



Federal Highway Administration (FHWA), South Carolina Division. During the hearing, the CPO received Exhibits 1 through 9 into evidence, heard oral arguments, and took testimony from all parties. This decision is based on the testimony and evidence presented at the hearing and applicable law.

## **I. NATURE OF THE PROTEST**

Tyler's statement of protest is attached as Exhibit A and incorporated herein by reference. Ideal's statement of protest is attached as Exhibit B and incorporated herein by reference. Randolph's statement of protest is attached as Exhibit C and incorporated herein by reference. Loveless' statement of protest is attached as Exhibit D and incorporated herein by reference. The letters of protest present the CPOC with two questions: 1) whether federal regulations concerning Disadvantaged Business Enterprise (DBE) contract requirements should be applied to this procurement; and 2) if the federal requirements are applicable to the procurement, did SCSU commit error under the federal standards in determining the protestants' bids to be non-responsive for failure to show adequate good faith efforts to meet the DBE participation goal set forth in the bid documents? In addressing these matters, the CPO's administrative review of SCSU's solicitation, actions, and decisions is narrowly limited to the issues raised in the letters of protest.

## **II. FINDINGS OF FACT**

The following dates and facts are relevant to the protest:

1. On December 21, 2009, SCSU advertised for bids to construct the Project. [Ex. E]
2. Pursuant to FHWA requirements, the invitation for bid provided as a goal that SCDOT certified DBE contractors or subcontractors would perform work equaling at least 20% of the value of the awarded contract. [Hearing Ex. 2]
3. The invitation for bid provided for a non-mandatory Prebid meeting on January 7, 2010. At this meeting, bidders were advised of the DBE participation goals and FHWA requirements set forth in the bid documents. [Hearing Ex. 3]
4. By the time for receiving bids on January 28, 2010, SCSU received 17 bids. [Ex. F]
5. On February 1, 2010, SCSU notified all bidders that it appeared they failed to meet the DBE participation goals set forth in the solicitation documents and requested that they each provide documentation, per the Instructions to Bidders, substantiating their good faith efforts to meet the DBE

participation goal. [Hearing Ex. 4, page OSE000116 – OSE000130]<sup>1</sup>

6. By noon of February 2, 2010, Ideal, Loveless, and Randolph provided documentation of their efforts to meet the 20% DBE participation goal. Tyler did not provide documentation of its efforts. [See Ideal's documentation at Hearing Ex. 4 at OSE000053 – OSE000089; Loveless' at Hearing Ex. 5, pages OSE000145 – OSE000161; and Randolph's at Hearing Ex. 6, OSE000220 – OSE000274]

7. By noon of February 2, 2010, International submitted documentation that it was a SCDOT certified DBE and that it would be self performing at least 20% of the work thus meeting the DBE participation requirements of the bid documents. [Hearing Ex. 8 at OSE000347]

8. By individual letters dated February 5, 2010, SCSU notified each of the fifteen bidders submitting a bid lower than International's that it had examined their documentation of efforts to achieve the DBE participation goal and determined those efforts to be non-responsive.<sup>2</sup> [Hearing Ex 4 at OSE000114; Ex 5 at OSE000189; Ex. 6 at OSE000279, and Ex. 9]

9. By letter dated February 6, 2010 and sent to SCSU by email the following day, Ideal requested reconsideration of its good faith efforts documentation. [Hearing Ex. 4, at OSE000108 and OSE000111]

10. On February 18, 2010, SCDOT reconsideration officials met with Ideal to reconsider its good faith efforts and determined that Ideal failed to prove adequate pre-bid good faith efforts to meet the DBE participation goal. [Hearing Ex. 4 at OSE000099]

11. On February 24, 2010, SCSU posted Notice of Intent to Award a contract to International, rejecting the fifteen bids that were lower than International's bid as non-responsive for failure to comply with the FHWA DBE requirements.<sup>3</sup> [Ex. G]

12. On February 26, 2010, Tyler submitted its protest to the CPO.

13. On March 1, 2010, Loveless submitted its protest to the CPO.

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<sup>1</sup> The hearing exhibits were submitted in notebook form with tabs one through eight. The CPOC marked each tab as a hearing exhibit. Because of the large numbers of documents behind each tab and for ease of identification, the CPOC subsequently had a number added to the top center of each page of Exhibits 1 through 9. This numbering starts with OSE00001 on the first page of Ex. 1 and ends with OSE000364 on the single page of Ex. 9.

<sup>2</sup> This letter was apparently sent by email and via the postal service that same day. [Hearing Ex. 4 at OSE000112; and Ex. 5 at OSE000190 and OSE000188] However, it is not clear that each letter was sent by email nor is it clear when Randolph, Ideal, and Tyler received their letter.

<sup>3</sup> Many will find it unconscionable that SCSU threw out the 15 lowest bidders and the award made to the 16<sup>th</sup> out of 17 bidders. However, eleven of the 15 bidders that SCSU threw out as non-responsive did not protest and the issue of whether it was proper for SCSU to throw these eleven out is not before the CPOC.

14. On March 4, 2010, Ideal submitted its protest to the CPO.

15. On March 5, 2010, Randolph submitted its protest to the CPO.

### **III. APPLICABILITY AND IMPLEMENTATION** **OF FEDERAL DBE REQUIREMENTS**

#### **A. PREFACE**

At the hearing, it was obvious that the bidders were generally dissatisfied with the DBE requirements set forth in the solicitation. Moreover, the CPOC is aware that the general contractor community in the state is dissatisfied with those same DBE requirements and that the process, as applied, resulted in an intended award of contract to the next to the highest bidder out of seventeen bidders. In short, there is a general feeling that the process was unfair.

The state and CPOC shares the business community's concern for fairness in state procurement activity. In this regard, the Consolidated Procurement Code provides as follows:

The underlying purposes and policies of this code are:

(a) to provide increased economy in state procurement activities and to maximize to the fullest extent practicable the purchasing values of funds while ensuring that procurements are the most advantageous to the State ...;

(b) to foster effective broad-based competition for public procurement within the free enterprise system;

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(f) to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement. *SC Code Ann § 11-35-20*

The gist of the feelings of the business community is that this procurement did not provide for increased economy, did not ensure a procurement most advantageous to the State, did not foster effective broad-based competition, did not ensure fair and equitable treatment of all persons dealing with this procurement, and did not promote public confidence in state procurement.

In addressing these concerns, the CPOC notes that 80 to 100 % of the funding for this procurement is United States Department of Transportation funds. These federal funds came with federal requirements that apply to SCSU. To the extent SCSU was required by law to follow these requirements and SCSU

properly applied these requirements, dissatisfaction with the state is misplaced.<sup>4</sup> The CPOC also notes that part of the issue here is that none of the parties involved (SCSU, OSE, general contractors, designers, or construction managers) have much experience, if any, with USDOT DBE requirements. Within South Carolina, only SCDOT personnel and contractors have such experience. A cursory review of federal cases regarding the USDOT DBE programs going back to the 1980's indicates that within the national highway construction community, there were similar reactions to these programs in their early implementation. However, for the national highway construction community today, compliance with USDOT DBE requirements is a way of life.

## **B. APPLICABILITY OF THE FEDERAL DBE REQUIREMENTS**

In 2002, the Federal Highway Administration (FHWA) awarded SCSU a grant pursuant to the authority contained in Title I, Subtitle B, of the Transportation Equity Act for the 21<sup>st</sup> Century of 1998 and its subsequent amendments (TEA-21). [Ex. H] Subsequent amendments to the grant increased this grant to an amount in excess of \$23,000,000. This grant as subsequently amended provides all or most of the funding for this project. TEA-21 § 1101(b)(2)(B) requires that at least 10% of the funds expended under Title I of the Act be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals. Congress has carried this requirement forward in successive Transportation Equity Acts.<sup>5</sup> Therefore, the funding for this project is subject to this enactment of Congress.

In response to the requirement of congress set forth in TEA-21 § 1101(b)(2)(b), the US Department of Transportation adopted the regulations set forth in 49 CFR § 26 – Participation By Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs. As a condition of the FHWA grant of funding for this project, SCSU agreed to comply with the FHWA Disadvantaged Business Enterprise Program in accordance with 49 CFR § 26.

The Consolidated Procurement Code Provides that “Where a procurement involves the expenditure of federal assistance, grant, or contract funds, the governmental body also shall comply with federal laws (including authorized regulations) as are mandatorily applicable and which are not presently reflected in

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<sup>4</sup> The CPOC is not the appropriate venue to raise objections to these federal requirements. The appropriate venue is the federal courts. However, the CPOC notes that these federal regulations have been challenged as unconstitutional in several federal circuits and found to be constitutional. *Northern Contracting, Inc., v. Illinois*, 473 F.3d 715 (7<sup>th</sup> Cir. Ct. App.); *Sherbrooke Turf, Inc., v. Minnesota Department of Transportation*, 345 F.3d 964 (8<sup>th</sup> Cir. Ct. App.); *Western States Paving Co., Inc., v. Washington State Department of Transportation*, 407 F.3d 983 (9<sup>th</sup> Cir. Ct. App.); *Adarand Constructors, Inc., v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. Ct. App.). It appears the Fourth Circuit Court of Appeals whose jurisdiction includes South Carolina has not addressed the issue.

<sup>5</sup> See the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, § 1101(b)(2)(B).

this code.”<sup>6</sup> *SC Code Ann § 11-35-40(3)* Therefore, under both Federal and State law, SCSU was required to conduct this procurement in compliance with the requirements of the FHWA Disadvantaged Business Enterprise Program in accordance with 49 CFR § 26. At the hearing, Tyler, the sole protestant on this issue, acknowledged SCSU’s procurement was subject to the federal DBE requirements.

