

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

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BUCKLEY & COMPANY, INC.	:	MARCH TERM, 2002
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Plaintiff	:	No. 1894
	:	
v.	:	COMMERCE PROGRAM
	:	
CITY OF PHILADELPHIA, and	:	
ROCKPORT CONSTRUCTION CO., INC.	:	
	:	
Defendants	:	Control No. 031066

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**OPINION**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION IN SUPPORT OF  
ORDER GRANTING THE REQUEST FOR A PRELIMINARY INJUNCTION**

The present dispute involves a protest from a disappointed bidder and taxpayer who seeks to preliminarily enjoin the execution of a publicly-bid contract on the grounds that the contract award violates competitive bidding laws and gives the apparent low bidder an unfair competitive advantage. Specifically, Plaintiff, Buckley & Company, Inc. (“Buckley”), contends that the award by Defendant, the City of Philadelphia (“the City”), to Defendant, Rockport Construction Co., Inc. (“Rockport”), must be enjoined because Rockport failed to meet the specified ten percent (10%) participation goal by Disadvantaged Business Enterprises (“DBE”) where the DBE firm that Rockport proposed to use could not be considered a “regular dealer” in the specific products that it would be supplying since those products did not fall under its current work classifications.

For the reasons set forth below, this Court holds that the City is enjoined from executing on the contract because Rockport’s bid, though facially responsive, is materially deficient where the proposed DBE firm cannot be given “regular dealer” credit for the products it would be supplying since those

products do not fall under the current work classifications listed by the Pennsylvania Department of Transportation (“PennDOT”) or under the City’s current commodity listings.

## **FINDINGS OF FACT**

### **The Parties**

1. Buckley, a Pennsylvania corporation with its main office and principal place of business at 3401 Moore Street, Philadelphia, PA, brings this action in its capacity as a taxpayer of both the Commonwealth of Pennsylvania and the City of Philadelphia. Am. Compl. & Answer, ¶ 6.<sup>1</sup>
2. The City is a City of the First Class, organized under the laws of the Commonwealth of Pennsylvania, and is a political subdivision of the Commonwealth of Pennsylvania. Am. Compl. & Answer, ¶ 7. See also, First Class City Home Rule Act of April 21, 1949, P.L. 665, Section 17, codified at 53 P.S. §13151; Pa. R. Civ. P. 76.
3. Rockport is a Pennsylvania corporation with its principal place of business at 231 North Wycombe Avenue, Lansdowne, PA. Am. Compl. & Answer, ¶ 8.

### **The Invitation for Bids and DBE Requirements**

4. The City, through the Department of Streets and the Procurement Department, solicited sealed bids pursuant to a Proposal for Construction and Improvement of Schuylkill River Park from West River Drive to Locust Street and Related Work, Bid # 3493R2 (the “Invitation for Bids”).<sup>2</sup> Am. Compl.

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<sup>1</sup>The Amended Complaint, which was filed on the same day as the Amended Petition for Preliminary Injunction, sets forth the same or similar allegations as the petition. References to this complaint in this Opinion are for purposes of setting forth the allegations which have been admitted in the City’s Answer thereto.

<sup>2</sup>This is the third time this project was bid. The second time it was bid, this Court granted Buckley’s Petition for Preliminary Injunction and enjoined the award by the City to Rockport because

& Answer, ¶ 11.

5. The Invitation for Bids is subject to competitive bidding under Section 8-200 of the Philadelphia Home Rule Charter.<sup>3</sup> Am. Compl. & Answer, ¶ 13.

6. As more particularly described in the Invitation for Bids, the work contemplated by the project involves the construction of an asphalt multi-purpose trail and associated lighting along the east bank of the Schuylkill River in Philadelphia, from the Locust Street right-of-way to West River Drive together with an access ramp and bulkhead improvements (“the Project”). Am. Compl. & Answer, ¶ 14.

7. The Invitation for Bids contained instructions to prospective bidders, including a section titled “Disadvantaged Business Enterprise (DBE) Requirements for PennDOT/FHWA Funded Projects” (“DBE Requirements”). Am. Compl. & Answer, ¶ 15. See also, Buckley Exhibit 5, at C-29.<sup>4</sup>

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Rockport’s bid was non-responsive where it contained an insufficient description of the work to be performed by the same proposed DBE in the current case and the post-bid discussions amended Rockport’s bid to give it an unfair competitive advantage. See Buckley & Co., Inc. v. City of Philadelphia and Rockport Constr. Co., Inc., July 2001, No. 833, slip op. at 14, 19-21 (C.P. Phila. Sept. 10, 2001)(Herron, J.). The current matter addresses different issues involving whether American Indian can be considered a regular dealer and whether Rockport’s bid has met the stated DBE participation goal. For this reason, the Court denied Rockport’s Motion for Summary Judgment by Order dated April 17, 2002.

<sup>3</sup>Section 8-200 provides, in pertinent part, that:

“(1) Except in the purchase of unique articles or articles which for any other reason cannot be obtained in the open market, competitive bids shall be secured before any purchase, by contract or otherwise is made or before any contract is awarded for construction, alteration, repairs or maintenance or for rendering any services to the City other than professional services and the purchase shall be made from or the contract shall be awarded to the lowest responsible bidder. . . .”

Philadelphia Home Rule Charter, § 8-200 (1991).

<sup>4</sup>Buckley Exhibit 5 is also attached as Exhibit A to the Amended Complaint..

8. Because the Project was federally funded, the City needed an approval from PennDOT before making a contract award on the Project. Am. Compl. & Answer, ¶ 16.

9. The Invitation for Bids also specified that it was “issued under the provisions of the U.S. Department of Transportation (“U.S. DOT”) Regulations, 49 C.F.R. Part 26, as amended.” Buckley Exhibit 5 at C-29.

10. The DBE Requirements include a “goals” section which states:

To create a level playing field on which DBEs can compete fairly for U.S. DOT assisted contracts, the City of Philadelphia (“City”) has established in connection with this contract, the goal of 10% of the total dollar amount of the contract for the utilization of firms owned and controlled by socially and economically disadvantaged persons. This goal shall remain in effect through the life of the contract.

Buckley Exhibit 5 at C-29, ¶ A.

11. All bidders were required to submit, as part of their bid, either a “Schedule for Participation” certifying that they had met the ten percent (10%) participation goal of the DBE Requirements, or a “Request for Waiver” documenting the bidder’s good faith efforts to meet the 10% participation goal and requesting a waiver or reduction of the 10% goal. Am. Compl. & Answer, ¶ 18. See also, Buckley Exhibit 5 at C-32-C-34, ¶¶ F(1)-(5).

12. The Invitation for Bids also explicitly provides that “[t]he submission of a ‘Schedule for Participation’ or a ‘Request for Waiver’ with this bid is an element of responsiveness to the bid and the failure to submit a ‘Schedule for Participation’ or a ‘Request for Waiver’ will result in the rejection of the bid.” Buckley Exhibit 5 at C-32, ¶ F(1). See also, Am. Compl. & Answer, ¶ 19.

13. The DBE Requirements further provide that “[a]ny DBE that is listed on the ‘Schedule for

Participation' . . . must be certified by PennDOT at the time of bid opening in order to be counted toward the participation goals established for the contract.” Buckley Exhibit 5 at C-35, ¶ J(1). See also, Am. Compl. & Answer, ¶ 21.

