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April 24, 2018

Via Email (tli@pkfm.com) and Regular Mail

Thomas L. Isenberg, Jr.
Director of Compliance and Contract Controls
PKF Mark III Inc.
17 Blacksmith Road
P.O. Box 390
Newtown, PA 18940-0390

**RE: IFB 16-035X – Rail Operations Center (ROC) Unit Substation
PKF-Mark III, Inc.’s Request for Reconsideration**

Dear Mr. Isenberg:

NJ TRANSIT acknowledges receipt of PKF-Mark III, Inc.’s (PKF) Request for Reconsideration dated December 7, 2017 and its December 13, 2017 Disadvantaged Business Enterprise (DBE) Good Faith Effort Position Statement with supporting documentation (Position Statement). In those documents, PKF requests that NJ TRANSIT reconsider its finding that PKF failed to demonstrate good faith efforts in accordance with the NJ TRANSIT DBE Requirements for Race-Conscious Federal Procurement Activities (incorporated into the Invitation for Bids) and 49 C.F.R. Part 26.

Following a careful review of the record, and consideration of PKF’s Request for Reconsideration, Position Statement, and in-person presentation, NJ TRANSIT denies PKF’s Request for Reconsideration. The bases for this final administrative decision are summarized below.

I. Background

NJ TRANSIT’s Procurement Department advertised Invitation for Bids (IFB) 16-035X – Rail Operations Center (ROC) Unit Substation on July 3, 2017. The advertisement described the work as: “the construction of a new 480Y/277 volt double-ended indoor secondary unit substation with primary switchgear, transformers and low voltage switchgear, arranged in a main-tie-main configuration arranged in a primary selective scheme.” It notified potential bidders: “Disadvantaged Business Enterprises, in accordance with the Department of Transportation (DOT) Regulations 49 CFR, Part 26,

shall have the maximum opportunity to participate in the performance of this contract. A race conscious nineteen percent (19%) DBE goal has been set for this project.” The IFB included a document entitled “DBE Requirements for Race-Conscious Federal Procurement Activities” (DBE Instructions), which provided instructions on how to comply with the DBE requirements. Sections 2 and 2.2 of the DBE Instructions provided guidance on what constitutes good faith efforts and provided a list of actions that NJ TRANSIT would consider as evidence of good faith efforts.

On October 5, 2017, four (4) bids were received. On that same date, the Procurement Department requested completed DBE Compliance forms from the lowest and second lowest bidders: PKF and Northeast Remsco Construction, Inc. The DBE Compliance forms were due by October 10, 2017. Both bidders submitted their Compliance Plans by the due date.

PKF’s DBE Compliance Plan was comprised of a cover letter, Forms A (First Tier DBE Utilization), A1 (Bidder/Proposer Solicitation and Contractor Information), A2 (Non-DBE Sub Utilization), B (Intent to Perform as a DBE Sub) and D (DBE Good Faith Effort). The Compliance Plan advised that PKF had committed 7.73% of the contract to DBE firms. PKF’s Form A listed two subcontracts, as summarized below.

DBE Subcontractor	Scope of Work	Dollar Value of Sub-contract	Percentage of Work
North Star Electrical Supply Company, Inc.	Electrical supplies	\$989,300 x 60% = \$593,580*	7.16%
Consolidated Steel & Aluminum Fence Co.	Furnish & install fencing	\$47,440	.57%
TOTALS		\$641,020	7.73%

* Per 49 C.F.R. § 26.55(e)(2)(i), if a DBE supplier is a regular dealer (and not the manufacturer of the supplies), the bidder can only utilize 60% of the value of the subcontract toward the DBE goal. The instructions require the bidder to show the value of the subcontract value multiplied by 60%.

Because PKF did not meet the goal of 19%, it was required to submit Form D (DBE Good Faith Effort). That form asks bidders to identify their efforts to meet the goal, and provides a checklist of some actions that may be considered good faith efforts. Although it is in the form of a checklist, it explicitly states that the list “**is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive.**” [Emphasis in original] Form D includes some of the items listed in Section 2.2 of the DBE Instructions and in the applicable regulation (49 C.F.R. Part 26, Appendix A, § IV). The Form adds two others not within either Section 2.2 or the regulation:

- “Provided written notice to DBEs in sufficient time to allow the DBE to respond”;
- and

- “Followed up initial solicitation of interest by contacting DBE to determine interest.”

