
STATE OF MINNESOTA

DEPARTMENT OF TRANSPORTATION

Administration Reconsideration Hearing Request by
Knife River Materials – Northern Minnesota Division
Pursuant to 49 C.F.R., Part 26 – S.P. 0302-72

TRP/271/DBE/2011

RECONSIDERATION PANEL DECISION

FINDINGS AND CONCLUSIONS

1. This decision is issued pursuant to 49 C.F.R., Part 26 after a reconsideration hearing held on February 14, 2011 on the request of Knife River Materials – Northern Minnesota Division (KRM).
2. Minnesota Department of Transportation Office of Civil Rights (“Mn/DOT OCR”) set a DBE participation project goal of 3.6% for the State Project 0302-72 (“Project”). KRM does not dispute the legality of Mn/DOT OCR’s project goal.
3. KRM was the apparent low bidder on the Project and submitted documentation to Mn/DOT OCR to demonstrate that it achieved 1% DBE commitment for the Project and also summarized its good faith efforts toward achieving the DBE project goal. KRM submitted these documents on November 30, 2010.
4. By letter dated January 11, 2011, Mn/DOT OCR informed KRM its determination that KRM has neither attained the 3.6% DBE goal (non-responsive) nor demonstrated adequate good faith efforts to meet the project’s DBE goal (non-responsible). In Mn/DOT OCR’s analysis, it referred to ten different elements or types of action as the basis for demonstrating adequate good faith efforts as outlined in the federal regulations.¹
5. Upon receipt of a written request [undated] for a reconsideration hearing from KRM, Mn/DOT Office of Chief Counsel scheduled a reconsideration hearing by a panel of three Mn/DOT officials to be held on February 14, 2011. The three panel members had no role in the Mn/DOT OCR’s decision to reject KRM’s bid as non-responsive. The parties were informed in writing of the location, time duration, and their rights at the hearing.² Both

¹ Mn/DOT OCR’s letter dated January 11, 2011 at 3-10. (On file with the Minnesota Department of Transportation.)

² Notices dated January 26, 2011 and January 31, 2011. (On file with the Minnesota Department of Transportation.)

KRM and Mn/DOT OCR were given equal opportunities to present their respective positions.

6. At the hearing, KRM, among other things, presented the following to support its position:
 - A. The federal standards for determining adequate good faith efforts are mostly subjective and give the Mn/DOT OCR wide discretion. It was difficult for KRM to make a judgment as to how much effort would be considered “necessary and reasonable” within the meaning of the federal regulations or to the satisfaction of the Mn/DOT OCR.³
 - B. The only objective criterion in the federal regulations is the average DBE participation obtained by the other bidders on the Project and KRM exceeded the average (0%) in this case.⁴
 - C. KRM was self- performing only 29% of the Project work. The DBE bids that KRM rejected were significantly higher than KRM’s cost (of trucking) and the other non-DBE bidders on other types of work.⁵
 - D. Minnesota law requires when bids are solicited on a competitive basis, the contract should be awarded to the lowest responsible bidder. In this case, KRM was the lowest bidder and was the only bidder who has obtained any DBE commitment.⁶
 - E. Because KRM had won or lost a total of 39 contracts by less than \$10,000 during the years 2008, 2009 and 2010, it was reasonable for KRM not to accept higher bids from DBEs and run the risk of losing the Project contract.⁷
 - F. KRM maintains a DBE list of its own and sent out solicitations to the DBEs on that list. KRM missed one DBE (Morris Sealcoat). KRM has solicited Morris Sealcoat before but has never received a quote from them. KRM did not use the DBE directory maintained by Mn/DOT that has 224 pages.⁸

³ Hearing Transcript (“Tr.”) 7, 8, 10 and 14.

⁴ Tr. 8, 13.

⁵ Tr. 16.

⁶ Tr. 12.

⁷ Tr. 17, 28; Ex. G. KRM also mentioned the number of contracts it won or lost by less than \$5000. According to Jeremy Ganske, the number was 29 and according to Doug Muyres, the number was 23. Tr. 25, 28, 80.

⁸ Tr. 20-21.

- G. KRM did not receive a bid from TranSignal for traffic control before the submission due date but received a copy of the bid afterwards and found the bid to be \$10,900 or 180% higher than the low bid.⁹
- H. Although KRM submitted its documentation of good faith efforts in a timely manner, the Mn/DOT OCR took 30 business days instead of 10-12 business days as required by the Special Provisions, to inform KRM of its evaluation and determination of KRM's good faith efforts.¹⁰
- I. Most bids are received just prior to the bid submittal deadline. Therefore, it would be practically difficult to follow-up or negotiate with the DBEs regarding price, de-bundling etc.¹¹
7. Mn/DOT OCR, among other things, presented the following to support its position:
- A. Although the competitive bid law may require awarding the contract to the lowest bidder, the federal law requirement of adequate good faith efforts must be adhered to by contractors who bid on contracts funded even partially by the federal funds.¹²
- B. Applying purely objective standards such as the average DBE commitment of the other bidders for evaluating the good faith efforts would result in a *de facto* quota.¹³ A degree of subjectivity is essential when the law requires a case by case analysis. For example, the federal regulations contain many terms that necessarily imply subjectivity: "quality;" "quantity;" "intensity;" "actively;" "aggressively;" and "judgment call" etc. It is not possible to take out the subjective goals without making the DBE program unconstitutional.¹⁴
- C. The Eighth Circuit Court of Appeals has held that the DBE program is constitutional. The United States Supreme Court denied certiorari for review.¹⁵
- D. Mn/DOT OCR sets the DBE project goal after looking at the engineer's estimate, the size, scope and location of the project, and possible DBE participation. It also conducts a "soft audit" based on the DBE directory and calling some of the DBEs in the area.¹⁶

⁹ KRM exhibit G at 4.

