
STATE OF MINNESOTA
DEPARTMENT OF TRANSPORTATION

**Administration Reconsideration
Hearing Request by
Ulland Brothers, Inc.
State Project Number 5007-32**

MnDOT # TRP/301/DBE/2016

ADMINISTRATIVE RECONSIDERATION PANEL DECISION

Minnesota Department of Transportation Office of Civil Rights (“OCR”) set a disadvantaged business enterprise (“DBE”) goal of 8.2% for the State Project Number 5007-32 - Trunk Highway 105 in Austin. Ulland Brothers, Inc. (“Ulland”) was the apparent low bidder (“ALB”). By letter dated, February 11, 2016, (“OCR Letter”) OCR informed Ulland that it was not a responsible bidder because Ulland neither achieved the DBE goal nor demonstrated good faith efforts to meet the DBE goal.¹

Ulland requested a reconsideration of the OCR decision.²

Minnesota Department of Transportation (MnDOT) Office of Chief Counsel assigned a panel of three MnDOT officials (“Panel”) to conduct a reconsideration hearing. James Cownie (Assistant Chief Counsel for Construction & Contract Management), Thomas O’Keefe (Director, Metro Program Delivery) and Nandana Perera (Associate Legal Counsel) were assigned to the Panel. The three panel members did not take part in the original determination that Ulland 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.³ The Panel conducted a hearing on March 3, 2016 commencing at 1 p.m. in conference room 421 of the Transportation Building in St. Paul. Jeff Carlson - Vice President, Vallery Sheedy, and Wendy Brackey represented Ulland. Erik Johnson, Assistant Attorney General represented the OCR. Mathew Ferche, Assistant Attorney General advised the Panel.⁴

A Court Reporter prepared a transcript of the hearing (“Tr.”)

¹ OCR Letter.

² Ulland’s letter dated 2/15/2016.

³ Notice of Hearing dated February 24, 2016.

⁴ Tr. 1-2.

PANEL'S FINDINGS, CONCLUSIONS, AND REASONS

1. The Project included work such as bituminous mill and overlay, bituminous surfacing, traffic signals, ADA improvements and storm sewer, concrete work, and landscaping etc.⁵
2. The bid letting date was December 18, 2015. Ulland was the ALB with a bid of \$1,804,314.86. The DBE goal was 8.2% of the total Project cost. Ulland obtained a DBE commitment of 4.5%. Because Ulland did not meet the DBE goal, Ulland submitted its good faith documentation ("GFE") to OCR on December 23, 2015.⁶
3. On February 11, 2016, OCR determined that Ulland did not make adequate good faith efforts to obtain DBE commitments because Ulland:
 - a.) Did not provide to OCR examples of its solicitation efforts such as copies of the solicitation advertisement, fax confirmations or logs of fax activity or emails.
 - b.) Did not include three DBE quotes in the good faith documentation – Simplex, Boys Water Products, and Central Minnesota.
 - c.) Did not solicit more DBE supply firms.
 - d.) Did not solicit 19 additional DBE firms certified to perform the scopes of work needed on the Project. The additional 19 DBE firms are in MnDOT districts 6, 7, and 8.
 - e.) Rejected the higher DBE quotes from O'Malley Construction, Safety Signs, Reiner Contracting, and Erosion Control.
 - f.) Did not follow up with TranSignal to determine with certainty if TranSignal was interested in bidding.
 - f.) Achieved only 4.5% DBE commitment while one other bidder achieved 8.2% (the contract goal).⁷
4. Before the March 3, 2016 hearing, Ulland submitted additional documents that included the actual DBE and non-DBE quotes, copies of solicitation letters, solicitation and follow-up emails and emails showing Ulland's efforts to negotiate with O'Malley and Erosion Control. OCR had no objections to the introduction of Ulland's documents at the hearing.⁸
5. In Part D of the good faith efforts documentation submitted to OCR, Ulland provided a list of twenty DBEs that it solicited. Ulland did not however, provide a sample of its solicitation letter to OCR. In Part D of the submission to OCR, Ulland

⁵ OCR Letter; Ulland's solicitation letter.

⁶ Ulland's GFE submission dated December 23, 2015; OCR Letter; and Ulland's solicitation letter.

⁷ OCR Letter.

