
STATE OF MINNESOTA

DEPARTMENT OF TRANSPORTATION

Administrative Reconsideration Hearing Request by
Wagner Construction Inc. State Project Number
036-755-001 CSAH 155 Pursuant to 49 C.F.R. Part 26

TRP/276/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 June 24, 2011 on the request of Wagner Construction, Inc. ("Wagner").¹ Minnesota Department of Transportation Office of Civil Rights ("MnDOT OCR") set a DBE participation project goal of 7% for the State Project Number 036-755-001 ("Project").² Wagner was the apparent low bidder ("ALB") on the Project and submitted documentation to MnDOT OCR to demonstrate that it achieved 1.3% DBE commitment for the Project and also summarized its good faith efforts toward achieving the DBE project goal.³ MnDOT OCR determined Wagner's documentation supported only 0.8% DBE participation.⁴

By letter dated June 9, 2011, MnDOT OCR informed Wagner that it has not demonstrated adequate good faith efforts to meet the project's DBE goal. Wagner 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 Wagner's bid as non-responsible. The panel informed the parties in writing of the location, time duration, and their rights at the hearing.⁵ Erik M. Johnson, Assistant Attorney General represented the MnDOT OCR and Theodore V. Roberts, Attorney at Law, Fabyanske, Westra, Hart & Thomson represented Wagner. Both Wagner and MnDOT OCR had equal opportunities to present their respective positions at the hearing.

The panel made this decision based on the record made available by both parties, arguments made at the reconsideration hearing on June 24, 2011, and the following analysis.

¹ Mike Brewinski's request dated June 13, 2011.

² MnDOT OCR's letter dated June 9, 2011.

³ Wagner submitted its good faith efforts documentation by the submission due date, April 18, 2011.

⁴ MnDOT OCR's bid-rejection letter at p. 7.

⁵ Notice dated June 15, 2011.

ARGUMENTS

1. Parties do not dispute the facts. Wagner does not dispute MnDOT OCR's findings that its DBE commitment as of Submission Due Date was 0.8% or that Wagner failed to demonstrate adequate good faith efforts as of the Submission Due Date. Instead, Wagner argues it is a responsible bidder because subsequent to the Submission Due Date, and before the reconsideration hearing, it has obtained a DBE commitment of 12%.⁶ For this argument, Wagner relies on *City of Rochester v. U.S. Environmental Protection Agency*, 496 F.Supp. 751, 756 (D. Minn. 1980). Wagner interprets the federal regulations as allowing it to demonstrate responsibility by showing that it achieved the project goal at any time before MnDOT commits to the performance of the contract by the bidder. Wagner requests the panel or the OCR to waive the five-day deadline for demonstrating good faith efforts and determine that Wagner has achieved the Project's DBE goal. Relying on *Foley Bros., Inc. v. Marshall*, 123 N.W.2d 387 (Minn. 1963), Wagner characterizes its failure to obtain the DBE commitment before the Submission Due Date as a "minor technical defect that does not affect the substance of the bid." Wagner argues therefore, the timing of its DBE commitment is acceptable under 49 C.F.R., Part 26.⁷

2. Wagner also argues that if MnDOT OCR could violate its ten to twelve-day deadline in issuing the good faith evaluation determination, it is unfair to hold the bidder to the five-day deadline.⁸

3. MnDOT OCR argues that because Wagner failed to demonstrate its good faith efforts by the Submission Due Date (April 18, 2011), Wagner's bid must be rejected. MnDOT OCR points out that the Special Provisions were adopted in August, 2010, with ample notice to the contractors about the process of evaluating the good faith efforts and the need to provide documentation to MnDOT OCR within five days. MnDOT OCR further argues that the five-day period is in fact an additional period of time allowed for the ALB to obtain more DBE commitment, make additional efforts to do so, or to prepare documentation to demonstrate it did so. According to MnDOT OCR, the five-day period was introduced to circumvent the ongoing and continuous submission of good faith efforts documentation and implement a clear deadline to provide evidence of good faith efforts.⁹

4. MnDOT OCR further argues that MnDOT Special Provisions provide for extensions to the five-day deadline under certain circumstances. On two occasions, MnDOT OCR has allowed extensions to the ALB. MnDOT OCR takes the position that because Wagner did not request for

⁶ Transcript ("Tr.") 10; Hearing Ex. 2

⁷ Tr. 6-9, 11-15.

⁸ Tr. 7-8, 16-17, 54, 64, 69.

⁹ Tr. 23-30.

an extension, it cannot now argue the five-day period is arbitrary: they had the opportunity to ask for an extension to get more DBE commitment and they did not.¹⁰

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.¹¹ Federal regulations governing the DBE program allows Recipients to require good faith efforts documents to be submitted either (1) at the time of bid as a matter of responsiveness, or (2) after the bid opening and "at any time before you commit yourself to the performance of the contract by the bidder/offeror, as a matter of responsibility." When the Recipient opts to allow good faith efforts documentation to be submitted after the bid opening, the regulation required the Recipient to "make sure all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before committing yourself to the performance of the contract."¹²

2. DBE Special Provisions state, "[t]he reconsideration process is a review of only the good faith efforts made by the ALB as of the Submission Due Date. Good faith efforts made subsequent to that date will not be considered."¹³ MnDOT OCR issued the new Special Provisions in August 2010 emphasizing the need to thoroughly document the good faith efforts. MnDOT OCR issued communications and training regarding the requirements of the new Special Provisions.¹⁴ Thus, Wagner knew that the standard or degree of detail required for demonstrating the good faith efforts changed in August 2010. In keeping with the Special Provisions, MnDOT OCR evaluated Wagner's good faith efforts as a matter of responsibility in this case.

