</sup> Warning Lites did not solicit any DBE firms to perform paving or surveying. Warning Lites stated that it relied on its own knowledge of the marketplace and did not consult the DBE directory to determine if there were additional DBEs that could have been solicited.<sup>9</sup>

6. Both the federal regulations and the Special Provisions require the ALB to "*document adequate good faith efforts.*"<sup>10</sup> (*Emphasis added.*) The Special Provisions require the ALB to submit documentation of GFE by the submission due date.<sup>11</sup> On a plain reading of the federal regulations, it is clear that the ALB has the burden of proof in demonstrating its GFE. The ALB could discharge this burden of proof by documenting adequate GFE by the submission due date.
7. On March 17, 2016, OCR determined that Warning Lites' bid was non-responsible. On March 21, 2016, Warning Lites, in its request for a reconsideration of the OCR decision, provided several reasons as to why it did not solicit the certified DBEs listed in the DBE directory.<sup>12</sup> Warning Lites reiterated these reasons at the reconsideration hearing on April 12, 2016.<sup>13</sup> The Panel finds that the reasons and findings that Warning Lites offered in its March 21 letter were efforts made *after* the submission due date. Warning Lites did not present any of these reasons to OCR on the submission due date. Understandably so—those efforts were made approximately 6 weeks after the submission due date.<sup>14</sup>
8. Previous panels have consistently refused to consider efforts made after the submission due date.<sup>15</sup> To do so would not only be prejudicial to the other bidders who did not have the same opportunity but also provide Warning Lites

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<sup>7</sup> Warning Lites' GFE submission.

<sup>8</sup> OCR Letter, p 2; DBE Directory available at <http://mnucp.metc.state.mn.us/Default.aspx> (last visited on 4/18/2016).

<sup>9</sup> Tr. 10-11, 16, 20, 22, 29, 33-34.

<sup>10</sup> 49 C.F.R. Pt. 26, App. A I.

<sup>11</sup> MnDOT Special Provisions, p 4.

<sup>12</sup> Warning Lite's letter dated March 21, 2016.

<sup>13</sup> Tr. 10-12.

<sup>14</sup> Submission due date was February 5, 2016. Warning Lite made most of its efforts to confirm the facts on March 21 by calling the DBEs.

<sup>15</sup> Eg. Reconsideration Panel Decision in PCi, LLC, S.P. Number 6703-23B dated August 8, 2012.

with two submission due dates for this contract. The Special Provisions provide only one submission due date for the ALB.<sup>16</sup> Accordingly, the Panel does not consider the justifications and reasons that Warning Lites offered in its March 21 letter and at the hearing for not soliciting the certified DBEs. In this reconsideration hearing, the Panel evaluates the efforts that the ALB made to solicit the DBEs on or before the submission due date. Later efforts and findings that reveal such efforts would have been futile, and would not have resulted in more DBE participation, do not demonstrate GFE. This new information actually reflects the efforts that Warning Lites made after OCR had informed Warning Lites of OCR's original determination. Such later findings demonstrate a lack of timely GFE and a failure to document GFE. These explanations, if true, may have been relevant information. An ALB's determination that certified DBEs were unavailable or incapable of performing the work is also part of its GFE. The ALB must present the documents that support such determinations to OCR by the submission due date so that OCR can conduct an appropriate review to determine the veracity of those statements and to make appropriate findings. Warning Lites, in effect, asks the Panel to do two things here: (1) determine that those statements are true without any means of verification; and (2) determine that actions taken only after the initial rejection of GFE somehow "explained" determinations that Warning Lites made during the bidding process. It would be unreasonable for the Panel to make either of those determinations.

9. The record contains five emails that show Warning Lites did follow up with TranSignal and Safety Signs—both DBEs—regarding the traffic control quotes.<sup>17</sup> The record also shows that Warning Lites is in fact using TranSignal for traffic control work on the project.<sup>18</sup> OCR noted in its letter that Warning Lites does traffic control work. Instead of performing all the traffic control work by itself, Warning Lites decided to solicit and recruit a DBE to do traffic control. The Panel agrees with OCR that this is notable. It is certainly a positive step toward GFE by Warning Lites, but it does not, in itself, constitute adequate GFE.
10. The Panel does not hold Warning Lites' failure to use Safety Signs, a DBE, on the Project for traffic control against Warning Lites because it is using TranSignal, another DBE to perform traffic control work. Warning Lites is also using JL Theis, another DBE, to perform erosion control work.<sup>19</sup>

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<sup>16</sup> MnDOT Special Provisions, p 5.