¹⁰ Tr. 31.

¹¹ Tr. 75.

¹² Tr. 41-42.

¹³ Tr. 38-39.

¹⁴ Tr. 37-38, 47; Mn/DOT OCR Outline.

¹⁵ Tr. 36.

¹⁶ Tr. 38, 41.

- E. KRM failed to target the solicitations from the geographical area where the project was located. Despite the fact that TranSignal informed KRM that it would bid on the traffic control work, KRM did not follow up with a phone call or other communication. KRM failed to solicit the correct scope of work as mentioned in the engineer's estimate. These facts show that KRM did not actively and aggressively solicit from the DBEs.¹⁷
- F. KRM failed to submit its solicitation letter in its submission of good faith efforts documentation to the Mn/DOT OCR. The solicitation letter is a crucial document in the evaluation process. KRM failed to do so despite the Special Provisions requirement of supporting documentation to verify good faith efforts. KRM also failed to follow-up or negotiate with the DBEs that it rejected.¹⁸
8. 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.¹⁹
9. Federal Regulations governing the DBE program allow the Recipients to use their discretion to evaluate good faith efforts as a matter of responsibility.²⁰ 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.²¹ The Mn/DOT OCR has evaluated KRM'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.²²
10. 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.²³ The Mn/DOT OCR used the criteria listed in Appendix A to evaluate KRM's good faith efforts and reached the conclusions on each one of them after the investigator examined the facts and circumstances of this case.²⁴ More specifically, the Mn/DOT OCR

¹⁷ Tr. 20, 47, 49, 52-53.

¹⁸ Tr. 49.

¹⁹ 49 C.F.R. Part 26 (2008).

²⁰ 49 C.F.R. §26.53, b 3.

²¹ *City of Rochester v. U.S. Environmental Etc.*, 496 F. Supp. 751 (D. Minn., 1980).

²² 49 C.F.R. §26.53.

²³ 49 C.F.R. § 26 Appendix A.

²⁴ Tr. at 86.

evaluated KRM'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 KRM, the Mn/DOT OCR also used independently obtained facts through its investigators in its good faith determination.²⁵

11. Mn/DOT OCR's analysis of KRM's good faith efforts is detailed and supported by reasons. It is also a reasonable and proper application of the facts of this case to the federal guidelines. KRM has not advanced any reasons to rebut the Mn/DOT OCR's analysis of KRM's failure to take the types actions provided as examples in the federal guidelines.
12. Mn/DOT OCR's delay (about 30 business days after the submission due date instead of 10-12 business days) to issue its January 11, 2011 determination did not adversely affect its *evaluation of KRM's good faith efforts*. The Panel, however, strongly encourages the OCR to communicate its decision within the timeline prescribed by the Special Provisions so as to ensure the efficient award of the state project contracts.
13. KRM 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. The Panel concludes that KRM failed to take many practical steps to satisfy the federal adequate good faith efforts requirement. For example, KRM could have targeted their solicitation efforts at the DBEs who were doing business in the area where the Project was located; KRM could have avoided the "difficulty" they would encounter in the "last minute" negotiating with the interested DBEs regarding the price and de-bundling if it engaged in the DBE solicitation actively and aggressively by giving the DBEs an earlier deadline to submit their bids; KRM could have negotiated about de-bundling and price in a timely manner and more effectively if KRM had taken attempts to build better relationships with the DBEs; KRM could have taken an effort to utilize the Mn/DOT DBE directory and could have been more careful in not "missing" one DBE (Morris Seal Coat) that was in geographically close proximity to the Project; and KRM could have followed up with TranSignal about their bid prior to the bid submittal date because TranSignal indicated it would bid on the project.

DECISION

KRM has failed to show that it took all necessary and reasonable steps to achieve the DBE goal set by Mn/DOT OCR for the State Project 0302-72. Based on the record, the Panel concludes that although KRM took some steps to solicit DBE participation, its efforts lacked the required intensity and aggressiveness. KRM failed to exercise reasonable care in determining which DBEs are located in the geographic area where the Project was located. KRM also failed to develop measures to ensure that all the DBEs in the relevant

²⁵ Mn/DOT OCR's letter dated January 11, 2011.

geographical area were included in its solicitation efforts. Soliciting the available DBEs by taking all "necessary and reasonable steps" is undoubtedly a subjective standard. It follows that the efforts will necessarily vary from bidder to bidder and project to project, and sometimes depending on the scope of the work solicited. For example, personal contact with DBEs or pre-bid meetings and/or extensive use of electronic notices or written advertisements may be reasonable means in many circumstances. But regardless of the means used, a bidder should be able to show that it included all the DBEs that were "reasonable and available" in their solicitation. In particular, when a DBE has expressed interest or indicated its intention to respond to a solicitation, a bidder who is aggressively attempting to meet a DBE goal should take additional steps to obtain that DBEs participation or to determine conclusively that the DBE will not participate.

The Panel has considered the additional efforts that would have been required of KRM to take the necessary and reasonable steps as explained in this order. Panel has also considered KRM's risk of losing a contract by accepting a higher bid from a DBE over the lower bid of a non-DBE. The need for these additional efforts and higher risk of losing a contract are inherent in the bidding process, and consequential to the obligations that are imposed by the federal law.

Based on the record made available by both parties, and the presentations at the February 14, 2011 reconsideration hearing, the Panel concludes that KRM failed to demonstrate adequate good faith efforts as required by 49 C.F.R., Part 26 (2008) and Mn/DOT OCR correctly determined that KRM's bid was non-responsible.

February 18, 2011 

Date

Ward Briggs

For the Mn/DOT Reconsideration Panel of February 14, 2011.