

STATE OF MINNESOTA
DEPARTMENT OF TRANSPORTATION

**Administration Reconsideration
Hearing Request by
Gladen Construction, Inc.
State Project Number 1406-66**

MnDOT # TRP/300/DBE/2015

ADMINISTRATIVE RECONSIDERATION PANEL DECISION

The Minnesota Department of Transportation (“MnDOT”) Office of Civil Rights (“OCR”) set a disadvantaged business enterprise (“DBE”) goal of 6.8% for the State Project Number 1406-66 (the “Project”). The Project involved work on Trunk Highways 75 and 94, including bituminous and concrete surfacing, grading, bituminous mill & overlay, curb and gutter, erosion control, bridge work, construction of turn lanes, and a pedestrian bike trail. Gladen Construction, Inc. (“Gladen”) was the apparent low bidder. By letter dated October 23, 2015, (“OCR Letter”) OCR notified Gladen that it was not a responsible bidder because Gladen neither achieved the DBE goal nor demonstrated good faith efforts to meet the DBE goal.

Gladen requested a reconsideration of the OCR decision.

MnDOT assigned a panel of three MnDOT officials (the “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 Gladen 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 Panel conducted a hearing on November 19, 2015 commencing at 1:00 p.m. in conference room 120A of the Transportation Building in St. Paul. At the hearing, Mathew Ferche, Assistant Attorney General advised the Panel. Natasha Karn, Assistant Attorney General represented the OCR. Clayton Gladen, CEO/Owner of Gladen and Mark Frosaker, Vice President/Controller represented Gladen.

PANEL’S FINDINGS, CONCLUSIONS, AND REASONS

1. The Project included work such as grading, bituminous and concrete surfacing, bituminous mill and overlay, signals, lighting, ADA improvements, trucking, erosion control, and concrete and asphalt sawing.¹

¹ MnDOT’s Bid Proposal for SP 1406-66; Gladen’s solicitation email dated September 23, 2015 (Gladen Exhibit C)

2. The bid letting date was September 25, 2015. Gladen submitted the lowest bid of \$12,430,189.18. The DBE goal was 6.8% of the total Project cost. Gladen obtained 3.8% DBE commitments and submitted its good faith efforts documentation to OCR on September 29, 2015.²
3. On October 23, 2015, OCR determined that Gladen did not make adequate good faith efforts because Gladen:
 - a.) Did not solicit DBEs in a timely manner.
 - b.) Failed to follow up on its September 23 solicitation.
 - c.) Did not break out supply from install to increase DBE participation.
 - d.) Rejected the higher DBE bids without negotiating with them.
 - e.) Did not provide any evidence to show that it offered to provide assistance for obtaining bonding, lines of credit, or insurance, equipment, supplies, and material.
 - f.) Achieved only 3.8% DBE commitment while one other bidder achieved the contract goal of 6.8%.³
4. Gladen solicited fifty two DBEs by email dated September 23, 2015 and one DBE firm by phone. Seven DBE firms informed Gladen that they would not bid on the Project. Four said they would bid on the Project. Only three of the four however, submitted bids to Gladen. They were: Reiner Contracting; Central Minnesota Sawing; and Quality Cutting. Reiner Contracting quoted \$36,941.55 for sawing concrete pavement and bituminous pavement. Central Minnesota Sawing quoted \$38,270.05 for the same work. Quality Cutting quoted \$50,124.50.⁴ Gladen admits that these solicitations occurred very close to the bid date, but stated at the hearing that Gladen's decision to bid on the Project was made just days before when they realized that they could self-perform 30% of the project. Gladen argues that all subcontractors — DBEs and non-DBEs — were given the same amount of time to submit their quotes. In other words, Gladen implies that the DBEs were not singled out by soliciting just 2 days prior to bid letting.⁵
5. OCR found that Gladen failed to follow up on the solicitations. Gladen did not provide any evidence of follow-up efforts to OCR except for a form that had some minor notes, such as "yes," next to a few names. Gladen admitted that this was the full extent of its documentation of telephone follow-ups.⁶ It would be unreasonable to

² OCR Letter and Written Submissions to the Panel.

³ OCR Letter.

⁴ Part G – DBEs quoted but not selected (Gladen Exhibit 8 – pp 1-4). OCR did not produce a copy of Part G to the Panel. Gladen did. OCR admits that Gladen submitted Part G (Gladen Exhibit 8) to OCR when Gladen submitted the good faith efforts documentation. See Tr.

