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STATE OF MINNESOTA

DEPARTMENT OF TRANSPORTATION

Administrative Reconsideration Hearing Request by  
Hardrives, Inc. , State Project Number 6917-127  
Pursuant to 49 C.F.R. Part 26

TRP/272/DBE/2011

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**ADMINISTRATIVE RECONSIDERATION PANEL DECISION**

**PROCESS / PROCEDURAL HISTORY**

1. This decision is issued pursuant to 49 C.F.R. Part 26 after a reconsideration hearing held on April 21, 2011 at the request of Hardrives, Inc. ("HD").
2. Minnesota Department of Transportation Office of Civil Rights ("Mn/DOT OCR") set a DBE participation project goal of 6.6% for the State Project Number 6917-127 ("Project").
3. HD was the apparent low bidder on the Project and submitted documentation to Mn/DOT OCR to describe that it achieved 2.3% DBE commitment for the Project and also summarized its good faith efforts toward achieving the DBE project goal. HD submitted these documents on February 7, 2011.
4. By letter dated March 29, 2011, Mn/DOT OCR informed HD of its determination that HD has not demonstrated adequate good faith efforts to meet the project's DBE goal (non-responsible). Federal regulations describe the standards that a recipient of federal funds may use in determining an apparent low bidder's good faith efforts.<sup>1</sup> Mn/DOT OCR used the federal standards for its analysis of the adequacy of HD's good faith efforts.<sup>2</sup>
5. HD requested a reconsideration of Mn/DOT OCR's decision. Mn/DOT Office of Chief Counsel scheduled a reconsideration hearing by a panel of three Mn/DOT officials. The three panel members had no role in the Mn/DOT OCR's decision to reject HD's bid as non-responsible. The parties were informed in writing of the location, time duration, and their rights at the hearing.<sup>3</sup> Both HD and Mn/DOT OCR were given

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<sup>1</sup> 49 C.F.R. Part 26, Appendix A.

<sup>2</sup> Mn/DOT OCR's letter dated March 29, 2011 at 3-8. (On file with the Minnesota Department of Transportation.)

<sup>3</sup> Notice dated April 6, 2011. (On file with the Minnesota Department of Transportation.)

equal opportunities to present their respective positions. Donald Hall, Jim Thompson, and Kevin Foster represented HD and Jeffery Thompson, Assistant Attorney General represented Mn/DOT OCR.

### RECONSIDERATION HEARING

1. At the hearing, HD made the following arguments to support its position:
  - A. Exhibit 7 that HD used to solicit bids in the Project has been used for a considerable time with no problems. HD intends to add to future solicitations the information that Mn/DOT OCR is suggesting such as the DBE goals and that the project is a Mn/DOT project.<sup>4</sup>
  - B. HD failed to realize that Northwoods Sodding, Inc. (NSI) that quoted for erosion control at \$53,196 was in fact a DBE. Had it known that NSI was a DBE, HD would have included them in its bid. This was an unintentional oversight on HD's part and HD is willing to correct it by including NSI's bid. With NSI's bid included, HD's total DBE commitment will increase to 3.91% from 2.3%.<sup>5</sup>
  - C. HD has always strived to obtain the maximum DBE participation possible. For example, just four days prior to being informed that its bid on the Project was rejected, HD achieved the DBE goal on another project. Mn/DOT OCR also presented to HD the Award for the DBE Contractor, 2010.<sup>6</sup>
  - D. HD did send solicitations to both Honda Electric and Highway Solutions, Inc. although the quote from Highway Solutions, Inc. was not available at the relevant time. The two fax numbers (715)549-6162 and (763)241-0799 that appear in Exhibit 6 – fax activity report are those of Honda Electric and Highway Solutions. Highway Solutions did not send a quote to HD because on Quest's CDN.com, an online data network available to the construction industry, HD was listed as "Other" and not as a prime contractor. In support of this statement, HD produced a letter from Highway Solutions, Inc.<sup>7</sup> Honda Electric submitted a quote but that was not low.<sup>8</sup>
  - E. HD has worked with Honda Electric on prior projects and when they were unable to buy the material required for the work, HD provided the materials. HD

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<sup>4</sup> Tr. 9.

<sup>5</sup> Tr. 7-8.

<sup>6</sup> Tr. 27.

<sup>7</sup> HD exhibit 1.

