

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE COMMISSIONER OF TRANSPORTATION AND PUBLIC FACILITIES**

WESTERN MARINE CONSTRUCTION, INC.,)
)
 v.)
)
 DEPARTMENT OF TRANSPORTATION)
 AND PUBLIC FACILITIES) OAH No. 11-0119-PRO
) Project No. 69200/AK-03-0075

DECISION ON SUMMARY ADJUDICATION

I. Introduction

The Department of Transportation and Public Facilities (Department) issued a solicitation for bids for the construction of a new ferry terminal at Annette Bay. The project was subject to a specific goal for participation by disadvantaged business enterprises (DBE's). The Department issued a notice of intent to award the contract to Southeast Road Builders, Inc. Southeast's bid included a subcontract to Johnson Control, Inc., for bid item 504(2). Johnson is a DBE, and Southeast's bid represented that it would meet the required 10.1% DBE participation primarily through its subcontract with Johnson.

Western Marine Construction, Inc. filed a protest asserting that the value of the Johnson subcontract was not creditable to DBE participation. The procurement officer denied the protest, and Western Marine appealed. Western Marine filed a motion for summary adjudication; the Department opposed the motion and filed a cross-motion for summary adjudication.

The pending motions raise two primary issues: is Johnson performing a commercially useful function under its subcontract with Southeast, and if so, to what extent is the value of materials purchased by Johnson creditable to the DBE goal. Because the undisputed facts establish that Johnson is performing a commercially useful function under its subcontract with Southeast, and that the procurement officer did not abuse his discretion in determining that the DBE-creditable value of the subcontracts exceeds 10.1% of the total contract value, Western Marine's motion is denied and the Department's cross-motion is granted.

II. Facts

A. Solicitation, Bids and Additional Information

The Department's solicitation for bids for the construction of a new Alaska Marine Highway ferry terminal at Annette Bay described the project to consist of excavating and paving an uplands staging area and constructing a covered passenger waiting area and enclosed restroom, a floating dock, a steel transfer bridge, and associated piling, fenders and dolphins.¹ The project was subject to a goal of 10.1% participation by disadvantaged business enterprises.²

Section 504 of the bid specifications covered construction of the steel and aluminum structures and structural components on the project, primarily consisting of the floating dock and the transfer bridge.³ The specifications for the dock required using Flexifloat Series S70 steel floats with integral locking assemblies manufactured by Robishaw Engineering (Robishaw), a Houston, Texas firm.⁴ The floats were to be modified to include ballast compartment bulkheads, watertight hatches,⁵ and anodes⁶ and paint coating⁷ as stated in the bid drawings.⁸ Any necessary additional locking assemblies and castings for structural attachment fabrications were also to be obtained from Robishaw.⁹

Bids were to be submitted as offers to perform the specified work at the price bid for each of 66 basic bid schedule items, among them seven items covering the work within the scope of Section 504 of the bid specifications, one of which, bid schedule item 504(2), covered the floating dock.¹⁰ The contract was to be awarded based on the lowest total basic bid price, that is, the sum of the basic bid schedule items.¹¹ Four bids were received. The lowest basic bid price, \$8,153,832, was submitted by Tamico, Inc., a marine construction contractor.¹² Tamico's bid,

¹ Agency Record (hereinafter R.) 4; Supplemental Agency Record (hereinafter SAR) 23 (site plan); R. 141 (bid compilation, item 695).

² See R. 13, 62. The project originally had a DBE goal of 15.4% which was reduced to 10.1% in response to a protest by Southeast asserting that as a civil construction contractor its ability to compete for the project against a contractor specializing in marine construction was unfairly reduced. See SAR 35-36; Protest Decision at 2.

³ R. 84-100.

⁴ R. 85.

⁵ Hatches were to be Baier Model BFHO or equal, oval, 15" x 24", with watertight removable covers. R. 86.

⁶ Specific requirements for the cathodic protection anodes were provided. R. 86.

⁷ The specifications include extensive requirements for painting. See R. 110-121.

⁸ R. 85.

⁹ R. 85.

¹⁰ R. 26, 28-32, 100.

¹¹ R. 28.

