

STATE OF MINNESOTA
DEPARTMENT OF TRANSPORTATION

**Administration Reconsideration
Hearing Request by
Diamond Surface, Inc.
State Project Number 8827-257**

MnDOT # TRP/303/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 12.5% for the State Project Number 8827-257 (the “Project”). The Project is located in MnDOT District 7. Diamond Surface, Inc. (“Diamond Surface”) was the apparent low bidder (“ALB”) on the Project. By letter dated February 22, 2016, (“OCR Letter”) OCR notified Diamond Surface that it was not a responsible bidder because Diamond Surface neither achieved the DBE goal nor demonstrated good faith efforts to meet the DBE goal.

Diamond Surface requested a reconsideration of the OCR decision.

MnDOT assigned a panel of three MnDOT officials (“Panel”) to conduct a reconsideration hearing: James Cownie (Assistant Chief Counsel for Construction and Contract Management), Ward Briggs (Director, Commercial Vehicle Operations) and Nandana Perera (Associate Legal Counsel). The three panel members did not take part in the original determination that Diamond Surface 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.¹ The Panel conducted a hearing on March 22, 2016 commencing at 1:00 p.m. in conference room 421 of the Transportation Building in St. Paul. At the hearing, Erik Johnson, Assistant Attorney General represented OCR. Mathew Ferche, Assistant Attorney General advised the Panel. Al Adamek and Terry Kreamer represented Diamond Surface.

The Panel recorded the proceedings using a digital recorder. A court reporter prepared a transcript (“Tr.”) using the digital recording.

¹ Notice of Hearing dated March 17, 2016.

PANEL'S FINDINGS, CONCLUSIONS, AND REASONS

1. This project involves constructing rumble strips—both centerline and shoulder—in MnDOT District 7.²
2. The bid letting date was January 29, 2016. Diamond Surface submitted the lowest bid of \$862,949.23. The DBE goal was 12.5% of the total Project cost. Diamond Surface obtained 11% DBE commitments and submitted its good faith efforts (“GFE”) documentation to OCR on February 4, 2016.³
3. On February 22, 2016, OCR determined that Diamond Surface did not make adequate good faith efforts because Diamond Surface:
 - a.) Did not demonstrate adequate solicitation efforts because it solicited only two DBE firms and did not provide adequate documentation to show the solicitation efforts.
 - b.) Did not provide adequate information about plans, specifications, and requirements of the contract to assist the DBE firms in responding to solicitation.
 - c.) Rejected one of the two DBE firms—Safety Signs—that it solicited based on a slightly higher price.
 - d.) Did not select portions of work from the quoted items to increase the DBE participation.
 - e.) Did not submit information that it made efforts to provide financial assistance, equipment and supplies, materials or related assistance or services.
 - f.) Achieved only 11% DBE commitment while the only other bidder on the Project committed to meeting the goal of 12.5%.⁴
4. Both federal regulations and MnDOT Special Provisions require an ALB to solicit DBEs “through all reasonable and available means . . . certified DBEs who have the capability to perform the work of the contract.”⁵ The ALB’s efforts to obtain DBE participation become important only when the ALB does not achieve the DBE contract goal. Diamond Surface did not even look at the DBE directory that is available on line for public access free of charge.⁶ Nor did Diamond Surface show any other efforts that it took to find out what DBEs have the capability to perform on the Project. When asked how Diamond Surface picked the four firms

² State Project Number 8827-257.

³ OCR Letter; Diamond Surface’s Good Faith Efforts Submission.

⁴ OCR Letter.

⁵ 49 C.F.R. Pt. 26, App. A IV A.

⁶ Available at <http://www.dot.state.mn.us/civilrights/dbedirectory.html> (last visited on 3/14/2016); Tr. 10, 20, 26, 28, 30 and 44.

that it thought were DBEs, Al Adamek from Diamond Surface explained that through their experience they knew the DBEs who could perform the kind of work required on a rumble strip project. Based on that knowledge, Diamond Surface solicited just four firms that it thought were DBEs.⁷ In fact, it was undisputed that only two of the four solicited firms were certified DBEs. Diamond Surface did not offer any evidence to show that only two DBE firms (or four as they mistakenly believed) were capable of performing the work of the contract. A reasonable contractor who is using all “reasonable and available” means to solicit DBEs would first make an informed decision to select the DBEs capable of performing on the Project before it sends out the solicitation letters. Diamond Surface did not do so.

