

**AGENDA
OF THE CITY
COUNCIL WORK SESSION
CITY OF EAST GRAND FORKS
TUESDAY, MARCH 11, 2014 - 5:00 P.M.**

CALL TO ORDER:

CALL OF ROLL:

DETERMINATION OF A QUORUM:

- 1. 2013 City Project No. 1 Sidewalk Improvements – Greg Boppre**
- 2. 2015 City Project No. 1 Stabilization Ponds – Greg Boppre**
- 3. 2014 Assessment Job No. 1 17th St Reconstruction – Greg Boppre**
- 4. In-Depth Inspections Contract – Nancy Ellis**
- 5. Organization of EDHA and City Involvement – David Murphy**
- 6. Adoption of New Adult Use Ordinance – Nancy Ellis/Ron Galstad**
- 7. Street Improvement Districts – David Murphy**
- 8. Review of Assessment Policy – David Murphy**
- 9. Civic Center Expansion – David Murphy**

ADJOURN:

Upcoming Meetings

Regular Council Meeting – March 18, 2014 – 5:00 PM – Council Chambers
Work Session – March 25, 2013 – 5:00 PM – Training Room
Regular Council Meeting – April 1, 2014 – 5:00 PM – Council Chambers
Work Session – April 8, 2014 – 5:00 PM – Training Room

Request for Council Action

Date: March 3, 2014

To: East Grand Forks City Council, Mayor Lynn Stauss, President Craig Buckalew, Council Vice President Greg Leigh, Council Members: Clarence Vetter, Henry Tweten, Chad Grassel, Mark Olstad and Dale Helms.

Cc: File

From: Greg Boppre, P.E.

RE: 2013 City Project No. 1 – Sidewalk Improvements (TE)

Background:

This project was bid last fall and recently(see attached) the State of Minnesota has denied Paras Contracting the bid due to DBE goals set forth for the project. Therefore, we will need to rebid this project and the following is the schedule:

- A) File with City Council March 18
- B) Receive bids April 8 at 10:00 am(bring to Work Session)
- C) Take to City Council for approval, contingent upon MnDOT approval.

The following is the budget from last fall:

PROPOSED BUDGET

	<u>2013 CP #1 Base Bid</u>
Construction	\$282,196.20
Plans / Specifications	\$33,863.54
Staking / Inspection	\$22,575.70
Contingencies	\$14,109.81
Administration / Legal	<u>\$8,465.88</u>
TOTAL PROJECT COST	\$361,211.13

PROPOSED FUNDING

	<u>2013 CP #1 Base Bid</u>
MnDOT - Federal Funds	\$160,290.40
MnDOT - State Funds	\$81,833.20
City	<u>\$119,087.53</u>
TOTAL PROJECT COST	\$361,211.13

Enclosures:

State of Minnesota panel decision

**STATE OF MINNESOTA
DEPARTMENT OF TRANSPORTATION**

Administrative Reconsideration Hearing Request by
Paras Contracting, Inc.
Pursuant to 49 C.F.R. § 26
State Project Number 119-010-005, Trunk Highway 220

TRP/284/DBE/2014

ADMINISTRATIVE RECONSIDERATION PANEL DECISION

I. INTRODUCTION

This decision is issued pursuant to 49 C.F.R. § 26.53 after a reconsideration hearing held on February 4, 2014 at the request of Paras Contracting, Inc.¹ The Minnesota Department of Transportation (hereinafter "MnDOT") Office of Civil Rights (hereinafter "OCR") set a disadvantaged business enterprise (hereinafter "DBE") participation project goal of 4.2% for State Project Number 119-010-005, East Grand Forks multi-use path on West Trunk Highway 220. Paras was the apparent low bidder on the project and submitted documentation on September 23, 2013 to MnDOT OCR to demonstrate it made good faith efforts pursuant to Title 49, § 26 of the Code of Federal Regulations (hereinafter "49 C.F.R. § 26"), Appendix A to solicit DBEs.² On December 30, 2013 OCR informed Paras that it had failed to make good faith efforts to meet the Project's DBE goal and notified Paras of the opportunity for administrative reconsideration pursuant to 49 C.F.R. § 26.53(d).³ On January 8, 2014 Paras requested a reconsideration hearing.⁴

The MnDOT Office of Chief Counsel scheduled a reconsideration hearing with a panel (hereinafter "Panel") consisting of three (3) MnDOT employees who did not participate in the original determination that Paras failed to meet the goal or make adequate good faith efforts pursuant to 49 C.F.R. § 26, Appendix A. MnDOT scheduled a reconsideration hearing for February 4, 2014 and sent a Notice of Hearing via certified mail.⁵ The Notice of Hearing notified Paras the time and location of the informal hearing that officials involved in the Panel did not play any role in the original good faith efforts determination, that parties could submit written documentation and/or arguments to support their positions and that the parties may be represented by attorneys of their choice.⁶

Assistant Attorney General Natasha Karn represented MnDOT OCR and Paras Contracting, Inc.'s owner, Russ Kiser, and its secretary and treasurer, Heather Kiser, appeared on behalf of Paras Contracting. On February 4, 2014 Paras and OCR appeared and presented their arguments in support of their positions before the three-member Panel and a court reporter.

The Panel's decision herein is based on the record made available by both parties including arguments at the DBE reconsideration hearing and evidence submitted in support of the parties' respective arguments. For the reasons outlined below, the Panel hereby affirms OCR's original decision, despite OCR's failure to timely inform Paras of its failure to make good faith efforts pursuant to the federal DBE regulations

¹ Letter from Paras Contracting to MnDOT (Jan. 9, 2014).

² OCR Additional Submission 1 (Sept. 23, 2013); 49 C.F.R. Pt. 26 (2011).

³ Letter from OCR to Paras Contracting (Dec. 30, 2013).

⁴ Letter from Paras Contracting to MnDOT (Jan. 8, 2014).

⁵ Letter from MnDOT Office of Chief Counsel to Paras Contracting (Jan. 13, 2014).

⁶ *Id.*

and notwithstanding internal MnDOT miscommunication regarding project approval. Regardless of internal miscommunication and error, Paras failed to submit sufficient evidence demonstrating that Paras adequately solicited DBEs to participate in the contract.

II. FACTUAL BACKGROUND

A. Goal of the Federal DBE Program

The federal Department of Transportation issued regulations found in 49 C.F.R. § 26 in response to Congressional legislation intended to remedy decades of race discrimination in government highway contracting.⁷ The regulations detail the requirements of federal-aid highway fund recipients to ensure nondiscrimination in the award and administration of highway and transit financial assistance programs.⁸ The program objectives seek to create a level playing field wherein disadvantaged business enterprises⁹ may equitably compete for Department of Transportation contracts; ensures the program is narrowly tailored; defines DBE eligibility standards; removes barriers to DBE participation; promotes and develops DBEs; and provides flexibility in establishing and providing opportunities for DBEs.¹⁰ To promote these objectives, the federal Department of Transportation sets minimum DBE participation contract goals wherein bidders are encouraged, but not required, to meet.¹¹ If a bidder fails to meet the goal, it must, however, demonstrate that it made adequate good faith efforts to meet the goal.¹² The federal DBE program has been upheld by the Supreme Court because it is narrowly tailored to meet a compelling governmental interest in prohibiting racial discrimination in the distribution of federal funding.¹³ Additionally, federal courts have upheld the MnDOT DBE program.¹⁴

B. Paras Contracting's Bid Submission

The project before the reconsideration Panel is State Project 119-010-005, involving a multi-use path on the West side of Trunk Highway 220 in East Grand Forks, Minnesota (hereinafter "Project"). The Project is a state aid project involving federal funding and thus is subject to federal DBE regulations.¹⁵ MnDOT set a DBE participation goal at 4.2% of the bid amount.¹⁶

Paras Contracting, Inc. (hereinafter "Paras") is a Fargo-based paving contractor which focuses on curb, gutter, street paving and sidewalk work.¹⁷ Paras is owned by Russ Kiser, and assisted by its secretary and

⁷ See *Sherbrooke Turf, Inc. v. Minn. Dept't of Transp.*, 345 F.3d 964, 970 (8th Cir. 2003); *C.S. McCrossan Const., Inc. v. Minn. Dept't of Transp.*, 946 F.Supp.2d 851, 853 (D. Minn. 2013).

⁸ 49 C.F.R. Pt. 26.1 (2011); 49 C.F.R. Pt. 26.3.

⁹ 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 disadvantaged individual. 49 C.F.R. Pt. 26.5 (2011).

¹⁰ *Id.*

¹¹ 49 C.F.R. Pt. 26.45(a)(1) (2011).

¹² *Id.* Pt. 26.5.

¹³ *Adarand v. Peña*, 515 U.S. 200 (1995).