¹² Ex. A.

which subcontracted the earthwork to Southeast,¹³ was rejected for failure to meet the DBE goal or demonstrate a good faith effort to meet it, and the Department issued a notice of intent to award the contract to the next lowest bidder, Southeast.¹⁴

Southeast is primarily an earthwork contractor, with particular expertise in the uplands portion of the contract (clearing, excavation, rock crushing).¹⁵ It submitted a basic bid of \$8,327,674.¹⁶ Consistent with its expertise in earthwork, Southeast's bid offered to perform that portion of the work itself and to subcontract out most of the rest of the work, including all of the work on the floating dock, vehicle apron and lift, transfer bridge, access and intermediate ramps and assorted pilings and dolphins.¹⁷ That work, costing \$4,326,455, was to be subcontracted primarily to Tamico, except for the floating dock, bid schedule item 504(2), which was to be subcontracted to Johnson.¹⁸ Johnson is a general contractor, certified to perform work as a DBE in a broad variety of categories, including steel supply and marine dock construction.¹⁹

Bid schedule item 504(2) covered:

[P]roviding all labor, materials, equipment and incidentals necessary to furnish, fabricate and erect the bridge float structure; complete, in-place and accepted. Payment shall include furnishing all materials, fabrication and placement of the completed float structure including structural steel float system, cathodic protection anodes, paint or other specified coatings and all associated connection or other hardware as noted on the Plans and not measured or paid for elsewhere. Payment further includes furnishing and installing the float bollard mooring line attachment fixtures where noted on the Plans.^[20]

Southeast bid item 504(2) at \$1,404,300.²¹ Johnson is a DBE, and Southeast's bid represented that it would meet the required 10.1% DBE participation primarily through a subcontract with Johnson in the creditable amount of \$1,151,000,²² which was the price that Johnson had offered Southeast to furnish and install the Robishaw floats.²³ Robishaw, in turn, had offered Johnson to furnish the floats, with installed ballast compartment bulkheads, watertight hatches, anodes and

¹³ See SAR 44.

¹⁴ See SAR 41-52, 56-57.

¹⁵ SAR 35.

¹⁶ R. 141.

¹⁷ R. 135, 137.

¹⁸ *Id.* See R. 98-99, SAR 24, 26.

¹⁹ The administrative law judge takes official notice of Johnson's listing on the Department's records as shown online at <http://www.dot.state.ak.us/cvlrts/directory.shtml> (accessed April 25, 2011). A party may object to taking official notice in a proposal for action. See 2 AAC 64.300(a).

²⁰ R. 99.

²¹ R. 135.

²² R. 167.

²³ R. 184, 198.

exterior paint as required in the bid specifications, for a total of \$880,700, F.O.B. at its plant in Houston.²⁴ It quoted a price of \$54,560 for the lock assembly accessories, also F.O.B. at its plant in Houston.²⁵ (Robishaw had provided an identical quote to Western Marine.)²⁶

The Robishaw floats are proprietary and incorporate a patented interlock and framing system that the Department had used on numerous prior projects and planned on using for a number of planned similar Alaska Marine Highway terminal projects.²⁷ The Department had obtained approval to specify Robishaw floats as a sole source product for the Annette Bay project.²⁸ While the bid specifications permitted the contractor to utilize a subcontractor other than Robishaw to modify the basic steel floats, as a matter of trade practice Robishaw provides its floats engineered and fabricated to meet a purchaser's requirements for ballast compartment bulkheads, watertight hatches, anodes and paint, and the Department fully expected that this work would be performed by Robishaw.²⁹

The value of the raw materials (steel) incorporated into the finished steel floats is approximately \$255,000-\$297,500.³⁰ The cost of labor, miscellaneous materials and overhead to fabricate the basic steel floats and modify them to meet the bid specifications is approximately \$500,000.³¹ Painting the modified floats costs about \$93,000.³² Transporting the completed floats from the Robishaw plant in Houston to the project site will cost approximately \$75,000.³³ Assembling and installing the floats at the job site is a relatively simple job of several hours' work for a crew of three workers with no specialized training.³⁴

²⁴ R. 186.

²⁵ R. 186.

²⁶ Bid Protest, Ex. D.

²⁷ R. 129-130.

²⁸ R. 130.

²⁹ Supp. Decl. of K. Hart (April 22, 2011). See Department's Supplemental Memorandum at 2.