14. The Invitation for Bids specify different counting percentages to be applied toward the stated DBE participation goal depending on what the DBE does and/or how the DBE is classified under the contract. Buckley Exhibit 5 at C-30-C-31.

15. Specifically, the method for counting DBE participation is as follows:

DBE Firms (those who perform the work): 100% of the portion of the construction contract that is performed by the DBE’s own forces, including the cost of supplies and materials obtained by the DBE for the work of the contract, except the supplies and equipment that the DBE subcontractor purchases or leases from the prime contractor or its affiliate, and including the entire amount of fees or commissions charged by the DBE firm for providing a bona fide service, is counted toward the DBE goal.

DBE Manufacturers (those who manufacture the materials for the project): 100% of the cost of the materials or supplies obtained from the DBE manufacturer and produced for the performance of the contract is counted toward the DBE goal.

DBE Regular Dealers (those who sell or supply materials manufactured by others): 60% of the cost of materials or supplies furnished for the performance of the contract is counted toward the DBE goal.

DBE Service Providers (those who act as brokers or manufacturers’ representatives): the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies or fees or transportation charges for the delivery of materials or supplies required on a job site is counted toward DBE goals.

Buckley Exhibit 5 at C-30-C-31. See also, 49 C.F.R. § 26.55(a)-(e) (providing the same standards for counting DBE participation).

16. Under the Instructions for Bidders, a “regular dealer” is “a firm that owns, operates or

maintains a store, warehouse or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock and regularly sold or leased to the public in the usual course of business.” Buckley Exhibit 5 at C-31, ¶ 3 (emphasis added). See also, 49 C.F.R. § 26.55(e)(2)(ii).

17. Further, the Instructions for Bidders state as follows:

[t]o be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone or asphalt without owning, operating or maintaining a place of business as provided above if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers’ own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

Packagers, brokers, manufacturers’ representatives or other persons who arrange or expedite transactions are not regular dealers.

Buckley Exhibit 5 at C-31, ¶ 3 (emphasis added). See also, 49 C.F.R. § 26.55(2)(ii)(A)-(C).<sup>5</sup>

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<sup>5</sup>As commentary to the promulgated regulations regarding the “regular dealer” concept, the U.S. Department of Transportation stated, in pertinent part, as follows:

. . . Before a recipient may count (or permit a contractor to count) 60 percent of the value of a product toward a goal, the recipient must ensure that the firm is a regular dealer in the products involved. (Obviously, a firm may be a regular dealer in one product but not in another. It is intended that 60 percent credit be permitted only where the firm is a regular dealer in the product involved in the particular transaction.) This determination could be made on a case-by-case basis or could be done through a certification process. The choice is up to the recipient.

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A key purpose of the “regular dealer” definition is to distinguish between firms that supply a

18. The bids for the Project were received and opened on January 29, 2002. 4/22/02 N.T. 108.

See also, Buckley Exhibits 1 & 10.

### **Rockport's Bid and Schedule for Participation**

19. Rockport submitted a bid in response to the Invitation for Bids. Am. Compl. & Answer,

¶ 25.

20. Five other firms, including Buckley, submitted bids. City Exhibit 3.

21. The total dollar amount of Rockport's bid was \$6,398,427, which was the lowest figure of all the bidders. City Exhibit 3.

22. Rockport's bid contained a Schedule for Participation indicating participation by a DBE firm named American Indian Builders & Suppliers, Inc. ("American Indian"). Am. Compl. & Answer, ¶ 26.

See also, Buckley Exhibit 2.

23. The other DBE firm listed on Rockport's Schedule for Participation was L & R Construction Co., Inc. Buckley Exhibit 2.

24. On its Schedule for Participation, Rockport identified American Indian as a "Regular

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product on a regular basis to the public and those that supply the product on only an ad hoc basis in relation to a particular contract or contractor. Such indications of being a regular, established, supplier as maintaining an inventory or distribution equipment are very useful in making this distinction. At the same time, business practices may differ for suppliers of different types of goods or in different parts of the country, and an absolute, across-the-board requirement for either the maintenance of an inventory or possession of distribution equipment could be unrealistic.

52 Fed. Reg. 39228 (U.S. Dep't. of Transp. 1987)(final rule; request for comments).

Dealer” to supply the following items:

Item # 13-1013(p) & Item # 13-1014(p) - Precast Coping;  
Item # 13-1001(p) - Access Ramp SS Railing; and  
Item # 13-1021 - Low Bulkhead Railing

Buckley Exhibit 2.

25. The total dollar amount of these components from American Indian, based on the 60% rule applicable to “Regular Dealers,” was \$540,935, which represented 8.45% of Rockport’s total bid and/or approximately 85% of Rockport’s DBE participation.<sup>6</sup> Am. Compl. & Answer, ¶ 28; Buckley Exhibit 2.

26. L & R Construction, Inc. was identified as a DBE subcontractor, whose participation amounted to 1.72% of Rockport’s total bid and/or approximately 17% of Rockport’s DBE participation.

Buckley Exhibit 2.

27. Rockport’s bid fails to meet the 10% DBE participation goal unless the participation of American Indian, as a Regular Dealer in “precast concrete coping”, “stainless steel railings” and “low bulkhead railings,” is counted. Am. Compl. & Answer, ¶ 29.

28. On its face, Rockport’s bid, through its Schedule for Participation, appeared to meet the 10% DBE participation goal. Buckley Exhibit 2.

29. However, it was not determinable from the face of Rockport’s Schedule for Participation whether American Indian was actually certified as a “Regular Dealer” in the specific items it proposed to supply, i.e., precast concrete coping, stainless steel railings or low bulkhead railings. Buckley Exhibit 2.

### **The City’s Initial Approval of Rockport’s Bid and Buckley’s Protest**

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<sup>6</sup>Prior to applying the 60% rule, the total dollar amount of American Indian’s participation equals \$901,559. Buckley Exhibit 2.



30. On or about February 5, 2002, the City's Minority Business Enterprise Council ("MBEC") determined that Rockport was both responsive and responsible and had satisfied the requisite DBE participation goal of 10%. Buckley Exhibit 1.

31. On February 6, 2002, Joseph R. Synchron ("Synchron"), the Chief Engineer and Surveyor for the City's Streets Department, wrote to Ms. Jocelyn I. Harper, the Director of the Bureau of Equal Opportunity at PennDOT, indicating that Rockport appeared to be the low bidder and requesting PennDOT's approval as to Rockport's listed DBE firms to determine if the DBE certifications are current and the DBE requirements for the contract are met. Buckley Exhibit 10; Rockport Exhibit 17.

32. On February 7, 2002, Buckley sent a protest letter to Harry Hillock ("Hillock"), the City's Deputy Procurement Commissioner, asserting that Rockport's apparent low bid should be rejected for failure to meet the DBE requirements under PennDOT regulations with respect to American Indian. City Exhibit 4; Rockport Exhibit 12.

33. Specifically, Buckley's protest letter stated, in pertinent part, that:

. . . [American Indian] was listed as a Regular Dealer in the Schedule for Participation by [DBEs] to furnish precast concrete coping and stainless steel railings.

Under [PennDOT] regulations, certified regular dealers are approved to furnish only those materials within their respective work classifications. The work classification approved by PennDOT for [American Indian] are - asphalt, electrical, pipe and plumbing supplies, steel, precast catch basins/risers, coatings/lumber.