⁸ Ulland Exhibit A.

provided the phone and fax numbers of the DBEs solicited, whether they were bidding or not, and the dates on which they were contacted. According to Part D of Ulland's submission, Ulland contacted nineteen DBEs on December 1, fourteen of those again on December 7, and 11 of them again on December 14, 2015. Out of the five DBEs that were contacted only on December 1, one DBE – F & S Concrete Paving – informed Ulland that it was not bidding on the project. Another DBE – Ace Hydro Seeding – informed Ulland that it was no longer in business.⁹

6. OCR Letter at page 2 states, "Ulland provided information showing it solicited a total of 20 companies; all of them were DBE firms." Immediately before the above statement, OCR Letter states that Ulland did not provide examples of its solicitation efforts such as copies of the solicitation advertisement, fax confirmations or logs of fax activity or emails.¹⁰ At the hearing, OCR did not dispute the credibility of Ulland's information regarding its solicitation efforts.¹¹
7. OCR Letter at page 5 states, Ulland submitted an email to Lori O'Malley and notes of a phone call to Mark Hayes of Safety Signs. The documents that OCR submitted to the Panel as Ulland good faith efforts submission however, does not contain the above mentioned email or the notes of the phone call. There is nothing in the record to substantiate a phone call to a person called Mark Hayes. But Ulland's Exhibit A contains, among others, an email dated December 18, 2015 from Lori O'Malley to Andrew Erichson at Ulland asking him to call Brian O'Malley or Curt Rogers with a handwritten note "8.59 Andy called."¹²
8. In Part G of the good faith efforts documentation that Ulland submitted to OCR, Ulland only listed four DBEs who quoted on the Project but were not selected. Ulland listed in Part G, O'Malley Construction, Safety Signs, Reiner Contracting, and Erosion Control. In Part G, Ulland did not list Simplex Construction, Boys Water Products and Central Minnesota Sawing – all DBEs – as quotes that Ulland rejected.¹³
9. According to the documents that Ulland produced to the Panel, Simplex quoted for supply of materials and items such as expansion fiber, and iron truncated domes with a total value of \$2,100.¹⁴ Ulland solicited Boys Water Products and rejected

⁹ Ulland GFE documentation dated December 23, 2015; Ulland Exhibit A, p 1.

¹⁰ OCR Letter, p 2 – "Solicitation."

¹¹ See Tr. 16-19, 21-22.

¹² Ulland Exhibit A, p 6 (email dated December 18, 2015 from Lori O'Malley to Andrew Erichson with copy to Wendy Brackey).

¹³ Part G of Ulland GFE documentation.

¹⁴ Simplex quote dated December 11, 2015 (the Panel added the individual dollar amount quoted for each item and arrived at the total dollar amount).

its quote of \$2387.94 for supply of pipes and accessories.¹⁵ Boys Water Products is supplying materials to Ulland subcontractor River City Electric on this Project. Ulland solicited and received Central Minnesota Sawing quote of approximately \$5878 for concrete sawing. Ulland is using Reiner Contracting, a DBE, to do part of the work that Central Minnesota Sawing quoted.¹⁶ OCR did not find that Ulland accepted other non-DBE quotes instead of the above three DBE quotes. The Panel does not either.

10. Ulland rejected the following DBE quotes and accepted the lower bids from non-DBEs:

- DBE O'Malley's quote of \$255,822.96 for concrete work and accepted non-DBE Komitt Concrete quote of \$158,852.75 to carry out the same line items.
- DBE Reiner Contracting quote of \$57,421.58 for milling and accepted non-DBE Road Milling's quote of \$23,833.16.
- DBE Safety Signs' traffic control quote of \$41,500 and accepted non-DBE Warning Lites' quote of \$18,000.¹⁷

11. Ulland also rejected Erosion Control's quote of \$24,069.75 for landscaping as incomplete and high.¹⁸

12. Ulland is using MJ Nelson Trucking and K O'Conner, LLC for \$41,500 worth of trucking.¹⁹ OCR found that Ulland failed to solicit 19 additional firms who would have likely quoted for the work on the Project.²⁰ At the hearing, Ulland stated that 13 DBE firms that Ulland did not solicit are trucking firms and that Ulland solicited, and is using two trucking firms and a substantial amount of DBE trucking on the Project.²¹ OCR did not contradict this information.

