
STATE OF MINNESOTA

DEPARTMENT OF TRANSPORTATION

Administrative Reconsideration Hearing Request by
Forest Lake Contracting Pursuant to 49 C.F.R. Part 26
State Project Number 02-716-011

TRP/281/DBE/2011

ADMINISTRATIVE RECONSIDERATION PANEL DECISION

INTRODUCTION

This decision is issued pursuant to 49 C.F.R. Part 26 after a reconsideration hearing held on September 1, 2011 on the request of Forest Lake Contracting ("Forest Lake").¹ Minnesota Department of Transportation Office of Civil Rights ("MnDOT OCR") set a DBE participation Project goal of 13% for the State Project Number 02-716-011 ("Project").² Forest Lake was the apparent low bidder ("ALB") on the Project and submitted documentation to MnDOT OCR indicating that it achieved 2.9% DBE commitment for the Project and also submitted documentation of its good faith efforts to MnDOT OCR on June 13, 2011.³

By letter dated August 1, 2011 ("bid rejection letter") MnDOT OCR informed Forest Lake that it has not demonstrated adequate good faith efforts to meet the Project's DBE goal. Forest Lake requested a reconsideration of MnDOT OCR's decision.

MnDOT Office of Chief Counsel scheduled a reconsideration hearing by a panel of three MnDOT officials. The three panel members had no role in the MnDOT OCR's decision to reject Forest Lake's bid as non-responsible. The panel informed the parties in writing of the location, time duration, and their rights at the hearing.⁴ Erik M. Johnson, Assistant Attorney General represented the MnDOT OCR and Theodore V. Roberts, Attorney-at-law, Fabyanske, Westra, Hart & Thompson, P.A. represented Forest Lake. Both Forest Lake and MnDOT OCR had equal opportunities to present their respective positions.

At the hearing, MnDOT OCR made its presentation based on an outline marked as MnDOT OCR exhibit 1. Forest Lake marked its written argument dated September 1, 2011 and other supporting documents as Forest Lake exhibit 2.

¹ Letter dated August 1, 2011 from Trishia Carlson to Deputy Commissioner Bernard Arseneau.

² Bid rejection letter

³ MnDOT exhibit 2-6.

⁴ Notice dated August 18, 2011.

The panel made its decision based on the record made available by both parties, arguments made at the reconsideration hearing on September 1, 2011, and the following analysis.

Another reconsideration hearing was held on August 31, 2011⁵ on state project number 62-631-005 on a request by Forest Lake ("Forest Lake I"). Because Forest Lake and MnDOT OCR made arguments in Forest Lake I that it makes in this case, the panel has decided to address each such argument in its Findings and Conclusions without restating each such argument.

PANEL'S FINDINGS AND CONCLUSIONS

1. At this hearing, Forest Lake made the same procedural arguments that it made in Forest Lake I. Because the decision in Forest Lake I addressed many objections and issues that arose at this hearing, the panel incorporates by reference, the relevant parts of the earlier decision as stated below:

- i. Ruling on the procedural objections that Forest Lake made, the panel incorporates by reference, paragraphs 1 – 6 of Panel's Findings and Conclusions of the panel's decision in Forest Lake I. (Forest Lake I decision is attached marked as Annex A.)
- ii. Forest Lake argued that MnDOT OCR's suggested negotiations amount to bid-shopping. The panel disagrees. The panel incorporates by reference, paragraph 10 of Panel's Findings and Conclusions in Forest Lake I.

2. MnDOT OCR agrees that Forest Lake's solicitation efforts were adequate.⁶ MnDOT OCR determined Forest Lake failed to demonstrate adequate good faith efforts because it failed to: adequately follow-up the initial solicitations; adequately negotiate with the DBEs; accept higher DBE quotes without a showing they were unreasonable or excessive;⁷ offer or provide assistance to DBEs; and identify recruitment and placement of resources for DBEs. MnDOT OCR also considered the performance of other bidders (average – 6%) and Forest Lake's decision to self-perform electrical work against Forest Lakes.

3. Forest Lake's follow up action consisted of two phone calls after the solicitation fax.

⁵ Administrative Reconsideration Hearing Request by Forest Lake Contracting, S.P. No. 62-631-05 ("Forest Lake I").

⁶ Bid rejection letter at 4; Transcript ("Tr.") 45.

⁷ Bid rejection letter at 9.

Trishia Carlson from Forest Lake explained the discrepancy of the dates and pointed out that June 6 was a typographical error and all their phone calls were made on June 3.⁸ These statements support the information that Forest Lake provided to MnDOT OCR.⁹ Forest Lake also stated that it contacted the non-responsive DBEs on June 6.¹⁰ Explaining why Forest Lake did not follow up with three DBEs who indicated they were not sure of quoting, Forest Lake stated that two of them were trucking companies and Forest Lake already had a DBE trucking firm performing work.¹¹ Forest Lake made a total of 43 phone calls on June 3, 2011 alone and provided that evidence to MnDOT OCR in a timely manner.¹² Panel finds that with the extensive solicitation efforts, Forest Lake's overall follow-up was adequate.