5. Both the federal regulations and MnDOT DBE Special Provisions require the ALB to “*document* adequate good faith efforts.”⁸ (*Emphasis added.*) MnDOT DBE Special Provisions require the ALB to submit documentation of good faith efforts by the submission due date.⁹ OCR found that Diamond Surface did not directly solicit Courtland, LLC, a DBE that is supplying materials to Century Fence who is a non-DBE subcontractor performing work on the Project.¹⁰ At the hearing, Diamond Surface responded to this finding by stating that it asked Century Fence to obtain DBE participation, implying that Courtland participation was a result of its encouragement to Century Fence.¹¹ Diamond Surface did not mention anything about this “effort” of calling Century Fence as part of the GFE submission. The record does not contain any document that supports a finding that Courtland’s participation is a result of Diamond Surface’s solicitation efforts. The Panel has no reason to disbelieve Diamond Surface’s statement at the hearing that it asked Century Fence to obtain DBE participation. Even if Diamond Surface’s phone call to Century Fence resulted in Courtland’s quote, one phone call to a subcontractor simply asking for DBE commitment misses the mark and does not support a finding of adequate solicitation efforts.

6. The record shows that Diamond Surface solicited twelve subcontractors on January 15, 2016.¹² Only two of them were DBEs.¹³ According to the GFE documentation that Diamond Surface submitted to OCR, Diamond Surface followed up with both Simplex and Safety signs on January 27, 2016. This follow up was timely because the bid-letting date was January 29, 2016. But there is

⁷ Tr. 30.

⁸ 49 C.F.R. Pt. 26, App. A I.

⁹ MnDOT Special Provisions, p 4.

¹⁰ OCR Letter, p 2.

¹¹ Tr. 7.

¹² Part D of GFE submission and list of subcontractors.

¹³ OCR Letter, p 2.

little documentation as to what this follow-up consisted of, or whether the follow-up was merely *pro forma*.¹⁴ The Panel is unable to give sufficient weight to this follow up given that so few DBEs were originally solicited. Examining the follow up efforts both practically and logically, the Panel cannot find that Diamond Surface's follow up efforts were adequate in the absence of adequate solicitation.

7. 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.¹⁵ But the federal regulations and MnDOT DBE Special Provisions do not require the prime contractor to accept DBE quotes that are excessive and unreasonable.¹⁶ At the hearing, Diamond Surface justified its rejection of Safety Signs' quote for traffic control by saying that it was 6.1% higher than the traffic control quote it accepted from A & H Co.¹⁷ According to Part D of the GFE submission, Safety Signs quoted \$78,980.00 for traffic control work and A & H quoted \$74,420.00. Taking the work item of traffic control in isolation, Safety Signs' quote may have been 6.1% higher than the non-DBE bid. But this difference of \$4560.00 is about 0.5% of the total bid price. Based on the facts of this case, and the overall bid price, the Panel does not consider the difference in the amount quoted by Safety Signs to be excessive and unreasonable.

8. Diamond Surface stated at the hearing that in the past it had lost multi-million contracts due to a \$500-dollar difference.¹⁸ 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 Diamond Surface emphasized at the hearing are not unique to Diamond Surface. All contractors must wrestle with these decisions, and all contractors are similarly situated when determining the bid price and submitting the bid. Diamond Surface could have, for example, absorbed the \$4,560.00 additional cost, without raising its 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

¹⁴ Document titled, "Various Counties District 7: SP 8827-257" submitted along with Diamond Surface's GFE documents. This document simply states the names of firms, a name, 1st contact date/time, and 2nd contact date/time.

¹⁵ 49 C.F.R. Pt. 26, App. A IV D (2).

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

¹⁷ Tr. 8, 17-18.

¹⁸ Tr. 15, 43.

a chance to participate in projects, requiring sound environmental practices during construction, and requiring the payment of prevailing wages.