<sup>17</sup> Warning Lites' GFE submission, four emails dated January 25 and one dated January 29, 2016.

<sup>18</sup> Part E of Warning Lites' GFE submission.

<sup>19</sup> *Id.*

11. According to the federal regulations that MnDOT has adopted in its DBE Special Provisions, the fact there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal.<sup>20</sup> But the federal regulations and the Special Provisions do not require the prime contractor to accept DBE quotes that are excessive and unreasonable.<sup>21</sup> Warning Lites received two quotes for earthwork and grading; one from All Phase, a DBE, and another from New Look, a non-DBE. All Phase's quote was \$111,525.40 more than New Look's quote.<sup>22</sup> Because New Look's quote was lower, Warning Lites accepted it. Warning Lites did not present any evidence to show that it took any initiative to negotiate in good faith with All Phase. Warning Lites stated at the hearing that it would not ordinarily contact a subcontractor who has already quoted. Warning Lites leaves it to the expertise of the subcontractor who quotes to make determinations and would not try to influence them. Warning Lites also stated that the bids are usually received at the last minute—implying there is hardly any time for such negotiations.<sup>23</sup>
12. In evaluating the ALB's good faith efforts, the Panel is not focused so much on the results achieved, or the likelihood of DBE participation that could result from good faith negotiations. As noted in earlier panel decisions, it is possible for a prime contractor to enter into a dialogue with a DBE without crossing the ethical line. Such dialogues, whether they result in DBE participation or not, constitute GFE. The Panel does not expect the ALB to engage in the practice commonly known as bid shopping. The unethical, or perhaps illegal, bid shopping occurs when a contractor takes a bid by one subcontractor and discloses the bid price to another potential subcontractor in the same trade to obtain a lower bid. The federal regulations governing the DBE program requires the ALB to negotiate in good faith with the interested DBEs.<sup>24</sup> Prime contractors can negotiate in good faith without bid shopping. Negotiations can take place without disclosing the price of other bidders. For example, Warning Lites in this case could have initiated a discussion with All Phase and asked the question if it could be more competitive on at least some of the line items, such as common embankment, mobilization, and 18" RC pipe sewer design. Alternatively, Warning Lites could have explored the possibility of breaking out some other portions of New Look quote. Warning Lites did not produce any documents to substantiate its claim of negotiations that resulted in it taking out \$20,060.00 worth of mulch material from New Look's quote and giving that work item to JL Theis—a DBE contractor. The

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<sup>20</sup> 49 C.F.R. Pt. 26, App. A IV D (2).

<sup>21</sup> 49 C.F.R. Pt. 26, App. A IV D2; MnDOT's DBE Special Provisions, p 6.

<sup>22</sup> Warning Lites' GFE submission.

<sup>23</sup> Tr. 47, 52.

<sup>24</sup> 49 C.F.R. Pt. 26, App. A, IV D (1).

Panel did not hear about any efforts that Warning Lites took to initiate a discussion with All Phase. Given the substantial price difference between All Phase and New Look quotes, it is most likely Warning Lites could not have negotiated a price from All Phase that is practically acceptable. But the Panel is not evaluating the numbers here. It is all about efforts—whether successful or not.

13. The Panel is aware of MnDOT's competitive bidding process. When a contractor is examining different bids for the same scope of work with the knowledge that MnDOT would award the contract to the lowest bidder, it is difficult to make a decision to accept a higher bid from a DBE. The business risk that is involved in deciding how to determine the total bid price is inherent in competitive bidding. This risk and uncertainty that Warning Lites emphasized at the hearing are not unique to Warning Lites. All contractors must wrestle with these decisions, and all contractors are similarly situated when determining the bid price and submitting the bid. 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, requiring sound environmental practices during construction, and requiring the payment of prevailing wages.
  
