

CITY OF PHILADELPHIA PENNSYLVANIA

OFFICE OF THE CONTROLLER

Promoting honest, efficient, and fully accountable government

Division of Aviation
Contract Compliance Investigation
Terminal D-E Expansion Project
Ernest Bock and Sons, Inc., Contractor

AUDITOR'S REPORT
July 2010



City Controller
ALAN BUTKOVITZ



CITY OF PHILADELPHIA

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The Office of the City Controller conducted a special investigation of a construction contract between the City of Philadelphia's Division of Aviation (DOA) and Ernest Bock and Sons, Inc. Our investigation was conducted pursuant to Section 6-400 (c) of the Philadelphia Home Rule Charter. A synopsis of the results of our work is provided in the executive summary to this report. The conditions giving rise to the findings and recommendations contained in this report occurred under the former director of the DOA.

We believe that our recommendations, if implemented by management, will improve the effectiveness of the Division of Aviation pertaining to the administration and monitoring of City funded infrastructure contracts.

We would like to express our thanks to you and your staff for the courtesy and cooperation displayed during the conduct of our work.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Alan Butkovitz'.

ALAN BUTKOVITZ
City Controller

cc: Honorable Michael A. Nutter, Mayor
and Members of the Mayor's Cabinet
Honorable Anna C. Verna, President
and Honorable Members of City Council



DIVISION OF AVIATION CONTRACT COMPLIANCE INVESTIGATION EXECUTIVE SUMMARY

Why The Controller's Office Conducted the Investigation

The Office of the City Controller conducted a special investigation of the Division of Aviation's Contract Number 074063 with Ernest Bock & Sons, Inc. (EBS). This investigation was to assess this contractor's compliance with the minority, women and disabled owned business enterprise (M/W/DSBE) requirements of the \$35.9 million net bid contract. We initiated this investigation in response to the following allegations which were received by our office:

- EBS inflated its minority business enterprise (MBE) participation goals in order to obtain the City contract and subsequently reduced or eliminated the pledged goals after award of the contract.
- One of the participating minority subcontractors was utilized as a pass-through to satisfy the minority participation requirements.

We conducted this investigation pursuant to the requirements of Section 6-400 (c) of the Philadelphia Home Rule Charter.

What The Controller's Office Found

Based on our investigations and analysis, we determined that EBS was not in compliance for the following reasons:

- EBS' bid included minority businesses which were not utilized on the construction project in accordance with its participation commitments and the City's anti-discrimination policy.
- EBS did not require its minority subcontractors to execute distinct elements of work for \$3.95 million of its minority participation commitments or 11% of its bid.
- EBS failed to comply with the contract terms requiring payment of M/W/DSBE subcontractors.

In our opinion these conditions of non-compliance occurred because Division of Aviation and the Office of Economic Opportunity failed to adequately monitor and enforce the anti-discrimination provisions of the contract.

What The Controller's Office Recommends

The Controller's Office has developed a number of recommendations to address our findings. Detailed recommendations can be found in the body of the report.

- The City should initiate administrative sanctions against Ernest Bock & Sons, Inc., Circle Construction, LLC, Atrium International, and DB Interiors, including but not limited to debarment from submitting and/or participating in future City Contracts for a period of up to three (3) years.
- EBS should be directed to provide documentation of its payments in full to M/W/DSBE subcontractors for work performed or be directed to pay any outstanding balances due to M/W/DSBE subcontractors.
- The Office of Economic Opportunity and the Division of Aviation should devise and implement strategies to improve the monitoring and enforcement of contract activities for City funded contracts.

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BACKGROUND

The Controller's Office conducted a special investigation of Ernest Bock & Sons, Inc.'s compliance with the terms and conditions of a City of Philadelphia contract with the Division of Aviation. More specifically we investigated issues related to this firm's compliance with the City anti-discrimination policy.

The investigation was initiated in response to information received by our office alleging that Ernest Bock & Sons (EBS) inflated its minority business enterprise (MBE) participation goals in order to obtain the City contract and subsequently reduced or eliminated the pledged goals after award of the contract.

To help put the results of our investigation into perspective an overview of the relevant issues related to the City's contracting and bidding process, the anti-discrimination policy, the contract, and key entities and contract participants is provided.

Contracting and Bidding Process

Public works contracts are awarded by the City through an open bid process based on specific terms and conditions that are included in advertised bid notices. Bids are submitted by qualified vendors to the City's Procurement Department following specific guidelines. Sealed Bids are publicly opened and read in the presence of Procurement and Controller representatives, and the bidding public. An apparent low bidder is selected based on price. Final determination of award of contract is made by Procurement to the lowest responsible bidder after assessment of the bid and review by Office Economic Opportunity (OEO) for responsiveness to and compliance with the City's Anti-discrimination Policy. If the apparent low bidder is disqualified, Procurement will consider the second low bidder for the award.

Anti-discrimination Policy

In conformity with Executive Order No. 2-05, the City of Philadelphia has "established an anti-discrimination policy ("Policy") relating to the participation of Minority (MBE), Women (WBE) and Disabled (DSBE) Owned Business Enterprises in City contracts. The purpose of this Policy is to provide equal opportunity for all businesses and to assure that City funds are not used, directly or indirectly, to promote, reinforce or perpetuate discriminatory practices."