Work classifications necessary to include the precast concrete coping on this project are - concrete structures, as approved for Alexson Supply, Inc., or - precast concrete products, as approved for Janette Redrow, Ltd.

Work classifications necessary to include stainless steel railings are - stainless

(steel), as approved for Specialty Steel Supply Co., Inc., or handrail, as approved for Harold Carmichael & Associations.

Contractors must be guided by, and rely on, the work classification approvals set forth in Publication #270, [PennDOT's] [DBE] Directory, when bidding a project where DBE's [*sic*] must be certified by PennDOT.

If some contractors are permitted to use their discretion about whether or not a non-listed product fits into a listed work classification, and other contractors rely on work classifications only as listed in the DBE Directory, certainly the latter contractors are at a competitive disadvantage. . . .

City Exhibit 4; Rockport Exhibit 12.

**American Indian - Its DBE Certification History and Role on the Project**

34. Kimball Patterson ("Mr. Patterson"), Vice President of American Indian, testified that American Indian regularly sells steel products in the course of its business and has previously sold precast concrete and steel in all different forms, including custom-made forms, on other Department of Transportation projects. 4/22/02 N.T.<sup>7</sup> 35-36.

35. American Indian has a 300 by 300 foot yard and a 2800 square foot warehouse from which it regularly sells products to the general public. 4/22/02 N.T. 34.

36. Mr. Patterson also testified that American Indian has provided services as a regular dealer in selling construction materials to contractors for approximately twenty-eight years. 4/22/02 N.T. 31.

37. Further, according to a document prepared by Mr. Patterson in 1997, American Indian provides a general line of products which include air conditioning equipment, precast concrete, doors and

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<sup>7</sup>The designation "N.T." represents the notes of testimony produced from the preliminary injunction hearing held on April 22 and 25, 2002.

door hardware, electrical materials, fire protection equipment, frames and grates, generators, heating and ventilation equipment, building supplies, landscaping, lumber, masonry and masonry supplies, paint and coatings, all types of pipes, plumbing, sand and gravel, site work, steel and steel pipes. Rockport Exhibit 32.

38. American Indian is certified as a DBE/MBE<sup>8</sup> by numerous other cities, states and agencies. Rockport Exhibit 33.

39. Specifically, in Pennsylvania, American Indian is certified as a DBE/MBE by the Pennsylvania Department of General Services, PennDOT, the Pennsylvania Southeastern Transportation Authority, the City of Philadelphia, and the City of Harrisburg. Rockport Exhibit 33.

40. Government entities normally investigate and/or review American Indian's certification status every one to two years to ensure that American Indian is properly certified as a DBE. 4/22/02 N.T. 33.

41. In 1996, 1998 and 1999, American Indian was certified by PennDOT as a DBE to deal in certain products including concrete pipe and precast concrete; specifically precast concrete catch basins and risers. Rockport Exhibits 26-29.

42. American Indian's 1999 DBE certification in precast concrete catch basins and risers was set to expire on June 30, 2002. Rockport Exhibit 29.

43. In a letter dated June 27, 2000, PennDOT requested American Indian to submit either a "No

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<sup>8</sup>The acronym "MBE" stands for a minority-owned (disadvantaged) business enterprise.

Change Affidavit” or a “DBE Certification Affidavit” in order to maintain its DBE certification even though its certification would not expire until June 30, 2002. Rockport Exhibit 30.

44. In response, on July 17, 2000, Elma R. Patterson (“Ms. Patterson”), President and majority owner of American Indian, submitted a “No Change Affidavit”, indicating that there have been no change in circumstances that would affect the firm’s “ability to meet the disadvantaged status, ownership or control requirements set forth in 49 C.F.R. Part 26.” Rockport Exhibit 30.

45. No evidence was presented that PennDOT rejected this “No Change Affidavit.”

46. In November, 1999, American Indian submitted a “Recertification Disclosure Affidavit” to MBEC listing the following products: valves and valve parts, pipe and fittings - cast and ductile iron, corrugated pipe, fire hydrants, precast concrete, doors and frames, and electrical material. City Exhibit 1.

47. In this same affidavit, American Indian attested that it did lease office space, a warehouse and other facility and that it had an estimated inventory worth \$76,000. City Exhibit 1.

48. In response to this re-certification application, the City, specifically Charles E. Thorpe of MBEC, recommended that American Indian “be re-certified under the same commodity codes as were previously applied for and approved.” City Exhibit 2.

49. Further, in a letter dated August 29, 2000, the City, through MBEC, informed Ms. Patterson that American Indian would be re-certified as a minority-owned disadvantaged business (M-DBE) and woman-owned disadvantaged business (W-DBE), permitting the firm’s participation to be counted towards DBE contracting goals as established, pursuant to 49 C.F.R. Part 26, for federally-funded or federally-assisted projects administered by the City of Philadelphia. Rockport Exhibit 31

50. The City's certification also allowed American Indian to participate as a DBE subcontractor on competitively-bid City projects. Rockport Exhibit 31.

51. American Indian's DBE certification by the City would not expire until August 21, 2003. Rockport Exhibit 31.

52. This certification and American Indian's placement in "MBEC's Directory of Certified Firms" applied only to specific commodity codes "in order to assist City departments, agencies and prime contractors in the solicitation of Disadvantaged Business Enterprise ('DBE') participation." Rockport Exhibit 31.

53. American Indian's current commodity codes under the City's DBE certification only includes the following:

- 32321 Valves & Valve Parts (Stock Supplier)
- 32332 Pipe & Fittings (Stock Supplier)
- 32337 Corrugated Pipe (Stock Supplier)
- 41211 Fire Hydrants (Stock Supplier)

Rockport Exhibit 31.

55. The record is not clear as to why American Indian was not also certified by the City for precast concrete as was requested in its "Recertification Disclosure Affidavit" or whether this omission was simply a mistake. Compare City Exhibit 1 and Rockport Exhibit 31.

56. At the time of bid opening, American Indian was certified by PennDOT as a DBE firm. 4/22/02 N.T. 32. See also, Buckley Exhibit 3; Rockport Exhibits 30, 31, 33.

57. However, PennDOT's DBE Directory for Regular Dealers specifically lists American Indian's current work classifications to include only the following items: asphalt, electrical, pipe and

plumbing supplies, steel, precast catch basins/risers, and coatings/lumber.<sup>9</sup> Buckley Exhibit 3.

58. In a letter dated March 6, 2002, PennDOT responded to American Indian's request to expand its DBE supplier certification to include miscellaneous precast concrete products for regular dealer credit, but PennDOT distinguished generic precast concrete from specialty precast concrete and deemed that as to the latter, American Indian could only be given credit as a broker. Buckley Exhibit B-20.<sup>10</sup>

59. Pursuant to this letter, PennDOT stated as follows:

[PennDOT's] review uncovered that your firm deals in various precast concrete products, some of a generic nature that it stockpiles, selling to customers from this stocked inventory, and some of a specialty nature. In the case of a specialty precast concrete product the usual way is that the needed design is worked out with the manufacturer, produced by the manufacturer, then drop shipped to the customer. It therefore appears that **generic precast concrete products have the potential to be DBE credited at a rate of 60% (regular dealer) while specialty precast concrete products would appear to be eligible for DBE credit only for the transactional fees involved (broker).**

Buckley Exhibit 20 (emphasis in original).