⁵ Transcript ("Tr.") 8-9.

⁶ The OCR Letter; Gladen Exhibit 2.

assume that OCR, without further explanation, would have understood this to be documentation of follow-up phone calls.

6. Gladen rejected all three DBE quotes because they were higher than the non-DBE quotes for the same work. OCR stated the rejected quotes ranged from \$11,021.75 to \$24,204.70. At the hearing, the Panel clarified the information appearing in Part G that mentioned the figures of 11,021.75 and 24,204.70. Both parties explained that the prices of actual quotes of the three DBEs appear on the left most column of Part G and the figures that appear in the right most column indicate how much higher the DBE quotes were, compared to the non-DBE quotes. The rejected quotes ranged from \$36,941.55 to \$50,124.50.⁷
7. Gladen did not solicit Simplex Construction Supplies — a DBE supplier — during its solicitation efforts. But Shafer Contracting Co, Inc. — a non-DBE subcontractor — solicited Simplex who agreed to supply materials for Shafer's work on the Project. The DBE Special Provisions permit a credit of 60% for supply of materials. Accordingly, Gladen claimed 60% of the total cost of goods that Simplex will be supplying to Shafer Contracting on the Project. The price of Simplex materials (\$98,000) constituted 20.7% of the DBE participation that Gladen claimed.⁸
8. H&S Contracting is a DBE trucking company. Gladen, in its submissions to the Panel indicates that Gladen did unbundle the work that it would usually self-perform. Gladen stated, that it awarded the trucking portion of hauling Select Granular Embankment, Aggregate Surfacing Class 1 and Aggregate Base Class 5 that Gladen would be supplying for the Project. Gladen submits that had it asked H&S Contracting to both supply and haul, H&S Contracting would not have been able to do so. Gladen takes the position that it broke out the contract items by asking H&S to do only hauling. Gladen admits that it did not submit accurate information about H&S work to OCR. Gladen simply submitted H&S quote as a DBE commitment but did not document Gladen's negotiations with H&S or that it decided to unbundle the work that it would have otherwise self-performed. Gladen did not present its efforts of breaking out the contract items and negotiation with H&S to OCR.⁹ Gladen presents this information to the Panel for the first time. This is new information.
9. Gladen admits that it did not directly solicit electrical, rebar and erosion control suppliers. According to Gladen, it relied on its subcontractors to provide the respective supplies and materials.¹⁰ According to the OCR, the subcontractors

⁷ OCR Letter; Gladen Submission paragraph 1 f; and Tr. 12, 49.

⁸ Gladen Submission paragraph 1 d; Tr. 41.

⁹ Gladen Submission paragraphs 3 a & b; Tr. 14-16, 25, 29-30, 48.

¹⁰ Gladen Submission paragraph 1 d; Tr. 41.

solicited and obtained rebar and erosion control DBE suppliers.¹¹ Other than OCR's statement and Gladen's admission at the hearing, the Panel has no other evidence in the record to ascertain these facts. Because the parties do not dispute these facts, the Panel admits these facts as undisputed.

10. Gladen submits, again for the first time, that it facilitated or negotiated the breaking out of the contract items by requesting Mark's Sand and Gravel to unbundle their quote to allow utilization of a DBE contractor, Reiner Contracting. When asked why Gladen simply depended on its subcontractors to solicit DBE suppliers instead of soliciting them directly, Gladen stated that they were not comfortable directly soliciting the suppliers for work that Gladen does not self-perform or does not know anything about. Gladen stated that it is not familiar with concrete work and therefore, left it to its subcontractor to solicit the DBEs. Shafer Contracting Company solicited Simplex Construction, a DBE, to supply dowel baskets, rebar and cure. Gladen explained to the Panel that unlike with Shafer, they were comfortable facilitating Mark's Sand and Gravel and Reiner Contracting negotiate and unbundle the work because Gladen has worked with both Mark's Sand and Gravel and Reiner Contracting.¹² Gladen did not submit this information to OCR. This is new information.
11. Gladen is utilizing six DBEs on this Project.¹³ The record and the information that the parties presented to the Panel at the hearing demonstrate that Gladen did not directly solicit Simplex. According to the OCR Letter, Gladen is also using "one erosion control firm that was not solicited solely as a supplier . . . provided a quote to a subcontractor and would be utilized on the project."¹⁴ The Panel is unable to determine with any certainty the number of DBEs in Part E of the good faith documentation that Gladen directly solicited. Therefore, based strictly on the record, the Panel assumes without concluding, that Gladen directly solicited four of the six DBEs listed in Part E.
12. 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."¹⁵ Gladen made a business decision to bid on the Project in the afternoon of September 22, 2015. Gladen sent out the solicitations that afternoon. This late start should have provided Gladen sufficient motivation to very aggressively solicit and follow up with DBEs. When a contractor starts soliciting quotes, the aim is to obtain the DBE goal. If the contractor fails to obtain the project's

¹¹ OCR Letter p 2.