To achieve the City's anti-discrimination contracting objectives, the Office of Economic Opportunity [formerly the Minority Business Enterprise Council (MBEC)] approves projected ranges of participation for invitations and bids which serve as a guide in determining each bidder's responsibility. "These ranges represent the percentage of MBE, WBE and/or DSBE (collectively, "M/W/DSBE") participation that should be attained by M/W/DSBEs from business opportunities existing in the available market absent discrimination in the solicitation and selection of these businesses." The participation ranges (or goals) are based upon an analysis of factors such as the size and scope of the contract and the availability of certified M/W/DSBEs to perform various elements of the contract. The Office of Economic Opportunity is also responsible for monitoring the participation of M/W/DSBEs in City awards for City departments and certain quasi-governmental agencies.

All bidders are informed that the submission of a “Solicitation For Participation and Commitment Form” and any supporting documentation is an element of responsiveness to the bid and failure to submit the required information will result in rejection of their bid. Bidders are asked to verify that all forms, information and documentation submitted to MBEC are true and correct. They are also notified that the submission of false information by a bidder is subject to the penalties of 18 Pa.C.S. Section 4904 relating to unsworn falsification to authorities.

OEO reviews the type of participation included for each M/W/DSBE to determine whether the subcontractor will perform a commercially acceptable function. All bidders are provided the following instructions regarding the City’s anti-discrimination policy:

“No bidder that seeks to meet the participation range(s) for participation by entering into subcontracts with any M/W/DSBE subcontractor shall be considered to meet the range(s) if the M/W/DSBE subcontractor does not perform a commercially acceptable function (“CAF”). A M/W/DSBE is considered to perform a CAF when it engages in meaningful work or supply effort that provides for a distinct element of the subcontract (as required by the work to be performed in accordance with the Bid Specification), where the distinct element is worthy of the dollar amount of the subcontract and where the M/W/DSBE carries out its responsibilities by actually performing, managing and supervising the work involved.”

In addition, the City’s anti-discrimination policy requires M/W/DSBE subcontractors to perform at least 50% of the cost of the subcontract (not including the cost of materials, equipment or supplies incidental to the performance of the subcontract) with their own employees.

Contract #074063

Contract #074063 is part of a \$341 million Terminal D/E Expansion Project with Division of Aviation (DOA) which was financed by several sources including airport revenue bonds, passenger facility charges, and Transportation Security Administration (TSA) funds (see Table 1). This project consists of a new multi-level connector building between Terminals D and E, a 50,000 square foot addition to the Terminal E concourse, a 9,000 square foot connector building between Baggage Claims D and E, and renovations to various areas within the two terminals and the adjacent Satellite Thermal Plant.

The City had originally invited contractors to bid on the entire Terminal D/E Expansion Project as one contract in April 2006; but, later decided to divide the project into small packages that would be put out to bid in phases.

Phases 1A and 1B are the new multi-level connector building between Terminals D and E. The first level houses a new baggage make-up area, which replaces the existing areas in each of the terminals. This area also contains an Explosive Detection System (EDS) to be operated by the TSA as part of an in-line baggage screening system. The second level is a 14-lane passenger security screening area serving both terminals. The third level houses Division of Aviation offices and has a space for an airline club. Phase 1A consisting of site work, building foundations, utility relocation and structural steel placement for the connector building has been completed.

In October 2006, the City invited contractors to bid on Phase 1B of the project. Anti-discrimination contracting requirements were applicable to the invitation and bid for Contract

#074063. The MBEC-approved participation goals for Contract #074063 were 15%-20% for MBE firms; 3%-5% for WBE firms; and best efforts for DSBE firms. Accordingly, the inclusion of M/W/DSBE participation commitments in its Bid would benefit a prime contractor in obtaining the City contract.

During a public bid opening on December 5, 2006, EBS was selected as the apparent low bidder under Bid #6847 and was subsequently awarded Contract #074063 (based on \$35.9 million net bid amount). Contract #074063 was for the general construction portion of Phase 1B which includes the building envelope, interior finishes, furniture, etc., to complete the connector building. Work under the contract commenced in August 2007 and is projected to be completed in December 2010.

Key Entities and Participants

In addition to the Office of Economic Opportunity, the following entities and City agencies were significant in our investigations: The Division of Aviation, Ernest Bocks & Sons, Inc., Circle Construction, LLC, Atrium International, Inc., DB Interiors, and Ritter Consulting, Inc. Below is a brief background on each of these parties.

Division of Aviation

The Division of Aviation (“DOA”) was established under the Commerce Department, by the 1951 Philadelphia Home Rule Charter, to operate the Philadelphia International Airport (PHL) and Philadelphia Northeast Airport (PNE). DOA operates the Philadelphia Airport System (“the Airport”), which is owned by the City of Philadelphia, as a self-sustaining entity and is therefore responsible for the granting of all leases and licenses in the operation and use of its facilities. The Director of Aviation, assisted by the Deputy Directors of Administration and Finance, Operation and Maintenance, Planning and Development, and Public Affairs and Marketing is responsible for the management and operation of the Airport.