60. This letter also stated that “[b]e advised, however, that crediting decisions are ultimately made on a case by case basis, depending upon how a firm is transacting in a given product on a particular job.” Buckley Exhibit 20.

61. As to the current Project, according to Rockport's Schedule for Participation, American

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<sup>9</sup>This same directory also provides that Alexson Supply Inc.'s work classifications include “concrete structures” and lists those of Janette Redrow Ltd. to include “precast concrete products” but no such reference to “concrete” items is made as to American Indian's work classifications. Buckley Exhibit 3, City Exhibit 5.

<sup>10</sup>Mr. Patterson testified that this letter was in response to American Indian's request and came from American Indian's business records. 4/22/02 N.T. 29. Defendants objected to its admission but the Court overruled the objection on the grounds that it was a business record of American Indian. *Id.* at 30.

Indian proposed to supply precast coping, stainless steel railings and low bulkhead railings. Buckley Exhibit 2.

62. The record contains two separate quotations from American Indian to Rockport: one relating to the access ramp stainless steel railing and the low bulkhead railing; and the other relating to the precast coping. Buckley Exhibits 15 & 18.

63. As to railings, American Indian offered to sell to Rockport the following:

1,600 LF Access Ramp Railing	Item # 13-1001	for	\$426,703.00
1,832 LF High Bulkhead Railing	Item # 13-1020	for	\$241,292.00
1,341 LF Low Bulkhead Railing	Item # 13-1021	for	\$ 58,427.00
		Total:	\$726,422.00

Buckley Exhibit 15.

64. American Indian was prepared to obtain these stainless steel railings from Sanweld Industries, Inc. of Worcester, MA (“Sanweld”), a non-DBE manufacturer, who would be preparing the shop drawings, fabricating the custom-made railings and shipping the railings directly to the job site.

4/22/02 N.T. 23-27. See also, Buckley Exhibits 15 & 17.

65. Sanweld’s quote offered to sell American Indian the following:

Item 13-1001 / Approx. 1,600 LF Access Ramp Railing	for	\$414,275.00
Item 13-1020 / 1,832 LF High Bulkhead Railing	for	\$234,264.00
Item 13-1021 / 1,341 LF Low Bulkhead Railing	for	\$ 56,725.00

Buckley Exhibit 17.

66. American Indian’s quote to Rockport for the respective railings demonstrated a three percent (3%) mark-up from Sanweld’s original quote for those railings. 4/22/02 N.T. 47-50.

67. As to the precast coping, American Indian offered to sell Rockport the following:

1995 lf Precast Coping (High) - 371 pcs.	Item 13-1013	for	\$266,049.00
1354 lf Precast Coping (Low) - 294 pcs.	Item 13-1014	for	\$233,810.00
	Total		\$499,859.00

Buckley Exhibit 18.

68. American Indian was prepared to obtain these items from J & R Slaw, Inc. (“Slaw), a non-DBE manufacturer, who like Sanweld, would be preparing the shop drawings, fabricating the precast coping and delivering it directly to the job sight. 4/22/02 N.T. 24-26. See also, Buckley Exhibit 19.

69. Slaw had actually sent its quote for precast coping directly to Rockport, and Rockport then sent Slaw’s quote to American Indian. 4/22/02 N.T. 25; 4/25/02 N.T. 72.

70. Similar to the transaction with Sanweld, American Indian would make approximately a three percent (3%) profit or \$14,000 in obtaining the items from Slaw. 4/22/02 N.T 24, 49.

71. Both the high and the low precast coping that American Indian proposed to supply Rockport were referred to in the Instructions to Bidders as “architectural precast coping” or specialty precast coping. 4/25/02 N.T. 12-13, Buckley Exhibit 4 at D-19-D-25.

72. Architectural precast concrete coping is different from catch basins and risers. 4/25/02 N.T. 12-13.

73. American Indian’s stock of precast concrete pieces only includes culverts, storm water storage basin items, and risers which are used for highway or road construction, but its stock does not include custom-made items such as those needed for the Project. Buckley Exhibit C at 28-29; 4/22/02 N.T. 27; 4/25/02 N.T. 8-9.

74. Mr. Patterson testified that American Indian, as a regular dealer, pays independently for the



products it obtains from the manufacturer and then has the contractor pay it. 4/22/02 N.T. 37-38.

75. Mr. Patterson also testified that American Indian assumes the credit risk by being liable to the manufacturer irrespective of its contract with the City or Rockport. 4/22/02 N.T. 38-40.

76. Further, Mr. Patterson testified that he would review shop drawings from the manufacturer to ensure that they complied with contract specifications; and that American Indian reviews insurance requirements and carries insurance for all of its jobs. 4/22/02 N.T. 41-42.

77. Mr. Patterson is not an engineer. 4/22/02 N.T. 50-51.

78. Additionally, Mr. Patterson testified that American Indian helps facilitate transactions with smaller contractors and helps with the arrangement of trucking and ensuring the products arrive in a timely manner. 4/22/02 N.T. 42.

79. Similarly, Synchron testified that regular dealers play an important role in making contacts with small contractors and filtering different quotations, as well as having some role in the shop drawings and scheduling the delivery of the products. 4/22/02 N.T. 106-107.

80. The manner in which American Indian proposed to obtain the stainless steel railing and the low bulkhead railing from Sanweld or the precast coping from Slaw does not negate American Indian's status as a DBE "regular dealer".

81. However, the fact that American Indian is not certified as a DBE regular dealer in these specific commodities under PennDOT's work classifications or the City's commodity listings demonstrates that the City should not consider American Indian to be a DBE regular dealer in stainless steel railings, bulkhead railings and specialty precast coping. See Buckley Exhibit 20; City Exhibit 2; Rockport Exhibit 31.

**The City's Investigation of American Indian, Its Position and Ultimate Award to Rockport**

82. Following Buckley's protest, the City, through MBEC, investigated American Indian to determine whether it had previously supplied precast concrete products to other contractors. 4/22/02 N.T. 56-58, 116-117.

83. The City did not investigate American Indian's experience with steel products because PennDOT's DBE Directory listed "steel" under American Indian's work classification. 4/22/02 N.T. 58, 116-117. See also, Buckley Exhibit 3.

84. Syrnick testified that he understood "steel to include stainless steel; however for purposes of what we did on this contract, that whole work classification is completely irrelevant because the City makes the decision as to whether or not as to the qualifications of subcontractors and material suppliers." 4/22/02 N.T. 116.

85. Incidentally, in response to the City's request for PennDOT's approval, PennDOT, on February 15, 2002, recommended its concurrence in awarding the bid to Rockport subject to approval of Rockport's DBE submission. Rockport Exhibit 19.

86. On February 27, 2002, at the City's request, American Indian faxed to MBEC 14 pages of documentation of its previous dealings in precast concrete products, along with a "Recertification Disclosure Affidavit" listing the specific commodities that American Indian sought certification. Buckley Exhibit 6.

87. The documentation included a letter from Kistner Concrete Products, Inc. ("Kistner"),<sup>11</sup>

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<sup>11</sup>Kistner is a manufacturer of, among other things, precast concrete products. Buckley Exhibit C at 25-27.

relating that American Indian had “over the past ten or more years” been supplying precast concrete products; i.e., road barrier, sound walls and an assortment of underground utility precast products, throughout the northeastern United States. Buckley Exhibit 6.