¹⁴ *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 345 F.3d 964, 973-74 (8th Cir. 2003); *C.S. McCrossan Const., Inc. v. Minnesota Dept. of Transp.*, 946 F.Supp.2d 851, 864 (D. Minn. 2013)

¹⁵ Transcript of Paras Contracting DBE Reconsideration Hearing 13, Feb. 4, 2014.

¹⁶ Letter from OCR to Paras Contracting, at 1 (Dec. 30, 2013).

¹⁷ T. 6:16; 24-25.

treasurer, Heather Kiser.¹⁸

The project was originally bid on July 9, 2013 but due to funding restrictions and the bid amounts, the project was rebid and a bid letting date was set for September 19, 2013.¹⁹ Paras ordered the project plans on September 18, 2013.²⁰ Paras did not solicit any firms, including DBEs for the project.²¹ Paras instead put its name on the plan holder's list and accepted the quotes of subcontractors who sent quotes to Paras.²² Paras received bids from two (2) different certified DBEs for ADA panels and electrical traffic signals.²³ In its bid submittal, Paras used the quote from the DBE for the ADA panel scope of work.²⁴ Paras received a quote from a DBE electrical contractor which was \$18,700 more than the lowest electrical subcontract bid.²⁵ Paras chose to use the lower subcontract electrical bid, which was a non-DBE.²⁶ Paras also received a quote from a veteran-owned business it believed to be a DBE²⁷ but was not certified as a DBE through the Minnesota Unified Certification Program as required by the Regulations and MnDOT DBE Special Provisions.²⁸

On the bid opening Paras was determined to be the apparent low bidder (hereinafter "ALB") with its bid in the amount of \$282,196.20.²⁹ Paras was instructed by Wiseth Smith Nolting (hereinafter "WSN"), an engineering firm involved in the Project on behalf of the city, that contract provisions required Paras to submit DBE documentation to MnDOT within the next five (5) business days.³⁰ Paras submitted the good faith efforts forms to OCR on September 23, 2013. Although Paras had submitted a DBE commitment of 0% as part of its bid documents, the forms submitted to MnDOT showed DBE participation of 1.6%.³¹ Paras submitted the OCR good faith efforts paperwork within the 5-day deadline.³²

C. MnDOT Procedural Issues

On October 10, 2013 MnDOT's District 2 State Aid Engineer gave permission to WSN to send a contract award letter to Paras.³³ The MnDOT Central Office of State Aid inquired with WSN whether the contract was cleared by OCR and WSN confirmed the documents were submitted to OCR but Paras had not heard anything from MnDOT.³⁴ While MnDOT may wish to explore procedural improvements in this area, the fact remains that the District State Aid Engineer had no authority to approve contract award prior to OCR "clearance," therefore the purported "award" letter is immaterial to the dispute before the Panel.³⁵

On October 11, 2013 OCR asked for an additional copy of the good faith efforts submittal and Paras re-

¹⁸ *Id.* at 6:17-19.

¹⁹ Paras Contracting First Submission, D-2, Jan. 29, 2014.

²⁰ T. 28:8.

²¹ *Id.* at 28:12; 31:17.

²² *Id.*

²³ T. 9:1-25.

²⁴ T. 9:1-19.

²⁵ T. 9:22-24.

²⁶ *Id.*

²⁷ T. 9:17.

²⁸ 49 C.F.R. Pt. 26.81 (2011); OCR DBE Special Provisions, at 3 (May 2011).

²⁹ T. 3:11-13; Paras Contracting First Submission, D-2.

³⁰ Paras Contracting First Submission, D-9, D-15-16.

³¹ T. XX, XX; Paras Contracting First Submission, D-20.

³² T. 10:14-15.

³³ Paras Contracting First Submission, D-27, D-203.

³⁴ *Id.* D-28, D-204.

³⁵ T. 46:15-21.

submitted the good faith efforts documents.³⁶ OCR had misplaced the files and requested Paras to submit additional copies.³⁷

OCR found that Paras' bid included \$4,378.44 of work to be subcontracted with a DBE, or 1.6% of the bid, which fell 2.6% short of the project DBE goal.³⁸ OCR also determined that Paras failed to demonstrate adequate good faith efforts to meet the DBE contract goal because Part D of the good faith efforts forms, Solicitation of Subcontractors, Suppliers and Service Providers, was left blank in the Paras submittal.³⁹ Specifically, OCR noted that while Paras submitted good faith efforts documentation stating it accepted a quote from Decorative Concrete Designs, a women-owned business enterprise, Paras failed to include that information on Part D of the good faith efforts documentation.⁴⁰

On December 30, 2013 OCR sent a letter to Paras informing the contractor its bid was non-responsible because: (1) Paras failed to meet the 4.2% DBE participation goal; and (2) Paras failed to document adequate good faith efforts to achieve the contract DBE goal.⁴¹ In the OCR letter, it outlined Paras' right to a reconsideration hearing pursuant to 49 C.F.R. § 26.53.⁴²

D. Request for DBE Reconsideration Hearing

On January 9, 2014 MnDOT received Paras' request for an administrative reconsideration of OCR's decision.⁴³ On January 13, 2014 the MnDOT Office of Chief Counsel sent a Notice of Hearing to Paras confirming the administrative reconsideration for February 5, 2014.⁴⁴ The Notice of Hearing notified Paras the time and location of the informal hearing that officials involved in the Panel did not play any role in the original good faith efforts determination, that parties could submit written documentation and/or arguments to support their positions and that the parties may be represented by attorneys of their choice.⁴⁵ In Paras' letter dated January 6, 2014 to OCR it included ten (10) documents - subcontractor quotations - that were not included in the September 23, 2013 good faith efforts submittal to OCR.⁴⁶

E. Administrative Reconsideration Hearing

An administrative reconsideration was held on February 4, 2014 at the MnDOT Central Office in St. Paul, Minnesota.⁴⁷ The Panelists presiding over the hearing were MnDOT employees not involved in the original OCR determination.⁴⁸ The Panel officials were Mr. Tom O'Keefe, Director of Program Delivery for MnDOT's Metro District, Ms. Nancy Daubenberger, State Bridge Engineer, and Mr. Jim Cownie, an attorney who is Director of Contract Management for MnDOT. The Panelists admitted into evidence two submittals from OCR: an outline entitled "Administrative Reconsideration Panel Hearing" and an

³⁶ *Id.* D-31, D-207; T 14:11-12.

³⁷ T. 14:4.

³⁸ Letter from OCR to Paras Contracting, at 1 (Dec. 30, 2013).

³⁹ *Id.*; OCR Good Faith Efforts Submission, at 19.

⁴⁰ Letter from OCR to Paras Contracting, at 1 (Dec. 30, 2013).

⁴¹ *Id.*

⁴² *Id.*, at 2.

⁴³ Letter from Paras Contracting to OCR (Jan. 9, 2014).

⁴⁴ Letter from MnDOT Office of Chief Counsel to Paras Contracting (Jan. 13, 2014).

⁴⁵ *Id.*

⁴⁶ Transcript, at 33:19-25; 34:1-3.

⁴⁷ *Id.*, at 1.

⁴⁸ *Id.*

additional submission "Guidelines for Certificate of Good-Faith Efforts Consolidated Form."⁴⁹ Three pieces of evidence were admitted on behalf of Paras: (1) a timeline and e-mail communications from WSN submitted January 29, 2014; (2) a second submission from Paras dated January 31, 2014; and (3) a January 6, 2014 letter to MnDOT requesting a DBE administrative reconsideration.⁵⁰

Both Paras and OCR were afforded an opportunity to present their arguments. Paras argued that it did not solicit DBEs.⁵¹ Further, Paras argued that it would not have work for its own employees or be in business if it was required to select portions of the work to be performed by DBEs or break out the contract.⁵² Additionally, Paras stated that it would have taken on the additional cost of the higher electrical DBE bid but it may not have been awarded the bid in that situation.⁵³ Finally, Paras argued that it submitted the required good faith efforts documentation but did not hear from OCR until its December 30, 2013 rejection letter.⁵⁴ Paras argued that it left the OCR good faith efforts form blank because other than the single DBE subcontractor, it did not plan on using other DBEs.⁵⁵

OCR asserted that Paras failed to meet the DBE goal and Paras' good faith efforts documentation was "devoid of any information about contact with DBEs" because the documentation was left blank.⁵⁶ OCR noted that even if the Panel were to admit Paras' January 6, 2014 submission which included copies of the quotes from DBEs, OCR would still lack sufficient documentation evidencing good faith efforts.⁵⁷ OCR noted, however, that the Panel should not review the January 6, 2014 information because it is important to treat all bidders the same.⁵⁸ Finally, OCR argued that the record reflected no information to illustrate Paras solicited DBEs, broke out scopes of work, or negotiated with DBEs to increase participation.⁵⁹

III. STANDARD OF REVIEW

MnDOT determinations regarding non-responsible bids are quasi-judicial administrative actions.⁶⁰ 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."⁶¹ Courts review the DBE reconsideration hearing 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."⁶² But

⁴⁹ OCR Additional Submission 1; Administrative Reconsideration Panel Hearing, Requesting Party Paras Contracting, Incorporated, T. 4:22-5:3; 20:5-9

⁵⁰ Paras Submission 1 (Jan. 29, 2014); Paras Submission 2 (Jan. 31, 2014); Letter to MnDOT from Paras (Jan. 6, 2014); T 5:4-18.