9. Both the federal regulations and MnDOT DBE Special provisions require the ALB to negotiate in good faith with interested DBEs. The ALB must also take the responsibility to select portions of the work to facilitate DBE participation.¹⁹ Diamond Surface rejected Safety Signs bid that was \$4560.00 more than the lower non-DBE bid without taking any effort to negotiate or select some portions of the work that Safety Signs could perform at a competitive price. Safety Signs' Revised Sign Quotation states, "All Items Tied Unless Arrangements Are Made to Split Items Off."²⁰ This indicates that there is room for splitting the items in Safety Signs' quote by arrangement. Because Diamond Surface did not provide a copy of the traffic control quote that it accepted—the A & H quote—the Panel cannot examine the potential for splitting the items for higher DBE participation.
10. Diamond Surface stated at the hearing that talking to subcontractors after they submit a bid raises some ethical considerations.²¹ The previous Panels have examined this issue. Reputed contractors do not engage in the practice known in the construction industry as bid shopping—a practice whereby a prime 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.²² Prime contractors can negotiate in good faith without bid-shopping. Negotiations can take place without disclosing the price of other bidders. For example, a prime contractor can follow up with a DBE subcontractor to find out if the DBE understood the proper scope of work when quoting, or ask if the DBE can be more competitive in its price. Diamond Surface did not take any initiative to negotiate or discuss the possibility of obtaining a more competitive price from Safety Signs or selecting the portions of the traffic control work as required by the federal regulations.
11. Diamond Surface also pointed out at the hearing that it fell short of the DBE contract goal of 12.5% only by 1.5%.²³ This point requires an analysis of the proper scope of federal regulations governing the DBE program. 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

¹⁹ 49 C.F.R. Pt. 26, App. A IV D (1).

²⁰ Safety Signs' "Revised Sign Quotation" dated 1/29/2016.

²¹ Tr. 15, 17.

²² 49 C.F.R. Pt. 26, App. A, IV D (1).

²³ Tr. 9, 16, 18, 33, 42.

DBE participation. Second, even if the ALB does not meet the goal, it can document its adequate good faith efforts to obtain DBE participation.²⁴ When the ALB does not meet the goal, it “must show that it took all necessary and reasonable steps to achieve a DBE goal.”²⁵ Because Diamond Surface did not meet the DBE contract goal of 12.5%, it had to show 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—becomes irrelevant. When evaluating good faith efforts, OCR and panel decisions focus on evaluating the efforts and not the percentage of DBE commitment achieved. The Panel’s inquiry in this case must focus on the efforts Diamond Surface made, and not what percentage of participation it achieved—either on its own or through its subcontractors. Accordingly, the Panel is unable to consider in Diamond Surface’s favor, the fact that it came so close to achieving the DBE goal and fell short by just 1.5%.

12. The federal regulations have provided for circumstances under which a recipient of federal funds can consider an ALB’s lower DBE commitment as relevant. 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 good faith efforts.²⁶ But in this case, the only other bidder who quoted on the Project achieved the DBE contract goal.²⁷ Therefore, the performance of the other bidders does not favor Diamond Surface.
13. OCR found that Diamond Surface 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 Diamond Surface did not provide any evidence that it offered this assistance to the DBEs that it solicited.
14. Making “adequate good faith efforts” to achieve a DBE goal does not mean that the bidder 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.”²⁸ In this case, Diamond Surface could have done much more than it did to actively and aggressively solicit the DBEs.

²⁴ 49 C.F.R. Pt. 26, App. A, I.

²⁵ *Id.*

²⁶ 49 C.F.R. Pt. 26, App. A V.

²⁷ OCR Letter, p 4.

²⁸ 49 C.F.R. Pt. 26, App. A, I.

The Panel hopes Diamond Surface will use this decision as a learning experience to its advantage in future bidding.

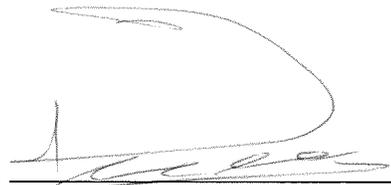
15. The Panel makes this decision based on the facts and evidence presented to the Panel and application of the federal regulatory scheme and MnDOT DBE Special Provisions to the facts of this case.

DECISION

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

March 29, 2016

Date



A. Nandana Perera
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For the MnDOT Administrative
Reconsideration Panel of
March 22, 2016