4. MnDOT OCR determined that Forest Lake identified portions of work that DBEs could perform and provided information to demonstrate that it considered breaking out work to increase DBE participation.¹³ The panel agrees.

5. MnDOT OCR determined that Forest Lake's solicitations were timely and informative but found additional follow-up should have been attempted.¹⁴ MnDOT OCR explained that Forest Lake failed in its follow-up efforts to find out if assistance could be offered to the DBEs.¹⁵ The panel finds that Forest Lake has satisfied the federal requirement of providing information.

6. The panel finds that Forest Lake negotiated with the following firms: MN Pipe and Equipment (resulted in \$14,397.60 DBE dollars); Boys Contracting (resulted in \$ 11,975.40 DBE dollars; Carlo Lachmansingh Sales (no result); Chippewa Wood Products (no result); and non-DBE firms whose bids were accepted (resulted in unspecified DBE dollar amounts in the areas of landscaping, bituminous paving, concrete, and traffic control).¹⁶ Although the panel thinks that Forest Lake could have done more negotiations, the panel finds that Forest Lake made more than pro forma efforts to negotiate.

7. Forest Lake did not reject any DBEs as disqualified. On this, the panel finds in Forest Lake's favor.

⁸ Tr. 10-11,12-13

⁹ Tr. 10-11; MnDOT OCR exhibit 5.

¹⁰ Tr. 10.

¹¹ Tr. 10-11.

¹² MnDOT exhibit 5.

¹³ Bid rejection letter at 5.

¹⁴ Bid rejection letter at 6.

¹⁵ Tr. 45-46.

¹⁶ MnDOT OCR exhibit 4 ("Recap of Good Faith Efforts for Project")

8. Forest Lake stated in its solicitation letter “[i]f your firm needs assistance in bonding for this project please contact our office.”¹⁷ The panel concludes this single sentence does not satisfy the federal requirement of offering assistance to the interested DBEs. The record does not show, and no evidence was presented at the hearing, that the interested DBEs could have performed more work on the Project had Forest Lake offered assistance with finances, equipment and supplies. Therefore, the panel does not consider this failure as fatal. Although the panel does not advocate or encourage the prime contractors to wait until DBEs request assistance, the panel finds no evidence that any interested DBE requested or indicated to Forest Lake the need for such assistance.

9. MnDOT OCR found that Forest Lake failed in the area of recruitment and placement.¹⁸ Forest Lake contacted MnDOT OCR and inquired about finding a DBE to perform retaining wall work. Based on the advice from MnDOT OCR, Holte Contracting was added to Forest Lake’s solicitation list.¹⁹ MnDOT OCR found that Forest Lake’s solicitation efforts were adequate. The purpose of using additional resources to find the DBEs is to broaden the solicitation efforts. In view of an undisputed finding of adequate solicitation efforts, panel cannot heavily weigh this failure against Forest Lake. Solicitation would not have been sufficient unless Forest Lake solicited the DBEs that were reasonably available to bid on the project. Forest Lake achieved this by using the MnDOT DBE Directory. MnDOT OCR did not provide any evidence that using other directories or resources would have provided more information about the available DBEs.

10. MnDOT OCR weighed other bidders’ average DBE recruitment (6%) against Forest Lake. Forest Lake stated that it has another on-going project 1 mile north of this project that has materials that it will also use in this project. In keeping with Forest Lake’s usual operational strategy, it will be reclaiming existing road and grind to make its own gravel for this project. These two circumstances reduced a substantial need for trucking. There is a high concentration of DBEs in trucking. Therefore, Forest Lake argued, Forest Lake’s ability to obtain DBE trucking was necessarily reduced.²⁰ MnDOT OCR did not respond to this argument. The panel has no detailed information about how much trucking DBE commitment the other bidders submitted. But it is not disputed that there is a high concentration of DBEs in trucking.²¹ Because Forest Lake’s need for trucking was obviously

¹⁷ MnDOT OCR exhibit 5.

¹⁸ Bid rejection letter at 8; Tr. 29-30.

¹⁹ Tr. 29-30.

²⁰ Tr. 32-33.

²¹ Tr. 34. (MnDOT OCR did not dispute this fact.)

reduced due to the geographical location of the Project and Forest Lake's operational strategies, the panel considers these circumstances as relevant. The panel notes that Forest Lake did not submit this information to MnDOT OCR by the submission due date. The question then arises whether this is new evidence that Forest Lake is presenting to the panel. Strictly speaking, this information does not *directly* relate to Forest Lake's good faith efforts. Rather, the panel is of the opinion, these are mitigating circumstances that existed before the submission due date. Had Forest Lake simply solicited DBEs and claimed that it made good faith efforts, the panel would not have considered these circumstances in Forest Lake's favor. But Forest Lake did more than mere solicitation – it followed up, selected portions of work, successfully and unsuccessfully negotiated with the DBEs, sought information from MnDOT OCR about finding a DBE for retaining walls etc. Therefore, the panel concludes that based on the specific facts of this case, Forest Lake's failure to exceed DBE participation obtained by other bidders does not weigh heavily against Forest Lake.

