STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0024

Administrative Reconsideration Hearing Request
by Central Specialties, Inc.,
Pursuant to 49 C.F.R. Part 26
State Project Number 65-611-044

Filed August 27, 2012
Affirmed
Hudson, Judge

Department of Transportation
File No. TRP/283/DBE/2011

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Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Stoneburner, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

Relator construction firm challenges an administrative decision concluding that relator's construction-project bid failed to meet federal regulatory requirements for participation by disadvantaged business enterprises (DBEs). Because we conclude that

the decision was not arbitrary or unsupported by the evidence, and that relator was not entitled to a contested-case hearing on reconsideration of its bid, we affirm.

FACTS

Relator Central Specialties, Inc. (CSI), a highway-construction firm, submitted a bid on a road-construction project to the Minnesota Department of Transportation (MnDOT), acting as agent for Renville County, which had solicited bids for the project under Minnesota municipal contracting law. *See* Minn. Stat. §§ 471.345, 375.21, subd. 1 (2010).[1] Because the project was to receive certain federal funding, MnDOT was subject to the federal Disadvantaged Business Enterprise (DBE) Program.[2] That program requires that the project contract be awarded to a responsible bidder who documents that it has either (1) met a specified goal of including in its bid contractors who have been certified as DBEs; or (2) made good-faith efforts to meet that goal. 49 C.F.R. § 26.53(a) (2010).

The MnDOT Office of Civil Rights (MnDOT/OCR) set a DBE project goal of 5.3% of the bid amount, or $124,333.26. MnDOT/OCR found that CSI's bid of $2.34 million included approximately $59,000 of work to be subcontracted with DBEs, or 2.52% of the bid, which fell about $65,000, or 2.78%, short of the DBE goal.

[1] Minnesota public construction contracts have traditionally been awarded using a lowest-responsible-bidder approach to procurement. *Sayer v. Minn. Dep't of Transp.*, 790 N.W.2d 151, 155 (Minn. 2010). Under that approach, a public agency chooses a design, releases specifications, and eliminates bids from contractors that do not qualify based on a material variation from the specifications. *Id.* at 155–56. The agency then awards the contract to the lowest qualifying bidder. *Id.* at 156.

[2] A DBE is a for-profit small business at least 51% owned by socially and economically disadvantaged persons, with management and daily business operations controlled by at least one of those individuals. 49 C.F.R. § 26.5 (2010).

MnDOT/OCR also determined that CSI failed to demonstrate adequate good-faith efforts to meet the DBE contract goal. MnDOT/OCR reasoned that, although CSI had initially solicited DBEs, it did not post the project plans in its online plan room—as it had assured prospective DBEs it would do—until six days before the bid was due, which did not demonstrate that CSI was actively and aggressively pursuing DBE participation. MnDOT/OCR also stated that CSI did not show that it adequately selected portions of the work to be performed by DBEs because it rejected DBE quotes that were not substantially higher than non-DBE quotes and intended to perform 93.42% of the project work itself. MnDOT/OCR also noted that CSI's 2.5% DBE participation rate was below the 4.03% average rate of the other bidders on the project. MnDOT/OCR therefore rejected CSI's bid as non-responsible.

CSI requested reconsideration and met with a three-member reconsideration panel. CSI argued that MnDOT/OCR's decision was arbitrary and capricious. Specifically, CSI argued that its solicitation of DBEs was adequate; it sufficiently facilitated DBE participation by identifying portions of the work it would normally perform itself to be completed by DBEs; its intent to self-perform a substantial amount of the work was irrelevant and related mostly to acquiring project materials, which were not all available through DBE vendors; MnDOT/OCR's method of comparing DBE quotes to non-DBE quotes was unfair; and CSI had not deviated from its past good-faith efforts in relation to recently accepted bids. CSI also argued that the Minnesota Administrative Procedure Act (MAPA), Minn. Stat. §§ 14.001-.70 (2010), required a contested-case hearing before the reconsideration panel.