⁵¹ T. 28:12; 31:17.

⁵² T. 29:10-14.

⁵³ T. 29:5-9.

⁵⁴ T. 10:23-25.

⁵⁵ T. 29:16-21.

⁵⁶ T. 18: 1-2; 17:14-16.

⁵⁷ T. 22:24-23:6.

⁵⁸ T. 22:21-23.

⁵⁹ 24:4-12.

⁶⁰ *In re Administrative Reconsideration Hearing Request ex rel. Cent. Specialties, Inc.*, No. A12-0024, 2012 WL 3641295 (Minn. App. Aug. 27, 2012).

⁶¹ *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001) (quotation omitted).

⁶² *In re Administrative Reconsideration Hearing Request ex rel. Cent. Specialties, Inc.*, No. A12-0024, 2012 WL 3641295 (Minn. App. Aug. 27, 2012) (citing *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)).

"[i]f the agency's decision represents its will, rather than its judgment, the decision is arbitrary and capricious."⁶³ "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."⁶⁴ 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."⁶⁵

IV. ANALYSIS

For the reasons outlined below, the Panel affirms OCR's determination that Paras did not make adequate good faith efforts to meet the project DBE goal.

A. Evidentiary Determinations

The first issue before the Panel is whether to admit evidence contained in Paras' January 6, 2014 letter requesting a reconsideration hearing. Specifically, the Panel is faced with determining whether it may consider evidence of good faith efforts made prior to the bid submission due date but not presented to the OCR by the five (5) day deadline after the bid opening.

The administrative reconsideration regulations are silent on this specific issue, merely stating:

As part of this reconsideration, the bidder/offeror must have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so.⁶⁶

The regulations permit recipients such as MnDOT to require documentation of good faith efforts either: (1) at the time of bid opening as a matter of responsiveness; or (2) after the bid opening at any time before a recipient commits to the performance of the contract by the bidder as a matter of responsibility.⁶⁷ Bidders must submit written documentation of its good faith efforts to meet the contract goal. Recipients are required to ensure all information is complete, accurate and adequately documents the bidder's good faith efforts prior to committing to the contract. Recipients are required to consider the above factors when assessing whether a contractor has made good faith efforts to achieve the contract goal.⁶⁸

OCR issued new Special Provisions to the MnDOT contract specifications in August of 2010 (hereinafter "Special Provisions") outlining the requirements for bidders looking to obtain MnDOT contracts.⁶⁹ These Special Provisions set clear expectations and timelines regarding DBE goals and good faith efforts.⁷⁰ The Special Provisions specify that all information relating to good faith efforts must be submitted by the fifth business day after the bid letting date, unless the MnDOT OCR director grants a written extension for

⁶³ *Pope Cnty. Mothers v. Minn. Pollution Control Agency*, 594 N.W.2d 233, 236 (Minn.App.1999).

⁶⁴ *In re Review of 2005 Annual Automatic Adjustment of Charges for All Electric & Gas Utils.*, 768 N.W.2d 112, 120 (Minn.2009).

⁶⁵ *In re Administrative Reconsideration Hearing Request ex rel. Cent. Specialties, Inc.*, 2012 WL 3641295 (Minn. App.), 3 (Minn. App. 2012) (citing *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001)).

⁶⁶ 49 C.F.R. Pt. 26.53(d)(1) (2011).

⁶⁷ 49 C.F.R. Pt. 26.53(b)(3).

⁶⁸ 49 C.F.R. Pt. 26, App. A § II; see also *C.S. McCrossan Const., Inc. v. Minnesota Dept. of Transp.*, 946 F.Supp.2d 851, 854 (D. Minn. 2013).

⁶⁹ OCR DBE Special Provisions (August 2010).

⁷⁰ *Id.* at 1.

good cause.⁷¹ The Special Provisions warn that

FAILURE TO SUBMIT ALL REQUIRED INFORMATION WITHIN THE ALLOWED FIVE BUSINESS DAY PERIOD WILL RESULT IN REJECTION OF YOUR BID ON THE BASIS THAT YOU ARE NOT A RESPONSIBLE BIDDER. PARTIAL SUBMISSIONS WILL NOT BE CONSIDERED.⁷²

These Special Provisions were revised in May 2011 to include an updated Certificate of Good Faith Efforts Consolidated Form.⁷³ OCR sent out a letter to contractors notifying them of the updated provisions, providing information on the evaluation period of the Special Provisions and discussed upcoming trainings.⁷⁴

As part of its request for consideration (dated January 6, 2014) and in additional submissions to the Panel (dated January 29 and 31, 2014), Paras included additional subcontractor and supplier quotes which appear to have been received by Paras prior to the submission due date, but which were omitted from the good faith efforts documentation that Paras submitted to the OCR. The panel notes that it is a bidder's obligation to document its good faith efforts; Appendix A to the DBE Regulations state, "...even if it doesn't meet the goal, the bidder can document adequate good faith efforts."⁷⁵ Bidders should do a thorough job of documenting good faith efforts on the forms required by OCR, rather than waiting for the reconsideration process. In this case, however, the Panel believes that rejecting the January 6, January 29, and January 31, 2014 evidence submitted by Paras would elevate procedure over substance.

The Panel believes it would be disregarding the federal DBE regulations if it were to ignore *bona fide* good faith efforts conducted prior to the bid submission but which were not submitted by the five (5) day deadline through inadvertence or neglect. The Panel questioned OCR as to why it opposed admitting this evidence and OCR stated its concern for treating all prospective bidders equally.⁷⁶ While the Panel notes the extreme importance of preserving the equity in the bidding process, it believes that admitting this evidence would not substantially prejudice other prospective bidders by considering documents created prior to the submission deadline which have a direct bearing on the apparent low bidder's good faith efforts, but which were not submitted to OCR within the five (5) day deadline. Unlike post-submission efforts, the mere documentation of pre-submission efforts does not harm other bidders in the contracting process because all bidders are required to make all necessary and reasonable steps to achieve a DBE goal. Admitting Paras' additional submission does not overlook this requirement; it simply allows the Panel to make its determination with an accurate and complete understanding of the facts surrounding the bidder's efforts in achieving the DBE goal.

Because there is no federal regulation requiring a recipient to reject information regarding pre-bid good faith efforts and because accepting the Paras submission would not prejudice or harm other bidders the Panel hereby admits the evidence submitted by the apparent low bidder Paras after the five (5) day good faith efforts deadline to the extent that such evidence is relevant to Paras' good faith efforts within the allowable time period. The Panel notes that this rule shall be limited in application and applied on a case-by-case basis in order to weigh the goal of the federal regulations with the equity in the contracting process. Bidders should submit all required documents and related supporting documents to the OCR by

⁷¹ *Id.* at 4.

⁷² *Id.*

⁷³ OCR DBE Special Provisions (May 2011).

⁷⁴ Letter from OCR to Contractors (May 9, 2011).

⁷⁵ 49 C.F.R. Pt. 26, App. A (emphasis added).

⁷⁶ T. 22:4-9.

the submission deadline and not wait until an administrative hearing is conducted to submit thorough documentation of good faith efforts.

B. Failure to Meet DBE Contract Goal

In order to prohibit recipients from establishing quota programs, the federal regulations focus on goals for recipients to set on transportation contracts.⁷⁷ Bidders bidding for these contracts may either: (1) meet the DBE participation goal percentage; or (2) submit documentation evidencing the prime contractor made good faith efforts to meet the contract DBE goal.⁷⁸ A "good faith effort" is described as taking all "necessary and reasonable steps to achieve a DBE goal."⁷⁹ Recipients are required to use fair and reasonable judgment to determine whether bidders made a good faith effort.⁸⁰ The Department of Transportation advises that there is no one-size-fits-all approach and that recipients must make intrinsic fact-specific judgments.⁸¹ Furthermore, the regulations insist that mere *pro forma* efforts do not constitute good faith efforts, rather recipients are required to assess the quality, quantity and intensity of the efforts the bidder has made to determine if they were "actively and aggressively trying to obtain DBE participation."⁸² Thus the regulations specifically prohibit ignoring *bona fide* good faith efforts.⁸³

If a contractor fails to meet the DBE participation goal set by a recipient, it must submit documentation evidencing the contractor made sufficient good faith efforts to meet the contract DBE goal.⁸⁴ It is undisputed that Paras failed to meet the 4.2% goal established by OCR for S.P. 119-010-005. There is some dispute regarding the actual achieved goal. Paras asserted in its good faith efforts submittal on September 23, 2013 that its DBE participation was 0%, however in OCR's rejection letter it calculated DBE participation at 1.6%.⁸⁵ Paras argued that it entered 0% DBE participation in the OCR good faith efforts form because other than the single DBE subcontractor, it did not plan on using other DBEs.⁸⁶ Regardless whether Paras' DBE goal achieved was 0% or 1.6%, both numbers remain far below the goal OCR set for the project thus requiring the Panel to analyze whether Paras made good faith efforts to meet the DBE contract goal.