Ernest Bock & Sons, Inc

Ernest Bock & Sons, Inc. (EBS) is a general construction and construction management firm founded in 1949. EBS has been performing work on City and City-related projects since 1996 and has been awarded over \$224 million of City contracts. EBS currently has three separate contracts with DOA whose total maximum contract value is approximately \$118 million. In December 2006, EBS was selected as apparent lowest responsible bidder under Bid #6847 and was subsequently awarded Contract #074063 (based on their \$35.9 million net bid amount). As a result of numerous change orders associated with the contract, EBS’ total contract limit to complete the general construction project at the Philadelphia International Airport was increased to \$41.7 million in June 2009.

Circle Construction, LLC

Circle Construction, LLC (Circle Construction) is a New Jersey-based minority firm that was established on January 12, 2006 by Joseph Patterson, an African-American contractor, and John Orsini, his non-minority former partner. The partnership percentages were 51% and 49%, respectively. Circle Construction was certified, for one year, as a minority owned and controlled

company by the New Jersey Commerce & Economic Growth Commission on February 16, 2006, and applied for certification by the City of Philadelphia, Minority Enterprise Council (MBEC) on February 17, 2006. MBEC approved Circle Construction's reciprocal certification as minority business enterprise on March 3, 2006.

In March 2006, EBS included Circle Construction, LLC in its original bid (Bid #6839) for the Terminal D/E Expansion Project as an \$11.4 million subcontractor. The proposed subcontract for Circle Construction was for baggage handling (conveyor) systems work although Circle Construction had no prior experience in performing this type of work. A copy of Circle Construction's March 7, 2006 proposal to EBS for this bid is included in Appendix B. Some time after that, the City decided to cancel the bid opening and re-bid the project. In December 2006, EBS included Circle Construction, LLC, as a \$3.95 million (or 11%) subcontractor, in its general construction bid (Bid #6847) for Phase 1B of the revised Terminal D/E Expansion Project. EBS' bid indicated that Circle Construction's contract was for GWB/Carpentry work. Circle Construction's quote/proposal to EBS was in the form of a one paragraph letter, dated December 4, 2006, which stated:

“Circle Construction, LLC will furnish and install all Rough/Finish Carpentry and Drywall/Metal Stud work for the above-mentioned project for the sum of \$3,950,000.00. This estimate was based on plans/specs viewed at your office.”

However, as is explained more fully in Findings #1, our investigation revealed information that cast doubt upon these representations.

A copy of Circle Construction's quote/proposal letter is included in Appendix C.

Atrium International, Inc.

Atrium International, an MBEC certified minority subcontractor, was included in EBS' bid for \$450,000 of finish flooring work representing 1.3% of EBS' bid. Atrium International contract with EBS was subsequently amended to include \$2.4 million of the Rough/Finish Carpentry and Drywall/Metal Stud work originally awarded to Circle Construction. Atrium International did not perform any of the additional Rough/Finish Carpentry and Drywall/Metal Stud work with its own workforce.

DB Interiors

DB Interiors (DBI) a non-MBEC certified and non-minority owned firm performed Rough/Finish Carpentry and Drywall/Metal Stud work which had been identified as minority participation in EBS' bid and subcontracted to Circle Construction and Atrium International. DBI was purportedly a third-party subcontractor to Circle Construction and later to Atrium International. However, our investigation revealed that DBI started work for EBS on the Terminal D/E Expansion Project 28 days prior to the date Circle Construction signed its contract with EBS, and prior to Circle Construction issuing a contract to DBI. DBI was paid approximately \$2.9 million for work on Contract #07-4063.

Ritter Consulting, Inc.

Ritter Consulting, Inc., an MBEC-certified woman-owned firm, was included in EBS' bid to perform \$1.2 million of ceilings and painting work representing 3.3% of EBS' total bid.

Table 1			
FUNDING SOURCES			
Terminal D-E Expansion & Modernization Projects			
	Approved	Anticipated Change	Revised Total
<u>Airport Revenue Bonds</u>			
2001B	33,290,000		33,290,000
2005A	91,500,000		91,500,000
2005B	38,000,000		38,000,000
2007A	4,000,000		4,000,000
Total Bonds	166,790,000	0	166,790,000
Passenger Facility Charges	146,750,000	9,000,000	155,750,000
TSA Funds	18,000,000	0	18,000,000
TOTAL	331,540,000	9,000,000	340,540,000

OBJECTIVES, SCOPE, AND METHODOLOGY

The scope of this investigation comprised a review of Ernest Bock & Son, Inc.'s compliance with the terms and conditions of Contract #074063. Our investigation included, but was not limited to, an assessment of Ernest Bock & Sons, Inc.'s compliance with anti-discrimination provisions of Contract #074063 requiring the fulfillment of specified minority, women and disabled owned business enterprise (M/W/DSBE) commitments.

As part of our fieldwork, we investigated the validity of the following allegations received by our office:

- EBS had inflated its minority business enterprise (MBE) participation goals in order to obtain the City contract and subsequently reduced or eliminated the pledged goals after award of the contract.
- One of the participating minority subcontractors was utilized as a pass-through, in which a commercially acceptable activity was not provided, to satisfy the minority participation requirements.

