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STATE OF MINNESOTA

DEPARTMENT OF TRANSPORTATION

Administrative Reconsideration Hearing Request

Pursuant to 49 C.F.R. Part 26, by

PCi, LLC, State Project Number

6703-23B, TH 23, From TH 90 to the Jasper

Railroad Crossing

TRP/286/DBE/2012

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**ADMINISTRATIVE RECONSIDERATION PANEL DECISION**

**INTRODUCTION**

This decision is issued pursuant to 49 C.F.R. Part 26 after a reconsideration hearing held on July 31, 2012 on the request of PCi Roads, LLC ("PCi").<sup>1</sup> The Minnesota Department of Transportation, Office of Civil Rights ("MnDOT OCR") set a DBE participation project goal of 4.5% for State Project Number 6703-23B, TH 23 from TH 90 to the Jasper railroad crossing ("Project").<sup>2</sup> PCi was the apparent low bidder ("ALB") on the project and submitted documentation to MnDOT OCR to demonstrate that it achieved 1.06% DBE commitment for the project and also summarized its good faith efforts toward achieving the DBE project goal.<sup>3</sup> By letter dated July 10, 2012, MnDOT OCR informed PCi that it had not demonstrated adequate good faith efforts to obtain or meet the project's DBE goal. PCi requested a reconsideration of MnDOT OCR's decision.

MnDOT's 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 PCi's bid as non-responsible. The panel informed the parties in writing of the location, time, duration, and their rights at the hearing.<sup>4</sup> Jeffery Thompson, Assistant Attorney General represented the MnDOT OCR and Edward Matthews, Attorney at Law, Matthews Law Office, PLLC represented PCi. Both PCi and MnDOT OCR had equal opportunities to present their respective positions at the hearing on July 31, 2012.

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

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<sup>1</sup> Request for reconsideration from Edward Matthews, dated July 13, 2012.

<sup>2</sup> MnDOT OCR's letter dated July 10, 2012.

<sup>3</sup> PCi submitted its good faith efforts documentation by the submission due date, May 25, 2012.

<sup>4</sup> Notices of Hearing dated July 16 and July 17, 2012.

## BACKGROUND

Federal law requires the recipient of federal-aid highway funds (“recipient”) to award contracts to only those bidders who could establish that they either met the DBE contract goal for the project or made adequate good faith efforts toward meeting the DBE contract goal.<sup>5</sup> Federal regulations governing the DBE program allows a recipient to require documentation of good faith efforts 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 a recipient allows the submission of good faith efforts documentation after the bid opening, the regulation requires 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.”<sup>6</sup>

MnDOT OCR issued a “Special Provisions” document in August, 2010. It sets out a bidder’s need to thoroughly document its good faith efforts. In particular, the 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.”<sup>7</sup> The MnDOT OCR has issued communications and provided training regarding the requirements of the new Special Provisions.<sup>8</sup>

PCi submitted its good faith efforts documentation by the submission due date of May 25, 2012.<sup>9</sup> Although the DBE Special Provisions envision MnDOT OCR making its determination within ten days, MnDOT OCR issued its determination letter on July 10, 2012.<sup>10</sup> There was no claim of or showing that the issuance of the determination letter on that date caused any material prejudice to PCi’s rights in this proceeding.

PCi introduced Exhibits 9 through 22 at the hearing. MnDOT OCR objected to Exhibit 15 on the basis that the email in the exhibit was dated July 2, 2012, subsequent to the submission due date, and was therefore new evidence. The panel agrees and did not consider Exhibit 15 in its deliberations. Exhibit 10 was not considered for the same reason. Neither did the panel consider Exhibit 21 since information about DBE participation and

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<sup>5</sup> 49 C.F.R. Part 26 (2011).

<sup>6</sup> 49 C.F.R. §26.53 (b) (3) (2011)

<sup>7</sup> Special Provisions dated 8/2010 at p. 8.

<sup>8</sup> *Id.*

<sup>9</sup> PCi’s letter dated May 23, 2012 and supporting documentation.