88. The City, specifically Caleb Gaines (“Gaines”) of MBEC, did not ask American Indian to explain the nature of the association between Kistner and American Indian because the City’s purpose was merely in ascertaining whether American Indian had supplied precast concrete at other times. 4/22/02 N.T. 57.

89. In order to satisfy itself of American Indian’s performance abilities, the City also reviewed American Indian’s history with other projects and made telephone calls to other contractors who had previously worked with American Indian. 4/22/02 N.T. 117.

90. The City does not allow DBE brokers to participate in City contracts. 4/22/02 N.T. 63.

91. On behalf of the City, Gaines testified that “a broker is someone that is not a regular dealer. It would be someone that would [act] as a pass through, not really what we would call a reputable legitimate business. It could be someone who has maybe an office or a phone number. Basically, what they are doing is arranging transactions.” 4/22/02 N.T. 78.

92. According to the City, American Indian is distinguished from a broker in this transaction because it is an established business, it has a warehouse and it has “a track record of providing items of a general character that is what is called for in this particular project.” 4/22/02 N.T. 78.

93. The City does not consider American Indian’s DBE status to change because the precast concrete and the railings were shipped directly to the job site from the manufacturer. 4/22/02 N.T. 78-81.

94. It also did not matter to the City that the items which American Indian was obtaining for

Rockport were custom-made items by non-DBE manufacturers. 4/22/02 N.T. 60-61.

95. Gaines also testified that the City simply makes sure that the proposed DBE is actually certified by PennDOT, but the City is not concerned with the specific items or commodities listed in PennDOT's DBE registry. 4/22/02 N.T. 69.

96. On March 1, 2002, Gaines wrote to PennDOT, indicating that MBEC had conducted an additional review of Rockport's Schedule for Participation and of American Indian's status as a regular dealer in precast concrete products and concluding that American Indian is "indeed a regular dealer in the products shown on the Schedule as submitted by Rockport." Buckley Exhibit 7.

97. With this same communication to PennDOT, Gaines attached the documentation from Kistner to support that American Indian has previously dealt in precast concrete products. Buckley Exhibit 7.

98. On March 8, 2002, Syrnick wrote a Memorandum to the file, in which he documented that American Indian has been a regular dealer on previous projects, two of the City's regular general contractors have confirmed that American Indian had performed satisfactorily on these projects and the material supplied in these projects included pre-cast sewer and storm water items. Buckley Exhibit 13.

99. Syrnick also wrote that "[b]ased on this information the Department is able to re-affirm its position that [American Indian] is capable of performing this task on the Schuylkill River Park project and thus, are acceptable to the Department of Streets." Buckley Exhibit 13.

100. American Indian had previously been and was currently certified as a DBE regular dealer to supply precast sewer and storm water items in PennDOT's DBE Registry. Buckley Exhibit 3.

101. However, American Indian was not currently certified by either PennDOT or the City as a

Regular Dealer in the specialty concrete products it proposed to supply to Rockport. Buckley Exhibit 20; Rockport Exhibit 31; City Exhibits 1 & 2.

102. Syrnick testified that the City does not “pre-qualify” subcontractors or suppliers and that “certification” as a DBE is different than qualification. 4/22/02 N.T. 90, 114-116.

103. Syrnick also testified that PennDOT’s work classifications are irrelevant to the City in determining DBE certification for participation on City projects. 4/22/02 N.T. 116.

104. However, Syrnick relied on PennDOT’s work classification for American Indian as to steel in not having to determine American Indian’s DBE certification as to the stainless steel railings that it proposed to supply. 4/22/02 N.T. 116.

105. Therefore, Syrnick’s statement that PennDOT’s work classification is “irrelevant” and unrelated to certification as a DBE firm is less than credible. 4/22/02 N.T. 115-116.

106. On March 11, 2002, PennDOT wrote to the City, indicating it had reviewed the DBE firms listed for the Project and that it approved American Indian and L & R Construction Co., Inc.’s participation. City Exhibit 6; Rockport Exhibit 21. See also, Buckley Exhibit 14.

107. On March 14, 2002, the City made its award of the contract to Rockport. Rockport Exhibit 22.

108. The City believes that even if Rockport had not met the ten percent (10%) DBE goal, the City could still award the contract to Rockport because it made a good faith effort to meet the participation goals and provided all of the information requested by the City. 4/22/02 N.T. 72; 4/25/02 N.T. 45, 53-54.

109. Rockport’s good faith efforts to meet the DBE participation goal is not relevant to whether City abused its discretion and Rockport’s good faith would only have been relevant had it requested a waiver of the DBE requirements instead of submitting a Schedule for Participation which indicated full

compliance with the DBE requirements. See Buckley Exhibit 2.

110. Rockport received a limited notice to proceed on the contract. 4/25/02 N.T. 28-29.

111. Rockport is currently making arrangements for shop drawings and placing orders for specialty items with “long lead times.” 4/25 /02 N.T. 29.

112. Construction needs to begin soon before the construction season advances too far. 4/25/02 N.T. 97.

113. There is sufficient evidence that the City knew that American Indian did not regularly supply specialty “architectural precast concrete” as was required for this Project. See 4/25/02 N.T. 12-15.

114. There is sufficient evidence that the City relied on PennDOT’s DBE work classifications when the City did not investigate American Indian’s DBE certification or previous history with stainless steel. 4/22/02 N.T. 58, 116-117. See also, Buckley Exhibit 3.

115. There is also sufficient evidence that the City, through MBEC, certified DBE regular dealers or suppliers according to specific commodity codes. Rockport Exhibit 31.

116. American Indian cannot be considered a Regular Dealer of specialty architectural precast concrete as required by this Project under either PennDOT’s DBE criteria or the City’s DBE criteria. See Buckley Exhibits 3 & 20; Rockport Exhibit 31.

### **DISCUSSION**

In this taxpayer action, Buckley seeks to preliminarily enjoin the City from executing or taking any other actions in furtherance of the contract on the Schuylkill River Project because (1) Rockport has obtained a competitive advantage over other bidders since American Indian could not be considered a regular dealer in the products it would be supplying because those products do not fit within American

Indian's work classifications under the PennDOT DBE registry; (2) the City cannot waive the bid specifications or deem that American Indian's certification may be expanded after the bid opening; and (3) Rockport's bid must be deemed non-responsive because American Indian cannot be a regular dealer of "custom-manufactured" items which are required on the Project. See Buckley's Mem. of Law in Support of its Amended Pet. for Prel. Inj.

To be entitled to a preliminary injunction, the plaintiff must prove the following elements:

- (1) that relief is necessary to prevent immediate and irreparable harm which could not be remedied by damages;
- (2) that greater injury would result by refusing such relief than by granting it;
- (3) that the injunction will restore the parties to the status quo as it existed immediately prior to the alleged wrongful conduct;
- (4) that the injunction is reasonably suited to abate such activity; and
- (5) that the plaintiff's right to relief is clear and the alleged wrong is manifest.

Singzon v. Department of Public Welfare, 496 Pa. 8, 10, 436 A.2d 125, 126 (1981)). These requisite elements "are cumulative, and if one element is lacking, relief may not be granted." Norristown Mun. Waste Authority v. West Norriton Twp. Mun. Authority, 705 A.2d 509, 512 (Pa. Commw. Ct. 1998).