Investigation procedures applied included the following:

- Interviewing management and representatives of EBS, EBS' subcontractors, and the City of Philadelphia.
- Reviewing and analyzing various documents, reports, laws, regulations and other pertinent data obtained from EBS, EBS' subcontractors, the City and other relevant sources.

To put our findings into perspective, the City and the public should know that some of the factual substantiation for this report was provided by Joseph Patterson, CEO of one of the minority firms that participated in alleged misrepresentations to the City. We obtained information from interviews with Joseph Patterson. Mr. Patterson provided the Controller's Office with copies of emails containing discussions and admissions which add to the reliability and truthfulness of his stated facts. Our investigators also conducted other substantive interviews with relevant parties and obtained supporting documentation.

Our investigation revealed the following findings:

Finding 1: Minority business participation commitments were overstated in EBS' bid.

Ernest Bock & Sons, Inc.'s bid included minority businesses which were not utilized on the construction project in accordance with its participation commitments and the City's anti-discrimination policy.

EBS secured Contract #074063 through the Division of Aviation (DOA) based on a \$35.9 million net bid amount which included minority business participation commitment levels that were later found to be overstated. Our investigation revealed that minority subcontractors did not perform distinct elements of work for the 11% of EBS' bid constituting \$3.95 million of its minority participation commitments.

Under the terms and conditions of Contract #074063, EBS was required to make good faith efforts to utilize M/W/DSBE subcontractors in accordance with its "Solicitation For Participation and Commitment Form (BID)" which included participation levels of 12.3% for minority firms and 3.3% for women-owned firms. EBS' approved participation levels included:

- 11.0% MBE participation commitment to Circle Construction, LLC for GWB/Carpentry work;
- 1.3% MBE participation commitment to Atrium International for finish flooring; and
- 3.3% WBE participation commitment to Ritter Contracting for ceilings and painting.

Based on EBS' bid, MBEC determined the firm's participation commitments were responsive to the approved ranges for this contract. However, after the City awarded the contract to EBS as the low bidder, the firm reduced or eliminated its pledged commitments and utilization of minority business enterprises on the project. In our opinion, the EBS' bid would not have been judged as responsive without the 11.0% minority business participation which was purported to be committed to Circle Construction. Without the commitment to Circle Construction, EBS's minority participation would have only been 1.3% -- a percentage that in the context of this bid should not be viewed as responsive. Therefore, in our opinion, EBS would not have been awarded the contract.

Although Circle Construction submitted a proposal letter to EBS which is dated December 4, 2006, the day before the public bid opening, our investigation revealed information that contradicted the validity of Circle Construction's representation that its quote/proposal to EBS was based on their review of plans and specification for the project. In a March 19, 2008 email from Joseph Patterson to Thomas Bock, an EBS Vice President, Mr. Patterson makes the following comments:

“Before you got the contract, you told me you would furnish me with bid information knowing that I have limited experience with bidding union projects. You said you would have your staff teach me and/or my wife the billing process. You said I would be able to put a crew on the job and set me up with your sub so I would have enough people to staff the project. You said you would help me finance the job and give me an advance if needed.”

Furthermore, during an interview with Joseph Patterson, he informed our investigators that he did not know what EBS’ bid included for Circle Construction’s participation until after the bid opening. He said *“they just put me in the bid.”*

EBS issued a subcontract with Circle Construction in November 2007 and terminated its relationship with Circle Construction in March 2008 without informing the City or obtaining prior approval for the change in its minority participation commitment. In an August 08, 2008 letter to the Thomas Varughese of DOA, regarding EBS’ contract with Circle Construction, Anthony J. DePascale included the following statement: *“Termination Date – Approximately the end of February 2008 – beginning of March 2008.”* After terminating its contractual relationship with Circle Construction, EBS later executed an agreement with Atrium International for \$2.4 million of the GWB/Carpentry work that had been originally awarded to Circle Construction. However, neither minority-owned business performed any of this GWB/Carpentry work. Instead, the work was performed by DBI, a non-minority owned firm.

Finding 2: EBS’ M/W/DSBE subcontractors did not perform commercially acceptable functions in compliance with the City’s Anti-discrimination Policy.

Paragraph 34, Subcontracts, of the City’s *Standard Contract Requirements for Public Works Contract* establishes obligations for prime contractors to monitor subcontractors’ compliance with the terms and conditions of City contracts:

“The Contractor shall be as fully responsible to the City for the acts and omissions of its Subcontractors and Persons either directly or indirectly employed by them, as it is for the acts and omissions of the Contractor and Persons directly or indirectly employed by the Contractor.”

Accordingly, EBS had a duty to insure that its minority subcontractors were in compliance with the commercially acceptable function (CAF) requirements of City’s Anti-discrimination Policy.