PKF checked 6 of the 9 boxes on Form D. It also submitted a 5-page written narrative summarizing its good faith efforts and provided information about the DBE quotes rejected.

Finally, PKF’s DBE Compliance Plan noted: “PKF is, and remains, committed to the DBE targets for this project and will continue to pursue additional opportunities for DBE participation throughout the life of the project.”

NJ TRANSIT’s Office of Business Development (OBD) – whose role is to ensure the participation of DBE firms in contracting opportunities – reviewed PKF’s DBE submission for the purposes of conducting a fraud and compliance review and determining whether PKF had made good faith efforts to meet the 19% DBE goal. OBD determined that PKF failed to demonstrate good faith efforts to achieve the assigned DBE goal.

On November 15, 2017, OBD issued a Memorandum notifying the Procurement Department that it was denying authorization to award the contract to PKF, because “PKF failed to demonstrate satisfactory evidence of good faith effort to meet the assigned contract goal in accordance with Article 2.2 of the DBE Program Requirements.” By Memorandum dated November 28, 2017, OBD supplemented its November 15 Memorandum, providing a more detailed analysis.

By letter dated December 6, 2018, NJ TRANSIT’s Procurement Department notified PKF of OBD’s determination and that PKF had been removed from consideration. A copy of OBD’s November 28 Memorandum was enclosed. The Procurement Department’s December 6 letter further advised PKF:

Pursuant to 49 CFR § 26.53(d), PKF-Mark III may request administrative reconsideration within 5 (five) business days after receipt of this letter. To do so, PKF-Mark III must submit a written request for reconsideration, with any documentation or argument concerning the issue of whether PKF-Mark III made adequate good faith efforts to meet the goal. PKF-Mark III’s request must also indicate whether PKF-Mark III, would like the opportunity to meet in person with the reconsideration official.

By letter dated December 7, 2017, PKF requested reconsideration. On December 13, 2017, PKF submitted to NJ TRANSIT its DBE Good Faith Effort Position Statement with supporting documentation.

NJ TRANSIT's DBE Liaison Officer reviewed PKF's Position Statement and responded by Memorandum dated December 18, 2017. That letter was forwarded to PKF on January 17, 2017.

As permitted by 49 CFR § 26.53(d), PKF requested an opportunity for an in-person presentation. That presentation occurred on February 7, 2018.

II. Applicable Laws

As a recipient of federal funds, NJ TRANSIT is subject to regulations promulgated by the United States Department of Transportation (DOT). Among other things, those regulations require NJ TRANSIT to develop and implement a DBE program that conforms to DOT standards, as set forth in 49 C.F.R. Part 26.¹ The integrity of DOT's DBE program depends upon systematic procedures to ensure that only bona fide small firms, owned and controlled by socially and economically disadvantaged individuals, are certified to participate as DBEs in DOT federally assisted programs. The DBE regulations place primary responsibility for the certification process upon state transportation agencies like NJ TRANSIT.

Applicable regulations require NJ TRANSIT to establish goals for the participation of DBEs. Each DOT-assisted State and local transportation agency is required to establish annual DBE goals. Each agency must also review the scopes of anticipated large prime contracts throughout the year and establish contract-specific DBE subcontracting goals.

When bidding on a contract with a DBE subcontracting goal, each bidder must *either* meet the goal *or* document the good faith efforts it made to meet the goal. A prime contractor who neither meets a DBE subcontracting goal nor demonstrates adequate good faith efforts to meet that goal is ineligible to participate in federally funded contracting opportunities.

The nature and scope of what constitutes good faith efforts are explained in Appendix A to 49 C.F.R. Part 26.² Appendix A to Part 26 provides "Guidance Concerning Good Faith Efforts." In pertinent part, it states:

¹ The DOT's DBE program is designed to remedy ongoing discrimination and the continuing effects of past discrimination in federally-assisted highway, transit, airport, and highway safety financial assistance transportation contracting markets nationwide. The primary remedial goal and objective of the DBE program is to level the playing field by providing small businesses owned and controlled by socially and economically disadvantaged individuals a fair opportunity to compete for federally funded transportation contracts.