The reconsideration panel affirmed the decision rejecting CSI's bid as non-responsible. The panel concluded that CSI failed to perform meaningful solicitation; that CSI's rejection of all DBE quotes that were higher than non-DBE quotes demonstrated that CSI was not "actively and aggressively" pursuing DBE participation; and that MnDOT/OCR appropriately exercised its judgment in determining that CSI had not made adequate good-faith efforts to meet the project's DBE goal. The panel rejected CSI's argument that a contested-case hearing was required. This certiorari appeal follows.

D E C I S I O N

I

MnDOT/OCR and the reconsideration panel (hereinafter MnDOT) denied CSI's bid as non-responsible under federal DBE regulations, which require that agencies acting as recipients of federal funds must set an overall goal of DBE-contractor participation in federally-funded projects and attempt to ensure, without the use of quotas, that DBEs are awarded sufficient work to meet that goal. 49 C.F.R. §§ 26.45-.55 (2010). These regulations comport with the United States Supreme Court's 1995 holding that a federal program, which was designed to provide highway contracts to DBEs and employed race-based classification, was subject to strict-scrutiny analysis under the equal-protection component of the Fifth Amendment's due-process clause. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097 (1995); *see also Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 972–73 (8th Cir. 2003) (concluding that the DBE regulations, on their face and as applied in Minnesota and Nebraska, were narrowly

tailored to serve the compelling governmental interest of not perpetuating racial discrimination in the distribution of federal funds).

MnDOT's determination that CSI submitted a non-responsible bid constitutes a quasi-judicial administrative action. *See Minn. Ctr. for Envtl. Advocacy v. Metro. Council*, 587 N.W.2d 838, 841–42 (Minn. 1999) (stating that quasi-judicial action involves investigating a disputed claim and weighing evidentiary facts, applying those facts to a prescribed standard, and issuing a binding decision relating to the claim). On certiorari review of a quasi-judicial administrative decision, this court reviews the record for "questions affecting the jurisdiction of the [agency], the regularity of its proceedings, and, as to merits of the controversy, whether the order or determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it." *Rodne v. Comm'r of Human Servs.*, 547 N.W.2d 440, 444–45 (Minn. App. 1996) (quoting *Dietz v. Dodge Cnty.*, 487 N.W.2d 237, 239 (Minn. 1992)). This court does not "retry the facts or make credibility determinations," and will uphold the decision if the government entity "furnished any legal and substantial basis for the action taken." *Senior v. City of Edina*, 547 N.W.2d 411, 416 (Minn. App. 1996) (quotation omitted).[3] We defer to the agency's expertise and special knowledge in its field. *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance*, 731 N.W.2d 502, 514 (Minn. 2007).

[3] Although we reject CSI's argument that MAPA applies, *see discussion infra*, we have stated that "the APA's scope of review is similar to the common law scope of review on certiorari. Thus, the same standard applies regardless of the applicability of APA." *Staeheli v. City of St. Paul*, 732 N.W.2d 298, 304 n.1 (Minn. App. 2007).

CSI argues that MnDOT's determination that it did not make sufficient good-faith efforts to secure DBE participation is arbitrary and unsupported by the evidence. An agency's decision

> is arbitrary and capricious if the agency (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise.

Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs, 713 N.W.2d 817, 832 (Minn. 2006). An "agency's conclusions are not arbitrary and capricious so long as a rational connection between the facts found and the choice made has been articulated." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001) (quotation omitted). But "[i]f the agency's decision represents its will, rather than its judgment, the decision is arbitrary and capricious." *Pope Cnty. Mothers v. Minn. Pollution Control Agency*, 594 N.W.2d 233, 236 (Minn. App. 1999). "If there is room for two opinions on a matter, the [agency's] decision is not arbitrary and capricious, even though the court may believe that an erroneous conclusion was reached." *In re Review of 2005 Annual Automatic Adjustment of Charges for All Electric & Gas Utils.*, 768 N.W.2d 112, 120 (Minn. 2009).