3. 49 C.F.R. § 26.53 (b) (3) allows Recipients the discretion to require the bidder to present documentation to prove the DBE commitment or the good faith efforts.¹⁵ The panel concludes that MnDOT OCR has validly exercised that discretion when it implemented the Special Provisions in August 2011 and required the ALB to submit the information of good faith efforts within five business days after the bid letting date. Read in context, the words in 49 C.F.R. §26.53 (b) (3), "[a]t any time before you commit yourself to the performance of the contract by the bidder/offeror" support panel's interpretation. MnDOT OCR

¹⁰ Tr. 33-35, 65-66.

¹¹ 49 C.F.R. Part 26 (2008).

¹² 49 C.F.R. §26.53 (b) (3) (2008)

¹³ Special Provisions dated 8/2010 at p. 8.

¹⁴ Tr. 60; Special Provisions dated 8/2010.

¹⁵ §26.53 (b) (3) states, "[a]t your discretion, the bidder/offeror must present the information required by paragraph (b) (2) of this section. Paragraph (b) (2) lists the type of documents required.

did set that time as five business days from the bid letting date. Not setting a clear deadline to receive the documentation would make the DBE program inefficient and also make the evaluation process unduly burdensome. "At any time" must be sometime. MnDOT OCR set that time in its Special Provisions. Having set a five-day deadline for submitting the documents, if the ALB is allowed to come to the reconsideration hearing and submit documentation of more DBE commitment, that will not only undermine MnDOT OCR's good faith effort evaluation but will also result in an improper use of the reconsideration process. Wagner appears to believe that an ALB should be entitled to several iterations of their good faith efforts documentation in an effort to "get it right." Accepting Wagner's interpretation of the words, "at any time" would lead to the absurd result of putting the contract award timeline into the hands of the ALB rather than the contracting authority. The contracting authority needs some definite point at which it must make the determination of "complete, accurate, and adequate" good faith efforts documentation that is required by 49 C.F.R. Part 26.

4. Failure of MnDOT OCR to issue its determination within ten to twelve business days did not jeopardize Wagner's good faith efforts or its ability to procure more DBEs. MnDOT OCR's delay occurred after Wagner submitted its good faith efforts documentation. The panel, however, strongly recommends MnDOT OCR to improve its performance in this regard.

5. The panel distinguishes this case from its earlier decision in the Administrative Reconsideration Hearing Request by Valley Paving, Inc.¹⁶ First, in *Valley Paving*, the panel allowed Valley Paving to introduce "new documents" only to explain or further clarify its good faith efforts made prior to the Submission Due Date. The panel permitted Valley Paving to introduce "new" documents at the reconsideration hearing merely to allow for more organized and more detailed presentation of the facts and efforts that it made *before* the Submission Due Date.¹⁷ Second, the panel excluded from the record, Valley Paving documents or communications that were made *subsequent* to the Submission Due Date.¹⁸ Therefore, the panel's decision not to allow new information and Wagner's subsequent efforts to achieve the Project DBE goals is consistent with the panel's decision in *Valley Paving*.

6. In *City of Rochester v. U.S. Environmental Protection Agency*, 496 F.Supp. 751, (D. Minn. 1980), the ALB was held to be responsible because it submitted the evidence of positive efforts to meet the Minority Business Enterprises (MBE) goal. Like the MBE program, federal DBE program is also aimed at assisting the disadvantaged business enterprises. In *City of Rochester*, the ALB received a letter from the City of Rochester to "submit, before April 29, 1980, the evidence of

¹⁶ Administrative Reconsideration Hearing Request by Valley Paving, Inc. State Project Number 2781-415 Pursuant to 49 C.F.R. Part 26 - TRP/273/DBE/2011.

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 5.

positive efforts to meet the 10% MBE goal." On April 29, 1980, the ALB, in addition to submitting substantial data to the City of Rochester, stated its current MBE commitment of 7.45% would likely increase as they obtain more MBE contracts. The ALB in *City of Rochester* was responsible at the time it was required to be so. Accordingly, the court held that the ALB was a responsible bidder. Wagner was required to show it was responsible on April 18, 2011. After documentation was submitted, MnDOT OCR determined it was not responsible. Wagner does not dispute MnDOT OCR's determination.

7. Because Wagner did not argue it made adequate good faith efforts or that MnDOT OCR's evaluation of its good faith efforts was flawed, the panel does not address these two issues in this decision. The panel however, based on the record made available, concludes that MnDOT OCR's good faith efforts evaluation was not arbitrary and was a proper application of the federal regulations to the facts of this case.

8. This panel's role is to reconsider the decision that MnDOT OCR made. It must do so based on the facts made available to MnDOT OCR on the Submission Due Date. If the panel is asked to and does consider new facts - evidence that was not available to MnDOT OCR when the original decision was made - this hearing cannot be deemed a reconsideration hearing. Panel refuses to act outside the scope of its authority.

Decision

The Panel concludes that Wagner was neither responsive nor responsible as required by 49 C.F.R. Part 26. MnDOT OCR's determination dated April 4, 2011, rejecting Wagner's bid as non-responsible as of the Submission Due Date is affirmed.

June 30, 2011 Ward D. Briggs
Date

Ward D. Briggs, P.E.
For the MnDOT Administrative Reconsideration Panel
of June 24, 2011.