We found that neither Circle Construction nor Atrium International performed commercially acceptable functions for Rough/Finish Carpentry and Drywall/Metal Stud work purportedly subcontracted to them by EBS. This work was performed by DB Interiors. Thus, EBS’ M/W/DSBE percentage commitments were not maintained throughout the term of Contract #074063. Therefore, EBS was not found to be in compliance with Section B (Responsibility), Paragraph 1 of the City’s anti-discrimination policy which states:

“Upon award, the completed Solicitation For Participation and Commitment Form and accompanying documents regarding solicitation and commitments with MBEs, WBEs and DSBEs become part of the contract. M/W/DSBE percentage commitments are to be maintained throughout the term of the contract and shall apply to the total contract value

(including approved change orders and amendments). Any change in commitment, including but not limited to substitutions for the listed firm(s), changes or reductions in the work and/or listed dollar/percentage amounts, must be pre-approved in writing by the MBEC.”

During our investigation, Circle Construction’s CEO, Joseph Patterson, claimed that his firm was denied the opportunity to participate in the contract to the extent of its capacity. Mr. Patterson informed us that after the City awarded Contract #074063, EBS negotiated terms and conditions with DBI, a non-minority firm, to perform all of the GWB/Carpentry work which had been identified as minority participation in EBS’ contract with the City.

It was Mr. Patterson’s assertion that he provided EBS blank copies of Circle Construction’s letterhead at EBS’ request, and this blank letterhead was used to prepare a subcontract between Circle Construction and DBI. Joseph Patterson claimed he did not participate in the discussions with DBI regarding any of the terms and conditions of the contract. He stated he simply signed the contract because EBS agreed to pay Circle Construction 3% of the \$3.95 million subcontract plus reimbursement for any project related expenses incurred by Circle Construction.

Consistent with Mr. Patterson’s claims, the Controller’s Office obtained copies of certified payroll records from the Division of Aviation which shows that DBI started work on the Terminal D/E Expansion Project under EBS’ contract on November 1, 2007. As previously stated this was twenty-eight days prior to Circle Construction signing a subcontract with EBS on November 28, 2007. In addition, we obtained a copy of the Circle Construction/DBI contract which is substantially the same as the contract between Circle Construction and EBS. The major differences are the names of the parties, the amount of the contracts and the dates. Our investigators also obtained copies of EBS checks which were written to Circle Construction and endorsed by Mr. Patterson as payable to DBI.

Furthermore, statements in a March 19, 2008 email from Joseph Patterson to Thomas Bock, EBS’ vice president, at 8:49 AM support Patterson’s claim that he did not negotiate Circle Construction’s subcontract with DBI. The following comments refer to a meeting between Joseph Patterson, Anthony J. DePascale (EBS’ vice president and project manager for the Airport), and Ken Jackson, DB Interiors’ representative.

“Soon after the contract with the airport was awarded, I realized that I allowed myself to be fooled. The first time I met with Anthony and Ken Jackson, the look of confusion on their face when I mentioned putting a crew on the job was priceless”

DB Interiors was purportedly a third-party subcontractor to Circle Construction.

In the same March 19, 2008 email to Thomas Bock, Joseph Patterson made the following statements:

“When we first met two years ago, you gave me the impression that you were impressed by my knowledge and talents. What I have realized now is that you wanted a minority contractor that the City of Philadelphia was not familiar with so you get your contract at the airport, at the same time saying whatever necessary to get me to agree to work with you.”

Mr. Patterson went on to make statements indicating that Thomas Bock knew Circle Construction did not have the experiential or financial capacity to perform the subcontract awarded by EBS:

“Before you got the contract, you told me you would furnish me with bid information knowing that I have limited experience with bidding union projects. You said you would have your staff teach me and/or my wife the billing process. You said I would be able to put a crew on the job and set me up with your sub so I would have enough people to staff the project. You said you would help me finance the job and give me an advance if needed. All this was with the intention of starting what I thought was a working relationship leading to other projects and joint ventures so I could build my bonding capacity.”

Although a review of the above referenced emails reasonably leads to the conclusion that EBS knew or reasonably should have known of Circle Construction’s limited experiential and financial capacities, Thomas Bock reaffirmed his purported commitment to Circle Construction in a May 10, 2007 letter to Thomas Varughese, DOA’s Project Manager. Mr. Bock’s letter included the following statement:

“I wish to confirm that EBS has no intention on replacing Circle Construction LLC as one of our proposed minority firms on this project. EBS has committed to the company and issued a Notice of Award based upon the City of Philadelphia’s notice to EBS.”

In another email from Joseph Patterson to Anthony J. DePascale at 4:01 pm on March 11, 2008, Mr. Patterson is asking for clarity regarding their verbal agreement; it is important to note that Mr. Patterson is not referring to the written agreement in which Circle Construction agreed to supply labor, material, equipment and supervision for the project. Patterson wrote the following message:

“In the meeting that the 3 of us had Tom agreed to give me 3% plus 150k. Is this what we agreeing to?”