<sup>10</sup> Exhibit 22.

goals in past projects is not relevant to PCi's performance on this project. The panel has previously allowed the presentation of information that clarified or better organized information previously presented to MnDOT OCR by the submission due date. In keeping with that practice, and in the absence of any objections from MnDOT OCR, the panel admits Exhibits 9, 11, 12, 13, 14, 16, 17, 18, 19, 20, and 22 introduced by PCi as well as Exhibits 1 through 8 introduced by MnDOT OCR. It should be noted that Exhibit 5 includes information that MnDOT OCR did not have available as of the submission due date. The exhibit consists of e-mail correspondence from seven DBEs dated June 7, 8, 11, and 12, 2012. One e-mail states that the DBE did not quote because of the time of the year.<sup>11</sup> Five e-mails state that the DBEs solicited do not perform the type work required for the project.<sup>12</sup> Another e-mail cites the geographical location of the project as the reason it chose not to submit a quote.<sup>13</sup> We admitted this exhibit for three reasons: first, MnDOT OCR relied on the information to draw conclusions in its bid-rejection letter; second, the e-mail correspondence relates to events that occurred prior to submission due date; and third, because the e-mails were attached to the bid-rejection letter, they were part of the agency file and also part of the administrative record.

## DECISION

The federal regulations establish two ways of determining whether an ALB's bid is responsible and/or responsive. The first test is objective, *i.e.* "Did the ALB meet the project DBE goal?" The second test is subjective, *i.e.* "Did the ALB take 'all necessary and reasonable steps' to secure adequate DBE participation?" Formulating the second test in this way is consistent with our decision in the matter involving Knife River Materials.<sup>14</sup>

A contractor, at the time of bid preparation and submittal, must assess its own unique set of circumstances. Its bonding capacity, location, other projects or commitments, the skills and abilities of its staff, and a number of other factors all contribute to a contractor's overall ability to submit a competitive bid for a public contract. Undoubtedly some contractors, for one reason or another, are not able to compete as successfully as other contractors for projects where a DBE goal has been established. But, the fact that a contractor might have some perceived disadvantage as compared to a competitor does not relieve it of the obligations imposed by the federal regulations. Each contractor competing

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<sup>11</sup> Exhibit 5 - 9 of 10 (e-mail response to MnDOT OCR from O'Malley Construction dated June 7, 2012)

<sup>12</sup> Exhibit 5 - 3, 4, 6, 7, and 8 (e-mail responses from Hanson Custom Crushing, dated June 12, 2012, J & L Steel Erectors, dated June 8, 2012, JD Donovan, Inc., dated June 12, 2012, Dave Bice, dated June 11, 2012, and Sue Blanchard (Safety Signs) dated June 7, 2012; Tr. 9-11.

<sup>13</sup> Exhibit 5 - 9 of 10 (e-mail response from O'Malley Construction dated June 7, 2012; Tr. 10.

<sup>14</sup> Decision in the Knife River Materials Administrative Reconsideration Hearing (TRP/ 271/ DBE/ 2011).

for a contract when a DBE goal has been set, must take all necessary and reasonable steps to achieve a DBE goal or to obtain sufficient DBE participation, i.e., steps “which by their scope, intensity, and appropriateness to the objective could reasonably be expected to attain sufficient DBE participation, even if they were not fully successful.”

For example, one means of obtaining DBE participation is through solicitation of quotes from DBE’s. The fact that a particular contractor has no staff dedicated to this function does not relieve it of its obligations, nor does the fact that the contractor is simply following its standard operating procedures. It might be necessary to shift resources, depart from standard operating procedures, and take other reasonable steps to effectively solicit DBE interest in a project.

Circumstances surrounding a bid preparation are mostly unique to each contractor. Among these circumstances are the nature, scope and location of a project; the contractor’s capacity to self-perform and willingness to contract out work which it would prefer to self-perform; and a contractor’s ability to gain DBE participation. One circumstance that is common to all contractors, however, is that if a contractor has not met the DBE goal, it must document “adequate good faith efforts,” knowing that it will ultimately be up to the Recipient to “make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts.”<sup>15</sup>

Since PCi did not meet the DBE goal, this panel must return to the second or “subjective” test described above and reconsider whether MnDOT OCR made a “fair and reasonable judgment” concerning PCi’s good faith efforts. In order to provide thorough reconsideration, the panel must ask and answer the following question: “Given all of the circumstances surrounding PCi’s bid preparation, were the efforts employed by PCi those that one could reasonably expect to be taken if PCi were actively and aggressively trying to obtain DBE participation sufficient to meet the goal on State Project 6703-23B?”<sup>16</sup>