² The USDOT revised the DBE regulations – including Appendix A – effective November 3, 2014. See 79 FR 59600 (Oct. 2, 2014). In that context, the USDOT stated: "It is important to reiterate and reinforce that Appendix A is guidance to be used by recipients in considering the good faith efforts of bidders/offerors. It does not constitute a mandatory, exclusive, or exhaustive checklist. Rather, a good

[A] bidder must, in order to be responsible and/or responsive, make sufficient 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. [49 CFR Part 26, Appendix A, § I]

Section II of the Appendix places on NJ TRANSIT the burden of determining whether a bidder made adequate good faith efforts by considering the "quality, quantity, and intensity of the different kinds of efforts." It explains:

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. Determinations should not be made using quantitative formulas. [49 CFR Part 26, Appendix A, § II]

Section III of the Appendix cautions against ignoring bona fide good faith efforts. In other words, if a bidder makes an adequate showing of good faith efforts, NJ TRANSIT cannot require a bidder meet the DBE goal as a condition of contract award. [49 CFR Part 26, Appendix A, § III] When USDOT revised the DBE regulations in 2014, it noted that one of the "hallmarks of the DBE program" is the flexibility afforded participants, including the fact that "prime contractors . . . cannot be penalized or denied a contract for failing to meet the goal, as long as documented good faith efforts are made." [79 FR 59600, 59584 (Oct. 2, 2014)]

Section IV of the Appendix lists types of action which should be considered in determining whether a bidder showed good faith efforts. It is not a mandatory check-

faith efforts evaluation looks at the 'quality, quantity, and intensity of the different kinds of efforts that the bidder has made.'"

list.³ Nor is it intended to be an exclusive or exhaustive list of steps bidders must take. In fact, the Appendix notes: “Other factors or types of efforts may be relevant in appropriate cases.” [49 CFR Part 26, Appendix A, § IV]

Section V of the Appendix explains the significance of other bidders’ compliance with the DBE goal and/or good faith efforts requirement. It instructs:

In determining whether a bidder has made good faith efforts, it is essential to scrutinize its documented efforts. At a minimum, you must review the performance of other bidders in meeting the contract goal. 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 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. As provided in § 26.53(b)(2)(vi), you must also require the contractor to submit copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract to review whether DBE prices were substantially higher; and contact the DBEs listed on a contractor's solicitation to inquire as to whether they were contacted by the prime. Pro forma mailings to DBEs requesting bids are not alone sufficient to satisfy good faith efforts under the rule. [49 CFR Part 26, Appendix A, § V]

Finally, Section VI of the Appendix provides: “A promise to use DBEs after contract award is not considered to be responsive to the contract solicitation or to constitute good faith efforts.” [49 CFR Part 26, Appendix A, § VI]

III. Analysis of PKF’s Good Faith Efforts

As noted above, the Appendix to the rule, Section 2.2 of the DBE Instructions (incorporated by reference into the IFB) and Form D (DBE Good Faith Efforts) all contain lists of types of actions that may be considered good faith efforts. The lists are not intended to be mandatory checklists. The lists are simply examples of the types of efforts that can be used to demonstrate good faith efforts.

³ FTA’s Official DBE Questions and Answer state: “The factors cited in Appendix A, section IV, concerning good faith efforts are not an exclusive list of the things a recipient may consider in determining whether a bidder has made good faith efforts on a contract.” FTA’s Official Questions and Answers (Q&A’s) Disadvantaged Business Enterprise Program Regulation (49 CFR 26) (available at https://www.transportation.gov/sites/dot.gov/files/docs/Official_Questions_and_Answers_49_CFR_Part_26_1.pdf).

PKF claims to have utilized 6 of the 9 items on the OBD Form D list. It also described other good faith efforts, including certain contract-specific efforts such as:

- PKF solicited approximately 133⁴ DBEs via email;
- PKF used an internet-based program known as SmartBidNet (SBN) to permit DBEs to easily communicate, ask questions, review and print plans and specifications, and submit proposals;
- PKF did not require use of SBN but rather permitted DBEs to communicate and submit proposals through whatever method they wish;
- PKF solicited quotes for all types of work (including electrical work, which is PKF's stock in trade), regardless of whether it typically self-performs that work; and
- PKF made "[f]ollow up and phone calls with interested DBE partners."