### **C. IMPLEMENTATION OF THE FEDERAL DBE REQUIREMENTS**

Much was made at the hearing concerning SCSU’s implementation of the federal DBE requirements in the invitation for bids.<sup>7</sup> Specific concerns heard by the CPOC were that SCSU set the DBE participation goal too high when considering the size, type, and number of DBE subcontractors in South Carolina engaged in vertical construction; few DBE subcontractors engaged in vertical construction are on the SCDOT certified DBE list and bidders should have been allowed to use subcontractors certified by the Governor’s Office of Small and Minority Business Assistance or local governmental entities as minority business enterprises; considering the DBE requirements, the bid period was too short; and the various deadlines set forth in the invitation for bid were too short. These factors were clearly set forth in the invitation for bid. Any prospective bidder that felt these solicitation requirements were unreasonable should have protested the solicitation pursuant to *SC Code Ann § 11-35-4210(1)(a)* within fifteen days of the solicitations issuance. As it is, no one protested the solicitation within fifteen days of its issuance and the CPOC cannot address these complaints in this protest.

Another complaint was that an SCDOT certified DBE bidder such as International did not have to put forth the same level of effort to meet the DBE participation goals as a non-DBE bidder did. A similar complaint was set forth in Ideal’s protest letter protesting that the nature of the solicitation was “geared” to favor one company and avoid the competitive process. This item of protest is in reality a protest of the solicitation, not the award, and is untimely. *See SC Code Ann § 11-35-4210(1)(a)*. Moreover, this claimed favoritism is a result of compliance with the federal statutory and regulatory scheme and not any

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<sup>6</sup> This provision goes on to state: “Notwithstanding, where federal assistance, grant, or contract funds are used in a procurement by a governmental body as defined in Section 11-35-310(18), this code, including any requirements that are more restrictive than federal requirements, must be followed, except to the extent such action would render the governmental body ineligible to receive federal funds whose receipt is conditioned on compliance with mandatorily applicable federal law. In those circumstances, the solicitation must identify and explain the impact of such federal laws on the procurement process, including any required deviation from this code.” The application of 49 CFR § 26 was clearly stated in the solicitation in the FHWA Instructions included therein. Moreover, the FHWA Instructions mirror and explain how 49 CFR § 26 is implemented in the solicitation. No one asserted as an item of protest that SCSU’s solicitation failed to adequately “identify and explain the impact of such federal laws on the procurement process.” Therefore, CPOC does not address this issue in this decision.

<sup>7</sup> This issue was not properly before the CPOC as a grounds of protest, nor is this an issue over which the CPOC has subject matter jurisdiction.

conscious effort of SCSU or anyone else to favor one particular contractor. Anyone taking issue with this federal statutory and regulatory scheme should take their complaints to the courts, not the CPOC.

Despite the foregoing, the CPOC acknowledges that in hindsight there are things that SCSU could have done better to assist bidders and DBEs in achieving the DBE participation goals. Moreover, this is not the last, nor the largest building project that is a part of the James E. Clyburn Transportation Research and Conference Center. There are opportunities to make improvements in the future and the CPOC makes recommendations regarding improvements towards the end of this decision in the hopes that the problems and hard feelings generated by this solicitation do not occur in future solicitations.

#### **IV. BIDDER GOOD FAITH EFFORTS AND RESPONSIVENESS**

##### **A. FACTUAL BACKGROUND**

In order to comply with the federal DBE requirements, SCSU included the following FHWA documents in the bid documents: Disadvantaged Business Enterprise (DBE) Committal Sheet (hereinafter, DBE Committal Sheet), FHWA Instructions to Bidders – Federal Projects DBE Requirements (hereinafter, FHWA Instructions), and Disadvantaged Business Enterprises (DBE) – Federal Projects Guidelines (hereinafter FHWA Guidelines). As a whole, these documents identified and explained the impact of the federal DBE requirements on the procurement process, including any deviations from the Consolidated Procurement Code as required by SC Code Ann § 11-35-40(3).

As a part of the requirements of 49 CFR § 26, SCSU adopted an overall goal for SCDOT certified DBE participation in projects subject to the grant.<sup>8</sup> *See 49 CFR § 26.45*. Additionally, SCSU set a project goal of having a minimum 20% SCDOT certified DBE participation in this project. This 20% goal was set forth in the bid documents. [Hearing Ex. 2 at OSE000010].

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<sup>8</sup> Federal Regulations set forth specific requirements for certification of a business as a DBE. *See 49 CFR § 26 Subpart D*. Only businesses certified in accordance with the standards may be counted toward the DBE goal. While the Governor's Office of Small and Minority Business Assistance certifies businesses as minority businesses, the certification requirements are different than those required in 49 CFR § 26. On the other hand, businesses certified by SCDOT as DBE's are certified in accordance with the Federal requirements.

Federal regulations provide a process were a recipient of FHWA funds may, in the solicitation documents, treat a bidder's response to the DBE requirements as a matter of responsiveness or a matter of responsibility. *See 49 CFR §26.53(b)(3)*. The FHWA Instructions included in this solicitation provide that the bidder's response to the DBE requirements is a matter of responsiveness. [See FHWA Instructions §5, Hearing Ex. 2 at OSE000013]. Specifically, the FHWA Instructions required each bidder to submit with its bid a DBE Committal Sheet(s) containing all the information regarding how the bidder intended to meet the 20% DBE contract participation goal.

Throughout this document, the CPOC references the FHWA Instructions. Since it is the federal regulations that the state must follow, it is worth noting that the FHWA Instruction mirror and implement the requirements of 49 CFR § 26.

The requirements regarding application of Federal Regulations and the 20% DBE goal were presented at the pre-bid meeting held on Thursday January 7, 2010. [Hearing Ex. 3] None of the contractors attending the pre-bid meeting asked any questions or raised any concerns regarding the DBE requirements. Moreover, it appears that no bidder asked SCSU any questions or raised any concerns regarding the DBE requirements prior to bidding.

Each bid submitted to SCSU included a DBE Committal Sheet as required by the FHWA Instructions. Of the seventeen bidders only International met the 20% DBE participation goal through its DBE Committal Sheet. [Hearing Ex. 8 at OSE000338] However, Section 3(A) of the FHWA Instructions provides as follows:

If the bidder does not meet the DBE contract goal through the DBE committals submitted with the bid, the bidder may submit additional information to satisfy the SCSU that good faith efforts have been made by the bidder in attempting to meet the DBE contract goal. **THIS INFORMATION MUST BE FURNISHED TO THE SCSU CONTRACT ADMINISTRATION OFFICE IN WRITING WITHIN THREE (3) DAYS OF THIS LETTING.** One complete set and five copies of this information must be received no later than 12:00 noon of the third day following the letting.

[Hearing Ex. 2 at OSE000011]

Therefore, if any bidder wanted SCSU to consider its efforts to meet the 20% DBE participation goal beyond those indicated on their DBE Committal Sheets, the bidder was required to provide evidence of those efforts to SCSU no later than noon of the third day following the bid opening. If a bidder failed to meet the DBE participation goal but showed through its documentation adequate good faith

efforts to meet the goal, the bidder's bid would be considered responsive. *See 49 CFR § 26, App. A.*

Because the bid opening was on a Thursday, the term "days" as it appears in this section of the FHWA Instructions raises the question of whether the term means working days or calendar days and, if the latter, what happens if the third day falls on a non-working day. The FHWA Instructions do not answer these questions.<sup>9</sup> However, SCSU resolved this dilemma when it did not receive any documentation of good faith efforts by noon on Monday February 1, 2010 (the first business day after the third calendar day), by sending notice to all bidders that they had until noon of the following day to send in their documentation.<sup>10</sup> [Hearing Ex. 4, at OSE000116 – OSE000130] SCSU attached a copy of the FHWA Instructions found in the bid documents to this request.

Ideal, Loveless, and Randolph provided the requested information by noon of February 2, 2010. Tyler failed to submit any information at all.

On behalf of SCSU, Jonathan Roberts with CDI, SCSU's construction manager, and Ken Davis with SDSU Facilities Management, reviewed all documentation submitted to show a good faith effort to meet the DBE goal to determine if those efforts were adequate and acceptable. Using the eleven factors set forth in Section 3(C) of the FHWA Instructions and derived from 49 CFR § 26, Appendix A, Mr. Roberts and Mr. Davis determined that Ideal, Loveless, Randolph, and Tyler failed to demonstrate adequate good faith efforts to meet the 20% DBE participation goal.<sup>11</sup> By separate letters dated February 5, 2010 (a Friday), and emailed to the parties that same day, SCSU notified Ideal, Loveless, Randolph, and Tyler of its determination.<sup>12</sup> [Hearing Ex. 4 at OSE000114, Ex. 5 at OSE000174, Ex. 6 at OSE000279, and Ex. 9]

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<sup>9</sup> The Instructions do use the term "calendar days" in other sections so it would appear that the term "days" as used here is something other than calendar days. Assuming the term to mean working days, the third day after bid opening was Tuesday February 2, 2010. If one assumes the term to mean calendar days, the third day was Sunday January 31, 2010.

<sup>10</sup> While SCSU was not required to provide any notice regarding this matter, it is likely that had SCSU not done so, SCSU would not have received documentation of good faith efforts from any bidder.

<sup>11</sup> SCSU in fact determined that the 15 lowest bidders failed to demonstrate adequate good faith efforts.

<sup>12</sup> At the protest hearing and in a couple of the letters of protest, some of the protestants made much ado about not knowing why their bids were found to be non-responsive. However, a review of the Exhibits and a close reading of each letter of protest reveals that each protestant knew or should have known that their bids were determined to be non-responsive for failure to demonstrate adequate good faith efforts to meet the 20% DBE participation goal. What they did not know and apparently were asking is why SCSU considered their efforts to be inadequate. However, neither the FHWA Instructions nor 49 CFR §26 required SCSU to explain in this notice why it determined these efforts to be inadequate.