49 C.F.R. Part 26, App. A, provides guidance to recipients of federal funds when determining if an ALB made good faith efforts to achieve a DBE goal. However, Appendix A is “not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive.”<sup>17</sup> Further, it is clear that “meeting quantitative formulas is not required;” instead, the panel is charged with the task of making “fair and reasonable judgment” as to the ALB’s good faith efforts.<sup>18</sup> The panel followed this directive in this case.

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<sup>15</sup> 49 C.F.R. Part 26, Appendix A (“Appendix A”) II (2011).

<sup>16</sup> Appendix A I-II (2011).

<sup>17</sup> Appendix A IV (2011).

<sup>18</sup> Appendix A II (2011).

**Soliciting DBE participation.** On May 8, 2012, PCi sent a solicitation letter to 140 DBEs listed in the MnDOT DBE directory related to the project's location and scope. The letter included offers of various kinds of assistance (i.e., with project scheduling, preparing proposals, interpreting plans and specifications, and help with bonding and insurance matters) to interested DBE contractors.<sup>19</sup> No DBE requested the assistance offered. On May 15, 2012, three days before the letting date, PCi made follow-up telephone calls to all of the DBE's it had solicited.<sup>20</sup> MnDOT OCR found PCi's solicitation efforts deficient in that the letter included information about multiple projects and did not clearly indicate the type of work being solicited for each individual project.<sup>21</sup> MnDOT OCR also found the follow-up effort deficient by pointing out that all of the telephone calls were made on the same day – indicating that the follow-up might not have been as thorough as desired – and OCR also stated that PCi should have presented evidence of the outcome of the calls.<sup>22</sup> MnDOT OCR also maintained that PCi should have provided copies of all 140 solicitation letters instead of the one sample actually provided.<sup>23</sup> MnDOT OCR asserted that these shortcomings in the solicitation and follow-up amount to merely “*pro forma*” efforts by PCi.<sup>24</sup> Did PCi take necessary and reasonable steps to solicit DBE participation in a meaningful way or did it take such steps merely for the sake of form?

We conclude that PCi made a bona fide attempt to solicit DBE participation in the project. PCi used a broad (instead of a “targeted”) approach in its solicitation but that seems appropriate given the remote location of the project and the relatively small number of DBE contractors based in the area.<sup>25</sup> The fact that the letter included information about multiple projects would have no bearing unless it rendered the solicitation ineffective. The panel concluded that the letter did not render the solicitation ineffective. The same can be said of the follow-up telephone calls. The fact that the calls were made on the same day shouldn't be a concern unless there was evidence that DBEs were not effectively solicited. However, MnDOT OCR contacted a sample of seven DBEs solicited and all indicated they had, in fact, been contacted and had understood the types of work available on the project.<sup>26</sup> The remaining MnDOT OCR objections relate largely to documentation of PCi's efforts. We see no inherent benefit to prescriptive rules about copies of written solicitations – we believe MnDOT OCR should accept a bidder's certification that it mailed

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<sup>19</sup> Exhibit 7.

<sup>20</sup> Exhibit 9; Exhibit 22, p. 4; Tr. 37-39.

<sup>21</sup> Exhibit 22, p. 4; Tr. 37-39.

<sup>22</sup> *Id.*

<sup>23</sup> *See*, Exhibit 22, p. 3.

<sup>24</sup> MnDOT OCR Outline dated July 31, 2012 p. 2; Tr. 51-53.

<sup>25</sup> Exhibit 5; Tr. 10, 54, 83.

<sup>26</sup> Exhibit 5.

the solicitation to all on the list (which can be verified by sampling as MnDOT OCR did here). The panel urges PCi to consider the use of telephone contact logs as one method of documenting follow-ups. We remind bidders that they have the burden of documentation of good faith efforts. If a bidder is able to provide documentation sufficient to show that it made good faith efforts, it will benefit both the bidder and the OCR. If it is unable to do so, no amount of undocumented good faith efforts will save it. The burden clearly is upon the ALB to figure out how to properly document its efforts.