A court may properly enjoin the award of a competitively-bid public contract when irregularities are shown in the bidding process and the contract is awarded according to those faulty procedures. American Totalisator Co., Inc. v. Seligman, 489 Pa. 568, 576-77, 414 A.2d 1037, 1041 (1980); Stapleton v. Berks County, 140 Pa. Commw. 523, 542, 593 A.2d 1323, 1332 (1991). However, a court's scope of review is limited to determining whether the governmental authority's actions constituted a manifest abuse of discretion or purely an arbitrary execution of that authority's duties or functions. American Totalisator Co., 489 Pa. at 574, 414 A.2d at 1041 (1980); Kimmel v. Lower Paxton Twp., 159 Pa. Commw. 475, 481, 633 A.2d 1271, 1274 (1993). A court will not review the actions of governmental

bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud, capricious action or abuse of power. American Totalisator, 489 Pa. at 575, 414 A.2d at 1040-41.

“Drawing up the terms of, and the award of a contract to the ‘lowest responsible bidder’ involves the exercise of discretion by the contracting authority.” A. Pickett Constr., Inc. v. Luzerne Cty. Convention Center Authority, 738 A.2d 20, 24 (Pa. Commw. Ct. 1999). See also, Hibbs v. Arensberg, 276 Pa. 24, 29, 119 A. 727, 729 (1923)(“The term ‘lowest responsible bidder’ does not mean the lowest bidder in dollars; nor does it mean that the board may capriciously select the highest bidder regardless of responsibility or cost. What the law requires is the exercise of sound discretion.”). The statutory requirements for competitive bidding on public contracts do not exist solely to secure work at the lowest possible price, but also to invite “competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts.” Conduit and Foundation Corp. v. City of Philadelphia, 41 Pa. Commw. 641, 646-47, 401 A.2d 376, 379 (1979). The plaintiff bears the heavy burden of showing that the contracting authority abused its discretion and did not act in good faith or in its best interests. J.J.D. Urethane Co. v. Montgomery County, 694 A.2d 368, 370 (Pa. Commw. Ct. 1997)(upholding alternative higher bid where commissioners chose it for genuine safety reasons over lower bid).

Pennsylvania courts have repeatedly held that the specifications set forth in bidding documents are mandatory and must be strictly followed for the bid to be valid; otherwise, the bid award must be overturned. R. & B. Builders, Inc. v. School District of Philadelphia, 415 Pa. 50, 52, 202 A.2d 82, 83 (1964); Harris v. City of Philadelphia, 283 Pa. 496, 503, 129 A. 460, 462 (1925); Shaeffer v. the City of Lancaster, 754 A.2d 719, 722, 2000 WL 639940, at \* 2 (Pa. Commw. Ct. May 19, 2000); Smith



v. Borough of East Stroudsburg, 694 A.2d 19, 23 (Pa. Commw. Ct. 1997).. The administrative body has no discretion in deciding whether the bidder’s effort at meeting the bid requirements was sufficient. Shaeffer, 754 A.2d at 722, 2000 WL 639940, at \*3; Karp v. Redevelopment Authority of City of Philadelphia, 129 Pa. Commw. 619, 624, 566 A.2d 649, 651 (1989). Further, a violation of competitive bidding requirements may constitute irreparable harm where the intended bid award undermines the integrity of the bidding process and gives one bidder an impermissible competitive advantage over other bidders. Shaffer, 754 A.2d at 723, 2000 WL 639940, at \*4.

It is well-settled that a defective bid cannot be remedied once the bids have been opened. Kimmel, 15 Pa. Commw. at 484, 633 A.2d at 1275; City of Philadelphia v. Canteen Co., Div. of TW Services, Inc., 135 Pa. Commw. 575, 583, 581 A.2d 1009, 1013 (1990); Nielson v. Womer, 46 Pa. Commw. 283, 286, 406 A.2d 1169, 1171 (1979). Certain defects may be waived provided that the defect is a mere “technical” irregularity and no competitive advantage is gained. See Rainey v. Borough of Derry, 163 Pa. Commw. 606, 615-17, 641 A.2d 698, 703-04 (1994)(holding that no competitive advantaged inured to low bidder whose bid contained a calculation error and who submitted an equipment list after the bid opening where all of the bidders selected manufacturers from the same list). Nonetheless, courts have disallowed municipalities to waive “material discrepancies” where other bidders did not have the same opportunity to modify their bid. Shaffer, 754 A.2d at 723-24, 2000 WL 639940, at \*3-5 (reversing denial of injunction, finding unfair competitive advantage where the intended award was based on a bid containing a “contract credit” that operated in the event that the City elected to waive its right to salvage the valves, while other bidders did not have the same opportunity nor did the bid specifications permit the use of contract credits); Smith, 694 A.2d at 23 (bid predicated on out-of-state waste disposal was not a technical

aspect of the bid but substantially and materially deviated from requirement that waste disposal be done within the state); Kimmel, 159 Pa. Commw. at 483-485, 633 A.2d at 1275-1276 (townships lacked discretion to waive bidder's alleged "technical" bid deficiencies, consisting of missing asset page and absence of letter certifying access to a recycling center, in contravention of the mandatory bid instructions); and Conduit, 41 Pa. Commw. at 645-47, 401 A.2d at 379-80 (holding that low bidder's multiple listings of subcontractors in its bid was not "mere informality waivable or correctable in the city's exercise of discretion" where bid specifications allowed for only one listing).

Recently, the Pennsylvania Supreme Court in Gaeta v. Ridley School District, \_\_ Pa. \_\_, 788 A.2d 363 (2002), addressed the tension between government decision makers exercising their discretion to waive mere technical bid irregularities and enforcing compliance with bid documentation to ensure that there is equal footing among competitive bidders in furtherance of legislative objectives. 788 A.2d at 366-368.

The Pennsylvania Supreme Court stated the following principles for resolving this tension:

first, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary standard of competition.

788 A.2d at 368. Nonetheless, the Gaeta court reiterated the longstanding rule that: "in circumstances where legislative pronouncements particularize the manner in which government contracts are to be made, such requirements are not subject to waiver." Id. (citing Harris, 283 Pa. at 503, 129 A. at 462).

Applying these principles to the present case, this Court finds that the City grossly abused its discretion in deeming that Rockport's bid was responsive when, in reality, and after the City's own

investigation, it was evident that Rockport did not meet the 10% DBE participation goal because American Indian could not be considered a Regular Dealer in the specific commodities it would be supplying on the Project.

First, however, this Court must note what this case does not involve. Contrary to both Rockport's and the City's position, it is not unconstitutional to enjoin the City from executing on the award to Rockport because it failed to meet the 10% DBE goal. See Rockport's Post-Hearing Mem. of Law, at 3; City's Post-Hearing Mem. of Law, at 4 n.4. Both Rockport and the City contend that the DBE program established, pursuant to 49 C.F.R. Part 26, by PennDOT and the City, merely sets forth an "aspirational goal" of 10 percent that cannot be enforced as a "quota" or it would violate the Fourteenth Amendment of the U.S. Constitution. It is true that federal regulations state that the "10 percent goal is an aspirational goal at the national level, which the Department [of Transportation] uses as a tool in evaluating and monitoring DBEs' opportunities to participate in DOT-assisted contracts." 49 C.F.R. § 26.41(b). It is also true that recipients of DOT funds cannot use "set-asides" or "quotas" as part of the DBE program. 49 C.F.R. § 26.43. Additionally, the United States Supreme Court did hold that certain DBE or minority contracting plans, where based on racial classifications, were subject to strict scrutiny and had to be narrowly tailored to further compelling government interests. See, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)(holding that all racial classifications imposed by whatever federal, state or local governmental actor is subject to strict scrutiny); City of Richmond v. J.A. Croson Co., 488 U.S. 200, 212-14 (1989)(ruling that Richmond's set-aside program was not narrowly tailored to remedy past discrimination).