Pursuant to 49 CFR § 26(d), section 4 of the FHWA Instructions provided bidders the right to request reconsideration of SCSU's non-responsiveness determination. [Hearing Ex. 2 at OSE000013] However, the instructions regarding a request for reconsideration required the bidder to make the request in "writing within two (2) calendar days of receipt of the determination." Only one bidder, Ideal by letter dated February 6, 2010, took advantage of this Section of the FHWA Instructions and submitted a request for reconsideration. [Hearing Ex. 4 at OSE000111] Ideal sent this letter to SCSU as an attachment to email on Sunday February 7, 2010, the second calendar day after SCSU emailed notice of its determination of non-responsiveness.<sup>13</sup> The following day, SCSU acknowledged receipt of Ideal's request and advised Ideal that it would "designate an official who did not take part in the original determination ... to reconsider Ideal Construction's DBE commitment or good faith efforts." [Hearing Ex. 4 at OSE000107]

SCDOT's office of Business Development & Special Programs agreed to provide three of its employees, R. Todd Steagall, Curtis Sims, Jr. and Gary S. Linn, to act as reconsideration officials to review Ideal's good faith efforts. On or before February 18, 2010, the reconsideration officials received documentation from Ideal and personally met with Ideal representatives, Mr. Hammersla and Mr. Richardson, to discuss Ideal's efforts to meet the 20% DBE participation goal. The reconsideration officials determined that Ideal failed to "prove a good faith effort prior to the bid date based on the requirements of the regulations." [Hearing Ex. 4 at OSE000099] On February 22, 2010, Mr. Linn notified SCSU of the reconsideration officials' determination and SCSU's construction manager notified Ideal of that determination. [Hearing Ex. 4 at OSE000098 and OSE000099]

## **B. DISCUSSION**

"Good faith efforts means efforts to achieve a DBE goal ... which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement."<sup>14</sup> *49 CFR § 26.5* A bidder must show "adequate good faith efforts to meet the goal." *49 CFR § 26.53(a)(2)*. It is up to the recipient of USDOT funds to "make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts ... consider[ing] the quality, quantity, and intensity of the different kinds of efforts that the bidder has made." *49 CFR § 26 App. A*. "The efforts employed by

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<sup>13</sup> All parties relied on email to conduct their communications and provide notices.

<sup>14</sup> For ease of reference, a copy of 49 CFR § 26.53 and Appendix A is attached to the end of this opinion.

the bidder should be those 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 DBE contract goal.” *49 CFR § 26 App. A* [emphasis added] From the forgoing, it is clear that the efforts expected of a bidder in making efforts to meet the DBE goals are not ordinary or normal efforts one might go through to try to obtain subcontractor bids but extraordinary efforts.

Subpart IV, Appendix A, 49 CFR § 26 provides a non-exclusive and non-mandatory list of the types of actions an evaluator should consider in making his determination regarding a bidder’s good faith efforts.<sup>15</sup> This non-exclusive and non-mandatory list provides some examples of the type of one might consider to be active and aggressive efforts. For example, Appendix A provides as follows:

Negotiating in good faith with interested DBEs. It is the **bidder’s responsibility to make** a portion of the work available to DBE subcontractors and suppliers and **to select** those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. ... the fact that there may be some additional costs involved in finding and using DBE’s is not in itself sufficient reason for a bidder’s failure to meet the contract DBE goal, as long as such cost are reasonable.” *49 CFR § 26, App. A, Part IV(D)(1) & (2)* [emphasis added].

This provision envisions that the bidder will determine the skills and abilities of available DBE’s, break out portions of the work appropriate to those skills and abilities, find and approach those DBE’s, and attempt to negotiate with them to perform the work. With respect to solicitations for DBEs, Appendix A provides:

The bidder must **determine with certainty** if the DBEs are interested by taking appropriate steps to follow up initial solicitations. *49 CFR § 26, App. A, Part IV(A)* [emphasis added]

As with negotiations, this provision envisions a bidder taking active and aggressive efforts to follow up solicitations and determine with “certainty” DBE interest.

Not only does 49 CFR § 26 envision active and aggressive efforts to obtain DBE participation, the regulation requires adequate documentation of these efforts. For example, Appendix A, Part IV(D)(1) provides:

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<sup>15</sup> A search of federal case law and the USDOT website failed to yield any additional guidance than that contained in 49 CFR § 26.

Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBE's to perform the work.

The FHWA Instructions take the list of actions in 49 CFR § 26, Appendix A and break this list down into eleven factors. [Hearing Ex2 at OSE000012]. This is the list used by SCSU and SCDOT reconsideration officials in evaluating the good faith efforts of bidders. At the hearing, Mr. Cox, Randolph's attorney questioned SCSU's representatives, Mr. Roberts and Mr. Davis concerning how they went about evaluating each bidder's documentation of good faith efforts. From this testimony, it appears that SCSU took each bidder's documentation and looked through it for evidence that the bidder accomplished factors two through ten of the eleven evaluation factors in the FHWA Instructions. It appears that if the documentation failed to evidence the bidder implemented any one of these nine factors, SCSU determined the bidder's bid to be non-responsive.

It appears to the CPOC that the approach used by SCSU to evaluate good faith efforts was overly stringent in that such an approach would not give due consideration to overall efforts that were extensive and aggressive if the bidder failed to fully implement one factor such as attending a Prebid meeting.<sup>16</sup> The language of the FHWA Instructions as well as the language of 49 CFR § 26 Appendix A, make it clear that these factors are non-mandatory and non-exclusive factors and that SCSU could consider other factors as well in making its determination. However, regardless of the evaluation approach SCSU's evaluators used, the FHWA representative, Mr. Kitowicz, clearly believed that SCSU's determination with respect to all bidders was correct. Admittedly, the federal standard provides that this review is one left to the judgment of the recipient of federal funds, however, that judgment is to be fair, reasonable, and consistent with the law. *49 CFR § 26, App. A, Subpart II*. Moreover, the SCDOT Reconsiderations officials testified that they looked at the totality of the circumstances and used the eleven factors in the FHWA Instructions as a guide. The CPOC believes that the SCDOT Reconsideration officials' approach is the appropriate approach. Accordingly, using the eleven factors as a guide, an evaluator should determine if the totality of the circumstances indicate that the bidder "actively and aggressively" "took all necessary and reasonable steps ... which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful." *See 49 CFR § App. A, Subpart I*.

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<sup>16</sup> In fairness to the Mr. Roberts and Mr. Davis, this is the first time either had to apply these standards and they appeared to have relied heavily on instructions received from the FHWA representative.

Nothing in 49 CFR § 26 provides a standard for review of a determination of non-responsiveness for failure to prove adequate good faith efforts to meet a DBE participation goal. Moreover, the CPOC could not find any case law setting forth a standard of review.<sup>17</sup> The available case law even remotely touching on the subject simply notes that the determination is subjective. This is consistent with 49 CFR § 26 Appendix A Subpart II which states that the recipient's determination is a judgment call. In this sense, the good faith determination is similar to discretionary determinations in the Consolidated Procurement Code which are final "unless clearly erroneous, arbitrary, capricious, or contrary to law." *See SC Code Ann. § 11-35-2410.*

### 1. Responsiveness of Loveless

A review of The DBE Committal Sheet that Loveless submitted with its bid shows that the one subcontractor Loveless listed on that Sheet as a SCDOT certified DBE was not certified by SCDOT.<sup>18</sup> [Hearing Ex. 5 at OSE000141] Therefore, Loveless did not meet the 20% DBE participation goal through its DBE committals. However, Loveless did submit documentation of its good faith efforts to SCSU for a good faith effort determination and Loveless' letter of protest, essentially alleges "SCSU erred in dismissing its bid as nonresponsive, because it exercised adequate good faith efforts to ensure the participation of DBE's in the Project."

The FHWA Instructions and 49 CFR § 26.53(d) provided Loveless with the right to request a reconsideration of its good faith efforts. This reconsideration review is a de novo review. These provisions further provide that the reconsideration is to be made by an official that was not involved in the original determination thus providing for a measure of independence. Thus, all bidders submitting documentation of good faith efforts were provided the opportunity to have their efforts independently re-evaluated. However, Loveless did not request a reconsideration of SCSU's determination.

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<sup>17</sup> This lack of guidance is not surprising since 49 CFR §26.53 envisions a procedure where the final good faith determination (i.e. reconsideration determination) is not administratively appealable to the USDOT. See 49 CFR § 26.53(d)(5) [emphasis added].

<sup>18</sup> Within the Hearing Exhibits are two lists of SCDOT certified DBE's. One list may be found in Ex. 4 at OSE000058 through OSE000074. The other list may be found in Ex. 5 at OSE0000156 through OSE0000161. In addition, the CPOC received from SCDOT the January 2010 list of SCDOT certified businesses from SC, NC, GA, TN, VA, and WV. SCDOT's list includes contractors from states other than those listed but those contractors were not included in the list provided to the CPOC. In any event, all subcontractors listed on the protestants' DBE Committal Sheets were from states included in the lists provided to the CPOC. For purposes of the CPOC's discussion and analysis set forth herein, if a subcontractor listed in one of the protestants' DBE Committal sheets was listed on any one of the three list, the CPOC treated the subcontractor as a SCDOT Certified DBE.

The regulatory structure set forth in 49 CFR § 26.53 envisions that a bidder's only right to a de novo review of its good faith efforts to meet the DBE participation goal is a request for reconsideration.<sup>19</sup> Under this scheme, a bidder that fails to ask for reconsideration waives the right to a de novo review. Therefore, the CPO finds that a bidder must avail itself of the administrative remedies provided by 49 CFR § 26.53 and the FHWA Instructions in order to obtain a de novo review of its good faith efforts. The CPOC's administrative review pursuant to protest is not a de novo review of the protestant's good faith efforts but a review of whether one in SCSU's position could reasonably conclude from the documentation presented to it by the protestant that the protestant failed to prove adequate good faith efforts to meet the DBE participation goal.