**Efforts to Assist Interested DBE's.** As previously noted, PCi's solicitation letter included an offer of assistance to interested DBE's with regard to plan availability and interpretation, project scheduling, pit and plant locations, and waiving bond requirements. PCi provided the name of a PCi employee to contact for assistance. No DBE's availed themselves of this assistance, though the panel believes that such assistance would have been provided had it been requested. The panel weighs this offer of assistance, especially the waiving of bonds, in favor of PCi, though this was not a significant factor in the panel's decision.

**De-bundling Work Items.** Another issue raised in this case is the "de-bundling" of work in an attempt to increase DBE participation. For this project, Simplex (a DBE) quoted most or all of the same work as CMC (a non-DBE). PCi presented evidence that it was able, through negotiation, to get Simplex and CMC to untie their quotes, so that PCi could select some of the items quoted by Simplex, whose overall quote was somewhat higher than CMC's overall quote.<sup>27</sup> MnDOT OCR contended, however, that PCi's acceptance of part of the Simplex quote was primarily for the purpose of getting advantageous prices, and not really for the purpose of increasing DBE participation.<sup>28</sup> It should also be noted that there was some dispute as to the correct analysis of the quotes provided by Simplex and CMC. That dispute is largely irrelevant to the panel's decision.<sup>29</sup> While there is some merit to OCR's contention, the bottom line is that negotiations with Simplex and CMC resulted in some degree of de-bundling of work in favor of Simplex, and the panel believes the net effect of that activity should weigh in favor of PCi.

**Performance of Other Bidders and Rejection of DBE Quotes.** As permitted by 49 C.F.R. Part 26, Appendix A, Section V, MnDOT OCR took into account the performance of other bidders in meeting the goal.<sup>30</sup> MnDOT OCR argued that the fact that other bidders met the goal raised the question of whether PCi, with additional reasonable effort, could

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<sup>27</sup> Exhibit 12, 13, and 18.

<sup>28</sup> See Tr. 42-43.

<sup>29</sup> Tr. 41-44.

<sup>30</sup> Exhibit 22, p. 7.

also have met the goal.<sup>31</sup> In response, PCi argued that the panel should consider PCi's speculation as to why its competitor, Shafer Contracting ("Shafer") was able to meet the goal.<sup>32</sup> PCi argued that Shafer did not receive a concrete supplies quote from CMC Paving Solutions.<sup>33</sup> The panel agrees with MnDOT OCR's objection to exhibit 15 as dated after submission due date and irrelevant to the panel's inquiry.<sup>34</sup> PCi further argued that Shafer must have accepted a higher concrete supplies quote from the DBE Simplex.<sup>35</sup> In effect, PCi asked the panel to accept two key pieces of speculation: 1) the acceptance of Simplex quote by Shafer was the key reason why Shafer met the DBE goal; and 2) if Shafer had the advantage of a lower quote from CMC Paving Solutions ("CMC"), Shafer would have accepted that quote and not achieved the DBE participation that it achieved. PCi's bid was significantly lower than that of its closest competitor, Shafer. One could speculate about what Shafer would have done if it had received a comparable quote from CMC. Such speculation is neither relevant nor necessary. It is the conduct of PCi and not Shafer that is under examination – the panel must determine if PCi took all necessary and reasonable steps to obtain sufficient DBE participation under the federal guidelines. The panel believes that MnDOT OCR used the participation achieved by others in a valid manner to raise questions about PCi's performance. The panel did not find this discussion to be determinative in itself, but rather it highlighted for the panel the issue of whether PCi should have accepted some higher DBE quotes.

The panel notes that PCi could have accepted some DBE quotes that were higher than non-DBE quotes and still have maintained its competitive position. Specifically, PCi could have accepted the Holte quote or accepted the entire Simplex quote. PCi sought to introduce evidence that it negotiated with Holte, but there was no documentation of such effort provided to MnDOT OCR. The panel did not consider that assertion as, again, the bidder bears the burden of documentation. The panel does not believe that the Holte quote or the Simplex quote exceeded their non-DBE competitors by an "excessive or unreasonable" amount. The panel believes that MnDOT OCR properly weighed this factor against PCi.