C. Good Faith Efforts

Appendix A of the federal regulations outlines the eight (8) factor analysis to determine whether or not a contractor, in fact, made good faith efforts to meet the contract goal.⁸⁷ The factors are not exhaustive, exclusive, or mandatory.⁸⁸ For the purposes of clarity the Panel will analyze each of the factors separately.

⁷⁷ 49 C.F.R. Pt. 26.43(a).

⁷⁸ 49 C.F.R. Pt. 26.53(a).

⁷⁹ 49 C.F.R. Pt. 26, App. A § I (2011).

⁸⁰ 49 C.F.R. Pt. 26, App. A § II.

⁸¹ U.S. Department of Transportation, *What Are the Good Faith Efforts Procedures Recipients Following Situations Where There are Contract Goals*, June 25, 2013.

⁸² U.S. Department of Transportation, *What Are the Good Faith Efforts Procedures Recipients Following Situations Where There are Contract Goals*, June 25, 2013.

⁸³ 49 C.F.R. Pt. 26, App. A § III (2011).

⁸⁴ 49 C.F.R. Pt. 26.53(a).

⁸⁵ Transcript of Paras Contracting DBE Reconsideration Hearing 28:18, 12:16, Feb. 4, 2014; Letter from OCR to Paras Contracting, at 1 (Dec. 30, 2013).

⁸⁶ T. 29:16-21.

⁸⁷ 49 C.F.R. Pt. 26, App. A.

⁸⁸ *Id.*, § IV.

1. Soliciting Through All Reasonable and Available Means

First, a bidder should solicit the interest of all certified DBEs through all reasonable and available means.⁸⁹ This includes taking the appropriate steps to follow-up on initial bid solicitations.⁹⁰ Paras admitted on the record that it did not solicit DBEs or any non-DBEs to bid on the project.⁹¹ Therefore the Panel finds that, by its own admission, Paras failed to meaningfully solicit DBEs actively and aggressively as the regulations require.⁹²

Even if it had alleged that it solicited DBEs through telephone, e-mail or facsimile communications, the bidder must solicit interested DBEs within sufficient time to allow the DBEs to respond to the solicitation.⁹³ Paras stated that it ordered the project plans on September 18, 2013 and submitted its bid the following day on September 19, 2013.⁹⁴ The Panel does not believe that twenty-four (24) hours is sufficient time for DBEs to review project plans and specifications, and prepare adequate or accurate bids. Even though it decided only at the last minute, and apparently upon urging from the local contracting agency, to submit a bid, there were still proactive steps that Paras could have taken. For example, there was no evidence that Paras consulted the Minnesota Unified Certification Program (MnUCP) DBE directory, or reached out to any DBEs by telephone, email or facsimile, actions which could still have been taken even in the limited timeframe. Relying on subcontractors and suppliers to contact Paras after seeing Paras' name on a plan holder's list is not the type of "active and aggressive" efforts required by the regulations. Therefore the Panel finds that Paras did not adequately solicit DBEs pursuant to the federal regulations.⁹⁵

The local contracting agency perhaps should have allotted more time for the rebid of this project after rejecting the initial bids. That decision on the part of the local contracting agency, however, does not change the analysis under the federal DBE regulations.

2. Breaking Out Contract Work

Second, a bidder should break out portions of the contract work (otherwise known as de-bundling) to be performed by DBEs to increase the likelihood the goal will be achieved, even if a prime contractor might prefer to self-perform.⁹⁶ Paras stated at the hearing that it would not have work for its own employees or be in business if it was required to select portions of the work to be performed by DBEs or break out the contract.⁹⁷ The regulations state that, where appropriate, firms may break contract items into economically feasible units to facilitate DBE participation, even if the contractor might otherwise prefer to self-perform.⁹⁸

At the reconsideration, Paras noted that it is a concrete contractor and that if it were required to subcontract out the work to pour concrete, they would go out of business. There is nothing in the record to indicate that Paras even considered subcontracting some of the work it preferred to self-perform, so the

⁸⁹ *Id.*, § IV(A).

⁹⁰ *Id.*

⁹¹ *Id.* at 28:12; 31:17.

⁹² 49 C.F.R. Pt. 26, App. A § II.

⁹³ 49 C.F.R. Pt. 26, App. A § IV(A).

⁹⁴ T. 28:8-9.

⁹⁵ 49 C.F.R. Pt. 26, App. A § II (2011).

⁹⁶ 49 C.F.R. Pt. 26, App. A § IV(B).

⁹⁷ T. 29:10-14.

⁹⁸ 49 C.F.R. Pt. 26, App. A § IV(C).

Panel does not need to reach the issue of whether such de-bundling was infeasible. The bid did, however, include subcontracts for work such as electrical and testing which Paras does not self-perform, some of which work went to a DBE.⁹⁹

Therefore based on the record before the Panel, it holds that Paras gave no real consideration to self-performing less of the contract, but did break out a very minor amount of work Paras is not able to self-perform for a DBE opportunity.

3. Providing DBEs Plan and Specification Information in a Timely Manner

Third, a bidder should provide DBEs with adequate information regarding contract plans and specifications in a timely manner.¹⁰⁰ At the administrative reconsideration Paras stated that it spoke with the project engineer on approximately September 15, 2013, which was four (4) days prior to bid opening, and admitted it did not know if it would have time to bid the project.¹⁰¹ Paras admitted to informing the project engineer it "got such a late start in all of [its] subcontract work with the other contractors, it's been behind."¹⁰² Finally, Paras stated that it purchased the plan one day prior to the bid opening.¹⁰³

This is a very limited time frame requiring an extremely quick turnaround for interested bidders to submit their bids. Furthermore, Paras stated that it did not solicit any quotes from any firms.¹⁰⁴ Because Paras was limited to a twenty-four (24) hour window with which to solicit quotes and because Paras admits to not soliciting firms the Panel finds that there was no way for Paras to provide DBEs with plans or specifications in a timely manner. It would have taken significant proactive efforts, such as telephone contacts, on Paras' part to meet this requirement and there is simply no record of any proactive effort to make a good faith effort to meet the DBE goal.

4. Negotiating in Good Faith; Additional Costs

Fourth, a bidder should negotiate in good faith with DBEs and include evidence of negotiations to facilitate DBE participation or evidence why additional agreements could not be reached for DBEs to perform work.¹⁰⁵ The Regulations further require bidders to use good business judgment in negotiating with DBEs to consider a firm's price and capabilities.¹⁰⁶ Negotiations must not include bid shopping (releasing information of a subcontractor's bid in order to decrease the bid price) or bid chopping (informing subcontractors they must decrease the price in order to be awarded the subcontract).¹⁰⁷ Contractors "can enter into negotiations with a DBE [subcontractor] in good faith without divulging the solicited bids or the prices."¹⁰⁸

Some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the DBE goal however if a price difference is excessive or unreasonable prime contractors are not required to accept the higher DBE quote.¹⁰⁹ Minnesota Courts note that meeting a quantitative

⁹⁹ T. 29:10-12; 9:1-25.

¹⁰⁰ *Id.*

¹⁰¹ T. 8:24-9:9.

¹⁰² *Id.*

¹⁰³ T. 28:8.

¹⁰⁴ T. 28:12.

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

¹⁰⁶ 49 C.F.R. Pt. 26, App. A § IV(D)(2).

¹⁰⁷ See *C.S. McCrossan Const., Inc. v. Minn. Dep't of Transp.*, 946 F.Supp.2d 851, 864 (D. Minn. 2013).