The DBE regulations direct an administering agency to make "a fair and reasonable judgment" as to whether a contractor has made good-faith efforts to obtain DBE participation, which includes consideration of "the quality, quantity, and intensity of the different kinds of efforts that the bidder has made." 49 C.F.R. Pt. 26, App. A, § II

(2010). The agency considers several types of actions in determining whether a bidder has made adequate good-faith efforts to obtain DBE participation in a project. *Id.*, § IV. (2010). These include: (1) soliciting DBE interest "through all reasonable and available means" and "taking appropriate steps to follow up initial solicitations" to determine DBE interest with certainty; (2) when appropriate, "breaking out contract work items into economically feasible units to facilitate DBE participation," even if the bidder might otherwise choose to perform these items with its own workforce; and (3) "[n]egotiating in good faith with interested DBEs." *Id.*, § IV.A, B, D(1). These factors are not "exclusive or exhaustive." *Id.*, § IV. The rule "specifically prohibits . . . ignoring *bona fide* good faith efforts." *Id.*, § III (2010). But an agency's "determination concerning the sufficiency of the firm's good faith efforts is a judgment call: meeting quantitative formulas is not required." *Id.*, § II.

CSI challenges several aspects of MnDOT's determinations that CSI failed to make sufficient good-faith efforts to secure DBE participation to meet the contract goal.

Meaningful solicitation

"The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations." *Id.*, § IV.A. Good-faith efforts include "[p]roviding interested DBEs with adequate information about the plans, specifications, and requirements . . . in a timely manner to assist them in responding to a solicitation." *Id.*, § IV.C. MnDOT concluded that CSI failed to perform meaningful solicitation of DBEs because CSI did not make the project plans and specifications available to previously solicited DBEs in its online plan room until about a week before

the quotes were due, and CSI did not send a follow-up on earlier emails to DBEs until one day before the due date.

CSI argues that the administrative determination on this factor was arbitrary because CSI solicited 84 DBEs in August 2011; it also offered the project plans to DBEs by fax or email; and no regulatory requirement exists that bidders maintain plans online. CSI also maintains that the timing of its followup did not pose a barrier to DBE participation because CSI continued to accept bids from, and negotiate with, DBEs after the quotes were due.

The regulations require that a contractor must "actively and aggressively try[] to obtain DBE participation." 49 C.F.R. Pt. 26, App. A, § II. "Mere *pro forma* efforts are not good faith efforts to meet the DBE contract requirements." *Id*. The record supports the determination that, although CSI initially solicited a number of DBEs, it failed to follow up in a timely manner to assist the DBEs in responding to its initial solicitation before the deadline to submit quotes. And while there is no federal requirement that bidders provide online plans, once CSI promised prospective DBEs that it would do so, CSI had an obligation to post the plans in a timely manner in order to maximize DBE participation. And MnDOT correctly notes that the record contains no indication that CSI solicited or negotiated with DBEs after the submission deadline. We conclude that, on this record, MnDOT's determination that CSI failed to perform meaningful solicitation of DBEs, based on the failure to follow up its initial solicitation, was not arbitrary and was supported by the evidence.

Breaking out contract work

The regulations provide that, in determining whether good-faith efforts have been made, an agency may consider whether a contractor has "select[ed] portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved." 49 C.F.R. Pt. 26, App. A, § IV.B. This includes "breaking out contract work items into economically feasible units to facilitate DBE participation," even if the general contractor would prefer to self-perform the work. *Id*. MnDOT determined that CSI would be self-performing 93.42% of the work and failed to adequately identify which contract work would be performed by DBEs. The reconsideration panel noted that CSI failed to identify how much trucking work it would self-perform, even though the project contained a considerable amount of trucking; that CSI informed subcontractors that it would self-perform a portion of the traffic-control work; and that CSI intended to self-perform the construction survey work.