At the hearing, Loveless argued that it did ask for reconsideration. On February 5, 2010, Loveless emailed SCSU a letter asking why its good faith efforts were not adequate. [Loveless Letter Hearing Ex. 5 at OSE000188] On March 5, 2010, four days after protesting, Loveless sent a letter to SCSU asking SCSU to consider its letter of February 5, 2010 to be a request for reconsideration. [Hearing Ex. 5 at OSE000168] In this letter, Loveless argues that it is obvious from the language of its February 5 letter that Loveless was requesting reconsideration. Loveless reiterated this argument at the hearing, and asked the CPOC to find its February 5 letter to be a request for reconsideration. However, the CPOC can find nothing in the letter to suggest it is in any way a request for reconsideration. The letter is nothing more than a request for a debriefing on why Loveless' efforts failed so that Loveless could make improvements for the future. As such, Loveless' letter fails to put anyone on notice that it is requesting reconsideration.

Though not specifically argued by Loveless, its position at the hearing raises an issue concerning the sufficiency of notice. Adequate notice of the right for a 49 CFR § 26.53(d) reconsideration of one's efforts to meet the DBE participation goals necessarily consist of two parts: 1) notice that one's efforts to meet the DBE participation goal have been determined to be inadequate and 2) notice that the remedy of reconsideration is available. In the circumstances of this case, there can be no reasonable argument that SCSU failed to provide notice to all protestants of its determination of non-responsiveness on the grounds that their efforts did not meet the adequate good faith effort standard set forth in 49 CFR § 26. Loveless' letter of February 5 makes it clear that it understood the basis of the non-responsibility

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<sup>19</sup> The regulatory scheme only provides the bidder to the right to have an initial determination made by the recipient and to have an independent de novo reconsideration of that initial determination. The regulation provides for no further administrative review. Indeed, the regulation provides that the reconsideration decision is not administratively appealable to the USDOT. *49 CFR § 26.53(d)(5)*.

determination, noting that it “went to great time, effort and expense to make a good faith effort to meet the DBE goals.” SCSU also provided all bidders with notice of their right to reconsideration not once, but twice. The notice was set forth in Section 4 of the FHWA Instructions found in the solicitation documents. [Hearing Ex. 2 at OSE000013] SCSU also provided the notice with its February 1, 2010 letter to all bidders requesting them to submit their documentation of good faith efforts. [Hearing Ex. 5 at OSE000197] In this latter case, SCSU attached the FHWA Instructions to direct the bidders to the DBE requirements and rights set forth therein. The right to reconsideration is clearly set forth in the FHWA Instructions and any bidder reading them would understand that they had this right.

From the documentation submitted to SCSU, it appears that Loveless made a greater effort to meet the DBE participation goals than the other protestants. Nonetheless, one making a review of Loveless’ good faith efforts under the totality of the circumstances could reasonably conclude that Loveless did not prove adequate good faith efforts to meet the DBE participation goal.

In his testimony, Mr. Price argued that SCSU should have applied some sort of ranking formula or methods similar to those applied by some city governments in their DBE programs to determine the adequacy of a bidder’s good faith efforts. Mr. Price noted that building contractors are used to the requirements of DBE programs implemented by cities in South Carolina not the USDOT program. Mr. Price further testified that based on his experience with cities, he expected that if he took steps related to 70% of the factors provided in the FHWA Instructions for considering good faith efforts, he would have done all that is necessary to prove adequate good faith efforts to meet the DBE participation goal. While Mr. Price’s desire in this regard is understandable, this is not what the federal regulations provide.<sup>20</sup> Specifically, 49 CFR § 26 Appendix A, Part II provides that SCSU’s “determination concerning the sufficiency of the firm’s good faith efforts is a judgment call: meeting quantitative formulas is not required.” Using the approach suggested by Ideal, one could make pro forma efforts with respect to the majority of factors, fail to attain sufficient DBE participation and still be awarded the contract. However, “pro forma efforts are not good faith efforts to meet the DBE contract requirements.” *49 CFR 26, App. A, Part II.*

At the hearing, Loveless presented testimony of the good faith efforts it made with respect to the eleven non-exclusive, non-mandatory evaluation factors set forth in the FHWA Instructions. Using the eleven factors as a guide, the CPOC considers whether under the totality of circumstances one could reasonably conclude Loveless did not “actively and aggressively” take “all necessary and reasonable steps ... which,

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<sup>20</sup> This desire for a formula was specifically stated by Randolph and the other bidders concurred in the desire.

by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.” *49 CFR § App. A, Subpart I.*

“(1) Did the bidder attend any pre-bid meetings that were scheduled by the SCSU to inform DBEs of subcontracting opportunities?”

While Loveless did attend the only pre-bid meeting scheduled for the project, that pre-bid meeting was not specifically for the purpose of informing DBE’s of subcontracting opportunities. Because of the actual nature of this pre-bid meeting, SCSU appropriately did not evaluate bidders on this factor.

“(2) Did the bidder provide solicitations through all reasonable and available means (for example, advertising in newspapers owned by and targeted toward DBEs) at least 10 days prior to the letting; or did the bidder provide written notice to all DBE’s listed in the SCDOT DBE Directory that specialize in the areas of work in which the bidder will be subcontracting?”

Included in the documentation Loveless submitted to SCSU is an undated Invitation to Bid listing almost every division and subdivision of work found in the Construction Specification Institute’s standard specifications inviting “ DBEs, DVBEs, MBEs,WBEs and all other parties to bid this project with us.” [Hearing Ex. 5 at OSE000146 - OSE000147] The Invitation encouraged subcontractors to contact Loveless “for assistance in obtaining bonds, credit lines, Insurance, equipment, supplies and/or materials.” The invitation advises subcontractors to feel free to contact Loveless about breaking down “work scopes to better fit their capabilities.” Finally, the invitation advises interested subcontractors where they may find plans for the project. However, there is nothing in the documentation submitted to SCSU to indicate where, if anywhere, this invitation was placed, or to whom, if anyone, it was sent to. Therefore, from a reviewer’s standpoint this document does not indicate any effort to meet the DBE participation goal.

On January 14, 2010, Loveless did send, via facsimile, a different but substantially similar invitation to the DBE Program Development Office at the SCDOT with a request that SCDOT “post this announcement on your website and any other media outlet that is available to you to notify appropriate DBEs, DVBEs, MBEs and WBEs businesses.” [Hearing Ex. 5 at OSE000148 – OSE000149] There is no documentation that Loveless made any effort to determine what the DBE Program Development Office could do to assist in this regard before or after submitting this request. What SCDOT does do is once a month, they send all contractors on their DBE list information regarding all contracting opportunities. Provided that a bidder provides an invitation such as this prior to the date that SCDOT sends out its monthly mailing, SCDOT will include that invitation in that mailing. SCDOT sent out its mailing for the month of January a few days before January 14, 2010, and their next mailing did not go out until well after the bid date. The reason for Loveless’ failure to meet the SCDOT deadline will become apparent.

It appears to the CPOC that the Invitation to SCDOT differs from the first Invitation discussed above in that it list more specific scopes of work for which it is seeking bids as apposed to the broad list taken from the Construction Specification Institute's index of work divisions and subdivisions. While the Invitation sent SCDOT does use the phrase "but not limited to" to indicate it will take bids on other scopes, the Invitation does not specifically invite subcontractors to feel free to contact Loveless about breaking down work scopes to better fit their capabilities.

On January 14, 2010, Loveless submitted the same request and invitation that it submitted to SCDOT to the Governor's Office of Small and Minority Business Assistance (OSMBA) via facsimile. [Hearing Ex. 5 at OSE000150 – OSE000151] The policy of OSMBA is to post such invitations on its website provided it is received in time. The CPOC assumes that OSMBA did so in this case.

On January 14, 2010, Loveless submitted the same request and invitation that it submitted to SCDOT to the South Carolina Minority Business Enterprise Center (MBEC) via facsimile. The policy of MBEC is to send such invitations to its MBE members that it believes perform the type of work requested. Therefore, one may reasonably assume that this invitation was delivered by MBEC to its members.

Seven calendar days prior to the bid date, Loveless did advertise in the South Carolina Black Media Group. [Hearing Ex. 5 at OSE000154] This advertisement appears to be the same as the invitation sent to SCDOT. However, the documentation submitted to SCSU does not indicate why Loveless did not place such an advertisement sooner. At the hearing, Mr. Price testified that the Black Media Group publishes once a week and that he did not place the add sooner because he did not receive a copy of the plans and specifications from his employer in time to do so.

At the hearing, Mr. Price testified that he did not receive the plans until ten days before bid opening. However, the letters with invitation to bid to SCDOT, OSMBA and MEBC are all dated January 14, 2010, were delivered by facsimile that afternoon, and are written under Mr. Price's name. [e.g. Hearing Ex. 5 at OSE000149] Moreover, the Black Media Group requires that it receive an advertisement the Friday before publication, which in this case was January 15, 2010. The CPOC assumes from this, that

Mr. Price probably received the plans and specification the week of January 14, 2010, possibly that same day. Therefore, it appears that Mr. Price was talking about working days since the bid date was ten working days after January 14, 2010.<sup>21</sup> This delay in starting to take steps to seek DBE participation on the Part of Loveless is not an indication that Loveless took seriously the need to actively and aggressively seek DBE participation.

