

I. BACKGROUND¹

SEPTA is a state entity responsible for the mass transit system in Philadelphia and several neighboring counties. Pursuant to a contract with the Commonwealth of Pennsylvania made through the Pennsylvania Department of Transportation ("Penn DOT"), SEPTA operates and administers the Shared Ride Program.² The Shared Ride Program offers transportation to senior citizens at reduced fares. In addition to the Shared Ride Program, SEPTA operates transportation services for qualified individuals with disabilities, as required by the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101, et seq. (1994).

SEPTA's Paratransit Division is responsible for administering both the Shared Ride Program and the ADA transportation services. The Paratransit Division utilizes funding from both state and federal sources. Rather than providing direct service, the Paratransit Division contracts with private carriers to deliver the actual transportation services.

Allstate is a Pennsylvania corporation in the business of providing transportation services to customers in Philadelphia since 1988. On account of its African-American ownership,

¹Except where indicated, the facts contained within this section are undisputed by the parties.

²Prior to contracting with SEPTA in 1992, Penn DOT contracted with the Bionetics Corporation, also known as Ketron, to administer the Shared Ride Program.

Allstate was certified as a Disadvantaged Business Enterprise ("DBE") contractor by SEPTA beginning in 1989 through April 30, 1996. Gerald Henderson ("Henderson") is the owner and President of Allstate.

A. 1993 Contract

In 1993, SEPTA released an Invitation for Bids ("IFB") to replace various Paratransit service contracts that were set to expire. Under the IFB format, SEPTA is required to award the contract to the lowest responsible bidder. Allstate submitted the lowest bid for hourly rates on lift-van work. SEPTA awarded the portion of the bid related to work utilizing lift-vans to Allstate, and awarded the remainder of the bid work to three other non-DBE carriers. The terms of the resultant contract between Allstate and SEPTA ("1993 Contract") estimated a quantity of 9 daily tours for which Allstate would be paid the rate that it had bid.³

The 1993 Contract ran for the period of July 1, 1993, through June 30, 1996, and contained an option for a one-year extension exercisable at SEPTA's discretion. In 1996, SEPTA extended the 1993 Contract for one year to June 30, 1997. During this extension period, SEPTA paid Allstate the same hourly rate that Allstate had originally bid in 1993, adding only a cost-of-

³The 1993 Contract contains a disclaimer that it is a "requirements type contract," under which SEPTA is not bound to purchase any specific amount of services.

living adjustment.

B. 1996 Request for Proposals

In 1996, SEPTA instituted two major changes to the Paratransit system. First, SEPTA changed the reservation and scheduling system used in its Paratransit Division from a centralized dispatch system in which SEPTA arranged customer rides to the "Rider's Choice" system in which the individual carriers would compete for customer reservations and schedule rides on their own. Second, SEPTA changed the method by which it awarded Paratransit contracts from the Invitation for Bids to the Request for Proposals ("RFP") format. Unlike the IFB system which requires SEPTA to accept the lowest responsible bid, the RFP format allows SEPTA to consider other criteria in addition to price.

In 1996, SEPTA issued a Request for Proposals ("1996 RFP") in which it invited carriers to submit proposals on three different bid items. Bidding carriers were required to account for certain parameters, including an estimated maximum number of trips under the new Rider's Choice system. SEPTA created a panel to evaluate all of the submitted proposals. These evaluators, after reviewing the proposals, assigned points for specified criteria for a maximum total of 700 points.⁴ Five carriers,

⁴The evaluation criteria covered: (1) the proposal cover letter (maximum 4 points); (2) implementation plan (30 points); (3) system management (12 points); (4) job descriptions (12

including Allstate, submitted proposals under the 1996 RFP. The final scoring resulted in the following ranking: (1) Walsh Cab Company, t/b/a Access Paratransit ("Access") with 613 points; (2) Triage, Inc. ("Triage") with 572 points; (3) Metro Care, Inc. ("Metro") with 522 points; (4) Allstate with 454 points; and (5) Atlantic Express with 404 points. Because only three bid items were available, SEPTA awarded contracts to the top three finishers, namely Access, Triage, and Metro. All three winning carriers are non-DBE firms. SEPTA did not award a contract to either Allstate or Atlantic Express, a non-DBE firm.

C. 1997 RFP

After the 1996 RFP contracts were awarded, two of the winning carriers, Access and Metro, filed for Chapter 11 bankruptcy. Furthermore, in October of 1996, Access defaulted on its Paratransit contracts. In response, SEPTA purchased Access' vehicles and took over performance of its contract duties through a newly-created Freedom Division. SEPTA operated these direct carrier services for nine months pending release of a new RFP in May, 1997 ("1997 RFP").