In addition to these efforts, PKF described certain other, ongoing good faith efforts that were not contract-specific, including:

- PKF utilizes a professional diversity consultant to assist with outreach efforts;
- PKF conducts affirmative outreach to various women and minority resources (e.g., a written request for assistance in identifying MBE and WBE sent to almost 40 entities in July 2017);
- PKF attends DBE meetings, forums and business networking events; and
- PKF attends DBE seminars and other events, and served as a speaker/presenter at an NJDOT/DBE/Civil Rights workshop on March 1, 2017.

After reviewing these efforts, OBD concluded that "PKF failed to demonstrate satisfactory evidence of good faith effort to meet the assigned contract goal." The bases for that conclusion are summarized and analyzed below.

A. Solicitation of DBEs

Sections 2.0 and 2.2 of the DBE Instructions provided guidance on what constitutes good faith efforts and provided a list of actions that NJ TRANSIT would consider as evidence of good faith efforts. Section 2.2 indicated that "The Bidder/Proposer/Prime **shall** solicit . . . the interest of **all** certified DBEs who have the capacity to perform the work of the contract." [Emphasis added] Similarly, Appendix A lists notices/emails to all DBEs listed in the NJUCP among actions demonstrating good faith efforts. However,

⁴ The exact number of DBEs solicited by PKF is unclear. In one place, it claimed to have solicited 162 DBEs; in another place, it claimed it solicited 133 DBEs; it also provided a list of solicitations in which 135 different DBEs were listed.

the Appendix uses permissive language (noting efforts “may include” such notices/emails) and notes that the list is not a mandatory checklist.⁵

In its November 15 memo, OBD concluded that PKF’s use of:

An internet-based program known as SmartBidNet . . . is not a demonstration of good faith effort because Bidders are to utilize the New Jersey Unified Certification Program (NJUCP) to solicit DBE firms The NJUCP is the only directory that ensures the DBE firms have an active certification and provides complete listing of their NAICS codes and business descriptions for work they could perform on a project that will satisfy a contract goal.

In its November 28 memo, OBD elaborated, explaining that by using SBN, PKF “limited artificially the pool of ready, willing, and able potential DBE partners to which it performed outreach.” In reaching this conclusion, OBD assumed that SBN contained a subset of all available DBEs listed in NJUCP.

In its December 13, 2017 Position Statement, PKF explained its use of SBN to solicit DBEs. It described SBE as:

a web based program whereby PKF keeps, maintains and updates a global listing of DBE and non-DBE subcontractors and suppliers for solicitation and contracting efforts for particular projects. Among other things, after PKF selects those subcontractors/suppliers who will receive a solicitation, the SBN System generates an e-mail that specifically sets forth the requested scope of work or bid items for which PKF is seeking a quote.

PKF explained how SBN works, and how PKF uses SBN “to maintain and solicit all possible subcontractors/suppliers needed for a particular project - DBE firms and non-DBE firms.” With regard to DBE firms in SBN, PKF stated that:

The firms maintained on the SBN System originate from a plethora of areas, including PKF’s prior work history, the NJUCP website, NJDOT as well as other states in which PKF has performed work. The certified and non-certified firms, as maintained on the SBN System, are manually entered into the SBN System and are categorized by a number of factors, including but not limited to, the firms’ particular scope of work, geographic reach, specialty, prior performance and the like.

⁵ Although Section 2.2 seems to make such solicitations mandatory by using the term “shall”, the DBE Instructions provide that the efforts listed are not mandatory. Form D does not include notices to all DBEs among the list of actions considered as good faith efforts.

PKF acknowledged that the SBN System reports contained “a few designation/certification errors and the MBE/WBE/DBE nomenclature utilized by the SBN System may have caused a certain level of confusion.” However, PKF maintained that it “actively solicited 133 NJUCP certified DBE firms for interest and use on the Project.”⁶

During its in-person presentation, PKF provided additional information regarding SBN and the sources of data contained therein. In the summer of 2017, PKF downloaded all of the data contained in NJUCP into SBN. It then added data from NJ Department of Transportation’s list of prequalified contractors and the Pennsylvania Unified Certification Program (PAUCP), as well as additional data from its own records. As a result, SBN contains every DBE listed in NJUCP, plus additional DBEs and non-DBE contractors.