<sup>8</sup> Tr. 13-14.

has also advanced the bond money of \$25,000 to Honda Electric on a prior project.<sup>9</sup>

- F. Although Mn/DOT OCR maintains that HD is self-performing 48.3% of the total project, 31.2% is cost of the materials manufactured by HD and 6.3% is trucking. This leaves HD a 7% for self-performing. It is extremely difficult not to use the HD manufactured material because doing so would deprive its workforce of employment.<sup>10</sup>
  - G. De-bundling was not considered for several reasons: usually, the sub-contractors would quote for the entire scope and make an endorsement stating "all work tied;" the concept of de-bundling is new to both Mn/DOT and the construction industry and it takes time to change the present practice of quoting for the entire scope as listed; and sometimes, HD has only a few quotes to work with and it is not possible to find sub-contractors who would perform only the de-bundled portions of the work.<sup>11</sup>
  - H. Contrary to Mn/DOT OCR's assertion, HD's invitation to bid letter was not addressed to "whom it may concern" but to specific companies whose names and addresses appeared in the letter.
  - I. Unlike design-build projects, this project was quoted based on the rules and practices that apply to the low bid system. Therefore, HD considered the price as an important factor. When HD quoted higher prices in the past merely to include DBEs, doing so made HD non-competitive. Contrary what Mn/DOT OCR alleged, Erosion Control Specialist's bid was approximately \$17,000 more than the lowest bid for this work.
  - J. Attempting to negotiate with the sub-contractors after they quote is not a sound practice because it encourages the subcontractors to not quote the lowest bid for the project. Subcontractors will quote higher if the "word on the street" is that HD will negotiate even if you are not the lowest bidder.
2. Mn/DOT OCR, in addition to reiterating the reasoning in its March 29, 2011 bid rejection letter, presented the following to support its position:

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<sup>9</sup> Tr. 25.

<sup>10</sup> Tr. 21-22

<sup>11</sup> Tr. 21, 65-66.

- A. Although the competitive bid law requires awarding the contract to the lowest bidder, federal law requires adequate good faith efforts from contractors who bid on contracts funded by federal funds. Mn/DOT's failure to enforce the DBE requirements could result in the forfeiture of federal funds.<sup>12</sup>
- B. HD failed to demonstrate that it followed up with any of the 31 DBEs it initially solicited and failed to determine with certainty whether the DBEs were interested as required by the special provisions.<sup>13</sup>
- C. HD rejected NSI's quote (a DBE) that was \$57.63 lower than the quote it received from Doucette's Landscaping (a non-DBE) and did not demonstrate a legitimate business reason for doing so.<sup>14</sup>
- D. Determination of good faith efforts must be on a case by case by basis, based on the apparent low bidder's efforts on the current project. The Mn/DOT OCR cannot consider the past performance of the bidders.<sup>15</sup>
- E. The failure of HD to recognize that NSI as a DBE may have been an oversight. Neither the federal regulations nor the special provisions provide an exception for oversights such as this.<sup>16</sup>
- F. HD also did not provide any evidence of attempts to de-bundle the work involved. HD's only solicitation letter states, "[q]uotations will be evaluated on the basis of total cost, scope of work and ability to furnish a bond." The good faith efforts require an apparent low bidder to offer help to secure bonds rather than using the inability to furnish a bond as a disqualification.<sup>17</sup>

#### **PANEL'S FINDINGS AND CONCLUSIONS OF LAW**

1. Federal law requires the Recipients of federal-aid highway funds ("Recipients") to award contracts to only those bidders who could establish that they either met the DBE contract goal for the project in question or made adequate good faith efforts to meet the DBE contract goal.<sup>18</sup>

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<sup>12</sup> Tr. 40-41.

<sup>13</sup> Tr. 46

<sup>14</sup> Tr. 51.

<sup>15</sup> Tr. 41-42.

<sup>16</sup> Tr. 51

<sup>17</sup> Tr. 74.

<sup>18</sup> 49 C.F.R. Part 26 (2008).