³⁰ Decl. of K. Hart, ¶4 (April 21, 2011). Mr. Hart estimates the weight of the finished product as \$425,000, and quotes an estimated price of \$0.60-70 per pound for steel.

³¹ Subtracting the cost of painting (\$93,000) and raw materials (\$255,000-\$297,500) from the cost of the finished product (\$880,700) leaves \$490,200-\$532,700 as the total cost for labor, miscellaneous materials (*e.g.*, hatches, locking assemblies), and overhead.

³² Decl. of K. Hart, ¶5 (April 21, 2011).

³³ Robishaw quoted a cost of \$75,000 for freight to Tacoma, Washington. R. 186. Johnson anticipated making its own shipping arrangements at a substantial savings. R. 182. However, given the additional distance to Annette Bay, it is reasonable to posit a total cost of transportation to that location that is equivalent to Robishaw's estimated cost for the shorter trip to Tacoma.

³⁴ See Ex. E ("The units are designed and dimensioned for ease of handling, freedom of transport, and simplicity of assembly. They can be rapidly installed by inexperienced personnel..."); Decl. of K. Hart, ¶10 (April 21, 2011).

B. Procedural History

Southeast's basic bid price was \$8,327,674, so it was required to provide documentation of DBE-creditable work in the amount of at least \$841,095.07 in order to be eligible for contract award. Southeast claimed \$1,298,970 in DBE-creditable work, based on creditable amounts of \$1,151,000 for work to be performed by Johnson under a subcontract issued in connection with bid schedule pay item 504(2), and \$147,970 for a subcontract with a concrete firm.

Western Marine filed a protest asserting that Johnson was acting as an extra participant, used to pass the value of the Robishaw floats through a DBE-certified subcontractor, and that because Johnson was not performing a commercially useful function for Southeast (beyond assembling the Robishaw floats, a task that Western Marine estimated was worth perhaps \$50,000),³⁵ Southeast should not be provided DBE credit for the value of the floats (\$880,700) or the attachments (\$54,560).³⁶

The procurement officer ruled that Johnson will not be acting as an extra participant, but rather as a purchaser and installer of materials (basic steel floats) who had sub-subcontracted out specialty fabrication services to the supplier of those materials (Robishaw) in accordance with standard trade practice.³⁷ The procurement officer estimated the value of Robishaw's specialty fabrication services (*i.e.*, bulkheads, hatches, anodes and painting) as \$188,542, and determined that portion of the value of the Johnson subcontract was not DBE-creditable.³⁸ However, because subtracting that portion of the value of the Johnson subcontract did not reduce Southeast's DBE credit below the 10.1% minimum, the procurement officer concluded that Southeast's bid was responsive.³⁹

³⁵ Protest at 4.

³⁶ Protest at 5.

³⁷ Protest Decision at 5-6.

³⁸ Protest Decision at 7. The procurement officer estimated that the cost of specialty fabrication, anode and painting was 20% of the total cost of materials, which the procurement officer stated was \$942,760. The Robishaw quotes in the record total only \$935,760, however.

³⁹ Protest Decision at 8. The bid documents indicate that this determination is a matter of responsibility, not responsiveness. *See infra*, note 43. Because the procurement officer treated it as a matter of responsiveness, and the neither party has objected to consideration of the protest appeal, it is not necessary to determine whether a responsibility determination may be raised in a protest filed under AS 36.30.

III. Discussion

On appeal, Western Marine contends that the procurement officer erred in determining that Johnson is providing a commercially useful function and that the procurement officer's estimate of the value of Robishaw's specialty fabrication services was arbitrary.⁴⁰

A. Applicable Solicitation Terms

The invitation to bid included the Department's standard DBE program provisions, contained in Section 120. Under Sec. 120-3.01, bidders (prime contractors) must submit written documentation of the work to be performed by DBE subcontractors and the dollar amount of their DBE-creditable work.⁴¹ Bidders can also receive DBE credit (in specified percentages) for direct purchases of materials and supplies from DBE firms, or as a DBE prime contractor or joint venturer.⁴² If a bidder cannot demonstrate the ability to meet the DBE goal (or document good faith efforts to do so), the bidder is considered not responsible.⁴³