14. The DBE goal on the Project was 15.9%. Warning Lites achieved 10.5% and fell short of the goal by only 5.4%.<sup>25</sup> At first glance, this appears to be a reasonable achievement. The previous panels have emphasized, and given the above numbers the Panel is compelled to reiterate, an important point about GFE evaluation. Under the federal regulations, an ALB can comply with the DBE requirement in two ways: First, the ALB can meet the DBE contract goal, documenting commitment for DBE participation. Second, even if the ALB does not meet the goal, it can document its adequate GFE to obtain DBE participation.<sup>26</sup> When the ALB does not meet the goal, it "must show that it took all necessary and reasonable steps to achieve a DBE goal."<sup>27</sup> Because Warning Lites did not meet the DBE contract goal of 15.9%, it had to show that it took all necessary and reasonable steps to achieve a DBE goal. When the ALB does not meet the DBE contract goal, the DBE percentage achieved—however close it may be—does not by itself, support GFE, unless the ALB achieved a percentage that meets or exceeds the average DBE participation of other bidders. When evaluating GFE, OCR and panel decisions focus on evaluating the *efforts* and

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<sup>25</sup> OCR Letter, p 1.

<sup>26</sup> 49 C.F.R. Pt. 26, App. A, I.

<sup>27</sup> *Id.*

not the percentage of DBE commitment achieved. The Panel's inquiry in this case must focus on the efforts Warning Lites made. Because Warning Lites' GFE were not satisfactory, the Panel is unable to consider in Warning Lites' favor, the fact that it came so close to achieving the DBE goal and fell short by just 5.4%.

15. Federal regulations also require the ALB to make efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.<sup>28</sup> Warning Lite's March 21 letter indicated that at least one DBE firm—DMJ Asphalt—located in Hamel, Minnesota did not own equipment necessary to perform on the Project.<sup>29</sup> Had Warning Lites made the effort to find this out before the submission due date, it could have asked if DMJ Asphalt needed any assistance in obtaining the necessary equipment. Many contractors perform work with rented or leased equipment. Such an effort by Warning Lites contributes to its GFE.
16. If the ALB does not meet the DBE goal but its DBE commitment meets or exceeds the average DBE participation of other bidders, this fact, along with others, may support a finding of GFE.<sup>30</sup> But in this case, the other bidders achieved an average DBE participation of 14.6% and Warning Lites only achieved a DBE participation of 10.5%.<sup>31</sup> Therefore, the performance of other bidders, one factor relevant in determining whether the ALB made adequate good faith efforts, does not favor Warning Lites.
17. OCR found that Warning Lites did not provide any evidence of efforts to offer the interested DBEs assistance to obtain bonding, lines of credit, or insurance. The Panel agrees that Warning Lites did not provide any evidence that it offered this assistance to the DBEs that it solicited.
18. Making "adequate GFE" to achieve a DBE goal does not mean that the bidder acted in good faith and made *some* efforts. Instead, the governing federal regulations state, "[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."<sup>32</sup> In this case, Warning Lites could have done much more than it did to actively and aggressively locate and solicit the DBEs, engaged in negotiations with the

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<sup>28</sup> 49 C.F.R. Pt. 26, App. A, IV G.

<sup>29</sup> Tr. 10; Warning Lites' March 21, 2016 letter.

<sup>30</sup> 49 C.F.R. Pt. 26, App. A V.

<sup>31</sup> OCR Letter, p 4.

<sup>32</sup> 49 C.F.R. Pt. 26, App. A, I.

interested DBEs, and selected portions of work and broke out the work items more aggressively. The Panel hopes Warning Lites will use the Panel's explanatory guidelines as learning materials to successfully make and document good faith efforts if it fails to obtain a contract DBE goal in the future.

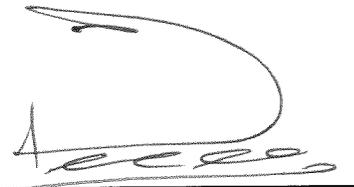
19. The Panel makes this decision based on the facts and evidence presented to the Panel and application of the federal regulatory scheme and the Special Provisions to the facts of this case.

### DECISION

Based on all the foregoing findings, conclusions, reasons, and on examination of the record made available, the Panel concludes that Warning Lites did not demonstrate adequate GFE to meet the DBE goal. The Panel finds that OCR was fair and reasonable in its review of Warning Lites' GFE. The Panel affirms OCR's determination that Warning Lites' bid is non-responsible because Warning Lites did not demonstrate that it made adequate GFE to meet the DBE goal.

April 18, 2016

Date



A. Nandana Perera  
Associate Legal Counsel

For the MnDOT Administrative  
Reconsideration Panel of  
April 12, 2016