13. Both the federal law and MnDOT DBE Special Provisions state that the prime contractor must solicit the certified DBEs "through all reasonable and available means," and "within sufficient time to allow the DBEs to respond to the solicitation."²² Ulland is directly using four of the DBEs that it solicited. In addition, Ulland's subcontractor River City Electric is using two DBEs that Ulland solicited.²³ These facts, together with the documentation supporting solicitation efforts,

¹⁵ Boys Water Products quote dated 12/16/2015.

¹⁶ Central Minnesota Sawing LLC quote (undated).

¹⁷ OCR Letter, p 2; Ulland GFE documentation; Komitt Concreted quote dated 12/17/2015; Road Milling quote dated 12/18/2015; and Warning Lites quote dated 12/3/2015.

¹⁸ OCR Letter, p 2.

¹⁹ Ulland GFE documentation, Part E – DBE Commitments.

²⁰ OCR Letter, p 3.

²¹ Tr. 25.

²² 49 C.F.R. Pt. 26, App. A IV A.

²³ Tr. 37, 40, 51-52.

support a finding that Ulland's solicitation efforts were reasonable. Panel notes that it is not clear on the record if Ulland's direct solicitation of Boys Water Products resulted in River City Electric hiring them to supply the materials. But it is clear on the record that Ulland solicited and Ulland's subcontractor is in fact using Boys Water Products. Once an apparent low bidder falls short of the DBE goal even by .5%, the inquiry shifts from percentage achieved to efforts made. In this case, Ulland's solicitation efforts consisted of 20 initial solicitations and a total of 26 follow-ups that in fact resulted in some DBE commitments. The Panel finds that the evidence does not support OCR's conclusion that Ulland did not make reasonable DBE solicitation efforts — an important element of good faith efforts.

14. Both the federal law and MnDOT DBE Special Provisions require that the prime contractor should find out "with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitation."²⁴ In this case, Ulland produced email communications to explain and elaborate the information it submitted to OCR that it sent emails to the DBEs to follow up on the quotes.²⁵ Accordingly, the Panel concludes that Ulland's follow up efforts were adequate.
15. The federal regulations and MnDOT DBE Special Provisions do not require the prime contractor to accept DBE quotes that are excessive and unreasonable.²⁶ What is excessive and unreasonable can become a difficult determination. Like all other factors that are considered in good faith efforts evaluation, this too requires a case-by-case approach. 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 contract DBE goal. While low price is important, it is not the only goal in government contracting.
16. The federal regulations also require the prime contractor to select portions of the work or break out contract work items into economically feasible units to facilitate DBE participation.²⁷ Intertwined with the above two responsibilities, the prime contractor also has the responsibility of negotiating with the DBEs in good faith.²⁸ Interestingly, the Panel finds that Ulland did not simply reject the DBE higher bids. Despite the substantial differences between the DBE quotes and the non-DBE quotes, Ulland did what the federal regulations require a prime contractor to do: Ulland initiated negotiations with O'Malley by asking if they can do anything to help O'Malley to be competitive; Ulland, instead of rejecting Reiner Contractors' entire quote because it was higher than the non-DBE quote, agreed to use Reiner

²⁴ 49 C.F.R Pt. 26, App. A IV A.

²⁵ Ulland GFE documentation; and Ulland Exhibit A.

²⁶ 49 C.F.R. Pt. 26, App. A IV D (2).

²⁷ 49 C.F.R. Pt. 26, App. A IV B.

²⁸ *Id.*

for saw cutting only; and Ulland agreed to hire Safety Signs for sign supply and install while rejecting the high price for traffic control portion of the quote.²⁹ The Panel finds that although Ulland rejected three higher DBE bids, viewed together with Ulland's efforts of negotiation and selection of the contract work items to accommodate DBEs, tip the scale in Ulland's favor.