In order to be eligible for the bidder's claimed DBE participation credit, a subcontractor must be certified by the Department in the category of work covering the commercially useful function to be performed under the subcontract.⁴⁴ A commercially useful function is defined in Section 120-1.04(2) as follows:

The execution of the work of the Contract by a DBE carrying out its responsibilities by actually performing, managing, and supervising the work involved using its own employees and equipment. The DBE shall be responsible, with respect to materials and supplies used on the Contract, for negotiating price, determining quality and quantity, ordering the materials, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, the Engineer will evaluate: the

⁴⁰ After the date for filing a protest had expired, Western Marine supplemented its initial protest with a challenge to Southeast's subcontractor list, asserting that Southeast's bid should have been declared non-responsive because its subcontractor list lacked required information. The procurement officer ruled that this issue was untimely and, in any event, that it lacked merit. The procurement officer's ruling was correct on both points. *See Computer Task Group, Inc. v. Division of General Services* at 3, OAH No. 07-0147-PRO (Commissioner of Administration 2007) (supplemental protest is untimely as to legal issues not within the scope of the initial protest); *Pinnacle Construction, Inc. v. Department of Transportation and Public Facilities*, at 7, OAH No. 09-0409-PRO (Commissioner of Transportation and Public Facilities 2010) (ITB construed as limiting required information to items required by AS 36.30.115(a)).

⁴¹ R. 64 (Sec. 120-3.01(2)(a), (b)).

⁴² *See* R. 66 (Sec. 120-3.03(1); R. 69 (Sec. 120-4.01).

⁴³ R. 64 (Sec. 120-3.01(2)(c)). *See also*, Sec. 120-2.01 ("A bidder shall demonstrate the ability to meet the DBE Utilization Goal or perform and document all of the required Good Faith Efforts under Subsection 120-3.02 in order to be eligible for award of this Contract.").

⁴⁴ R. 63 (Sec. 120-2.01) ("A DBE may be considered creditable towards meeting the DBE Utilization Goal at the time of Contract award, if the DBE is certified by the Department in a category covering the CUF to be performed at the time of listing on Form 25A-325C (DBE Utilization Report)").

amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the Contract is commensurate with the work it is actually performing, and the DBE credit claimed for its performance of the work. Other relevant factors will be considered. The determination of CUF is made by the Engineer after evaluating the way in which the work was performed during the execution of the Contract.^[45]

The definition is to be applied in light of the federal requirements for DBE programs, as stated in 49 C.F.R. §26.55.⁴⁶ Section 120-1.04(2) is substantially the same as current 49 C.F.R. §26.55(c)(1).⁴⁷

B. Johnson Will Perform A Commercially Useful Function

The definition of commercially useful function states that with respect to materials and supplies, a DBE subcontractor must be responsible for “negotiating price, determining quality and quantity, ordering the materials, and installing (where applicable) and paying for the material.” Western Marine concedes that Johnson is responsible for ordering and scheduling delivery of the steel floats, installing them and paying for them.⁴⁸ Western Marine argues that Johnson will not perform a commercially useful function with respect to the floats because it will not negotiate price or determine the quantity or quality of the floats provided by Robishaw.

Western Marine suggests that in the context of a sole-source specification, there is no price negotiation: the supplier unilaterally sets the price.⁴⁹ Similarly, it argues that when the owner has specified a sole source for the materials to be provided, the subcontractor who obtains those products from the specified source is not responsible for determining the quality of the products provided.⁵⁰ Lastly, Western Marine argues that the number of floats to be provided is

⁴⁵ R. 62 (Sec. 120-1.04(2)).

⁴⁶ See Sec. 120-1.02 (“It is the intent of this section to implement the requirements of 49 CFR, Part 26, and the Department’s federally approved DBE program.”).

⁴⁷ 49 C.F.R. §26.55(c)(1) states:

A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

⁴⁸ Western Marine Construction, Inc.’s Motion for Summary Adjudication (hereinafter, Motion) at 12.

⁴⁹ See Western Marine Construction, Inc.’s Reply in Support of its Motion for Summary Adjudication (hereinafter, Reply) at 6.