¹² Tr. 38-40.

¹³ Part E – DBE Commitments in Gladen's Submission to OCR (OCR Exhibit E).

¹⁴ OCR Letter p 2.

¹⁵ 49 C.F.R. Pt. 26, App. A IV A.

DBE goal, and becomes the apparent low bidder, then the OCR evaluates the contractor's efforts to obtain DBE participation. Had Gladen actively and aggressively made reasonable good faith efforts to obtain DBE participation, it's failure to reach the Project's specific DBE goal becomes irrelevant. Once an apparent low bidder falls short of the DBE goal even by .5%, the inquiry shifts from numbers to efforts. In this case, Gladen's solicitation efforts consisted of an email addressed to 52 DBEs and one phone call solicitation. The Panel finds that the evidence supports OCR's conclusion that Gladen did not make reasonable DBE solicitation efforts — an important element of good faith efforts.

13. 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."¹⁶ In this case, because Gladen solicited quotes too close to the letting date, Gladen should have conducted a much more intensive follow-up effort. As noted above, the Panel also concludes that the "follow-up phone call" list that Gladen provided was not an adequate documentation of the limited follow-up that Gladen actually did perform. Accordingly, the Panel concludes that Gladen's follow up efforts, and the documentation of those efforts, were both deficient.
14. The Panel concludes that Simplex participation in the Project and one other erosion control firm that would perform work on the project did not result from Gladen's solicitation efforts. Accordingly, the Panel determines that the participation of these two DBEs has no bearing on the analysis of the adequacy of Gladen's good faith efforts. The federal rules require that once the apparent low bidder falls short of the specific DBE goal, the inquiry shifts from the percentage achieved to the adequacy of apparent low bidder's efforts. Gladen did not solicit at least two of the six DBE firms participating on the Project.
15. The federal regulations and MnDOT DBE Special Provisions do not require the prime contractor to accept DBE quotes that are excessive and unreasonable.¹⁷ What is excessive and unreasonable can become a difficult determination. Like all other factors that are considered in good faith efforts evaluation, this requires a case-by-case approach. The fact that 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.¹⁸ Just like its decision to bid on the Project just two days prior to bid letting, Gladen made a business decision not to accept a higher DBE quote. Bid packages for government projects are undoubtedly complex. While low price is

¹⁶ 49 C.F.R Pt. 26, App. A IV A.

¹⁷ 49 C.R.R. Pt. 26, App. A IV D2; MnDOT's DBE Special Provisions, p 6.

¹⁸ 49 C.R.R. Pt. 26, App. A IV D2.

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 payment of prevailing wages. 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. This “burden” is not unique to Gladen — all contractors carry it. In this case, Gladen presented the facts that certain DBE quotes were higher than non-DBE quotes. But Gladen failed to provide a real analysis of how accepting those quotes would affect its bid. So the Panel cannot determine whether Gladen even gave serious consideration to accepting those quotes. The Panel believes that Gladen could have accepted one or more of those higher quotes without doing serious harm to an over \$12 million bid.

16. Gladen directly solicited only three suppliers.¹⁹ Gladen’s explanation that it did not solicit material suppliers for concrete work because it is not familiar with concrete work is not persuasive. Gladen refers to a vague understanding that existed between the concrete subcontractors and Gladen that the subcontractor would be soliciting DBEs to help Gladen achieve the contract DBE goal.²⁰ The good faith efforts inquiry is focused on the prime contractor’s efforts to solicit DBEs and get their commitments by following up with solicitation, breaking out contract items, negotiating in good faith, and in some cases even deciding to incur extra costs with the aim of obtaining more DBE commitments. When the prime contractor fails to achieve the contract DBE goal, the inquiry focuses on the prime contractor’s efforts. In this case, Gladen fell short of the contract DBE goal. Therefore, the subcontractors’ efforts to recruit the DBEs are not relevant, unless of course, Gladen advocated it or was actively involved in the negotiation process. Gladen’s evidence that it did so with Mark’s Sand and Gravel was not presented to the OCR. The Panel does not consider new evidence that is hardly convincing. Gladen did not produce any other documentation such as a phone log or record, or a letter from Mark’s Sand and Gravel or Reiner Contracting to support their assertion. Even assuming the Panel admits this new “evidence” about Gladen’s efforts to facilitate negotiations between Mark’s Sand and Gravel and Reiner Contracting, its weight in favor of Gladen is marginal.
17. The Panel has no reason to disbelieve Gladen’s new information about negotiation and facilitation of negotiation, or the follow up they did with the four DBEs. But the Panel’s job is to review the OCR’s evaluation based on the documents that were presented to the OCR. This is yet another case of poor documentation by an apparent low bidder. The federal regulations require the apparent low bidder to show