Because SBN contains every DBE listed in NJUCP, plus additional DBEs and non-DBE contractors, I find that PKF’s use of SBN to identify and solicit DBEs was the type of notice that both the DBE Instructions and the Appendix recognizes as evidence of good faith efforts.⁷

However, PKF did not solicit all DBEs listed in NJUCP that specialize in the areas of work desired. In Exhibit E to its Position Statement, PKF provided lists of subcontractors/suppliers solicited for each of the 80 subcontracting opportunities it identified. That list included not just DBEs but also non-DBEs. For example:

- With respect to demolition, PKF’s Exhibit E indicates that it solicited three subs. None are listed on NJUCP as DBEs. Although NJUCP lists 50 DBEs certified for demolition, PKF solicited none of them for that work.
- With respect to disposal/dumpster subs, PKF’s Exhibit E indicates that it solicited two subs. Neither is listed on NJUCP as a DBE. Although NJUCP lists 17 DBEs certified for disposal, PKF solicited none of them for that work.
- With respect to fire sprinkler subs, PKF’s Exhibit E indicates that it solicited 11 subs. None are listed on NJUCP as DBEs. Although NJUCP lists 6 sprinkler DBEs, PKF solicited none of them.

⁶ PKF also solicited MBEs and WBEs. While laudatory, those efforts are not relevant to determining whether PKF demonstrated good faith effort to meet the DBE goal. “Good faith efforts are efforts to obtain participation by certified DBEs on the contract. Efforts to include firms not certified as DBEs in the state where the contract is being let are consequently not good faith efforts to meet a DBE contract goal. This is true even if a non-certified firm is owned by minorities or women or is certified in another state.” [FTA’s Official Questions and Answers (Q&A’s) Disadvantaged Business Enterprise Program Regulation (49 CFR 26) (available at https://www.transportation.gov/sites/dot.gov/files/docs/Official_Questions_and_Answers_49_CFR_Part_26_1.pdf)]

⁷ The checklist within Form D does not contain this item.

- With respect to masonry subs, PKF's Exhibit E indicates that it solicited 9 subs. Six are listed on NJUCP as a DBE. Although NJUCP lists 54 masonry DBEs, PKF solicited only 6 of them.
- With respect to painting subs, PKF's Exhibit E indicates that it solicited 1 sub, which is listed on NJUCP as a DBE. Although NJUCP lists 69 painting DBEs, PKF solicited only one of them.
- With respect to roofing subs, PKF's Exhibit E indicates that it solicited 8 subs. Three are listed on NJUCP as DBEs. Although NJUCP lists 37 roofing DBEs, PKF solicited only 3 of them.
- With respect to steel subs, PKF's Exhibit E indicates that it solicited a total of 20 subs (for 9 different opportunities). Only 5 of the 20 subs solicited are listed on NJUCP as DBEs. Although NJUCP lists 73 steel DBEs, PKF solicited only 5 of them.

The Appendix does not *require* that a bidder solicit all certified DBEs. However, it notes that doing so is evidence of good faith efforts.

B. Self-Performance vs. Breaking Out Contract Work

In both its November 15 and November 28 Memoranda, OBD concluded that PKF is self-performing the majority of the work, but it could have subcontracted more line items providing additional opportunities for DBE participation. Neither memo identified which line items could have been broken out and subcontracted to DBEs.

In its December 13, 2017 Position Statement, PKF described the actions it took to make subcontracting opportunities available to DBEs, as part of its GFE:

While PKF acknowledges that some of the work activities are larger and can be broken down into distinct pieces or otherwise shared by multiple subcontractors, those work activities such as concrete curbing, single-ply roofing, gutters/downspouts (to name only a fraction) are so small that they cannot be broken down any further. In this regard, it is essential to note that, for the larger portions of work that make up the majority of the Project's costs but not the majority of bid items, PKF solicited NJUCP DBE's to either perform the work in whole, or in part.

PKF also asserted that it "broke the Project's scope of work into 80 distinct subcontracting or purchasing opportunities." It provided a 26-page list of those 80 opportunities along with a list of the subcontractors solicited for each. [See Exhibit B to PKF's Position Statement]

Among other possible ways to demonstrate good faith efforts, the Appendix suggests breaking out work into smaller tasks or quantities. It recommends:

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 (for example, smaller tasks or quantities) to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces. This may include, where possible, establishing flexible timeframes for performance and delivery schedules in a manner that encourages and facilitates DBE participation. [49 CFR Part 26, Appendix A, § IV(B)]

Furthermore, Section VI(D)(1) of the Appendix states:

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.