⁵⁰ Motion at 13-14.

fixed by the project plans, and thus Johnson has no responsibility to determine quantity.⁵¹ Because of Johnson's lack of responsibility for the materials it will supply, Western Marine argues that Johnson is an extra participant, simply acting as a DBE conduit through which funds are passed in order to for the prime contractor to obtain DBE credit.⁵²

These arguments are mistaken. In the first place, that a subcontractor's ability to negotiate price may be limited does not mean that it is entirely non-existent. In this case, Johnson cannot negotiate price with multiple offerors, but it can negotiate price with Robishaw. Moreover, Johnson is entirely responsible for making sure that Robishaw provides the correct number of floats, in the dimensions specified in the bid documents. Finally, Robishaw's quote to Johnson expressly asserted that in providing the specially modified steel floats, Robishaw was exempt from the contractor quality controls specified in the bid documents.⁵³ Robishaw's stance means that Johnson has assumed responsibility for compliance with those specifications.⁵⁴

More fundamentally, Western Marine's suggestion that Johnson is an extra participant is mistaken. An extra participant or "pass-through" is an entity "through which funds are passed in order to obtain the appearance of DBE participation."⁵⁵ To determine whether an entity is acting as an extra participant, the procurement officer "must examine similar transactions, particularly those in which DBEs do not participate."⁵⁶ In this case, the prime contractor, Southeast, has no expertise in marine construction and it subcontracted out all of the work in that category. For bid item 504(2), Southeast selected a DBE-qualified subcontractor rather than Tamico, to whom Southeast had subcontracted the remainder of the marine construction work. Johnson, as a general contractor DBE-certified in steel supply and marine dock construction, was able and DBE-certified to construct a floating marine dock. Johnson is no more an extra

⁵¹ *Id.*

⁵² Motion at 12.

⁵³ Robishaw's quote states that the floats "will be manufactured in accordance with our commercial design, specifications and established quality assurance programs....As stated in Section 504 of the subject bid documents, the Flexifloat units will be supplied as manufactured by [Robishaw] and are excluded from fabricator qualifications and quality control specifications." R. 186.

⁵⁴ As noted above, the Department contemplated that the specialty fabrication work would be performed by Robishaw. *Supra*, p. 4. On appeal, the Department argues that the extensive and detailed bid specifications governing metal fabrication applied to that portion of the work. *See* [Department's] Memorandum in Support of Cross-Motion for Summary Adjudication (hereinafter, Cross Motion) at 11. For present purposes, it is not necessary to determine whether the Department's interpretation of those specifications is correct. It is sufficient to observe that as between Johnson and Robishaw, Johnson has assumed responsibility for compliance with them, to the extent they apply.

⁵⁵ 49 C.F.R. §26.55(c)(2).

⁵⁶ *Id.*

participant or a pass-through with respect to bid item 504(2) than Tamico is with respect to the remainder of the marine construction work. Johnson will provide exactly the same commercially useful function for Southeast that a non-DBE subcontractor such as Tamico would have provided with respect to bid item 504(2): contact Robishaw, order up the steel floats, arrange for their timely delivery, make sure they are acceptable as to size, quantity and quality as delivered, install them at the job site, and pay Robishaw for the materials provided. That the owner specified the materials to be used does not alter Johnson's responsibility for this portion of the work.

Western Marine argues that because the actual portion of the work performed by Johnson employees will be less than 30% of the value of the subcontract, pursuant to 49 C.F.R. §26.55(c)(3) Southeast is not entitled to a DBE credit for Johnson's subcontract.⁵⁷ However, in promulgating subsection (c)(3), the federal Department of Transportation expressly noted that the 30% limitation does not apply if the DBE subcontractor has been determined to be providing a commercially useful function:

The comments opposing this proposal [the 30% requirement] may have misunderstood its implications for material-intensive contracts. This provision...does not interfere with such contracts: if the contractor is responsible for the materials (*i.e.*,...if the DBE negotiates price, determines quantities, orders the materials, and installs and pays for the material itself), the portion of the contract represented by the materials is viewed as being performed by the contractor.^[58]

Because Johnson has full responsibility to order all materials needed to perform the work under its subcontract with Southeast, to arrange for timely delivery, make sure the materials are acceptable as to size, quantity and quality as delivered, install them, and pay for them, the procurement officer correctly determined that Southeast may claim DBE credit for the marine construction work it subcontracted to Johnson.