11. In the area of trucking and electrical work, MnDOT OCR found against Forest Lake because Forest Lake decided to self-perform a portion of that work. The panel addressed the same issue in Forest Lake I. The panel incorporates by reference, the conclusions and reasoning as stated in paragraph 15 of Panel's Findings and Conclusions in Forest Lake I.

Decision

The Panel concludes that Forest Lake was a responsible bidder and has satisfied the adequate good faith efforts as required by 49 C.F.R. Part 26. MnDOT OCR's determination dated August 1, 2011, rejecting Forest Lake's bid as non-responsible as of the Submission Due Date is reversed.

9-12-11

Date



Greg Ous

For the MnDOT Administrative Reconsideration Panel
of September, 2011.

A majority of the panel agrees with the forgoing decision. One panel member issued a separate statement.

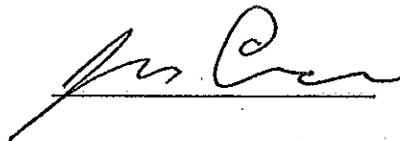
Statement of Panel Member James Cownie disagreeing with the majority decision.

1. I concur with the Panel's findings and conclusions as to the procedural objections raised by Forest Lake Contracting ("FLC").
2. I concur with the panel's findings and conclusion that FLC conducted its solicitation process in an acceptable manner.
3. I would uphold the decision of the Director of the MnDOT Office of Civil Rights ("MnDOT OCR"). The federal DBE regulations, in "Appendix A" states that a "determination concerning the sufficiency of the firm's good faith efforts is a judgment call" and further states that it is up to the recipient "to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts to do so". I would uphold MnDOT OCR's determination for two primary reasons:
 - a. I do not find MnDOT OCR's determination in this case to be unfair or unreasonable; and
 - b. I find that FLC's actions by their scope, intensity, and appropriateness could not have been reasonably expected to obtain sufficient DBE participation.
4. I was a member of the Reconsideration Panel in the matter of Administrative Reconsideration Request by Forest Lake Contracting TRP/280/DBE/2011; State Project Number 62-631-05 ("Forest Lake I"). In that case, the panel unanimously found in favor of FLC and reversed the decision of MnDOT OCR. While that case shares some common facts with this case, I do not find the cases to be identical. I distinguish this case from Forest Lake I on the following basis:
 - a. In Forest Lake I, the MnDOT OCR failed to satisfactorily explain how it weighed the Appendix A factors and other evidence of GFE in a manner that would have allowed me to conclude that its determination was fair and reasonable. In this present case, MnDOT OCR did satisfactorily explain the weighting process it used in arriving at its conclusion. FLC failed to present evidence or to make a compelling argument that MnDOT OCR exercised the discretion given to it by the regulations in a manner that was unfair, unreasonable, arbitrary, or capricious.

b. Forest Lake I involved a project of less than \$1 million with a goal of only 6%, and FLC's GFE resulted in DBE participation exceeding half of the goal amount. In that case, I agreed with the panel that FLC's efforts were appropriate to a project of that size with that DBE goal. This present case involves a project exceeding \$5 million, with a goal of 13%. In this case, FLC achieved less than ¼ of the goal and only about ½ of the average participation achieved. For this much larger project, with a much higher goal, FLC did not demonstrate that it was sufficiently active and aggressive in pursuing participation, or that its efforts were appropriately designed to achieve an adequate level of participation. Put quite simply, the efforts that are sufficient for one project may not be sufficient for another project, but need to be tailored to the project and to the goal. I am particularly troubled by FLC's refusal to accept some DBE quotes that were only nominally higher than non-DBE quotes, despite the clear language of the regulation which says that bidders should be willing to accept some higher quotes as long as the additional costs are "reasonable". FLC presented no evidence that those nominal costs were unreasonable or excessive. To argue, as FLC did, that any DBE quote which exceeds a non-DBE quote by some percentage is automatically "unreasonable and excessive" contravenes both the clear language of the regulation and the program's remedial intent. While I believe that FLC's explanation of the adjacent project is relevant to the amount of trucking that is needed by FLC for this project, I do not believe that FLC's decision to self-perform this limited amount of trucking should be weighed in favor of finding of Good Faith Efforts. The DBE regulation (in Appendix A), requires a bidder to break out work into "economically feasible units" "...to facilitate DBE participation even when the prime contractor might otherwise prefer to perform that work with its own forces." FLC presented no evidence that the limited amount of trucking they foresaw would not still constitute an "economically feasible unit" or that FLC's decision to self-perform the trucking was based on anything other than a preference.

Sept 12, 2011

Date



James Cownie
Panel member, Administrative
Reconsideration panel of September 1,
2011.