CSI argues that it solicited DBE participation in traffic control and surveying work; that its decision to self-perform a portion of traffic control and trucking was related to its ultimate rejection of DBE quotes that were excessive; and that acceptance of the reconsideration panel's reasoning would mean that a contractor could never reject a DBE in favor of self-performance. But "the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts." *Id.*, § IV.D(2). As MnDOT noted, the DBE program requires more efforts than a contractor would generally make in soliciting bids

from non-DBE contractors. *See id.*, § I (2010) (requiring that a contractor take "all necessary and reasonable steps to achieve a DBE goal").

An administrative decision is not arbitrary as long as an agency articulates "a rational connection between the facts found and the choice made." *Blue Cross & Blue Shield of Minn.*, 624 N.W.2d at 277 (quotation omitted). MnDOT articulated a rational connection between the finding that CSI chose to self-perform 93.42% of the total project and the determination that this self-performance rate did not increase the likelihood that the DBE participation goals would be met. Therefore, we conclude that MnDOT's consideration of this factor was not arbitrary.

Lack of good-faith efforts by failing to accept higher DBE quotes

CSI challenges the MnDOT determination that CSI's failure to accept at least some DBE quotes that were higher than non-DBE quotes demonstrated a lack of good-faith efforts to secure DBE participation. A prime contractor negotiating with subcontractors considers a number of factors in exercising good business judgment, including a firm's capabilities, price, and contract goals. 49 C.F.R. Pt. 26, App. A, § IV.D(2). Although the prime contractor is not required to accept higher DBE quotes if the price differential between DBE quotes and non-DBE quotes "is excessive or unreasonable," additional costs involved in using DBEs do not provide sufficient reason for failure to meet the contract DBE goal. *Id.*

The reconsideration panel found that, if CSI had accepted two higher DBE quotes—Dionne Construction's seeding quote for $57,626.75 and TranSignal's traffic-control quote for $8,500—CSI would have had sufficient participation, along with the

other DBE quotes that it accepted, to meet the DBE goal of 5.3% of the project. The panel rejected CSI's argument that whether DBE quotes were excessive is properly measured only by the percentage difference by which a single DBE quote is higher than the corresponding non-DBE quote, instead adopting a multi-factor approach that considers the total size of the project, the scope of the work, a comparison of DBE price versus the non-DBE price, and whether the higher DBE price, taken by itself, was a reasonable quote.

CSI argues that it accepted one DBE quote that was 1% higher than a non-DBE quote; it accepted two DBE quotes for trucking that exceeded market rates; and it had reason to reject the DBE quotes from Dionne Construction and TranSignal because those quotes were, respectively, 12% higher and 34% higher than non-DBE quotes. CSI also maintains that the multi-factor approach adopted by the reconsideration panel would constrain prime contractors' efforts to submit the lowest project bid.

We conclude that MnDOT did not err by considering a number of factors in determining whether CSI made adequate good-faith efforts to secure DBE participation. *See* 49 C.F.R. Pt. 26, App. A, § II. (noting that, in determining adequacy of good-faith efforts, "meeting quantitative formulas is not required"). We also conclude that MnDOT's determination that CSI failed to negotiate in good faith with DBEs is not arbitrary and is supported by the evidence. MnDOT reasonably found that, had CSI accepted the additional DBE quotes of Dionne Construction and TranSignal, CSI would have achieved the DBE project goal and increased its costs by only about $8,500 in relation to its total bid of over $2.34 million. Although the reconsideration panel

inaccurately failed to note that CSI accepted one DBE quote that was 1%, or approximately $101, over a non-DBE quote, that price differential is de minimis in the context of the bid as a whole. We agree with MnDOT that, under these circumstances, CSI failed to demonstrate that it made the kind of efforts "that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the . . . contract goal." 49 C.F.R. Pt. 26, App. A, § II.