C. The Steel Floats Furnished and Installed By Johnson Are Fully Creditable

The procurement officer characterized the basic steel floats as "materials" entitled to DBE credit pursuant to 49 C.F.R. §26.55(a)(1) and the specialty fabrication work as a subcontract, for which DBE credit is not allowed pursuant to 49 C.F.R. §26.55(a)(3).⁵⁹ Western

⁵⁷ Reply at 4. 49 C.F.R. §26.55(c)(3) states: "If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force,...you must presume that it is not performing a commercially useful function."

⁵⁸ 62 Fed. Register 29563.

⁵⁹ See Reply at 10-11.

contends that the procurement officer erred by providing any DBE credit at all for the floats, since Johnson played no more of a role in the fabrication of the basic steel floats than it did in the specialty fabrication, and under Sec. 120-3.03(2)(f), work is not creditable unless it is “performed, controlled, managed, and supervised by [the DBE].”⁶⁰

Western Marine’s argument and the Department’s response conflate two separate issues: first, whether the DBE subcontractor is performing a commercially useful function for the prime contractor; and second, to what extent is the value of the DBE subcontract credited to the prime contractor’s DBE goal. This is not surprising, since the definition of “commercially useful function” as stated in Sec. 120-1.04(2) itself conflates those two separate issues.⁶¹ With respect to the first issue, whether the subcontractor is performing a commercially useful function, there is, as Western Marine points out, no reason to distinguish between Johnson’s role with respect to fabrication of the basic steel floats and its role with respect to specialty fabrication. But whether a subcontractor is performing a commercially useful function with respect to materials and supplies depends on whether the subcontractor is responsible for negotiating price, determining quality and quantity, ordering, installing and paying for the materials, not on whether the subcontractor is responsible for fabricating them. As discussed in the preceding section, the undisputed facts in this case establish that Johnson will be providing a commercially useful function to Southeast, even though it will not itself fabricate the basic steel floats or modify them to meet the bid specifications. A subcontractor need not fabricate all of the products that it uses in the performance of its work for the prime contractor in order for the prime contractor to receive DBE credit for work that is the subject of the subcontract.

With respect to the second issue, the amount of DBE-creditable work to be performed, it is true that work that a DBE subcontractor sub-subcontracts out to a non-DBE entity is not DBE-

49 C.F.R. §26.55(a)(1) states: “Count the entire amount of that portion of a construction contract...that is performed by the DBE’s own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract....”

49 C.F.R. §26.55(a)(3) states: “When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE’s subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.” An equivalent prohibition against counting sub-subcontracted work is set forth in Sec. 120-3.03(2)(f)(4) (“There will be no DBE credit for lower-tier non-DBE subcontract work.”).

⁶⁰ See Reply at 4-5.

⁶¹ The definition states that “[t]he determination of CUF is made by the Engineer after evaluating the way in which the work was performed during the execution of the Contract.” In this respect, Section 120-1.04(2) differs from 49 C.F.R. §26.55, which addresses whether a DBE is performing a commercially useful function on subsection (c), and addresses the creditability of specific expenditures in subsection (a).

creditable. Whether the sub-subcontract consists of fabricating raw materials into a finished product, or specialty modification of a finished product to conform to the bid specifications, the value of a sub-subcontract is excluded from the DBE-creditable value of the DBE's subcontract. But to say that work sub-subcontracted out is not creditable does not shed any light on whether the transaction between Johnson and Robishaw should be characterized as a purchase order for materials (and thus creditable) or a sub-subcontract for fabrication (and thus not creditable). The procurement officer's decision essentially treats the transaction as a purchase order for materials with respect to the basic steel floats, and as a fabrication sub-subcontract with respect to their modification. Western Marine argues that this characterization of the transaction rests on an artificial distinction, and that rather than being divisible the transaction should be treated as a unitary fabrication sub-subcontract.⁶² It is equally arguable, however, that the entire transaction should be treated as a purchase of materials.