Breaking the Project's scope of work into 80 distinct subcontracting or purchasing opportunities is consistent with Section IV(B) of the Appendix, because it breaks out contract work items into economically feasible units to facilitate DBE participation. However, as noted above, PKF did not solicit DBEs for each of those 80 distinct subcontracting opportunities. Moreover, even when it did solicit DBEs, it did not solicit all of the DBEs listed in the NJUCP that specialize in those 80 areas. For example, Exhibit E to PKF's Position Statement identified ten opportunities for piling and pipe suppliers. For eight of those, PKF solicited only one supplier – a supplier which was not a DBE. For the remaining two opportunities, it solicited the same non-DBE supplier plus one DBE. Yet, NJUCP lists 21 DBEs that specialize in piling or pipes.

C. Price/Negotiations with DBEs

In its October 10, 2017 DBE Compliance Plan, PKF reported:

When evaluating DBE quotes for inclusion in the bid, PKF considered quotes that were no more than 5% higher than the lowest equivalent quote or our estimated cost plus material to the point where the DBE quote would be too costly. DBE quotes within 5% of the lowest quote for a work package were evaluated on a case by case basis for inclusion into the bid based on the absolute effect on our total bid of including a quote that was not the lowest cost.

In both its November 15 and November 28 Memoranda, OBD took issue with the fact that PKF only considered quotes that were no more than 5% higher than the lowest equivalent quote. OBD noted that "a DBE price is not a factor as long as it is fair and reasonable. The Bidder is to negotiate with a DBE." OBD also questioned whether PKF negotiated in good faith with interested DBEs.

In its December 13, 2017 Position Statement, PKF explained its approach as follows:

PKF recognizes that there are several relevant factors for consideration when deciding to contract, negotiate and ultimately use a DBE partner on the Project. Of the relevant factors, the cost or additional cost to PKF is but one such factor and is not, alone, sufficient to disqualify a DBE firm if the costs are reasonable. In other words, if a DBE firm provides a cost to perform work and said cost, although more than other bids or the estimate to perform the work, is nonetheless reasonable, the DBE partner may not be disqualified from consideration. Recognizing that the definition of "reasonable" is somewhat nebulous at best, PKF attempted to set its cost factor at 5%. . . . PKF did not disqualify any DBE's as a result of its proposed cost to perform the work or supply materials.

As addressed above and its initial GFE Summary, approximately 71 days before the ultimate bid date, PKF solicited quotes from 133 different NJUCP certified DBE firms. PKF sent follow up reminders to each such DBE firm and continued to electronically solicit said DBE firms each time an addendum was issued. Unfortunately, PKF only received actual quotes from 11 DBE firms. Of the 11 DBE firms, 3 quoted the supply of the same electrical equipment and 2 quoted the performance of on-site vibration monitoring. Moreover, with respect to 5 other DBE quotes, PKF was unable to commit at the time of the bid as the quantity/duration of the work was unknown thereby preventing PKF from establishing an actual committed cost for inclusion on the DBE Form A. Finally, 3 DBE's failed to provide a complete scope of work/scope of supply.

A bidder may not reject a DBE bid without sound reason; nor may it apply a set percentage in order to determine whether a DBE's bid was unreasonable. On the other hand, a bidder is not required to accept unreasonable quotes in order to satisfy the contract goal. Negotiating with DBEs is among the actions listed in the Appendix as evidence of good faith efforts. Section IV(D)(1) states:

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. [49 CFR Part 26, Appendix A, § IV(D)(1)]

Comments in the Notice of Adoption of Final Rule provide additional insight into what was intended by this Section:

The guidance . . . seeks to indicate what reasonably may not be viewed as a demonstration of good faith efforts. In this regard, rejecting a DBE only because it was not the low bidder is not consistent with the longstanding idea that a bidder/offeror should consider a variety of factors when negotiating with a DBE, including the fact that there may be additional costs involved in finding and using DBEs. . . . [A] firm's price is one of many factors to consider in negotiating in good faith with interested DBEs. [79 FR 59600, 59589 (Oct. 2, 2014)]

PKF asserted that it did not disqualify a single DBE firm merely on cost to perform. It described all 11 DBE quotes it received and the reasons all but two were not included in its bid. In sum:

- It received quotes from 3 different DBEs for the same supplies/equipment and selected 1 of those 3 (North Star);
- One DBE (Tyebar) failed to quote the correct rebar coating as required by the specifications;
- One DBE (Upstate Steel) “failed to quote individual bid items and provided an incomplete lump sum price”; and
- Five DBEs provided quotes where “no bid item existed specifically for the type of work.”