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<sup>31</sup> MnDOT OCR's outline dated July 31, 2012, section V; Tr. 49.

<sup>32</sup> PCi appears to have learned of Shafer's DBE commitment via a Data Practices Act request to MnDOT. This project was an "alternate bid" project, where bidders could choose to bid either a concrete or bituminous paving alternative. Neither party introduced evidence showing that Shafer bid the concrete option as PCi did, although Shafer is generally known in the industry as a concrete paver.

<sup>33</sup> Exhibit 15.

<sup>34</sup> Paragraph 5 explains the exclusion of some exhibits and although the panel comments about Shafer's bid in this decision, it was not influenced by the information in exhibit 15.

<sup>35</sup> Tr. 14.

PCi seemed to suggest that this panel should announce a “bright line” guidance to determine when a DBE’s quote is unreasonable and excessive, such as a certain percentage over a non-DBE’s quote.<sup>36</sup> The panel declines to provide such detailed guidance. Previous panels have, however, articulated some guidance on this issue in the past decisions. For example, in the administrative reconsideration hearing on the request by Valley Paving, the panel rejected Valley Paving’s argument that each DBE quote be looked at in isolation, as well as the MnDOT OCR’s argument that DBE quotes be viewed strictly in light of the prime contractor’s overall bid. In *Valley Paving*, the panel noted, “[t]he federal regulations undoubtedly require the ALB to accept at least some DBE quotes that are higher than non-DBE quotes in order to carry out the remedial intent of the program. The panel believes, however, at least some consideration must be afforded to the ALB’s assessment of the competitiveness of its bid when it accepts or rejects DBE quotes that are higher than non-DBE quotes.”<sup>37</sup> The type of bright-line test advocated by PCi is simply not supported by the federal regulations. The federal regulations simply state that 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 goal as long as such costs are *reasonable*.”<sup>38</sup> (Emphasis added.) The regulations do not provide a “bright-line” test. Instead, the regulations allow the recipients of federal funds (MnDOT in this case) the discretion to make a “fair and reasonable judgment” and these determinations are therefore, a “judgment call.”<sup>39</sup>

PCi repeatedly urged the panel not to play “Monday Morning Quarterback” with decisions made by PCi in the “black box of bid night.”<sup>40</sup> The panel rejects this argument. The panel’s review in such a manner is exactly what is contemplated by the DBE regulations. When a contractor decides to bid on a federally-assisted contract, it must understand that low cost does not “trump” the DBE program. If a bidder is unwilling or unable to meet the goal and chooses to rely on GFE, the bidder must understand that its efforts will be subject to scrutiny and second-guessing by the OCR. This is the tradeoff that the bidder expressly subjects itself to when it chooses whether to meet the goal or to rely on good faith efforts.

## CONCLUSION

As noted above, this panel does not apply Appendix A as a checklist. Ultimately, this panel believes that it is required to weigh the Appendix A factors along with other relevant

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<sup>36</sup> Tr. 61-62.

<sup>37</sup> Decision in the Valley Paving Administrative Reconsideration Hearing dated April 29, 2011 (TRP/ 273/ DBE/ 2011) p. 6.

<sup>38</sup> Appendix A II D (2011).

<sup>39</sup> 49 C.F.R.

<sup>40</sup> Tr. 22, 28, and 77.

factors to determine whether MnDOT OCR made the correct judgment call with respect to the good faith efforts of PCi. The panel weighed the solicitation process and the de-bundling through negotiation in favor of PCi. The panel weighed the failure to accept some additional DBE quotes against PCi. On weighing these factors carefully and after much deliberation, the panel concludes that PCi satisfied the federal good faith efforts requirement. The decision in this case is based on the facts of this case and application of the federal regulatory scheme to those facts in the panel's judgment.

The panel believes it is worthwhile to note that this case was a very close call. To use a football analogy, while PCi may have "crossed the goal line" it did so only by inches, not by feet, and the touchdown had to be confirmed by the replay official. PCi is urged to consider strengthening its DBE processes, including its level of documentation of its good faith efforts.

PCi has demonstrated adequate good faith efforts to achieve the DBE goal and PCi was a responsible bidder.

Aug 8, 2012

Date



James Cownie

For the MnDOT Administrative Reconsideration Panel  
of July 31, 2012