At 5:33 PM on the same day, Mr. Patterson sent the following email to Anthony J. DePascale:

“We need to meet to discuss our position at this point. To continue these projects for any less than the 3% plus the 150k (airport only)¹ will surely bankrupt my company. Tom knows that I refinanced my home to fund this project the first time it was bid. He assured me that he would help me however I needed after we won the rebid. I’ve carried insurance on this project months before it started because of delays. tom told me that I would have work with your company for years to come. If this is no longer his intention I must file

¹ On January 14, 2008, Circle Construction, LLC executed a \$1.4 million subcontracting agreement (Purchase Order No: 4548-1047) with EBS to supply labor, material, equipment and supervision for EBS’ contract with the School District of Philadelphia to build a new Samuel Fels High School. Circle Construction did not perform a commercially acceptable function on this project. DB Interiors was a third-party subcontractor to Circle Construction on the project providing labor, material, equipment and supervision similar to their role on Division of Aviation Contract #074063. In February 7, 2008 Rick Cosgrove, EBS project manager for Samuel Fels High School, sent the following email message to Joseph Patterson: *“Basically all you have to do is copy DBI’s schedule of values and add a line for profit.”*

chapter 13 immediately in order to save my home. Please let me know where I stand so I can make a decision”

At 6:34 AM on March 13, 2008, Thomas Bock sent an email to Joseph Patterson and Anthony DePascale by which he substantiated Mr. Patterson’s assertions regarding their agreement that Circle Construction would be paid 3% of the value of its subcontract with EBS, however, Mr. Bock denied agreeing to pay Circle Construction an additional \$150,000. He wrote the following comments:

“Joe, I never agreed to pay for your home etc. I said that we would give you added monies NOT 150 K. that was the added insurance costs for this job! U want me to pay for your whole insurance bill and what ever else bills you have, that is not happening. If you can not work this job then lets stop wasting ea other time and move on. please advise. I work on 3% as well !”

On March 14, 2008 at 1:00 PM, Debbie Kane, a staff person in EBS’ office, wrote the following email message to Joseph Patterson:

“Joe, We have checks that are due today for DB. We need you to come to the office to sign them over. Thanks Debbie”

These emails illustrate that Circle Construction functioned as a pass-through firm and did not perform distinct elements of work on the project that would satisfy the CAF requirements of the City’s anti-discrimination policy.²

In May 2008, EBS informed OEO that Circle Construction was unable to fulfill their contractual obligations and they had breached their contract with EBS for this project. EBS claimed that Circle did not have a payroll bond to be eligible to proceed; however, Circle Construction provided our auditor with evidence that it had secured a payroll bond on October 11, 2007.

Our investigator made the following observations related to this finding:

- EBS’ bid indicated that Circle Construction, LLC, an MBEC-certified minority subcontractor, would receive approximately 11.0% of work valued at \$3.95 million; however, Circle Construction did not perform a CAF or perform any work on the project.
- After terminating its agreement with Circle Construction, EBS amended its contract with Atrium International to replace Circle Construction and provide GWB/Carpentry work valued at \$2.4 million on the project; however, Atrium International did not perform a CAF or any of this additional work.
- DB Interiors, Incorporated (DBI), a non-minority owned firm, performed all of the GWB/Carpentry work that had been identified as 11% minority participation in EBS’ contract with the City. Based on DBI’s representations, the firm was paid approximately \$2.9 million for work on Contract #074063.

² On March 18, 2008, Rick Cosgrove, EBS’ Project Manager for the Fels School Project sent an email to Joseph Patterson which indicates that Circle Construction was also used by as a pass-through minority subcontractor for that project. He wrote the following comments: *Joe, I need your exhibit D for DBI’s invoice for Fels..Let’s get this done! You have to stay on top of the billing! Call me if you have any questions or comments.*

- Circle Construction and Atrium International received checks from EBS; however, neither firm submitted required Certified Payroll Forms to the City’s Labor Standards Unit as documentation indicating that work was performed by employees of their company.

Finding 3: EBS failed to pay M/W/DSBE Subcontractors in accordance with City requirements

EBS failed to comply with the contract terms requiring payments to M/W/DSBE subcontractors within five business days after receipt of a payment from the City of Philadelphia for work performed under the contract by its M/W/DSBE subcontractors.

Section A – General Construction Work Bid Document for Bid #6847 provides that the prime contractor shall, within five business days after receipt of a payment from the City of Philadelphia for work performed under the contract, deliver to its M/W/DSBE subcontractors the proportionate share of such payment for work performed (including the supply of materials) by its M/W/DSBE subcontractors. During our investigation, Ritter Consulting, Inc. provided evidence that they were owed money for work performed. When questioned about this, EBS only made conclusory representations but did not document payments to Ritter Consulting. Thus, we concluded that EBS did not make good faith efforts to honor its commitment to comply with the anti-discrimination provisions of Contract #074063 requiring the prime contractor to pay its subcontractors five days after receiving related payments from the City.

According to Judith Ritter, president of Ritter Contracting, EBS routinely reduced the reimbursable amount of Ritter Contracting invoices without providing justification. Ritter Contracting records indicate that the firm is owed \$150,112 from EBS for work performed on Terminals D&E – Package 1B (under EBS’ Contract #074063). During our investigation, EBS informed our auditors that the company did not owe money to any M/W/DSBE subcontractors for work performed on the Terminal D/E expansion project. However, EBS did not provide adequate information to substantiate this assertion.

Finding 4: Inadequate Monitoring and Enforcement of the Anti-discrimination Policy.