One of these – Upstate Steel – related to price and clearly warranted follow up. PKF originally solicited Upstate on July 25, 2017. Upstate submitted a quote at 10:25am on October 4, 2017 (the day before bid proposals were due). PKF responded at 10:29am (four minutes after receiving Upstate's quote). PKF advised Upstate “These need to be broken down by bid item so we can consider them for inclusion in our bid.” Upstate submitted a revised quote at 10:58am (29 minutes later). It included Items 31000 Structural Steel (cap & base plates, mobile connection box supporting frame, pedestal frame), 18000 H-pile (H10-57 2000 ft., 32 splice connectors), and 56000 Electrical poles (beam poles, down guy beams, base plates, anchor plates, guidewire plates, backing plates, top plates, dead end plates, cross arms, Crosby shackles). It is unclear whether this was sufficiently broken down. If so, PKF offered no explanation regarding why the

quote was rejected. If not, PKF did not follow up with Upstate to request a further break down or to explain exactly what it needed. (It must be noted, however, that this was the day before the bid was due to NJ TRANSIT, so there was limited time and opportunity for clarification and/or negotiation.)

With respect to the five DBEs that provided quotes where no bid item existed, it is unclear how or why this occurred. Did PKF solicit quotes from DBEs that had no relevant expertise? Or did the DBEs misunderstand what PKF was soliciting? If the former, then it would not constitute good faith efforts.⁸ If the latter, then follow up would have been appropriate.

D. PKF's Follow Up Efforts

In both its November 15 and November 28 Memoranda, OBD concluded that PKF's efforts to follow up with DBEs were insufficient. OBD notes that PKF provided "[n]o substantive document evidence" of follow up.

In its December 13, 2017 Position Statement, PKF acknowledged issues with the Form Ds it submitted. Nevertheless, PKF contended that its submission is still adequate since "the information requested therein was available through the SBN System Reports . . . [and], the activity reports show which DBE firms declined or failed to bid the Project." PKF submitted a DBE Communications Report, printed from SBN, which listed emails sent to DBEs – the initial solicitation as well as follow up emails. Between July 25, 2017 (three weeks after NJ TRANSIT advertised the IFB) and October 4, 2017 (the date before bids were due), PKF sent 1,188 emails to 135 different DBEs.⁹ The following table summarizes the information in Exhibit B to PKF's Position Statement.

⁸ "Pro forma mailings to DBEs requesting bids are not alone sufficient to satisfy good faith efforts under the rule." [49 CFR Part 26, Appendix A, § V] USDOT has described "pro forma" efforts as soliciting DBEs that do not perform relevant work. [See [DBE Program Good Faith Efforts \(§26.53 of 49 C.F.R.26\)](#) (USDOT, Office of the Secretary, Departmental Office of Civil Rights, DBE Division, available online at <https://cms.dot.gov/sites/dot.gov/.../session-12gfe-crsymposium-2017-final.pdf>; [Good Faith Efforts](#) (OCR, Aug. 2015), available online at http://aci-na.org/sites/default/files/good_faith_efforts_review_final_08-03-2015paw.pdf]

⁹ In some instances, PKF sent emails to more than one individual at the DBE. The numbers contained herein reflect the communications to the DBE not to the individuals. So, if PKF sent the same email to two different people at the same DBE, that was counted as one communication.

Date of Email	Number of Different DBEs PKF Emailed
July 25, 2017	55
August 1, 2017	45
August 8, 2017	118
August 21, 2017	122
September 6, 2017	114
September 8, 2017 (3:50 am)	128
September 8, 2017 (5:39 am)	128
September 21, 2017	110
September 22, 2017	129
September 27, 2017	135
October 4, 2017	104
TOTAL	1188

All of these communications were via email; PKF did not use SBN to track calls. I do not interpret the Appendix as mandating follow up phone calls. Nevertheless, follow up phone calls may sometimes be appropriate (for example, if email communications result in confusion or a misunderstanding). PKF contends that it did make follow up calls, but it did not maintain or provide a call log. Nor did it provide any other records or information about those follow up calls.