On Sunday January 22, 2010, eleven calendar days prior to the bid date, Loveless advertised in The State. [Hearing Ex. 5 at OSE000155] An affidavit by The State certifying publication was included in the documentation submitted to SCSU but not a copy of the advertisement. Nonetheless, the CPOC assumes the advertisement was identical to the one placed with the Black Media Group.

The record is clear that due to its own delay, that at least 10 days prior to the letting, Loveless did not provide solicitations through all reasonable and available means. However, Loveless did provide solicitations through several means at least 10 calendar days prior to letting and it appears from the testimony at the hearing that SCSU considered these efforts to be adequate for purposes of this aspect of factor number 2.<sup>22</sup>

With respect to the second aspect of factor number 2, there is no evidence in the documentation Loveless submitted to SCSU that shows Loveless provided “written notice to all DBE’s listed in the SCDOT DBE Directory that specialize in the areas of work in which the bidder will be subcontracting.” [Hearing Ex. 5 at OSE000145 – OSE000161] The cover letter to this documentation does suggest that they sent an invitation directly to the 93 DBEs listed on its telephone log and Mr. Price so testified at the hearing. However, Loveless did not provide any documentation of this to SCSU. Moreover, if the solicitation Loveless is referring to is the one with no evidence it was sent to anyone, there is no evidence from this document, or otherwise, that Loveless attempted to determine the capabilities of available DBEs, break the work down accordingly, and then solicit DBEs based on their capabilities. [Hearing Ex. 5 at OSE000146 - OSE000147]

“(3) Did the bidder follow-up initial solicitations of interest by contacting DBEs to determine with certainty whether they were interested or not?”

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<sup>21</sup> Mr. Price did not attend the January 7, 2010, pre-bid meeting on Loveless’ behalf.

<sup>22</sup> As previously noted by the CPOC, the FHWA Instructions do not define if the word “days” as used here means calendar days or working days. Elsewhere, the FHWA Instructions uses the term “calendar days” suggesting that the word calendar does not proceed the work days, days means something other than calendar days, which can only be working days. Nonetheless, for purposes of the analysis provided here, the CPOC assumes “days” means calendar days.

Loveless included in the documentation it submitted to SCSU telephone logs indicating that on January 20, 2010, one of its employees called 93 SCDOT certified DBEs.<sup>23</sup> [Hearing Ex. 5 at OSE000156 – OSE000161] There is no indication of what the caller was instructed to ask, offer, or discuss with the DBE's except whether the DBE intended to bid. The result of 12 of these calls is that Loveless either emailed or faxed the DBE an Invitation to Bid. There is no indication in the documentation submitted to SCSU that Loveless in any way followed up with these 12 DBEs to “determine with certainty whether they were interested or not.” The result of over half of these calls was that the caller left a message. There is no indication whether or not the call was returned nor is there any indication that Loveless made any further attempt to contact these DBEs and “determine with certainty whether they were interested or not.”

There is nothing in the documentation submitted by Loveless to indicate why Loveless decided to contact some SCDOT certified DBE's and not others. However, missing from the names of DBEs called by Loveless are five DBEs that provided bids to Ideal, one of which was listed by Tyler on its DBE Committal sheet.

“(4) Did the bidder select portions of the work to be performed by DBEs in order to increase the likelihood of meeting the contract goal? This includes, where appropriate, breaking out contract items of work into economically feasible units to facilitate DBE participation, even when the bidder might otherwise perform these items of work with its own forces.”

The Invitation to Bid in Hearing Ex. 5 at OSE000146 to OSE000147 clearly invites subcontractors to ask Loveless to break down the work into scopes that they can perform. However, the documentation does not indicate Loveless sent this particular invitation to any DBE. Based on the cover letter and Mr. Price's testimony, the CPOC assumes this is the invitation that both claim Loveless sent to 93 DBEs but the CPOC cannot determine this for a certainty from the documentation. However, looking at the evidence most favorably to Loveless it would appear that Loveless did make a limited attempt to accomplish this factor. The other Invitations submitted with Loveless' good faith documentation do not contain this offer to further break the work down but does break the work down into categories for which Loveless was seeking bids. This further evidences an attempt to accomplish this factor. However, the CPOC notes that 49 CFR § 26, App. A, expects the bidder to take more active and aggressive steps, steps to determine the skills and abilities of available DBE's, break out portions of the work appropriate to those skills and abilities, and find and approach those DBE's. Loveless did not provide any evidence that it took such steps.

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<sup>23</sup> These calls were made alphabetically, one after the other starting at 9:32 AM and ending at 4:34 PM with a break from 11:33 AM to 1:24 PM. Thus the caller averaged less than 3 ½ minutes a call.

“(5) Did the bidder provide interested DBEs with adequate and timely information about the plans, specifications, and requirements of the contract?”

The record shows that Loveless provided information where interested DBEs could find copies of the Project plans and specifications in every written solicitation Loveless sent out. [Hearing Ex. 5 at OSE000148 –OSE000154] Moreover, the documentation indicates that when DBEs Loveless called so requested, Loveless sent them a copy of an invitation to bid which included information on where to find the plans and specifications. Therefore, it appears that Loveless did provide DBEs that expressed interest with this information

“(6) Did the bidder negotiate in good faith with interested DBEs, or reject them as unqualified without sound reasons based on a thorough investigation of their capabilities? Any rejection should be noted in writing with a description as to why an agreement could not be reached. The fact that the bidder has the ability or desire to perform the work with its own forces will not be considered as sound reasons for rejecting a DBE’s quote.”

Loveless did not submit any documentation to show that it attempted to negotiate with DBEs. Loveless submitted no evidence that it took on the task of determining for itself the capabilities of available DBEs, actively and aggressively seeking out DBEs that could perform work on the Project, and attempting to negotiate with them. Mr. Price did testify that Loveless received two quotes from DBEs (five less than Ideal received) which according to him were excessively high in price. Loveless did not provide copies of these quotes. Moreover, Mr. Price testified that Loveless did not attempt to negotiate with these two DBEs and there was no evidence presented to show whether these quotes were received too late to provide an opportunity to negotiate.

“(7) Was a quote received from an interested DBE, but rejected as unacceptable because it was not the lowest quote received? The fact that the DBE’s quote is not the lowest quote received will not in itself be considered a sound reason for rejecting a DBE’s quote.”

Loveless did not submit any documentation to SCSU to show that it received any quotes from any DBE, much less documentation to show why it rejected DBE quotes. According Mr. Price, these quotes were excessively high. Though this is a valid reason for rejecting quotes, Loveless did not provide any documentation to SCSU or at the hearing of these quotes or of quotes received from non-DBEs on the same scopes of work by which one could make a comparison.

“(8) Did the bidder specifically negotiate with non-DBE subcontractors to assume part of the responsibility to meet the contract goal when the work to be sublet includes potential for DBE participation?”

Loveless did not submit any documentation to SCSU of efforts to get non-DBE subcontractors to share a scope of work with DBE subcontractors. This factor is a companion with factors 4 and 6. It makes sense

that there is no evidence that Loveless took measures with respect to this factor since Loveless did not submit any evidence to SCSU that it took active and aggressive steps to determine the skills and abilities of available DBE's and break out portions of the work appropriate to those skills and abilities.

“(9) Did the bidder make any efforts and/or offer any assistance to interested DBEs in obtaining the necessary equipment, supplies, materials, insurance, and/or bonding to satisfy the work for items in the bid proposal?”

The record shows that Loveless did include the following statement in all but one of its written invitations for bid:

We may also be of assistance to interested subcontractors, when possible, in obtaining equipment, supplies, materials, bonds, lines of credit and/or insurance for this project.

[Hearing Ex. 5 at OSE000148 –OSE000154]

While this statement does not offer assistance without restraint, it does encourage DBEs to enquire concerning assistance. Indeed, the invitation found in Hearing Ex. 5 at OSE000146 – OSE000147, which has no indication that it was sent to anyone, does expressly encourage subcontractors to contact Loveless concerning such assistance.

“(10) Any other evidence that the bidder submits which demonstrates that the bidder has made reasonable good faith efforts to include DBE participation.”

Loveless provided no other documentation to SCSU other than documentation previously discussed.

“(11) The DBE commitments submitted by all other bidders.”

The record shows that at least one other bidder, Tyler, listed one SCDOT DBE on its DBE committal sheet.<sup>24</sup> [Hearing Ex. at OSE000303] Loveless listed none. If one looks beyond the committal sheets, as envisioned by 49 CFR § 26, App. A, Subpart V, the record shows that at least one other bidder received quotes from seven SCDOT DBEs.<sup>25</sup> [Hearing Ex. 4 at OSE000081 – OSE000086 and OSE000089] This is an indication that had Loveless made more active and aggressive efforts, Loveless could have obtained more DBE interest than it did.

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<sup>24</sup> A review of the DBE Committal sheets submitted with each bid reveals that six other non-DBE bidders listed at least on SCDOT certified DBE on its DBE Committal sheet. One non-DBE bidder listed three. [Exhibit I]

<sup>25</sup> The CPOC has found it interesting that a company such as Loveless that on paper made more efforts than Ideal, obtain less DBE response than Ideal. Perhaps Ideal's efforts were greater than indicated by the documentation it submitted to SCSU indicates. Moreover, the decision of Loveless to wait until January 14, 2010 to start making efforts may be a factor.