2. Federal Regulations governing the DBE program allow the Recipients to use their discretion to evaluate good faith efforts as a matter of responsibility.<sup>19</sup> A “responsible” bidder is one who could make available to the contracting agency the DBE information subsequent to the opening of the bid and prior to the time the contract is awarded and demonstrate that it has made adequate good faith efforts.<sup>20</sup> The Mn/DOT OCR has evaluated HD’s DBE good faith efforts as a matter of responsibility in this case. This approach is consistent with the federal law that prohibits a Recipient from denying an award of the contract when the bidder has failed to meet the DBE contract goal but demonstrated adequate good faith efforts.<sup>21</sup>
3. Annex A to 49 C.F.R. §26 provides federal guidelines for evaluation of good faith efforts. These guidelines are not intended as a mandatory checklist. Nor are they exclusive or exhaustive.<sup>22</sup> The Mn/DOT OCR used the criteria listed in Appendix A to evaluate HD’s good faith efforts and reached the conclusions on each one of them after the investigator examined the facts and circumstances of this case. More specifically, the Mn/DOT OCR evaluated HD’s good faith efforts in relation to the types of action that federal regulations provide in the guidelines. In addition to the documentation received from HD, the Mn/DOT OCR also used independently obtained facts through its investigators in its good faith determination.<sup>23</sup>
4. Mn/DOT OCR’s analysis of HD’s good faith efforts is detailed and supported by valid reasons. This analysis is also a reasonable and proper application of the federal guidelines to the facts of this case. The panel agrees with the Mn/DOT OCR’s position that, among other things, HD’s failure to recognize NSI as a DBE supports a finding that HD did not make adequate good faith efforts. NSI is currently listed as a DBE in the DBE directory available to the public. According to the Mn/DOT OCR’s testimony, NSI was listed as a DBE during the relevant period.<sup>24</sup> The failure of HD to recognize NSI as a DBE due to an unintentional oversight was unfortunate. This oversight, however unintentional it may have been, does not mitigate its obligations under the federal regulations.
5. HD’s solicitation efforts consist of a single fax to the DBEs. Its failure to follow up with the 31 DBEs it initially solicited leaves it short of the good faith efforts as

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<sup>19</sup> 49 C.F.R. §26.53, b 3.

<sup>20</sup> *City of Rochester v. U.S. Environmental Protection Agency*, 496 F. Supp. 751 (D. Minn.1980).

<sup>21</sup> 49 C.F.R. §26.53.

<sup>22</sup> 49 C.F.R. § 26 Appendix A.

<sup>23</sup> Mn/DOT OCR’s letter dated March 29, 2011.

<sup>24</sup> Tr. 64; available at <http://dotapp7.dot.state.mn.us/dbe/reports/RetrieveMulti.asp?ReportID=8567445> (last visited on April 22, 2011).

defined and explained in the federal regulations.<sup>25</sup> HD did not offer any valid explanation for this failure of effort to obtain DBE participation.

6. The federal regulations that govern the DBE program suggest that the apparent low bidder negotiate with interested DBEs. HD's explanation for not negotiating with the DBEs is unpersuasive and contrary to those regulations.<sup>26</sup>
7. At the hearing, HD indicated its willingness to include NSI's quote. Panel notes that if included, HD's DBE commitment will increase 3.91%. Even assuming the NSI quote was included, HD's DBE commitment falls short of the 4.8% average DBE commitment of the other bidders on the Project. HD has failed to carry its burden of proving that it made adequate good faith efforts to recruit the DBEs as required by the federal law. HD failed to actively and aggressively solicit DBE by sending out just one fax to the DBEs and failing to follow up with any of the 31 DBEs to whom the fax solicitation was transmitted. HD did not take any attempts to de-bundle the scope of the work. HD did not provide sufficient information in its solicitation letter to identify the availability and location of the Project plans and specifications. HD failed to negotiate with the DBEs that were interested; HD failed to carefully review the information and quotes it received, utilize the Mn/DOT DBE directory appropriately and thereby overlooked a DBE (NSI) that could have been included in the DBE good faith affidavit. HD failed to offer assistance with bonding and lines of credit or insurance as is evident from the restrictive language used in its solicitation letter. HD failed to communicate with the DBEs adequately about other assistance it could offer.
8. Panel commends HD for its past performance and willingness to negotiate and to provide assistance to the DBEs. The panel hopes that HD will continue to do so in the future. The DBE good faith efforts, however, are evaluated on a case by case basis. Based on the facts of this case, HD failed to demonstrate that it had made adequate good faith efforts to get the DBE participation. Given HD's past performance and express willingness to comply with the federal requirements the Panel is confident that HD will implement a more systematic administrative procedure in their future efforts to obtain DBE participation.

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<sup>25</sup> 49 C.F.R. § 26 Appendix A, IV A requires the bidder to solicit DBEs actively and aggressively. It also requires the bidder to determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

<sup>26</sup> 49 C.F.R. § 26 Appendix A IV, D. 1) and 2).

### Decision

Based on the record made available by both parties and for the foregoing reasons, the Panel concludes that HD failed to demonstrate adequate good faith efforts as required by 49 C.F.R. Part 26 (2008). Mn/DOT OCR correctly determined that HD's bid was non-responsible. Accordingly, HD's bid on the Project must be rejected.

April 27, 2011

Date



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James Cownie  
For the Mn/DOT Administrative Reconsideration Panel  
of April 21, 2011.