A key component of good faith efforts must be documenting those efforts to enable OBD to verify them. Bidders are required to complete and submit specific forms for that purpose: Form D (DBE Good Faith Efforts). OBD utilizes Form D to establish and document that prime contractors are negotiating in good faith with interested DBEs and using all reasonable and available means to solicit DBEs in the effort to meet the DBE goal. The first page of Form D contains a list of the types of actions that may be considered good faith efforts. The second page of the Form asks bidders to complete questions to describe their efforts to obtain DBE participation. It notes: "Copies of correspondence, return receipts, telephone logs, or other documentation will be required to support good faith efforts." Bidders must complete a Form D for each DBE solicited.

In its November 28, 2017 Memorandum, OBD notes that PKF submitted more than 300 Form Ds; "however, only three of the Form Ds were signed by DBEs with no explanation. The other Form Ds were unsigned by DBEs, and [PKF] indicated on each form the same multiple reasons as to why the DBE firm was not available for work or unable to prepare a bid."

In its December 13, 2017 Position Statement, PKF conceded that “its utilization of the NJ Transit Form D was, at best, less than optimal.” It admits that it inadvertently sent the Form Ds to the DBEs with all three boxes checked (rather than letting each DBE check whatever box(es) were applicable). PKF did, however, provide proof of sending the Form Ds to the DBEs solicited. [See Exhibits B and G to PKF’s Position Statement]

PKF’s errors in completing the forms made it more difficult to determine whether PKF met the good faith efforts requirement.

E. Performance of Other Bidders in Meeting DBE Goal

In determining whether PKF (or any bidder) has made good faith efforts, the Appendix requires NJ TRANSIT to review the performance of other bidders in meeting the DBE goal. It provides:

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 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. [49 CFR Part 26, Appendix A, § V]

The second lowest bidder committed 19.05% of the work to DBE subcontractors. Upon review by OBD, the bidder actually had only 15.35% devoted to DBE subcontracts. This is less than the 19% goal – but more than the 7.73% contained in PKF’s bid.

The second lowest bidder did not meet the goal. But PKF did not meet or exceed the DBE participation obtained by the second lowest bidder.

F. Promises of Future Efforts

As noted above, PKF’s DBE Compliance Plan noted: “PKF is, and remains, committed to the DBE targets for this project and will continue to pursue additional opportunities for DBE participation throughout the life of the project.” In its Position Statement, PKF noted:

the total number of dollars committed to at the time of the bid does not reflect PKF’s actual or intended level of self-performance as not all subcontracts and/or purchase orders are formally committed to at the time of bid (or several days thereafter). In fact, there will be other subcontracting opportunities throughout the life of the Project- hence PKF’s obligation to use Good Faith Efforts when such opportunities arise while construction is on-going.

While this sentiment reflects well on PKF and its intentions, it is irrelevant to the analysis of good faith efforts. As noted in 49 CFR Part 26, Appendix A, § VI: "A promise to use DBEs after contract award is not considered to be responsive to the contract solicitation or to constitute good faith efforts."

III. Conclusion

PKF did not have to meet the goal set by NJ TRANSIT for this contract; however, it did have to show that it used good faith efforts to do so. Because it did not meet the DBE goal, PKF had to provide documentary evidence to demonstrate that it took all necessary and reasonable steps to achieve the goal. NJ TRANSIT is required to evaluate PKF's documented good faith efforts overall. It must review PKF's DBE Compliance Plan, including the forms submitted therewith, and evaluate the quality, quantity, and intensity of all of PKF's efforts. Good faith efforts must be judged based upon their scope, intensity, and appropriateness to the objective. USDOT has described this evaluation process as requiring a "holistic" approach.

While PKF clearly made efforts, those efforts fell short of the type of active and aggressive efforts required of bidders on federally funded contracts. For example:

- Although PKF identified 80 areas of subcontracting opportunities, it did not solicit DBEs for each of those opportunities even when DBEs with relevant expertise were listed in the NJUCP;
- Although PKF did solicit DBEs for some of the 80 areas identified as subcontracting opportunities, PKF did not solicit all of the DBEs listed in the NJUCP that specialized in those areas;
- Although PKF's efforts included 1188 emails to DBEs, PKF failed to document phone calls and other follow up (such as by maintaining a call log).

For these reasons, I conclude that PKF did not demonstrate active and aggressive efforts to obtain DBE participation sufficient to meet the DBE contract goal.

Sincerely,



Christine Baker
Hearing Officer