Despite Loveless' arguments, analyzing the documentation of good faith effort Loveless submitted to SCSU under the totality of circumstances, one could reasonably conclude that Loveless did not make all reasonable good faith efforts to meet the DBE participation goal.<sup>26</sup> Loveless made a flurry of broad solicitations through advertising and telephone calls and then passively waited for DBEs to provide bids. As a result, Loveless received only two DBE bids. Loveless did not attempt to negotiate with these two DBE bidders. Loveless' documentation does not indicate its efforts were the type of active and aggressive efforts "which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation." *49 CFR § 26 App. A.*

## 2. RESPONSIVENESS OF TYLER

A review of the DBE Committal Sheet that Tyler submitted with its bid shows that only one of the four subcontractor's Tyler listed on that Sheet as SCDOT certified DBEs was a SCDOT certified DBE. [Hearing Ex. 7 at OSE000303] This subcontractor was Taylor Brothers Construction Co. The \$248,000 listed as the value of Taylor Brothers subcontract was far less than 20% of Tyler's bid of \$4,119,378. Therefore, Tyler did not meet the 20% DBE participation goal through its DBE committals. Moreover, Tyler did not submit documentation of its good faith efforts to SCSU for consideration and presented no evidence at the hearing of its good faith efforts. Therefore, Tyler has failed to prove with a preponderance of the evidence that SCSU's improperly determined that, under the FHWA Instructions and Federal Regulations, Tyler's bid was non-responsive.

## 3. RESPONSIVENESS OF IDEAL

A review of The DBE Committal Sheet that Ideal submitted with its bid shows that none of the seven subcontractor's Ideal listed on that Sheet as SCDOT certified DBE's were SCDOT certified DBE's. [Hearing Ex. 4, at OSE000049] Therefore, Ideal did not meet the 20% DBE participation goal through its DBE committals. However, Ideal did submit documentation of its good faith efforts to SCSU for a good faith effort determination and Ideal asserted in its letter of protest that its bid was responsive under the standards set in 49 CFR § 26 regarding good faith efforts to meet DBE participation goals. [Hearing Ex. 4 at OSE000053 – OSE000089] Whether SCSU committed error in its review of Ideal's documentation is

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<sup>26</sup> Relying on the documentation Loveless submitted to SCSU, if one were to use the formulaic approach suggested by Loveless and give Loveless the benefit of the doubt by giving it 100% credit for its efforts on factors 1, 2, 3, 4, 5, and 9 and zero credit for the remaining factors which the documentation shows Loveless did not achieve, Loveless achieves a score of 55%. If you eliminate factor 1 and 11, Loveless achieves a score of 56%. If you also eliminate factor 10, Loveless achieves a score of 63%. Apply factors 1 through 9 to yield a result most advantageous to Loveless, Loveless only achieves a score of 67%. In other words, using the approach that Loveless argued for, Loveless fails to achieve a score of 70%, a score that it argued should be the appropriate score.

moot since Ideal asked for reconsideration and the reconsideration review is a de novo review. Therefore, the question before the CPOC is whether the SCDOT reconsideration officials committed error in their determination. As the protestant, Ideal bears the burden of proof that the SCDOT reconsideration officials' decision was erroneous. Ideal failed to carry its burden of proof on this issue. At the hearing, Ideal presented no evidence that the decision of the SCDOT reconsideration officials was erroneous, relying instead on the documentation they submitted to SCSU and on testimony during the presentation of Randolph's protest regarding how SCSU evaluated those documents.

In its letter of protest and at the hearing, Ideal argued that its post bid opening efforts to obtain agreements with SCDOT DBE's should have been considered in determining whether its good faith efforts were adequate. Ideal did not present any documentary evidence on this issue. Mr. Hammersla did state at the hearing that through post bid opening efforts, Ideal was able to obtain sufficient SCDOT DBE commitments to meet the 20% DBE participation goal. Ideal also pointed to the letter the SCDOT reconsideration officials sent to SCSU stating that Ideal failed to prove adequate pre-bid good faith efforts. In this letter, the reconsideration officials state that "Ideal Construction did demonstrate after the bid date a willingness and concerted effort after their bid submission to make a 'Good Faith Effort' and in doing so obtained three letters of intent from DBE firms meeting the 20% DBE goal?" In relying on its post bid efforts, Ideal misconstrues the requirements of this bid. Ideal points to 49 CFR § 26.53(b)(3) which provides as follows:

At your discretion (SCSU's), the bidder/offeror must present the information required by paragraph (b)(2) of this section-

- (i) Under sealed bid procedures, as a matter of responsiveness, ... or
- (ii) At any time before you commit yourself to the performance of the contract by the bidder/offer, as a matter of responsibility.

In short, Ideal relies on the second option, which is one of responsibility. As noted previously, however, for this solicitation, SCSU chose the first option, which is one of responsiveness. Accordingly, the invitation for bids expressly makes the proof of adequate good faith efforts a matter of bid responsiveness. A bid is responsive on the day of bid opening or it is not. Post bid efforts cannot render a non-responsive bid responsive.

The FHWA instructions required each bidder to submit a DBE Committal Sheet with its bid to show whether the bidder met the DBE participation goal at the time of bidding, not after bidding. Only if a bidder did not meet the bid goal did a bidder have a right to submit documentation of its efforts to meet that bid goal. At issue are the pre-bid efforts, not post bid efforts. The procedure for review of good faith

efforts is not intended to give a bidder that has failed to meet the bid goal and failed to demonstrate adequate good faith efforts prior to bid subsequent bites at the apple where between each step of the process the bidder can make additional efforts until they finally meet the goal.<sup>27</sup>

In its letter of protest, Ideal asserts that the reconsideration official “should have been a 3<sup>rd</sup> party official not affiliated with the SCDOT.” Ideal seems to argue that the SCDOT reconsideration officials had a conflict of interest since the contract was awarded to a SCDOT certified DBE contractor. However, Ideal failed to present any evidence showing this was in fact a conflict or that the SCDOT reconsideration officials had any interest in having the contract awarded to a particular contractor. The Project is not an SCDOT project and the solicitation is not an SCDOT solicitation. SCDOT has not interest whatsoever in this Project. Not only were the reconsideration officials independent third parties, they were, unlike the SCSU representatives who made the initial determination regarding good faith efforts, experienced in applying the federal standards for determining whether ones good faith efforts to meet required DBE goals were adequate. Ideal has utterly failed to prove any bias on the part of the SCDOT reconsideration officials.

Ideal did not present sufficient documentary evidence to SCSU or the Reconsideration officials to show that it actively and aggressively took all necessary and reasonable steps to obtain DBE participation prior to bid opening. This especially apparent if you compare Ideal’s documented efforts with those of other bidders.

Ideal submitted two cover letters to SCSU with its good faith effort documentation. In one of these letters, Ideal notes that it has attached a SCDOT DBE directory “with 51 contractors hi-lighted that we felt qualified either by locality or scope of work.” [Hearing Ex. 4 at OSE000056] In this letter, Ideal goes on to say, “Of those hi-lighted, there are a **few that we contacted**, prior to bid.” [emphasis added]. In other words, Ideal’s cover letter indicates Ideal did not make an effort to contact all hi-lighted DBE contractors that it felt were qualified, just a few.

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<sup>27</sup> Acceptance of Ideals argument would render the FHWA Instructions meaningless since under that argument a bidder could put forth absolutely no effort to meet the DBE goal at the time of bidding and, if they happen to submit the low bid, rely solely on post bid efforts to substitute non-DBE subcontractors with DBE subcontractors to meet the goal and attain the contract. This approach would also be inconsistent with the anti-substitution rules of the Consolidated Procurement Code.

Ideal's documentation of good faith efforts included a contact log that shows Ideal solicited quotes on two projects from bidders, this project and one for Richland School District Two. [Hearing Ex. 4 at OSE000075 – OSE000077] While this contact log includes a number of DBE contractors certified by the Governor's Office of Small and Minority Business Assistance or various local governmental entities, none

appear to have been on the list of SCDOT certified contractors current at the time this project was bid. This log also includes contractors that are not DBE contractors. Finally, there is nothing in the solicitation of quotes attached to the logs to indicate that Ideal was specifically seeking quotes from SCDOT certified DBE's or DBE's with any certification for that matter. The solicitation does not offer to break down the elements of work, does not offer to provide assistance with insurance and bonds, and does not identify a location where interested parties may find a copy of the plans and specifications, all of which are factors to consider under the FHWA Instructions.

Ideal's documentation of good faith efforts included a request to five plan rooms to list Ideal as a potential bidder on four different projects, one of which is this project. [Hearing Ex. 4 at OSE000078] This request suffers from the same defects as the solicitation of quotes attached to the contact logs.

Ideal's cover letter to its documentation of good faith efforts states:

We have participated in several bids this past year that involved solicitation of minorities and used this listing and resources such as advertising in the State newspaper, ...and enlisting the aid of various State and local agencies. [Hearing Ex. 4 at OSE000056]

However, Ideal's documentation of good faith efforts did not include any evidence that Ideal advertised in any newspaper or any evidence that Ideal enlisted the aid of various State and local agencies in this case. Moreover, Ideal did not present any evidence at the hearing that it took any of these steps.

Ideal's documentation of good faith efforts also included pre-bid quotes received from seven SCDOT certified DBE's but did not include information to allow an evaluation of these quotes compared to other bidders. In fact, Ideal redacted the bid prices so a reviewer could not see them. [Ex. 4 at OSE000081 – OSE000086 and OSE000089] Several of the DBE quotes indicate they may have been received one or two days prior to bid opening, Ideal did not provide any evidence that it followed up on any of these bids much less tried to negotiate with any of the bidders.

Ideal's documentation does not show any attempt to determine the capabilities of available DBEs, break out work commensurate with those capabilities to promote DBE participation, or to negotiate with DBEs. Ideal's documentation does not show any attempt to determine with certainty, SCDOT DBE interest in the project.

Ideal's cover letter indicates they were in contact with many DBE's after the bid opening, not before, trying to obtain their participation in the contract. These post bid opening efforts are apparent in the second cover letter by Mr. Hammersla, wherein he states that three and possibly four SCDOT DBE's will be participating in the contract. [Hearing Ex. 4 at OSE000054] However, none of the contractor's Mr. Hammersla references is listed on Ideal's DBE Committal sheet.