¹⁰⁸ *Id.*

¹⁰⁹ 49 C.F.R. Pt. 26, App. A § IV(D)(2).

formula is not required and it is appropriate to adopt a multi-factor approach to consider "the total size of the project, the scope of work, a comparison of DBE price versus the non-DBE price and whether the higher DBE price, taken by itself was a reasonable quote."¹¹⁰

The total amount of Paras' bid was \$282,196.20.¹¹¹ The scopes of work on the project that Paras received quotes for included: ADA panels, electrical traffic signals, testing, excavation, crosswalk markings, and concrete which Paras self-performs.¹¹² Paras received quotes from two¹¹³ DBEs for two different scopes of work, one of which Paras included in its bid and the second it rejected.¹¹⁴ The first DBE quote was for ADA panels in the amount of \$4,378.44 and the competing quote for ADA panels from a non-DBE was in the amount of \$5,600.00.¹¹⁵ Paras used the lower DBE quote in its bid.¹¹⁶

The second DBE quote Paras received was for \$40,300.00 for electrical traffic signals.¹¹⁷ The non-DBE electrical traffic signal quote was for \$21,600.¹¹⁸ Paras rejected the quote from the DBE for electrical work because it was \$18,700.00 more than the lowest electrical subcontract bid.¹¹⁹ The Panel inquired as to why Paras felt a difference of approximately \$20,000 made the DBE quote unreasonably higher and asked how Paras analyzed whether to accept the higher DBE quote.¹²⁰ Paras stated that their work is based on production.¹²¹ Paras stated that the electrical quotes contained the same specifications of material, but for twice the price.¹²² Paras did not provide any evidence of any effort to negotiate with the rejected DBE.

The Panel finds that due to the limited size of the project, the scopes of work, and the fact that the DBE electrical traffic signal quote was \$18,700 higher than the non-DBE quote, it was not unreasonable for Paras to reject the DBE quote. The panel finds that due to the limited size of the project and the excessive price difference between the DBE and non-DBE quotes, Paras was not required to accept the higher DBE quote therefore this factor does not weigh against a finding of good faith efforts. However, as noted above, the panel found no evidence of any attempt to negotiate the quote price with the rejected DBE.

5. Not Rejecting DBEs Without Sound Reason

Fifth, a bidder should not reject DBEs for being unqualified without sound reason.¹²³ The Regulations clarify that a contractor's standing within its industry and membership in specific groups, political or social affiliations are not legitimate grounds for rejecting a bid or failing to solicit bids.¹²⁴ There is no evidence or information on the record regarding this factor therefore the Panel finds it non-dispositive.

¹¹⁰ *Administrative Reconsideration Hearing Request by Central Specialties, Inc.*, No. TRP/286/DBE/2011 at *11 (Minn. App. Aug. 27, 2012) (citing 49 C.F.R. Pt. 26, App. A § II).

¹¹¹ Letter from OCR to Paras Contracting (Dec. 30, 2013).

¹¹² OCR Additional Submission 1 at 3-4 (Sept. 23, 2013); T. 6:24-25.

¹¹³ Paras attested it received an alleged third DBE quote from a veteran-owned business, Red River, but the Panel notes this firm is not a MnUCP certified DBE. *See infra*, at 3.

¹¹⁴ T. 9:10-24.

¹¹⁵ Letter from Paras Contracting to MnDOT at 4 (Jan. 8, 2014).

¹¹⁶ T. 9:11-13.

¹¹⁷ Letter from Paras Contracting to MnDOT at 3 (Jan. 8, 2014).

¹¹⁸ OCR Additional Submission 1 at 4 (Sept. 23, 2013).

¹¹⁹ T. 9:22-24.

¹²⁰ T. 40:14-20.

¹²¹ *Id.* 23.

¹²² T. 41:13-17.

¹²³ *Id.*, § IV(E).

¹²⁴ *Id.*

6. Assisting DBEs in Bonding, Credit

Sixth, a bidder should make efforts to assist DBEs in obtaining bonding, credit and/or insurance.¹²⁵ There is no evidence or information on the record regarding this factor and due to the limited window with which Paras obtained project plans and submitted a bid, the Panel finds that this factor is non-dispositive in its analysis.

7. Assisting DBEs in Obtaining Equipment, Supplies

Seventh, a bidder should assist DBEs in obtaining equipment, supplies and/or materials.¹²⁶ As in the fifth and sixth factors, there is no evidence or information on the record regarding this factor and due to the limited window with which Paras obtained project plans and submitted a bid, it would have been extremely difficult for Paras to assist DBEs in obtaining equipment and supplies prior to the bid submission deadline.

8. Effectively Using Community Organizations

Eighth, a bidder should effectively use the services of minority and women community organizations, contractors' groups, business assistance offices and other organizations.¹²⁷ As in the above fifth-seventh factors, there is no information in the record evidencing Paras' willingness to work with community organizations. The Panel encourages Paras to look into women and minority community organizations, contractors' groups, public assistance offices and other organizations to assist Paras in soliciting, working and reaching out to DBEs. Paras may also consider recruiting DBEs to work with them in future projects since it asserted that it earns its profit through production thus evidencing a continuing, regular need of subcontracting firms.

D. Other Considerations

Additionally, recipients may take into account the performance of other bidders in meeting the contract goal to evidence whether, with additional reasonable efforts, a successful bidder could have met the goal.¹²⁸ According to OCR, another bidder was able to meet and exceed the goal for this project.¹²⁹ The question arises, therefore, whether Paras could have met the goal with additional reasonable efforts.¹³⁰ Paras did not assert, nor does the record reflect, any additional actions it took to reach out to DBEs in any of the eight (8) above factors or through any other means. Therefore the Panel finds that this factor weighs against a finding of good faith efforts.

¹²⁵ *Id.*, § IV(F).

¹²⁶ *Id.*, § IV(G).

¹²⁷ *Id.*, § IV(H).

¹²⁸ 49 C.F.R. Pt. 26, App. A §V.

¹²⁹ T. 26:24-25.

¹³⁰ 49 C.F.R. Pt. 26, App. A § V.

V. CONCLUSION

Based on the record made available by both parties and the above-mentioned analysis, the Panel concludes that Paras Contracting failed to evidence adequate good faith efforts to solicit DBEs because it failed to solicit any firms, failed to undertake significant effort to de-bundle work, and failed to negotiate with DBEs. The Panel concludes that OCR made a fair and reasonable determination that Paras failed to demonstrate adequate good faith efforts as required by 49 C.F.R., Part 26 and the MnDOT Panel affirms OCR's determination that Paras' bid was non-responsible.

Feb 11, 2014
Date: February 10, 2014

Jim Cowrie
Jim Cowrie, For the Administrative
Reconsideration Panel of February 4, 2014

Request for Council Action

Date: March 6, 2015

To: East Grand Forks City Council, Mayor Lynn Stauss, President Craig Buckalew, Council Vice President Greg Leigh, Council Members: Clarence Vetter, Henry Tweten, Chad Grassel, Mark Olstad and Dale Helms.

Cc: File

From: Greg Boppre, P.E.

RE: 2015 City Project No. 1 – Stabilization Ponds

Background:

I would like to get permission to start the design phase of the stabilization pond project. We had a very successful meeting with MPCA and PFA on Tuesday, March 4.

Recommendation:

Permission to start design of the stabilization ponds

Enclosures:

N/A

Request for Council Action

Date: March 6, 2014

To: East Grand Forks City Council, Mayor Lynn Stauss, President Craig Buckalew, Council Vice President Greg Leigh, Council Members: Clarence Vetter, Henry Tweten, Chad Grassel, Mark Olstad and Dale Helms.

Cc: File

From: Greg Boppre, P.E.

RE: 2014 Assessment Job No. 1 – 17TH Street NE Reconstruction

Background:

I would like to file plans and specifications for the above referenced project, get authorization to advertise and set the bid date(April 8th). The project is our 2014 Sub-Target project for the four year rotation with Federal funds

The following is the estimated budget:

PROPOSED FUNDING

Construction	\$1,033,437.00	Federal	\$737,840.00
Plans/Spec's	\$124,012.44	Local	<u>\$605,628.10</u>
Stake/Inspection	\$82,674.96	TOTAL	\$1,343,468.10
Contingencies	\$51,671.85		
Admin/Legal	<u>\$51,671.85</u>		
TOTAL	\$1,343,468.10		

The local portion will come from special assessing, therefore we will have to prepare a report of feasibility, which will identify the cost and the benefitted properties.