Nonetheless, the issue in this case concerns whether or not Rockport's bid met the 10% DBE goal,

not whether that goal was constitutional. The Invitations for Bids explicitly provide that all bidders must, as an element of bid responsibility, either submit a Schedule for Participation, which certifies that they have met the specified goal, or submit a Request for Waiver. Buckley Exhibit 5 at C-32, ¶ F(1). If the goal is merely “aspirational” as the City and Rockport contends, why do the Invitations for Bids require the submission of a Schedule for Participation which meets the DBE goal as an element of responsiveness. Likewise, why have an alternative process for waiver of the DBE goal if the bidder knows in the first instance that it will not meet the DBE goal. It is not logical to require bidders to either meet the goal or submit a Request for Waiver and then claim that the “goal” is merely aspirational. The bidders would not know this to be the case prior to bidding. Therefore, if the City should succeed in this argument, a competitive advantage would inure to Rockport.

Further, the fact that Rockport engaged in good faith efforts to meet the 10% DBE participation goal is irrelevant.<sup>12</sup> The Invitations for Bids clearly set forth alternative methods with respect to the DBE requirement: one being a Schedule for Participation which meets the DBE goal or the other submitting a request for waiver, but not both. These alternative procedures also mimic the federal regulations which allow a bidder to either document that it has obtained the requisite DBE participation to meet the goal or document that it has made adequate good faith efforts to meet the goal. 49 C.F.R. § 26.53(a). If the bidder chooses the latter option, the contracting authority must not deny the award on the grounds that the

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<sup>12</sup>Even still, Rockport did assume that its use of American Indian on its Schedule for Participation was proper since it had not been informed by the City of anything to the contrary even when Rockport proposed to use American Indian in the previous bid. Contrary to Rockport’s position, the blame for not questioning American Indian’s status lays not with Buckley but with the City.

bidder failed to meet the goal. Id. Nonetheless, it would be self-contradictory to allow the bidder to submit a Schedule for Participation, certifying that it had met the 10% DBE participation goal, and then look at the bidder's good faith efforts if an additional review finds that the bidder did not meet the goal, even though the bidder did not submit a Request for Waiver. Even the City concedes that it would be inconsistent and self-contradictory to look at Rockport's good faith efforts, since the City, from the outset, deemed that Rockport had satisfied the 10% DBE goal. City Post-Hearing Mem. of Law, at 5 n.5.

Rather, this Court finds that the 10% DBE Participation goal, as specified in the Invitation for Bids, which incorporate 49 C.F.R. Part 26, is a mandatory goal which is not subject to waiver and which falls squarely under the admonition by the Harris court and reiterated by the Gaeta court. See Buckley Exhibit 5 at C-29. The Invitation for Bids require the Schedule for Participation to include the following:

A detailed description of the work that will be performed by each named DBE. This description shall include the item or work to be performed by the named DBE, describing such work as it relates to a distinct element of the contract as determined by the bid specifications. If the named DBE is scheduled to supply materials, a description of the materials and the quantity of such materials must be included. Failure to provide a detailed description of the work that will be performed by each named DBE shall result in rejection of the bid.

Buckley Exhibit 5 at C-32, ¶ F(2)(b). Moreover, the Invitation for Bids set forth explicit methods for counting DBE participation toward the stated participation goal and distinguishes between different categories of DBE firms, i.e., DBE contractors and manufacturers are counted 100% while DBE regular dealers are only counted for 60% of the cost of the materials and DBE service providers are merely counted for the amount of fees and/or commissions. Id. at C-30-C-31. These counting methods mimic those defined in the federal regulations. See 49 C.F.R. § 26.55(a)-(e). These categories are also explicitly defined in the Invitation for Bids and the definitions also mimic the federal regulations. Compare Buckley

Exhibit 5 at C-30-C-31 and 49 C.F.R. § 26.55.

Pursuant to Invitation for Bids, a “regular dealer” is a “firm that owns, operates or maintains a store, warehouse or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock and regularly sold or leased to the public in the usual course of business.” Buckley Exhibit 5 at C-31, ¶ E(3) (emphasis added). A regular dealer must engage in the purchase or sale of the “products in question.” Id. Compare 49 C.F.R. § 26.55(e)(2)(ii).

The City argues that its counting decision and treatment of Rockport’s Schedule for Participation is not subject to judicial review as such a determination is presumptively vested with the City. City Post-Hearing Mem. of Law, at 6. Notwithstanding that position, it is precisely the function of the judicial system to review abuses of discretion by governmental authorities. This concept harkens back to the “checks and balances” concept upon which this country was founded. This Court does not question the City’s position that DBE regular dealers perform an important function and that they may be certified to supply “custom-made” goods. See 4/22/02 N.T. 106-07. Nor does this Court base its present decision on the City’s distinction between brokers and regular dealers. See 4/22/02 N.T. 78-81. Further, even if it seems precarious to allow a DBE firm to be considered a regular dealer so long as it has a warehouse, a track record in the general products, and the manufacturer drop ships the goods directly to the job site, this Court’s ruling is not based on that definition by the City. See id. This Court also does not question whether American Indian performs a commercially useful function or its ability to perform that function, but agrees that the City may make that determination in its discretion.

Rather, this Court finds that the City abused its discretion in its counting American Indian as a

regular dealer in precast concrete coping to support that Rockport met the 10% DBE participation goal and that its bid was responsive. The Invitation for Bids, together with the relevant federal regulations, clearly indicate that a regular dealer must be certified in the specific products required by the contract. Buckley Exhibit 5 at C-31, ¶ E(3); 49 C.F.R. § 26.55(e)(2)(ii). Further, the relevant commentary to the respective federal regulations notes that “the recipient [the City] must ensure that the firm is a regular dealer in the product involved” and that “a firm may be a regular dealer in one product but not in another.” 52 Fed. Reg. 39228 (U.S. Dep’t. of Transp. 1987)(final rule; request for comments). Therefore, under both the mandatory bid instructions and the federal regulations upon which the instructions are based, a regular dealer must be certified in the actual products involved or products of the general nature.

Here, it is clear that American Indian was not certified as a DBE under PennDOT’s work classifications or the City’s commodity codes in precast concrete coping. The City argues that the PennDOT work classifications apply only to PennDOT jobs and are irrelevant to City projects. City’s Post-Hearing Mem. of Law, at 7. See also, Rockport’s Post-Hearing Mem. of Law, at 9 n.2.