¹⁹ Gladen Submission paragraph 1 d.

²⁰ Tr. 33.

that it took all necessary and reasonable steps to achieve the DBE goal. It is clear that when the apparent low bidder fails to achieve the DBE contract goal, the burden is on the apparent low bidder to demonstrate adequate good faith efforts. Gladen did not do so. While the Panel determines that Gladen's good faith efforts fall short of the requirements of the federal regulations and the MnDOT Special Provisions, the Panel finds Gladen's testimony to be credible. The Panel also appreciates the candor of Gladen representatives and their desire to learn from the process.

18. OCR found that Gladen failed to provide any evidence of efforts to offer the interested DBEs assistance to obtain bonding, lines of credit, or insurance.²¹ The Panel agrees that Gladen did not mention this explicitly in its solicitation letter. This alone however, does not weigh heavily against Gladen. The Panel did not hear any evidence that more DBEs would have participated had Gladen offered such assistance. Neither was there evidence to suggest that any of the DBEs were interested in obtaining that assistance.
19. OCR's Letter also implies that it used the DBE commitment obtained by one other bidder against Gladen. The Panel does not agree. The federal regulations state that when the apparent low bidder fails to meet the contract goal, but others meet it, one may reasonably raise the question of whether, with additional reasonable efforts, the apparent low bidder could have met the goal.²² In this case, only one other bidder met the goal. The regulations also state, "[i]f the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, [the recipient of federal funds] may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts."²³ Gladen's DBE commitment was 3.8% and average DBE participation of the other three bidders is 3.1%. So Gladen's DBE commitment exceeds the average DBE participation obtained by other bidders. In Panel's opinion, this weighs in favor of Gladen. As required by the federal regulations, this is only one factor that the Panel considers *in conjunction with other factors* when making a good faith efforts evaluation. Unfortunately, timeliness of solicitation, failure to provide evidence of follow up to OCR, failure to directly solicit potential DBE suppliers and to negotiate and breakout contract items to improve DBE participation, taken together, outweighs Gladen's above-average participation that was largely a result of the subcontractors' efforts.
20. Ultimately, making "adequate good faith efforts" to achieve a DBE goal does not mean that the bidder made some efforts. Instead, the governing federal regulations

²¹ OCR Letter p 3.

²² 49 C.F.R. Pt. 26, App. A IV.

²³ *Id.*

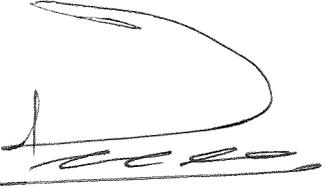
state, “[t]he bidder must show that it took all necessary and reasonable steps to achieve a DBE goal . . . by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient BE participation, even if they were not fully successful.”²⁴ In this instance, as discussed above, there were some reasonable steps that Gladen could have taken, but did not take. In fact, the record demonstrates that if Gladen has taken all reasonable steps, it would have likely met or exceeded the Project’s DBE goal. The Panel hopes Gladen will use the Panel’s analysis to its advantage in bidding for future projects. The Panel commends Gladen’s honesty and the willingness expressed at the hearing to learn from this exercise.

21. 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 November 19, 2015, the Panel concludes that Gladen has not demonstrated adequate good faith efforts to meet the DBE goal and that Gladen is non-responsible. The Panel finds that OCR was fair and reasonable in its review of Gladen’s Good Faith Efforts. The Panel affirms OCR’s determination that Gladen’s bid is non-responsible for failing to make good faith efforts.

November 30, 2015
Date



A. Nandana Perera
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For the MnDOT Administrative
Reconsideration Panel of
November 19, 2015

²⁴ 49 C.F.R. Pt. 26, App. A, I.