Recommendation:

Approve the filing of the plans and specifications

Enclosures:

cost estimate

ENGINEER'S ESTIMATE OF COST

City of East Grand Forks

S.P. 119-080-011

Widseth Smith Nolting
 1600 Central Avenue NE
 East Grand Forks, MN 56721
 Phone: 218-773-1185
 Fax: 218-773-3348
 WSN Project No. 0706G0018
 Date: December 16, 2013



STATEMENT OF ESTIMATED QUANTITIES				ENGINEER'S ESTIMATE	
ITEM NO.	DESCRIPTION	UNIT	QUANTITY	UNIT PRICE	TOTAL
2021.501	Mobilization	LUMP SUM	1	\$10,000.00	\$10,000.00
2104.501	Remove Sewer Pipe (Storm)	LIN. FT.	1409	\$25.00	\$35,225.00
2104.501	Remove Curb and Gutter	LIN. FT.	3574	\$4.00	\$14,296.00
2104.503	Remove Sidewalk	SQ. FT.	1015	\$3.00	\$3,045.00
2104.505	Remove Pavement	SQ. YD.	8438	\$7.50	\$63,285.00
2104.505	Remove Concrete Driveway Pavement	SQ. YD.	507	\$6.50	\$3,295.50
2104.509	Remove Casting	EACH	1	\$500.00	\$500.00
2104.509	Remove Sign	EACH	1	\$30.00	\$30.00
2104.509	Remove Drainage Structure	EACH	16	\$500.00	\$8,000.00
2104.511	Sawing Concrete Pavement (Full Depth)	LIN. FT.	378	\$9.00	\$3,402.00
2104.513	Sawing Bit Pavement (Full Depth)	LIN. FT.	148	\$5.50	\$814.00
2104.523	Salvage Sign	EACH	5	\$30.00	\$150.00
2104.523	Salvage Sign Support	EACH	4	\$30.00	\$120.00
2104.523	Salvage Casting	EACH	2	\$50.00	\$100.00
2104.602	Salvage Sign Special	EACH	2	\$50.00	\$100.00
2105.501	Common Excavation (P)	CU. YD.	3366	\$6.00	\$20,196.00
2105.604	Geogrid	SQ. YD.	9073	\$2.50	\$22,682.50
2112.604	Subgrade Preparation	SQ. YD.	9073	\$3.00	\$27,219.00
2211.607	Aggregate Base(10")	CU. YD.	2510	\$25.00	\$62,750.00
2301.504	Concrete Pavement 8.0"	SQ. YD.	7603	\$50.00	\$380,150.00
2360.503	Type SP 12.5 Wear CRS Mix (2,B) 4.0" Thick	SQ. YD.	129	\$90.00	\$11,610.00
2401.608	Reinforcement Bars (Epoxy Coated)	POUND	3600	\$3.50	\$12,600.00
2502.541	4" Perforated Drain Tile	LIN. FT.	3440	\$4.00	\$13,760.00
2503.511	12" RC Pipe Sewer	LIN. FT.	449	\$45.00	\$20,205.00
2503.511	15" RC Pipe Sewer	LIN. FT.	135	\$50.00	\$6,750.00
2503.511	18" RC Pipe Sewer	LIN. FT.	511	\$60.00	\$30,660.00
2503.511	24" RC Pipe Sewer	LIN. FT.	39	\$80.00	\$3,120.00
2504.602	Adjust Gate Valve & Box	EACH	4	\$250.00	\$1,000.00
2506.502	Const Drainage Structure Design A	EACH	16	\$1,200.00	\$19,200.00
2506.502	Const Drainage Structure Design C	EACH	1	\$3,500.00	\$3,500.00
2506.502	Const Drainage Structure Design G	EACH	5	\$5,500.00	\$27,500.00
2506.516	Casting Assembly, Type A	EACH	16	\$1,500.00	\$24,000.00
2506.516	Casting Assembly, Type B	EACH	4	\$3,000.00	\$12,000.00
2506.516	Casting Assembly Type C	EACH	2	\$1,000.00	\$2,000.00
2521.501	4" Concrete Sidewalk	SQ. FT.	10425	\$5.00	\$52,125.00
2531.501	Concrete Curb and Gutter, Design B624	LIN. FT.	3599	\$18.00	\$64,782.00
2531.618	Truncated Domes	SQ. FT.	33	\$50.00	\$1,650.00
2531.507	6" Concrete Driveway Pavement	SQ. YD.	478	\$50.00	\$23,900.00
2563.601	Traffic Control	LUMP SUM	1	\$15,000.00	\$15,000.00
2564.536	Install Sign Panel	EACH	5	\$200.00	\$1,000.00
2654.537	Install Sign Panel Special	EACH	2	\$200.00	\$400.00
2564.602	Furnish Sign Post	EACH	2	\$300.00	\$600.00
2564.602	furnish Sign Panel (Stop Sign)	EACH	2	\$300.00	\$600.00
2573.530	Storm Drain inlet Protection	EACH	16	\$300.00	\$4,800.00
2574.525	Common Topsoil Borrow (LV)	CU. YD.	260	\$12.00	\$3,120.00
2575.501	Seeding	ACRE	1.23	\$10,000.00	\$12,300.00
2582.502	24" Stop Line White-Epoxy	LIN. FT.	36	\$5.00	\$180.00
2582.502	4" Broken Line Yellow - Epoxy	LIN. FT.	430	\$5.50	\$2,365.00
2582.503	Crosswalk Marking-Epoxy	SQ. FT.	210	\$35.00	\$7,350.00
TOTAL=					\$1,033,437.00

Request for Council Action

Date: March 11, 2014

To: East Grand Forks City Council Mayor Lynn Stauss, President Craig Buckalew, Council Vice President Greg Leigh, Council Members: Clarence Vetter, Dale Helms, Henry Tweten, Mark Olstad, and Chad Grassel

Cc: File

From: Nancy Ellis, City Planner – Community Development

RE: In-Depth Inspections Contract

GENERAL INFORMATION:

East Grand Forks entered into a contract with In Depth Inspections to complete Building Code Enforcement/Building Inspections for the City of East Grand Forks for a 12 month period last March. The contract is set to expire at the end of this month. At this point in time, I still feel that the new Community Development Office is unable to conduct Building Inspections and Permitting work without entering into a year contract with In-Depth Inspections.

We did not see additional savings with hiring a contracted service (approximately \$95,000 in 2013 billing). However, a portion of their contract stated they would receive have the permit fees – which included an increase in commercial permit fees (almost \$50,000 in permit fees or revenue). With changes to the organization of the office, retirement of the permit technician in 2015 and other possible office changes; I would like to have another year to determine what office staff we need and what their duties will be.

RECOMMENDATION:

I have evaluated the past contract and staff is requesting an extension of the InDepth Inspection service contract for 1 year from the date of City Council approval.

Agreement for Building Inspections Services

This contract (the "Agreement") is made and entered into this _____ day of _____, 20____, between the City of East Grand Forks, Minnesota (the "City"), and Indepth Inspection, Inc, (the "Contractor"), (collectively, the "Parties").

1. Scope of Services. The Contractor agrees to perform the following services:

Building Code:

The consultant will be responsible for inspecting properties and enforcing the Minnesota State Building Code. The consultant, however, will not be responsible for enforcing the commercial Electrical Code as the City will continue to use State of Minnesota inspectors to perform such inspections.

Plumbing Code:

The consultant shall be responsible for providing enforcement and administration of the currently adopted Minnesota State Plumbing Code and performing plumbing plan review services.

Rental Housing Ordinance:

The consultant may be requested to assist with inspecting and enforcing the City's Rental Housing Ordinance, including but not limited to inspecting rental housing for license renewal, responding to complaint inspections and performing administrative tasks associated with the enforcement of the Rental Housing Ordinance.

Additional Duties:

Work regarding the above referenced codes and ordinances involves responsibility for plan review, scheduling, and inspection of residential and commercial buildings and other structures in regard to conformity with code requirements and technical standards, any administrative work in support of those duties assigned herein and enforcement. Work also involves determining building permit valuations for inspected construction projects and providing the City with Code revisions that are either desirable or required. Work also includes complaint investigations, hazardous building inspections and assistance with the prosecution of building code and hazardous building violations.

2. Compensation. The City agrees to pay the Contractor as follows:

Contractor shall bill the City monthly. City shall reimburse Contractor for building inspections and related services up to 50% of total permit fees, 100% of plan review fees, and \$75 per hour for other duties as required plus mileage reimbursement. The City shall not withhold monies for the payment of any federal or state income taxes, social security benefits, or other taxes.

3. Term. The term of the agreement shall be for a period of **twelve (12) months** commencing on or about **March 19, 2013 unless either party gives the other not less than sixty (60) days prior written notice** before the expiration of the then current term that it does not want the contract to

renew further. In addition, the City will be allowed to terminate if the consultant does not perform services in a satisfactory manner, loses its license to perform any of the services, becomes insolvent, or other similar reasons.

4. Independent Contractor Relationship. It is expressly understood that the Contractor is an “independent contractor” and not an employee of the City. The Contractor shall have control over the manner in which the services are performed under this Agreement. The Contractor shall supply, at its own expense, all materials, supplies, equipment and tools required to accomplish the work contemplated by this Agreement. The Contractor shall not be entitled to any benefits from the City, including, without limitation, insurance benefits, sick and vacation leave, workers’ compensation benefits, unemployment compensation, disability, severance pay, or retirement benefits.