Both Rockport and the City also argue that the use of PennDOT work classifications refer to “prequalifying” DBE firms to do a specific job. City’s Post-Hearing Mem. of Law, at 7. See also, Rockport’s Post-Hearing Mem. of Law, at 9. It is true that the federal regulations prohibit a DBE firm from being “prequalified as a condition for certification unless the recipient requires all firms that participate in its contracts and subcontracts to be prequalified.” 49 C.F.R. § 26.73(g). Even so, this position appears to be a red herring in light of the evidence presented at the injunction hearing which showed that the City reviews a DBE firm’s history with specific products when it is certifying or re-certifying the firm as a DBE

supplier.

During the injunction hearing, Synchron testified that the City does not “prequalify” suppliers and that DBE certification is different from qualification. 4/22/02 N.T. 90, 114-116. Synchron also testified that PennDOT’s work classifications are irrelevant to the City in determining DBE certification. 4/22/02 N.T. 116. Gaines testified that the City simply makes certain that the proposed DBE is actually certified by PennDOT, but that the City is not concerned with the specific items or commodities listed in the PennDOT DBE registry. 4/22/02 N.T. 69. However, the City did rely on the current PennDOT DBE registry in not checking American Indian’s DBE certification with respect to stainless steel railings because American Indian’s current work classifications lists “steel”. The City did investigate American Indian’s DBE certification and experience with precast concrete because this item was not listed in the PennDOT DBE work classifications for American Indian and was the focus of Buckley’s protest letter. See 4/22/02 N.T. 56-58, 116-117; Buckley Exhibit 6; City Exhibit 4; Rockport Exhibit 12. Therefore, it appears that the City uses the PennDOT DBE work classifications when it suits its purposes. But, the City cannot have it both ways.

Moreover, the City, through MBEC, uses specific commodity codes when it certifies DBE regular dealers or suppliers. See Rockport Exhibit 31, City Exhibits 1 & 2. Specifically, in August, 2000, the City certified American Indian under the same commodity codes as were previously applied for and approved. City Exhibit 2. The letter, dated August 29, 2000, officially notified American Indian that it was re-certified by the City as a DBE supplier of the valves and valve parts, pipe and fittings, corrugated pipe and fire hydrants. Rockport Exhibit 31. Ironically, and perhaps by mistake and ineptitude, the City did not re-certify American Indian in precast concrete, even though this item was listed on American Indian’s



Recertification Disclosure Affidavit. Compare City Exhibit 1 & Rockport Exhibit 31. Even assuming this omission to be a mistake, the City's additional post-bid investigation of American Indian only showed that American Indian had previously supplied precast concrete in the form of sewer and storm water items or road and underground utility products. See Buckley Exhibits 6 & 13. Such items are not akin or of the general nature to the specialty architectural precast concrete coping required for this Project. See 4/25/01 N.T. 12-13; Buckley Exhibit 4 at D-19-D-25. Clearly, PennDOT determined this to be the case after the bid opening, when it denied American Indian's request to expand its DBE certification as a regular dealer in specialty precast concrete products and only allowed American Indian to be certified in generic precast concrete products. Buckley Exhibit 20. Deeming that American Indian is a certified DBE regular dealer in the precast concrete products required for this Project constitutes a clear abuse of discretion when the City's own documents show that American Indian is not so certified. Therefore, Rockport's bid cannot be deemed responsive because it failed to meet the 10% DBE participation goal.

It is a shame that this Project which is of great public interest is further delayed by the City's repeated abuses of discretion. Once again, this Court is faced with reviewing actions by the City which fail to comport with the very instructions promulgated by the City. Why have instructions at all if you are going to emasculate their meaning. The City cannot issue these instructions simply to meet competitive bidding laws and then act to nullify these laws by not following the instructions. For these reasons, this Court finds that Buckley is entitled to a preliminary injunction. It has shown a reasonable likelihood of success on the merits where Rockport's bid, though facially responsive, was materially defective where it failed to meet the 10% DBE participation goal because American Indian could not be considered a regular dealer in the precast concrete copings to be supplied for the Project. Absent an injunction,

irreparable harm would result by Rockport's gaining an unfair competitive advantage that offends the purpose of competitive bidding. The balance of harms weighs in favor of granting the injunction to protect the taxpayers' right to a fair bidding process. The preliminary injunction will preserve the status quo since the City would be prevented from executing or proceeding on the contract award, when such award would most likely be voided on appeal or at a final hearing. Injunctive relief is also appropriate to protect the integrity of the competitive bidding process.

### **CONCLUSIONS OF LAW**

1. Buckley has shown a reasonable likelihood of success on the merits where Rockport's bid, though facially responsive, is materially defective because it fails to meet the 10% DBE participation goal.
2. Pursuant to federal regulations and the Invitations for Bids, the 10% DBE participation goal is a mandatory requirement which must be satisfied when a Schedule for Participation is submitted and there is no Request for Waiver submitted with the bid package.
3. Reviewing Rockport's good faith efforts to meet the 10% DBE participation goal is irrelevant, self-contradictory and inconsistent because Rockport did not submit a Request for Waiver.
4. The City clearly abused its discretion in deeming that Rockport met the 10% DBE participation goal where the City's own documents and DBE criteria show that American Indian is not certified as a DBE to supply the specialty precast concrete required for this Project.
5. Enjoining the City from executing on the award to Rockport is not unconstitutional where this Court is simply enforcing compliance with mandatory bid instructions and is not enforcing an otherwise illegal quota in the DBE participation goal.
6. Absent the injunctive relief requested, Rockport would gain an unfair competitive advantage

because it would have avoided a mandatory bid requirement while other bidders were not afforded the same opportunity.

7. Irreparable harm would arise if the City is not enjoined from proceeding on the contract award to Rockport because the integrity of the competitive bidding process would otherwise be undermined.

8. The balance of harms weighs in favor granting the injunction and preserving the competitive bidding process, even though this Project is delayed yet again.

9. An injunction will restore the status quo that existed before the City sought to award the contract to Rockport, where such an award would violate competitive bidding laws.

10. Buckley has shown that the wrong is actionable and that an injunction is reasonably suited to abate that wrong.

On the basis of the record, the court has entered an Order Granting the Petition for Preliminary Injunction.

**BY THE COURT,**

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**JOHN W. HERRON, J.**

**Dated: May 22, 2002**

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

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BUCKLEY & COMPANY, INC.	:	MARCH TERM, 2002
	:	
Plaintiff	:	No. 1894
	:	
v.	:	COMMERCE PROGRAM
	:	
CITY OF PHILADELPHIA, and	:	
ROCKPORT CONSTRUCTION CO., INC.	:	
	:	
Defendants	:	Control No. 031066

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**ORDER**

AND NOW, this 22 day of May, 2002, upon consideration of Plaintiff's Amended Petition for Preliminary Injunction, Defendants' responses in opposition thereto, the respective memoranda, having held a preliminary injunction hearing thereon, all other matters of record and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** that the Amended Petition for Preliminary Injunction is **Granted** and the Defendants are enjoined from proceeding to act or perform in any way under the Proposal for Construction and Improvement of Schuylkill River Park from West River Drive to Locust Street and Related Work, Bid #3492R2. This injunction shall remain in effect until further Order of Court following a final hearing to be scheduled at a later date.

It is also **ORDERED** that Plaintiff, in accordance with Pa. R. Civ. P. 1531(b)(1), shall post a bond in the amount of \$ 1,000.00 within ten (10) days of this Order.

**BY THE COURT,**  
  
\_\_\_\_\_  
**JOHN W. HERRON, J.**