The Division of Aviation and the Office of Economic Opportunity did not adequately monitor and enforce the anti-discrimination provisions of Contract #074063. Our investigators found that it is unclear who is responsible for administering the anti-discrimination policy of DOA contracts that are completely financed by the City. The Division of Aviation has a detailed program for monitoring and enforcing federally funded contracts (the “Philadelphia International Airport Disadvantaged Business Program”); however, it does not have a similar program for City funded contracts. DOA personnel informed our investigators that City funded contracts should be monitored by OEO. Further, we were informed that since Contract #074063 was funded with Philadelphia Airport Revenue Bonds, OEO was the responsible agency for monitoring and enforcing the anti-discrimination provision of the contract. However, in our opinion, as the agency responsible for administering the contract, DOA retains some responsibility for ensuring that contractors and their subcontractors are in compliance with all contract requirements.

Pursuant to the City's anti-discrimination policy, OEO is authorized to devise and implement strategies to monitor contracting activities. OEO is expected to make findings and recommendations to the Director of Finance as are necessary and appropriate to enforce Executive Order 2-05. Accordingly, Executive Order 2-05 provides that OEO/MBEC "may perform investigations to ensure that Bidders are complying with the goals and objectives of this Executive Order. Such investigations may include site visits to a Bidder's office, other place of business and/or job site to ascertain whether a Bidder has discriminated against and/or excluded M/W/DSBEs in the submission of a Bid during the process to award a City Contract or during the performance of a City Contract."

- As previously stated, DBI Interiors, a non-minority firm, completed the GWB/Carpentry work which was contracted to Circle Construction and Atrium International and earmarked for minority participation. Circle Construction and Atrium International merely served as "brokers" for the supply of work and materials while the actual work was performed by and the materials were supplied by companies that were not eligible minority business enterprises.
- Our investigator found no evidence that OEO or DOA performed due diligence to evaluate Circle Construction and Atrium International's financial and experiential capacity to manage the multi-million dollar GWB/Carpentry subcontracts awarded by EBS under Contract #074063.

Finally, representatives for two of EBS' M/W/DSBE subcontractors (Circle Construction and Ritter Contracting) informed our investigators that there appeared to be a lack of coordination, communication and enforcement of the anti-discrimination provisions of Contract #074063. Further, these subcontractors indicated that they did not feel they had an advocate in the City who would compel EBS to comply with the City's anti-discrimination policy.

RECOMMENDATIONS

The following recommendations are based on the Controller's Office investigation and the findings outlined:

Recommendation 1:

The City should initiate administrative sanctions against Ernest Bock & Sons, Inc., Circle Construction, LLC, Atrium International, Inc., and DB Interiors, including but not limited to debarment from submitting and/or participating in future City contracts for a period of up to three (3) years.

Recommendation 2:

EBS should be directed to provide documentation supporting its assertion that all M/W/DSBE subcontractors have been fully paid for work performed on Contract #074063. If EBS does not provide adequate documentation that the subcontractors have been fully paid, EBS should be directed to pay all outstanding balances due to M/W/DSBE subcontractors.

Recommendation 3:

The Office of Equal Opportunity and the Division of Aviation should devise and implement more responsive monitoring and better enforcement procedures for City-funded contracts to verify participation, utilization and payment of minority and women owned businesses.

Recommendation 4:

OEO and DOA should review and improve procedures for assessing whether M/W/DSBE firms have adequate financial resources and appropriate management experience to perform CAFs on City- funded contracts.

Recommendation 5:

The Department of Revenue should investigate whether Circle Construction, Atrium International, and DB Interiors filed all required tax returns (for business privilege, net profit, and wage taxes) with the City of Philadelphia for 2007, 2008, and 2009.