5. Insurance Requirements. (Note: Liability insurance requirements may be modified or waived depending on the nature of the contract.)

- A. Liability. The Contractor agrees to maintain Professional Liability, Errors and Omissions Insurance in an amount of at least \$500,000 single limit coverage, covering all personnel employed by the Contractor in the capacity of acting as an Agent of the City. The Contractor agrees to maintain commercial general liability insurance in a minimum amount of \$1,000,000 per occurrence. The policy shall cover liability arising from premises, operations, products-completed operations, personal injury, advertising injury, and contractually assumed liability. The City shall be named as an additional insured.
- B. Automobile Liability. If the Contractor operates a motor vehicle in performing the services under this Agreement, the Contractor shall maintain automobile liability insurance, including owned, hired, and non-owned automobiles, with a minimum liability limit of \$1,000,000, combined single limit. The City shall be named as an additional insured.
- C. Workers’ Compensation. The Contractor agrees to comply with all applicable workers’ compensation laws in Minnesota.
- D. Certificate of Insurance. The Contractor shall, prior to commencing services, deliver to the City a Certificate of Insurance as evidence that the above coverages are in full force and effect.

6. Indemnification. The Contractor agrees to defend and indemnify the City, and its employees, officials, volunteers and agents from and against all claims, actions, damages, losses and expenses arising out of the Contractor’s performance or failure to perform its duties under this Agreement.

7. General Provisions.

- A. Entire Agreement. This Agreement supersedes any prior or contemporaneous representations or agreements, whether written or oral, between the Parties and contains the entire agreement.
- B. Assignment. The Contractor may not assign this Agreement to any other person unless written consent is obtained from the City.

- C. Amendments. Any modification or amendment to this Agreement shall require a written agreement signed by both Parties.
- D. Governing Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Minnesota.
- E. Waivers. The waiver by either party of any breach or failure to comply with any provision of this Agreement by the other party shall not be construed as, or constitute a continuing waiver of such provision or a waiver of any other breach of or failure to comply with any other provision of this Agreement.
- F. Savings Clause. If any court finds any portion of this Agreement to be contrary to law or invalid, the remainder of the Agreement will remain in full force and effect.

IN WITNESS WHEREOF, the Parties, have caused this Agreement to be approved on the date above.

City of _____, Minnesota

By: _____
Its Mayor

And: _____
Its City Administrator

Contractor

Request for Council Action

Date: 3/11/2014

To: East Grand Forks City Council Mayor Lynn Stauss, President Craig Buckalew, Council Vice President Greg Leigh, Council Members: Clarence Vetter, Dale Helms, Henry Tweten, Mark Olstad, and Chad Grassel

Cc: File

From: City Administrator David Murphy

RE: Organization of EDHA and City Involvement

I have reviewed the In-Depth Inspections contract and the fact that they perform rental inspections got me thinking if there was the possibility of combining the rental inspections performed by the EDHA with those performed by Community Development. After investigating the item, further questions have surfaced.

This item is before the Council in Work Session for me to receive some direction and authorization from the Council. I am requesting authorization to look at the organization of the Economic Development /Housing Authority and to what extent the City is involved and/or cooperates with duties performed by the EDHA. The initial items I wish to research are: rental inspections, city lot sales and what the City's authority is in overseeing the department.

Request for Council Action

Date: March 11, 2014

To: East Grand Forks City Council Mayor Lynn Stauss, President Craig Buckalew, Council Vice President Greg Leigh, Council Members: Clarence Vetter, Dale Helms, Henry Tweten, Mark Olstad, and Chad Grassel

Cc: File

From: Nancy Ellis, City Planner ; Ron Galstad, City Attorney

RE: Adopt new Adult Use Ordinance

STAFF RECOMMENDATION

Staff recommends approval of a new ordinance on Adult Uses to be located as a permitted use within the I-1 and I-2 zoning Districts

GENERAL INFORMATION

APPLICANTS: City of East Grand Forks

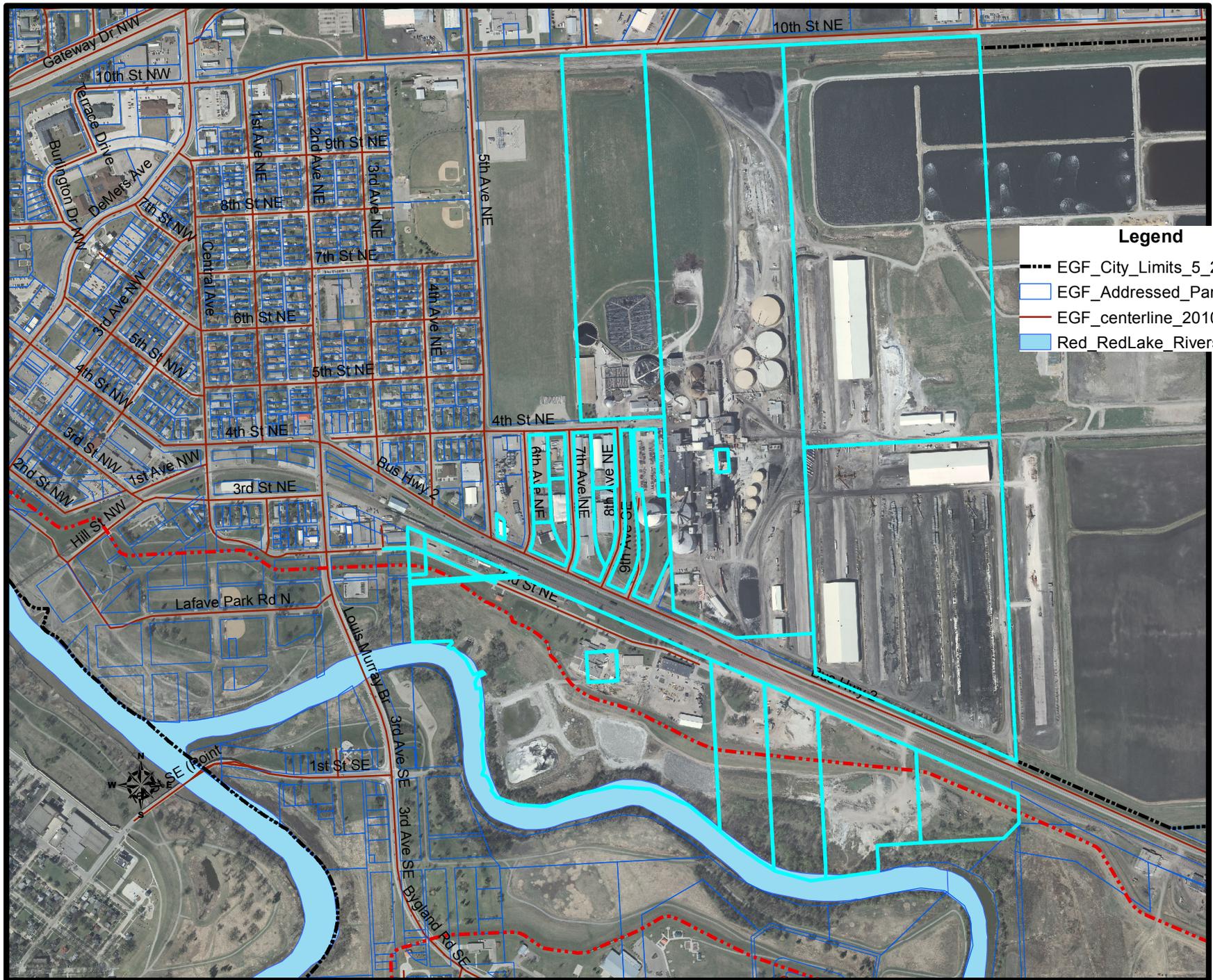
REQUESTED ACTION: Applicant is requesting amending text in the Zoning Code

SITE ZONING/LAND USE: Limited Industrial (I-1) , General Industrial District (I-2) and Definitions

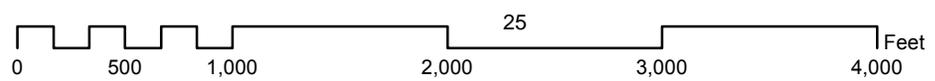
SURROUNDING ZONING/LAND USE: NA

As you recall, the definitions for our Adult Use Ordinance need to be amended to with stand legal scrutiny; and the City of East Grand Forks needed to repeal its Adult Use regulations within the I-2 District (Section 152.247) including the Adult Use definitions in the Definition Section (Section 152.006) and Section 150.13. We then adopted a moratorium ordinance for adult use/sexually oriented businesses until the City of East Grand Forks could adequately study and adopt a new ordinance pertaining to Adult Uses.