We recognize CSI's concern with remaining competitive in the bidding process as it solicits DBE participation. But, as the reconsideration panel noted, a bidder may reasonably choose to absorb the additional cost of using a DBE or allocate that cost to other portions of the project, especially when, as here, CSI could have used two additional DBE quotes at minimal cost and would have remained the lowest contract bidder.

Other bids

CSI also challenges the reconsideration panel's reference, in assessing CSI's good-faith efforts, to the 4.3% average DBE participation rate of other bidders, which would meet the DBE project goal. "[W]hen the apparent successful bidder fails to meet the contract goal, but others meet it, [the agency] may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal." *Id.*, § V (2010). CSI argues that the reconsideration panel failed to explore the reasons for the different DBE-participation rate between CSI and those of other bidders. But the regulation does not require such a detailed comparison. *See id.*

We therefore reject CSI's argument that the reconsideration panel misapplied this factor in its decision.

We therefore sustain the MnDOT's determination that CSI's bid was non-responsible because it failed to demonstrate adequate good-faith efforts to meet the project's DBE-participation goal.

II

CSI argues that it was deprived of procedural due process because MnDOT did not conduct a contested-case proceeding pursuant to MAPA, which requires procedural safeguards such as the right to examine opposing evidence and to cross-examine witnesses. We consider de novo constitutional issues, including whether due process requires a contested-case hearing under MAPA. *Zellman ex rel. M.Z. v. Indep. Sch. Dist. No. 2758*, 594 N.W.2d 216, 220 (Minn. App. 1999), *review denied* (Minn. July 28, 1999); *see State by Archabal v. Cnty. of Hennepin*, 495 N.W.2d 416, 420–21 (Minn. 1993).

Under MAPA, "'[c]ontested case' means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." Minn. Stat. § 14.02, subd. 3 (2010). MAPA generally does not provide the right to a contested case hearing; rather, it sets forth procedures that must be followed when another statute, agency rule, or constitution grants such a right. *In re Petition of N. States Power Co.*, 676 N.W.2d 326, 332 (Minn. App. 2004).

CSI argues that the federal regulation governing the reconsideration process requires a contested-case hearing. That regulation provides that "[t]he bidder/offeror

must have the opportunity to meet in person with your reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so." 49 C.F.R. § 26.53(d)(3). But by its plain language, the regulation, which provides only "the opportunity to meet in person with [a] reconsideration official," does not require a contested-case hearing. *Id.*; *see In re N. States Power*, 676 N.W.2d at 332 (concluding that absent plain language in governing statute, contested-case hearing was not required). We therefore conclude that CSI's argument lacks merit.

Absent statutory authority, an agency hearing is "a necessary prerequisite to determining [a party's] legal rights, duties, and privileges only if it is required by the due process provisions of the State and Federal Constitutions." *Indep. Sch. Dist. No. 581 v. Mattheis*, 275 Minn. 383, 386, 147 N.W.2d 374, 376 (1966); *see In re Jerve*, 749 N.W.2d 404, 406–07 (Minn. App. 2008) (rejecting argument that determination of police officer's claim for continuing health coverage was subject to contested-case hearing requirements under MAPA). CSI argues in the alternative that, because it was the low bidder, it had a legitimate expectation in its award of the project bid, which amounted to a property right entitling it to procedural due process.

A party seeking to assert a violation of procedural due process must show a protectable liberty or property interest. *See Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 901 (1976). We have observed that, under state competitive-bidding law for public contracts, "'the lowest responsible bidder in compliance with the bidding specifications and procedures has a legitimate expectation in being awarded the contract once the governmental body makes a decision to award the contract.'" *Schwandt*

Sanitation v. City of Paynesville, 423 N.W.2d 59, 66 (Minn. App. 1988) (quoting *L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517, 523 (8th Cir. 1985)). But in *Schwandt*, we rejected a bidder's due-process claim when the bidder failed to establish that it was the lowest bidder conforming to contract specifications. *See id.* Here, because MnDOT determined CSI's bid to be non-responsible, CSI cannot show that it was the lowest responsible bidder, and it therefore had no property right in the expectation of being awarded the project bid.