Mr. Hammersla's letter states that Ideal advertised in four publications, and negotiated pricing, contract amounts, and bonding issues with DBE's to satisfy the solicitation. The record contains no evidence of these efforts and Mr. Hammersla presented no evidence on these efforts at the hearing. To the extent Ideal negotiated with SCDOT certified DBE's, the record and testimony, including Mr. Hammersla's testimony, indicate Ideal did so after the bid opening. Ideals' documentation does not indicate Ideal took active and aggressive measures "which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful."

#### 4. RESPONSIVENESS OF RANDOLPH

A review of The DBE Committal Sheet that Randolph submitted with its bid shows that Randolph did not list any subcontractor on that Sheet asserting a 0% SCDOT certified DBE participation in its contract. [Hearing Ex. 6 at OSE000215] Therefore, Randolph did not meet the 20% DBE participation goal through its DBE committals. However, Randolph did submit documentation of its good faith efforts to SCSU for a good faith effort determination and Randolph's letter of protest asserts "SCSU erred in dismissing Randolph & Son's bid as nonresponsive, because Randolph & Son exercised good faith efforts to ensure the participation of Disadvantaged Business Enterprises in the Project."

The CPOC's findings with respect to Loveless regarding SCSU's standard of review and the right to request reconsideration apply to Randolph. SCSU in reviewing Randolph's good faith effort documentation applied the same standard it applied to Loveless' documentation. Like Loveless, Randolph did not request reconsideration.

Randolph did not argue that it did not have adequate notice of the right to request reconsideration. Instead, Randolph's position at the hearing was that Randolph did not request reconsideration because the federal reconsideration provision conflicted with the protest process provided for in the Consolidated Procurement Code. There are two types of protest rights provided for in the Consolidated Procurement Code, the right to protest a solicitation and the right to protest an award. *SC Code Ann § 11-35-4210*. The only protest right that Randolph could have in mind here is the right to protest the award. The CPOC does not comprehend how a post award right to protest the award conflicts with a pre-award right for a de novo review that was in the solicitation. Asking for reconsideration before SCSU makes an award does not void a bidder's right to protest the award. At worst, reconsideration will yield a determination that the bidder did not prove adequate good faith efforts, a determination the bidder can protest after award as Ideal did. On the other hand, if the reconsideration determination overturns the original determination there is no need to protest. By failing to request reconsideration, Randolph waived its right to a de novo review of its good faith efforts to meet the DBE participation goal.

One making a review of Randolph's good faith efforts under the totality of the circumstances could reasonably conclude that Randolph did not prove adequate good faith efforts to meet the DBE participation goal. If you compare Randolph's documented efforts to Loveless' documented efforts, it appears that Randolph put forth less effort than Loveless. If you compare Randolph's efforts to Tyler's, it is apparent that while Tyler did not provide any evidence of its efforts, Tyler did achieve some DBE participation on its DBE committal sheet. Randolph achieved none. Moreover, according to Randolph's testimony, Randolph's efforts yielded only two DBE bids while there is evidence in the record that other general contractors received more DBE bids.

Randolph's documentation of good faith efforts does indicate that it advertised in one newspaper for SCDOT certified bids. [Hearing Ex. 6 at OSE000222 – OSE000223] This advertisement appeared in the Orangeburg paper, The Times and Democrat, on January 17, 2010. This advertisement listed broad categories of work for which Randolph was seeking bids and advised interested parties of where they could find copies of the plans and specifications. Randolph did not advertise in any other publication such as publications catering to minorities. Moreover, Randolph did not advertise in The State Newspaper, a capitol city paper of general circulation in the state with a significantly greater readership and more likely to garner subcontractor interest than a small local paper. Finally, Randolph did not in this one advertisement offer to break categories of work into smaller pieces to assist DBE's and did not offer any assistance with insurance and bonding.

Included in Randolph's documentation of good faith efforts submitted to SCSU are copies of 51 facsimile solicitations to 50 different subcontractors, at least 42 of which appear to have been on the SCDOT certified DBE contractors list at the time in question.<sup>28</sup> Each solicitation is dated January 15, 2010, and while Randolph provided no documentation of transmittal, the CPOC assumes they were transmitted that same day. While each solicitation notified the DBE where it could find a copy of the plans and specifications, there were problems with the solicitations as a whole. Randolph tailored each solicitation to specific categories of work without regard to the size, capabilities, contractor licensing, etc of the DBEs they were sending the request to. As a result, Randolph asked a number of pavement marking companies (i.e. painting) to provide bids for complete asphalt paving and marking. [Hearing Ex. 6 at OSE000238 – OSE000241] Also as a result, Randolph asked some DBE's to bid complete items of work that exceeded

the limitations of their license.<sup>29</sup> In other cases, Randolph appears to have asked DBE's to bid scopes of work smaller than they were qualified to perform under their license or different than the type of work they were interested in based on bids they provided to other bidders.<sup>30</sup> None of the solicitations offered to break the work down further and none of the solicitations offered to provide assistance with insurance and bonding requirements. All of the forgoing is evidence that Randolph efforts were pro forma.

On each solicitation was a notation regarding the results of a January 19, 2010, telephone call following up on the solicitation. For 22 of these solicitations, the caller notes that she left a message. However, for five of the solicitations, the caller notes that the telephone number she obtained from the SCDOT list is a wrong number. There is no indication the caller tried to determine the correct number.<sup>31</sup> The same is true of the six solicitations with the notation disconnected.<sup>32</sup> Remaining forms generally indicate that the DBE intended to bid, did not intend to bid, or requested Randolph send them more information. There is no

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<sup>28</sup> The CPOC could not find seven of the contractors on the two lists provided in the hearing exhibits or the list provided by SCDOT.

<sup>29</sup> While the CPOC has not done an exhaustive review of this aspect of Randolph's solicitations, see Hearing Ex. 6 at OSE000260, Randolph asks Christie Brothers to provide a bid to complete the HVAC work. Christie only possesses a mechanical license with an AC subclassification, Group 4. This license limits Christie to air conditioning work not to exceed \$125,000 in value. The HVAC work of this project is estimated to substantially exceed this amount. See also the solicitations for complete electrical.

<sup>30</sup> Accepting Mr. Randolph's testimony as true, the evidence shows that Randolph did not receive bids from five SCDOT DBE's that submitted bids to Ideal in spite of the fact that Randolph contacted them by fax or telephone or both. One, Associated Contractors, bid a scope of work to Ideal entirely different than the very limited scope Randolph requested they bid. [Hearing Ex. 6 at OSE000268 and Ex. 4 at OSE000081] Another, Taylor Brothers appears to have bid a scope of work to Ideal (and possibly Tyler) larger than the scope Randolph asked it to bid. [Hearing Ex. 6 at OSE000227, Ex. 4 at OSE000082, and Ex 7 at OSE000303]

<sup>31</sup> The CPOC randomly picked one of these and very easily found the correct number.

<sup>32</sup> The CPOC randomly picked one of these and very easily found the correct number.

indication that the caller enquired about the DBE's abilities and if they were interested in different scopes of work nor is there any indication that the caller offered to break work down further or provide DBE's assistance with insurance and bonding. In addition, there is no indication Randolph provided more information when requested to. The forgoing does not indicate an active and aggressive effort to attempt to "determine with certainty if the DBEs are interested." *49 CFR § 26, App. A, Subpart IV(B)*.

In the documentation Randolph provided to SCSU to demonstrate its good faith efforts, there were no copies of any bids or quotes received from any DBEs, SCDOT certified or otherwise. Moreover, the documentation contained no evidence that Randolph offered to negotiate or negotiated with any DBE to work on the project as a part of Randolph's team. *See 49 CFR § 26, App. A, Subpart IV(D) Negotiating in good faith with interested DBE's ("It is the bidder's responsibility ... to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers." "It is the bidder's responsibility to make" these portions of work available to DBEs.)*

Mr. Randolph's testimony at the hearing did nothing to change the picture presented in its documentation. Mr. Randolph testified at the hearing that Randolph did not offer to break categories of work down because no one asked it to. In other words, Randolph passively waited on DBE's to suggest to Randolph that Randolph break the categories of work down further rather than actively offer to do so. Mr. Randolph testified at the hearing that Randolph received only two bids from SCDOT DBE's, Shady Grove and Edisto Flowers. In actuality, this indicates that Randolph received only one such bid since Shady Grove was not on the SCDOT certified DBE list at the time of bidding.<sup>33</sup> In any event, Randolph did not consider either bid because they were excessively high, which under the federal regulations is an appropriate standard for rejecting a DBE. *See 49 CFR § 26, App. A Subpart IV(D)(2)*. However, Randolph did not attempt to negotiate a more reasonable price with either of the two DBEs. Mr. Randolph did testify that there was no time to negotiate on bid day but did not testify concerning when he received these two bids. The dynamic changes if bids are received prior to bid day.

While the efforts of Randolph were more than one might normally make to obtain subcontractor bids, they appear to the CPOC to be somewhat less than active and aggressive measures "which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient

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<sup>33</sup> The CPOC could not find Shady Grove on the SCDOT lists that were provided by Ideal and Loveless with their good faith effort documentation, nor could the CPOC find Shady Grove on the list provided by SCDOT.

DBE participation, even if they were not fully successful.” One item of testimony made it clear to the CPOC that Randolph did not understand that the federal standard not only required additional efforts but active and aggressive efforts. According to Mr. Randolph’s testimony, Randolph did not change its bid preparation procedures on or before bid day to give special consideration to any DBE bid that came in. Randolph did take a few active steps but then passively waited for DBE bids, which apparently did not come, even from DBEs that provided bids to other general contractors.