As staff, I felt the moratorium ordinance had all of the city's necessary requirements to allow for Adult Uses and should be adopted as a permanent ordinance. In the ordinance, it stated that the Adult Use must be located in the I-2 zoning district and more than 250 feet from a sensitive receptor (schools, parks, churches and residential areas). Therefore, we studied the areas that an adult use can be located to meet the 250 foot setback and we were limited on available property within the I-2 district for this Use. It was suggested by our legal counsel to include the I-1 zoning district so that we have more lots that could be considered. I am attaching the new Ordinance and the maps that were reviewed for you to discuss.



- Legend**
- EGF_City_Limits_5_25_07
 - EGF_Addressed_Parcel
 - EGF_centerline_2010_current
 - Red_RedLake_Rivers





Request for Council Action

Date: 3/6/14

To: East Grand Forks City Council Mayor Lynn Stauss, President Craig Buckalew, Council Vice President Greg Leigh, Council Members: Clarence Vetter, Dale Helms, Henry Tweten, Mark Olstad, and Chad Grassel

Cc: File

From: David Murphy

RE: Street Improvement Districts

The topic of street improvement districts was brought up at the work session on February 25th. Council member Vetter asked for more information before this was brought forward for a vote. It was also suggested to give information to Council member Helms also. Both council members now have been given information on this topic.

Background Information:

The City Council passed a resolution (09-04-25) on April 7, 2009 and submitted to the League asking the state government to pass legislation which would give cities the authority to create street improvement districts. The City also included street improvement districts as a legislative priority in January 18, 2011 when adopting resolution 11-01-12 and again on February 7, 2012 with resolution 12-02-17. The League already has a resolution from East Grand Forks in support of street improvement districts.

This item was introduced in the 2013 session and will be considered during the 2014 session. Is this something the council would still like to support?

Request for Council Action

Date: 3/6/14

To: East Grand Forks City Council Mayor Lynn Stauss, President Craig Buckalew, Council Vice President Greg Leigh, Council Members: Clarence Vetter, Dale Helms, Henry Tweten, Mark Olstad, and Chad Grassel

Cc: File

From: David Murphy

RE: Seeking Authorization to Review the Assessment Policy

I am asking council to authorize me to review our current policy and research current special assessment laws and regulations. I will bring back an updated policy for council review.

Included is a copy of the current City Assessment Policy.

[There is also a page from the City Charter regarding special assessments.](#)

City of East Grand Forks

Special assessment policy for determining benefits to be levied for improvement projects. Total project front foot costs multiplied times the property front footage will determine the assessments for all improvements except storm sewer. The front of a corner lot shall be based on the shorter of the two outside property lines.

1. For Water and Sanitary Sewer:
 - A. Rectangular lots - The front footage will determine the assessment.
 - B. Odd-shaped lots - The front and determined rear line footage will be added together and divided by 2 (two). To determine the location and footage of the rear line, follow the shortest side-yard lot line from the front property line to its termination point and extend it either to the right or left with a line that's parallel or almost parallel to the front property line. Both side-yard lot lines shall never exceed 140 feet.
2. For Storm Sewer - The total square footage of the lot will be used to calculate the amount of benefit assessed, with the exception of river lots. On river lots the storm sewer benefit will be calculated in square footage to the extent that it does not drain into the river, except that it should never be less than 140 feet deep. The total project square footage will be multiplied by the determined lot square footage.
3. Curb, gutter, paving and soil cement - Assessment could consist of both front and end benefits or only one.
 - A. Rectangular lots - Assessments will be based on front footage for both front and end benefits.
 - B. Odd-shaped lots - The front and determined rear line footage will be added together and divided by 2 (two). To determine the location and footage of the rear line, follow the shortest side-yard lot line from the front property line to its termination point and extend it either to the right or left with a line that's parallel or almost parallel to the front property line. Both side-yard lot lines shall never exceed 140 feet.
 - C. Front benefit is calculated on the front footage of the lot.
 - D. End benefit will be assessed halfway down the block from the side street based on the front footage.

Public Improvements and Special Assessments

Section 7.01. Power to Make Improvements and Levy Assessments. The city may make any type of public improvement not forbidden by law and levy special assessments to pay all or any part of the cost of such improvements as are of a local character. The total assessments for any local improvement may not exceed the cost of the improvement, including all costs and expenses connected therewith, with interest. No assessment shall exceed the benefits to the property.

Section 7.02. Assessments for Services. The council may provide by ordinance that the cost of city services to streets, sidewalks, or other public or private property may be assessed against property benefitted and collected in the same manner as special assessments.

Section 7.03. Local Improvement Procedure. When the city undertakes any local improvement to which the state local improvement code applies, it shall comply with the provisions of that law. The council may by ordinance prescribe the procedure to be followed in making any other local improvement and levying assessments therefor.

Request for Council Action

Date: 3/11/2014

To: East Grand Forks City Council Mayor Lynn Stauss, President Craig Buckalew, Council Vice President Greg Leigh, Council Members: Clarence Vetter, Dale Helms, Henry Tweten, Mark Olstad, and Chad Grassel

Cc: File

From: City Administrator David Murphy

RE: Civic Center Expansion

Enclosed with your packet is a drawing of the proposed expansion of the Civic Center along with an estimated cost. I am looking for direction from Council on how to proceed.

WSN is offering to provide the schematic drawing at no cost. Once the schematic drawing is complete WSN will be able to firm up the estimated costs. I am asking Council to place this on the agenda for March 18th to authorize WSN to complete the schematic design.

I am also looking for direction from Council on the funding of the project. My suggestion would be a meeting between the City, School District and Blue line club to start to allocate costs. Please discuss and provide direction.

David Murphy

From: Greg Boppre [Greg.Boppre@wsn.us.com]
Sent: Tuesday, February 25, 2014 2:08 PM
To: David Murphy
Cc: Brent Dammann
Subject: FW: EGF Civic Center Estimate

Dave – here you go. Also, has I mentioned previously, we would do the schematic designs for free for the City (Brent is estimating \$8,500), up to authorizing us approval to prepare plans/specifications. If you need anything else, please call or email.

Thanks Greg

From: Brent Dammann
Sent: Tuesday, February 25, 2014 2:05 PM
To: Greg Boppre
Subject: EGF Civic Center Estimate

Greg,

I broke down the estimate for the Civic Center a little further as was requested. Here's what I've got:

Lockerroom Remodel	3,000sf	\$175,000
Lower Level Restrooms	300sf	\$35,000
Platform Lift	--	\$40,000 (+\$40,000 for elevator)
<i>(does not include shaft walls)</i>		
Lobby Renovation	1,900sf	\$50,000
Lobby Addition	2,650sf	\$450,000
Sitework	--	\$75,000
	Sub-Total	\$825,000
	Contingency	\$165,000
	A/E Services	\$84,000
	Total	\$1,074,000

Double-check the sitework number if you agree.

Again, I would advise they use some caution with these numbers since they are budgetary in nature. If these numbers are reasonable to them, my suggestion to them would be to complete a schematic design set of drawings that would include floor plans, exterior elevations, a building section, site plan, a detailed estimate, and possibly an exterior rendering to help sell it. We could probably do that for \$8,500.

I also checked into the platform lift. I called a company out of Duluth that Ron worked with. They were able to answer some questions for me. The maximum height travel distance they can do is 14', which may be close for us. Also, it has to be enclosed like an elevator. It can't have open sidewalls. And it would also require an emergency call system like an elevator. The savings for the city would be on the upfront cost and maintenance, but it's also not as large as an elevator.

Brent Dammann, AIA
Architect, VP

David Murphy

From: Brent Dammann [Brent.Dammann@wsn.us.com]
Sent: Tuesday, March 04, 2014 10:21 AM
To: David Murphy
Cc: Greg Boppre
Subject: EGF Civic Center Addition Estimate

Good morning David,

I went through the preliminary budget estimate for the Civic Center to see if we can get it down to the \$750K amount. I believe it can be done, but we'll have to reduce the area of the addition and be really mindful of the materials we select. Below is a summary of the estimate:

Lockerroom Remodel	~2,050 sf	\$100,000
Lower Level Restrooms	No work	\$0
Platform Lift	--	\$40,000 (+\$40,000 for elevator)
<i>(does not include shaft walls)</i>		
Lobby Renovation	1,900 sf	\$45,000
Lobby Addition	2,250 sf	\$325,000
Sitework	--	\$75,000
Sub-Total		\$585,000
Contingency		\$117,000
A/E Services		\$60,000
Total		\$762,000

As I mentioned in our discussion yesterday, we can really begin to firm up these numbers once we get into the schematic design. Again, we our offering to complete schematic design services at no cost.

If you have any questions let me know.

Brent Dammann, AIA

Architect, VP
701-765-8005 | Direct
218-821-5679 | Cell



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