In determining whether a particular transaction between a subcontractor and a third party should be characterized (for purposes of allowing DBE credit) as a materials purchase or a fabrication sub-subcontract, it is notable that nothing in the relevant federal regulation or in Section 120 suggests that the terms "materials" is limited to raw materials and cannot under any circumstances include fabricated products. It is also notable that the federal Department of Transportation has specifically stated that the policy goals of the DBE program are met when a DBE subcontractor under a furnish and install subcontract is provided a 100% credit for materials furnished under the subcontract, even though the materials were not manufactured by a DBE, and even though the prime contractor would not have been entitled to DBE credit if it had purchased the same materials directly from the manufacturer.⁶³ These considerations suggest that creditable materials can include a relatively broad spectrum of items, including (in appropriate circumstances) fabricated products.

The central consideration in determining whether to include particular products obtained by a DBE subcontractor as creditable materials or as sub-subcontracted fabrications is the nature of the work encompassed by the subcontract in question. That is to say, the "work" that a DBE subcontractor must perform, control, manage, and supervise, as stated in Sec. 120-3.03(2)(f), is

⁶² Reply at 2-4.

⁶³ 64 Fed. Reg. 5116 (February 2, 1999) (noting policy supports providing 100% credit to furnish and install DBE contractor but only a 60% credit to non-DBE contractor who obtains goods manufactured by a non-DBE manufacturer from a DBE regular dealer).

the work that is subcontracted to it.⁶⁴ Thus, if the contractor's anticipated performance, in light of trade practice, the Department's prior course of dealing, the bid specifications, and any other relevant considerations, includes fabrication of particular products, then the purchase of those products by a DBE subcontractor from a manufacturer might reasonably be characterized as a fabrication sub-subcontract. By contrast, if the contractor's anticipated performance is limited to obtaining products fabricated by others, then their purchase by a DBE subcontractor from that same manufacturer might reasonably be characterized as a purchase of materials.

In this particular case, the Department specified the use of Robishaw floats because those floats had been used previously in similar projects and were anticipated to be used in future projects. Robishaw is a manufacturer, not a construction contractor, and the Department contemplated that the prime contractor would either purchase the floats directly from Robishaw, or subcontract out the work of obtaining and installing them. Moreover, as previously mentioned, the Department contemplated that the specialty fabrication work involved would also be performed by Robishaw, in conformity with its standard course of dealing in transactions involving the Department, no matter who performed the work described in bid item 504(2). Thus, from the Department's perspective, the work subcontracted by the prime contractor to Johnson was a furnish and install task for steel floats to be purchased in modified form from Robishaw, not a fabrication task (either as to the basic float or the modified float) that either the prime contractor or the subcontractor would have any responsibility for: the Department had taken the fabrication element of the work out of their hands altogether.⁶⁵ Had the prime contractor elected to purchase ("furnish") the floats itself and to subcontract out installation to Johnson, then it would have been entitled to DBE credit only for the cost of installation.⁶⁶ But because it elected to subcontract out the entire task the Department had asked it to perform under bid item 504(2) to Johnson, the prime contractor is entitled to DBE credit for the cost of the product installed by Johnson as well as for the cost of Johnson's own labor to install it.⁶⁷

⁶⁴ The language in Sec. 120-3.03(2)(f) reflects the wording of former 49 C.F.R. §23.47(d)(1): "[A DBE] is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing, and supervising the work involved."

⁶⁵ This is not to say that the Southeast would not have been entitled to credit if the Department had not specified the manufacturer. The central issue is not the identity of the manufacturer, but whether fabrication was the contractor's responsibility.

⁶⁶ See note 64, *supra*.

⁶⁷ *Id.*

Because the entire value of the modified floats is DBE-creditable, it is not necessary to determine whether the procurement officer correctly calculated the value of basic steel floats.

IV. Conclusion

Because Johnson will perform a commercially useful function, Southeast is entitled to DBE credit for work performed by Johnson under its subcontract with Southeast. Because the bid specifications call for the prime contractor to furnish and install products specified by the Department, and the prime contractor subcontracted that work to Johnson, the procurement officer had discretion to include the entire cost of those products as materials within the meaning of 49 C.F.R. §26.55 for purposes of calculating the amount of Southeast's DBE credit. Western Marine's appeal is therefore denied.

DATED May 6, 2011.

By: Signed
Andrew M. Hemenway
Administrative Law Judge

Adoption

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 1st day of June, 2011.

By: Signed
Signature
Marc A. Luiken
Name
Commissioner, Alaska DOT&PF
Title

[This document has been modified to conform to the technical standards for publication.]