In analyzing the efforts of each of the protestants, the CPOC is cognizant of the fact that none appeared to start taking efforts to obtain DBE interest until the fourth week after the solicitation was issued. This is an indication to the CPOC that the bidders did not appreciate the degree of effort expected under the federal regulations. If they did understand what was required they probably would have started putting forth efforts sooner. It is reasonable to expect bidders to review the solicitation documents upon issuance and immediately determine what is required. In deed, the Consolidated Procurement Code expects this of bidders by requiring anyone objecting to the requirements in the solicitation to protest within fifteen days of the date of the solicitations issuance. *See SC Code Ann § 11-35-4210(1)(a)*. From the record, it would appear that bidders did not look at the solicitation documents and the requirements contained in those documents until after the protest period expired. Moreover, the documentation submitted to SCSU to show good faith efforts indicates that Ideal, Randolph, and Loveless did not start making any efforts to obtain DBE interest until one week after the pre-bid meeting and two weeks before the bid opening.

The limited nature of the documentation submitted to SCSU to show good faith efforts is an indication that the bidders did not appreciate the need to maintain documentation of their efforts. It is possible the protestants did more but they did not provide any documentary evidence that they did so to SCSU. The protestants’ reliance on testimony to the CPOC cannot be substituted for the documentation they submitted to SCSU to make its determination. The CPOC must look to the information SCSU had before it to determine if there was a reasonable basis for SCSU’s determination of non-responsiveness. In any event, the testimony provided at the hearing did not significantly supplement the documentary evidence.

#### **IV. POTENTIAL IMPROVEMENTS FOR FUTURE SOLICITATIONS**

Having reviewed the evidence and complaints presented in this case, the CPOC believes that there are nuggets of gold that SCSU and the State can mine from the facts presented to improve solicitations on subsequent phases of the Clyburn Center. In such an endeavor, the CPOC sets forth following ideas:

## **A. EFFORTS SCSU SHOULD CONSIDER MAKING**

While working on design documents for future phases, it may be helpful if SCSU would contact OSMBA to encourage DBEs certified with OSMBA to pursue certification with SCDOT. This will benefit both the DBEs certified with OSMBA by positioning them to have a leg up to obtain work on a project and it will benefit bidders by increasing the pool of DBE's that work in the field of vertical construction.

The CPOC also encourages SCSU to revisit the available pool of SCDOT certified DBEs that routinely perform work on vertical construction projects and select its DBE goal accordingly. By doing so, SCSU will know that it is using a realistic goal and will have a supportable response to bidders that question the validity of the goal.

## **B. INVITATION FOR BIDS, SOLICITATION REQUIREMENTS AND SCHEDULING**

In the next solicitation for a USDOT funded project, SCSU with OSE's assistance should modify the advertisement for bids to note that the project is federally funded and includes a DBE goal. SCSU should also consider advertising a non-mandatory pre-bid meeting intended to inform DBEs of bidding opportunities. This meeting should be scheduled after the pre-bid meeting intended to inform bidders of the requirements of the solicitation. SCSU should make efforts to notify DBE's of this meeting by providing timely notice through SCDOT and OSMBA and other appropriate venues.

Considering that it is a reality of the industry that bidders probably will not look at the solicitation requirements until after the pre-bid meeting, the CPOC recommends that SCSU schedule the pre-bid meeting for any future project subject to USDOT requirements not less than thirty days before the bid opening. The pre-bid meeting should also be scheduled with due consideration to advertising schedules for minority news sources, and SCDOT's schedule for mailing bid opportunities to SCDOT DBEs. This pre-bid meeting should be mandatory for prime bidders to prevent future claims that the bidder did not understand what was required. At the pre-bid meeting, SCSU should cover in detail the requirements of 49 CFR § 26 applicable to bidders. SCSU may want to enlist the SCDOT to assist with this meeting.

The Consolidated Procurement Code requires that the "invitation for bids must be given at a reasonable time before the date set forth in it for the opening of bids." *SC Code Ann § 11-35-1520(3)*. It appears to the CPOC that in this case, considering the Christmas and New Years holidays, that the invitation for bids was not given at a reasonable time before the bid opening. Future solicitations involving USDOT DBE requirements should provide more time for bid preparation than was provided here.

Because the FHWA Instructions provide short deadlines to submit documentation of good faith efforts and requests for reconsideration, SCSU should schedule the bid opening to occur on a Tuesday. SCSU should also provide notice of its determination regarding good faith efforts on a Monday, Tuesday, or Wednesday. Where the FHWA instructions does not place the word “calendar” before the word “day” SCSU should, with FHWA’s permission, add language to define if “day” means business day and if not, what happens when a deadline falls on a weekend or holiday. SCSU should include a copy of 49 CFR § 26.53 and Appendix A in the Instructions.

Finally, the CPOC commends SCSU for asking SCDOT to provide an independent and experienced reconsideration official for this Project. So that bidders understand in advance that they will receive a fair reconsideration evaluation, the CPOC suggest that SCSU, with SCDOT’s agreement, modify the FHWA Instructions to state that SCDOT will provide the reconsideration official.

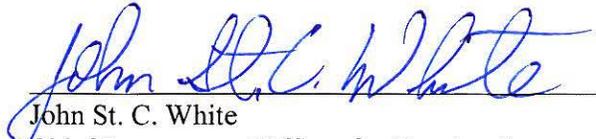
### **DECISION**

The decision of the CPOC is narrowly limited to the issues properly raised in the four letters of protest. The CPOC cannot and does not address whether SCSU committed error in rejecting as non-responsive any of the bidders that did not protest.

It is the decision of the Chief Procurement Officer for Construction that:

1. this project was subject to USDOT DBE requirements;
2. Ideal failed prove that the SCDOT reconsideration officials’ determination that Ideal failed to prove adequate good faith efforts to meet the DBE participation goal was arbitrary, capricious, clearly erroneous, or contrary to law. Moreover, a review of the documentation Ideal submitted to SCSU and SCDOT to prove its good faith efforts supports a determination that Ideal failed to prove adequate good faith efforts;
3. That Randolph and Loveless failed to request reconsideration of SCSU’s determination that they did not show adequate good faith efforts thus waiving their right for a de novo review of their efforts;
4. The documentation Randolph and Loveless provided to SCSU for its consideration of their good faith efforts supports SCSU’s determination that Randolph and Loveless failed to prove adequate good faith efforts to meet the DBE participation goal; and
5. Tyler failed to provide any evidence of its good faith efforts.

For the foregoing reasons, the Protests of Tyler, Ideal, Randolph, and Loveless are denied.

  
\_\_\_\_\_  
John St. C. White  
Chief Procurement Officer for Construction

  
\_\_\_\_\_  
Date

Columbia, South Carolina

## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: [www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2008 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 310, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

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### **Title 49: Transportation**

#### PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

##### Subpart C—Goals, Good Faith Efforts, and Counting

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#### **§ 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?**

(a) When you have established a DBE contract goal, you must award the contract only to a bidder/offeror who makes good faith efforts to meet it. You must determine that a bidder/offeror has made good faith efforts if the bidder/offeror does either of the following things:

(1) Documents that it has obtained enough DBE participation to meet the goal; or

(2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder/offeror does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal. See Appendix A of this part for guidance in determining the adequacy of a bidder/offeror's good faith efforts.

(b) In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following:

(1) Award of the contract will be conditioned on meeting the requirements of this section;

(2) All bidders/offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:

(i) The names and addresses of DBE firms that will participate in the contract;

(ii) A description of the work that each DBE will perform;

(iii) The dollar amount of the participation of each DBE firm participating;

(iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;

(v) Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and

(vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part); and

(3) At your discretion, the bidder/offeror must present the information required by paragraph (b)(2) of this section—

(i) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or

(ii) At any time before you commit yourself to the performance of the contract by the bidder/offeror, as a matter of responsibility.

(c) You must make sure all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before committing yourself to the performance of the contract by the bidder/offeror.

(d) If you determine that the apparent successful bidder/offeror has failed to meet the requirements of paragraph (a) of this section, you must, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration.

- (1) 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.
  - (2) Your decision on reconsideration must be made by an official who did not take part in the original determination that the bidder/offeror failed to meet the goal or make adequate good faith efforts to do so.
  - (3) The 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.
  - (4) You must send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.
  - (5) The result of the reconsideration process is not administratively appealable to the Department of Transportation.
- (e) In a "design-build" or "turnkey" contracting situation, in which the recipient lets a master contract to a contractor, who in turn lets subsequent subcontracts for the work of the project, a recipient may establish a goal for the project. The master contractor then establishes contract goals, as appropriate, for the subcontracts it lets. Recipients must maintain oversight of the master contractor's activities to ensure that they are conducted consistent with the requirements of this part.
- (f)(1) You must require that a prime contractor not terminate for convenience a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without your prior written consent.
- (2) When a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement.
- (3) You must include in each prime contract a provision for appropriate administrative remedies that you will invoke if the prime contractor fails to comply with the requirements of this section.
- (g) You must apply the requirements of this section to DBE bidders/offerors for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, you count the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.

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**Title 49: Transportation****PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION  
FINANCIAL ASSISTANCE PROGRAMS****Subpart F—Compliance and Enforcement**[Browse Next](#)**Appendix A to Part 26—Guidance Concerning Good Faith Efforts**

I. When, as a recipient, you establish a contract goal on a DOT-assisted contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

II. In any situation in which you have established a contract goal, part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, it is up to you to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those 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 DBE contract goal. Mere *pro forma* efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call: meeting quantitative formulas is not required.

III. The Department also strongly cautions you against requiring that a bidder meet a contract goal ( *i.e.* , obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring *bona fide* good faith efforts.

IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

A. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.

C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.

D. (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for

DBEs to perform the work.

(2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, 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. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

E. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.

F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

H. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

V. In determining whether a bidder has made good faith efforts, you may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.

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