APPENDIX A –

PROJECT TIMELINE

**Division of Aviation
Contract #074063 (Bid No. 6847)
Terminal D-E Expansion & Modernization -- Package 1B**

Date	Activities	Comments
01/12/2006	Circle Construction, LLC was established by Joseph Patterson and John Orsini.	
02/16/2006	Circle Construction was certified as a minority and controlled business by the NJ Commerce & Economic Growth Commission.	51% minority owned and controlled.
02/17/2006	Circle Construction applied to MBEC for certification as a minority business enterprise (MBE).	
03/03/2006	Circle Construction was approved for certification an MBE under the City's reciprocal certification guidelines.	
03/07/2006	Circle Construction submitted an \$11.4 million quote to EBS for work as a baggage handling systems subcontractor for the Airport's Terminal D/E Expansion Project.	
April 2006	The City canceled the original Terminal D/E Expansion Project bid opening to break the project into small phases.	
10/17/2006	Pre-Bid Meeting	
11/21/2006	Bid Due Date	
12/04/2006	Circle Construction submitted a letter to EBS proposing to perform \$3.9 million of general construction work for Bid No. 6847 (Contract #074063)	
12/05/2006	EBS submitted its commitment proposals in response to the OEO approved MBE, WBE and DSBE participation ranges for this Invitation and Bid.	Bid Invitation included the following participation ranges: MBE – 12% to 15%; WBE – 3% to 5%; and DSBE – Best Efforts
12/06/2006	Public opening for Bid No. 6847 was held.	
04/11/2007	The City of Philadelphia and EBS executed Contract #074063.	
05/10/2007	Thomas Bock, EBS' Vice President, wrote a letter to Thomas Varughese, Aviation's Project Manager, inform him that "I wish to confirm that EBS has no intention on replacing Circle Construction LLC as one of our proposed minority firms on this project. EBS has committed to the company and issued a Notice of Award based upon the City of Philadelphia's notice to EBS."	
06/28/2007	City issued EBS a Notice To Proceed	
08/21/2007	MBEC sent a letter to EBS stating that "Circle does not have to be replaced and MBEC will monitor this project to ensure MBE participation commitments are met."	
10/11/2007	EBS was issued the First Payment from City of Philadelphia for Contract #074063.	
10/11/2007	Circle Construction obtained a payroll bond through Fidelity and Deposit Company of Maryland.	
11/1/2007	DBI begins work under EBS' Contract #074063.	This was prior to DBI's third- part subcontract with Circle Construction and prior to Circle Construction's contract with EBS.
11/ 29 /2007	Circle Construction executed a \$3.95 million subcontract with EBS for work on Contract #074063.	EBS' vice president, Anthony DePascale signed the agreement on 12/18/2007.
11/30/2007	DBI executed a \$2.8 million 3 rd -party subcontract with Circle Construction to perform work for Contract #074063.	
03/19/2008	EBS and Circle Construction agreed (via email) to terminate their contract for the Terminal D-E Expansion Project.	Neither party informed the City of this agreement at the time.

05/01/2008	EBS provided the Controller's Office with a Subcontractor List still showing Circle Construction as a \$3.95 million minority subcontractor.	
05/ /2008	EBS informed the City that it had terminated the agreement with Circle Construction.	
05/ /2008	EBS executed a contract amendment with Atrium International to replace Circle Construction and complete the designated GWB/Carpentry work.	
5/9/2008	DBI executed an agreement with Atrium International to perform GWB/Carpentry work under Contract #07-04063.	Atrium International's president, Donahue Bailey, signed contract on 5/20/2008.
08/15/2008	Atrium International received its first payment from EBS for Contract #074063	
01/06/2009	EBS submitted a MBE/DBE Tracking Form (M/D Form) to the Division of Aviation indicating previous payment to Circle Construction totaling \$381,145.25.	The M/D Form was submitted by Rosa Torres.
03/28/2009	The City of Philadelphia and EBS executed contract amendment which increased the maximum compensation due under the agreement to \$41.7 million.	

Appendix B

Circle Construction's Quote to EBS for Bid #6839

CIRCLE CONSTRUCTION, LLC

401 Cooper Landing Road Suite C3-B
Cherry Hill, NJ 08002

856-779-1533 Offices

856-321-2662 Fax

March 7, 2006

Ernest Bock & Sons, Inc.
2800 Southampton Road
Philadelphia, Pa 19154

ATTN: Mr. Ernest Bock, Jr.

RE: Phila. International Airport Terminal D-E Expansion

Dear Mr. Bock,

Circle Construction would like to offer the following services for your consideration on the above-mentioned project.

We propose to supply all necessary labor and miscellaneous equipment to complete the installation of Specification Section 14520 Baggage Handling Systems. We also include in our proposal all necessary labor and equipment to complete Division 2 Site work. All work is to be completed per plans, specifications and addendums 1 thru 7 for the total sum of (\$11,400,000.00) Eleven Million Four Hundred Thousand Dollars and No Cents. However, we do exclude the following items from our proposal.

Exclusions:

- Transport Conveyors (BHS)
- Power Turns (BHS)
- High Speed Diverters (BHS)
- Non-Metallic Beds (BHS)
- Queue Conveyors (BHS)
- Irrigation System (DIV 2)
- Chain Links Fences and Gates (DIV 2)
- Welded wire mesh Fences and Gates (DIV 2)
- Guide Rail (DIV 2)
- Concrete filled Bollards (DIV 2)
- Site Furnishings (DIV 2)
- Landscaping (DIV 2)
- Stainless Steel Wire Rope Trellis (DIV 2)

Please be advised that Circle Construction is a certified MBE firm with the City Of Philadelphia.

Sincerely,

Joe Patterson

Appendix C

Circle Construction's Quote to EBS for Bid #6847


CIRCLE CONSTRUCTION, LLC

1325 Deacon Road
Hainesport, NJ 08036
609-702-7554 Offices/Fax

December 4, 2006

Ernest Book and Sons, Inc.
2800 Southampton Road
Phila, PA 19154

Attn: Mr. Ernest Book, Jr.

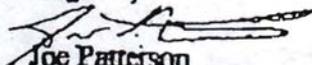
RE: Philadelphia International Airport Terminal D-E Expansion

Dear Mr. Book,

Circle Construction, LLC will furnish and install all Rough/Finish Carpentry and Drywall/Metal Stud work for the above-mentioned project for the sum of \$3,950,000.00. This estimate was based on plans/specs viewed at your office.

Should you need any further assistance, Please Call 609-743-5074.

Regards,


Joe Patterson
CEO
Circle Construction, LLC