17. Appendix A to the federal regulations states, ". . . the fact that there may be some additional costs involved in . . . using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable." In Ulland's December 23, 2015 cover letter to its GFE documentation, Ulland explained why it rejected quotes from four DBEs. Ulland noted that O'Malley's concrete work quote was \$96,907.21 higher than the non-DBE quote – a difference of 161%. The Panel believes that this quote is unreasonably excessive in the scope of a \$1.8 million bid. Ulland points to other percentage differences between DBE and non-DBE quotes. But the previous panels have repeatedly emphasized that a percentage difference alone is insufficient to justify rejection of a higher DBE quote. A bidder must look at both the percentage difference and the dollar difference, both in the context of the overall bid amount to determine reasonableness.
18. While the Panel believes that the O'Malley quote was unreasonably excessive, Ulland should have given closer attention to the Reiner and Safety Signs quotes, and should have provided more documentation as to why, in the context of an overall \$1.8 million bid, it would have been unreasonable to accept those quotes.
19. Ulland states that Erosion Control's bid was incomplete and did not include soil bed preparation or the site restoration. But Ulland did not give Erosion Control an opportunity to provide a complete bid. Also, Ulland did not initiate any negotiations with Erosion Control like it did with O'Malley. In demonstrating good faith efforts the most important inquiry is not the percentage achieved by certain efforts with a certain DBE but how much efforts the prime contractor made to hire the DBE.
20. The Panel finds that while Ulland's ultimate failure to use the Reiner and Safety Signs quotes, and to initiate negotiations with Erosion Control weighs against Ulland, that failure is mitigated by two factors: 1) Ulland was ultimately able to use Safety Signs and Reiner for some contract work; and 2) Ulland engaged in some negotiations/discussions with O'Malley and Safety Signs concerning their quotes.
21. OCR found that Ulland failed to provide any evidence of efforts to offer the interested DBEs assistance to obtain bonding, lines of credit, insurance,

²⁹ Ulland GFE documentation.

equipment and supply assistance.³⁰ The Panel agrees that Ulland did not mention this explicitly in its solicitation letter. This alone however, does not weigh heavily against Ulland. The Panel did not hear any evidence that more DBEs would have participated had Ulland offered such assistance. Neither was there evidence to suggest that any of the DBEs were interested in obtaining any assistance.

22. OCR Letter also implies that one other bidder's achievement of the DBE contract goal works against Ulland. The federal regulations state that when the apparent low bidder fails to meet the contract goal, but *others* meet it, one may reasonably raise the question of whether, with additional reasonable efforts, the apparent low bidder could have met the goal. (*Emphasis added.*) In this case, only one other bidder met the goal. As required by the federal regulations, even when other bidders meet the goal, that is only one factor that the Panel considers *in conjunction with other factors* when evaluating good faith efforts. (*Emphasis added.*) Again, reasonable and timely solicitations, timely follow-up, negotiations and selecting portions of contract work items weigh slightly in Ulland's favor.
23. 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 DBE participation, even if they were not fully successful."³¹ As discussed above, totality of circumstances show that Ulland took all necessary and reasonable steps by their scope, intensity, and appropriateness to the objective as a prime contractor to achieve the DBE goal.
24. Ulland did not do so well in presenting documentary proof for all its actions. Ulland submitted the copies of individual emails, fax logs and letters only to the Panel. The previous panels have allowed new documents to the extent that they explain or corroborate the information already presented to OCR. In this case too, because Ulland presented the bare facts about its solicitation and follow-up efforts to OCR in Part D, the Panel allowed additional documents to explain and corroborate the information already presented to OCR.
25. The Panel notes that the submission due date in this case was December 28, 2015 and Ulland submitted its documents to OCR on December 23. The Panel does not intend to impose any administrative burdens on OCR by requiring it to ask a prime contractor to clarify or ask for further documentation to support the ALB's claims. The Panel hopes Ulland will use the Panel's analysis to its advantage when presenting its good faith efforts documentation in future projects.

³⁰ OCR Letter, p

³¹ 49 C.F.R. Pt. 26, App. A, I.

The Panel commends Ulland's honesty and the willingness expressed at the hearing to learn from this exercise. But the Panel must also emphasize the importance of detailed and organized documentation to demonstrate the ALB's good faith efforts. All copies of documents, whether paper or electronic that the ALB generates, sends out, or receives during the solicitation and negotiation process including phone and fax logs, notes from phone discussions etc. become relevant when evaluating the ALB's good faith efforts. They must be submitted to OCR on the submission due date to avoid denial of a low bid and administrative burdens on MnDOT.

26. The Panel decides this case on the facts and evidence presented to the OCR and 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 and reasons, and on consideration of the relevant evidence made available at the hearing on March 3, 2016, the Panel concludes that Ulland has demonstrated adequate good faith efforts to meet the DBE goal and that Ulland is a responsible bidder. OCR determination dated February 11, 2016 is reversed.

March 10, 2016
Date



A. Nandana Perera
Associate Legal Counsel

For the MnDOT Administrative
Reconsideration Panel of
March 3, 2016