"[Q]uasi-judicial proceedings do not invoke the full panoply of procedures required in regular judicial proceedings," but only require the limited due-process rights of reasonable notice of a hearing and a reasonable opportunity to be heard. *Barton Contracting Co. v. City of Afton*, 268 N.W.2d 712, 716 (Minn. 1978). MnDOT provided CSI with reasonable notice of the reconsideration hearing and an opportunity to be heard before a three-member reconsideration panel, as required by the DBE regulations. *See* 49 C.F.R. § 26.53(d) (stating requirements for reconsideration). We conclude that CSI has failed to show that it was entitled to the full range of due-process safeguards provided by a contested-case hearing. *See id.; see also Clarke Electric, Inc. v. State of Oregon*, 763 P.2d 1199, 1201 (Or. Ct. App. 1988) (concluding that the rejection of a contractor's bid for failure to meet the good-faith effort requirements of the federal DBE goal does not require a contested-case hearing under that state's administrative-procedures act).

We also reject CSI's argument that MnDOT's application of the DBE regulations violated principles of equal protection by requiring CSI to contract with excessively expensive DBEs and to discriminate against non-DBEs. The Eighth Circuit Court of

Appeals has rejected equal-protection challenges to the DBE program both facially and as applied by MnDOT, concluding that the Minnesota DBE program was narrowly tailored to further the compelling governmental interest of not perpetuating the effects of racial discrimination. *Sherbrooke*, 345 F.3d at 973–74. The DBE regulations themselves support this conclusion: they provide, for instance, that a firm owned by a non-minority may qualify as a DBE if the owner can demonstrate that he or she is socially and economically challenged, while a minority or non-minority person with a high net worth does not qualify for DBE certification. 49 C.F.R. § 26.67(b), (d) (2010).

Finally, we reject CSI's vagueness challenge to MnDOT's application of the DBE regulations. A statute, ordinance, or regulation "is void due to vagueness if it defines an act in a manner that encourages arbitrary and discriminatory enforcement, or the law is so indefinite that people must guess at its meaning." *Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 171 (Minn. App. 2001) (quotation omitted). The use of general language, however, does not render a regulation unconstitutionally vague. *Id.* To prevail on a vagueness-as-applied challenge, a party must show that the regulatory standard lacks specificity as to its own activity. *In re On-Sale Liquor License, Class B*, 763 N.W.2d 359, 366 (Minn. App. 2009).

CSI argues that, in applying the DBE regulations, MnDOT failed to provide adequate guidance for determining whether DBE quotes higher than market rate were "excessive or unreasonable," so that CSI was not required to accept those quotes. *See* 49 C.F.R. Pt. 26, App. A, § IV.D(2) (stating that contractors are not required to accept higher DBE quotes "if the price difference is excessive or unreasonable"). CSI maintains

that it did not receive notice that it would be penalized for failing to accept DBE quotes that were 12% higher (the Dionne Construction quote) and approximately 40% higher (the TranSignal quote) than corresponding non-DBE quotes. But the applicable regulation refers specifically to "the price difference" between DBE and non-DBE quotes, not the percentage difference between those quotes. *Id*. The regulation also provides that additional reasonable costs involved in using DBEs do not by themselves furnish a sufficient reason for failing to meet a DBE goal. *Id*. In this over $2 million contract, the price difference between Dionne Construction's DBE bid and a non-DBE bid was approximately $6,000, and the price difference between TranSignal's DBE bid and a non-DBE bid was $2,500. We conclude that under the applicable regulation, CSI was provided sufficient notice of the standards used to evaluate its good-faith efforts to obtain DBE participation, and the regulation is not vague as applied to that activity.

Affirmed.