The 1997 RFP substantially revised some of the requirements

points); (5) selection process (7 points); (6) operational plan (35 points); (7) facility (7 points); (8) safety record (15 points); (9) vehicle inventory (10 points); (10) other equipment (7 points); (11) experience (15 points); (12) financial capabilities (35 points); (13) references (4 points); (14) insurance and bonds (7 points); (15) presentation (100 points); (16) site visits (200 points); (17) cost (200 points).

of the 1996 RFP. SEPTA now required carriers to pay a substantially higher bid bond and performance bond than under the 1996 RFP. SEPTA further mandated a minimum wage for drivers, and prohibited the use of leased drivers and maintenance subcontractors. Most notably, the 1997 RFP required bidders to waive any claims that could potentially be brought in connection with the 1997 RFP process. Allstate declined to submit a proposal. Only one carrier, Atlantic Paratransit, submitted a proposal, and was consequently awarded the contract.

D. Allstate's Application for DBE Recertification

Pursuant to federal law, SEPTA maintained a program by which it certified contracting companies who met certain eligibility standards as Disadvantaged Business Enterprises. Allstate was originally certified for one year as a DBE in 1989. SEPTA then recertified Allstate as a DBE for a three-year term beginning in 1990, and then again for another three years in 1993.

This last DBE certification expired on April 30, 1996. Several weeks prior to that date, Allstate applied for recertification. To date, SEPTA has neither formally approved or denied Allstate's application. SEPTA's failure to render a decision prevents Allstate from appealing to the US DOT through procedures provided under the relevant federal regulations.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The substantive law determines which facts are critical and which are irrelevant. An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 321. Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine

issue for trial.”⁵ Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing “sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

III. DISCUSSION

The Amended Complaint alleges seventeen counts, six of which have already been dismissed with prejudice by prior Order.⁶ Counts II through V allege that SEPTA discriminated against Allstate on the basis of race in violation of 42 U.S.C. § 1981 (1994) (Count II); 42 U.S.C. § 1983 (1994) (Count III); Title VI

⁵In opposition to SEPTA’s Motion for Summary Judgment, Allstate submitted five volumes of exhibits totaling hundreds of pages. In its accompanying brief, Allstate essentially directed the Court to read all of the exhibits and select those facts that support Allstate’s claim. (See e.g. Pl. Resp. to Def’s Mot. for Summary Judgment at 70 “Unfortunately, for the Court’s review process the entire deposition transcripts of all four principal SEPTA witnesses should be read. . . . In those are laid out the crux of plaintiff’s complaints about this process.”) The Court declines Allstate’s invitation for such an open-ended review, and only considers those submissions to which Allstate specifically points in the relevant sections of its briefs. It is the litigating party, and not the Court, who bears the burden of setting forth specific facts in support of its case.

⁶The Court dismissed Counts I, XII, XIII, XIV, XVI, and XVII by Order dated February 12, 1998, approving and adopting the Memorandum Order of Magistrate Judge Charles B. Smith dated October 20, 1997.

of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994) (Count IV); and 49 U.S.C. § 306(b) (1994) (Count V).

Counts VI and VII claim breaches of the 1993 Contract under Pennsylvania state law. Counts VIII and IX allege that SEPTA breached its contracts with the United States Department of Transportation ("US DOT") and Penn DOT respectively by discriminating against Allstate on the basis of race. Count X requests recovery for SEPTA's alleged failure to comply with a promise to assign extra work to Allstate under the 1993 Contract on a theory of promissory estoppel under Pennsylvania law. Count XI asserts a cause of action for breach of the implied covenant of good faith and fair dealing under the 1993 Contract. Lastly, Count XV states a claim for unlawful retaliation in violation of Title VI and section 1983.

A. Counts II - V

As stated above, Allstate brings claims under sections 1981, 1983, 2000d, and 306 for impermissible racial discrimination. 42 U.S.C. § 1981 mandates equal rights to make and enforce contracts:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

42 U.S.C. § 1981 (1994). To sustain a claim under section 1981, a plaintiff must prove that: (1) he is a member of a protected racial group; (2) the defendant intended to discriminate against him on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute, namely the making and enforcement of contracts. Wood v. Cohen, Civ. A. Nos. 96-3707, 97-1548, 1998 WL 88387, at *5 (E.D.Pa. Mar. 2, 1998)(citation omitted).

Likewise, to state a claim under section 1983 based on the Equal Protection Clause of the Fourteenth Amendment, Allstate must prove that SEPTA purposefully discriminated against it. Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990). To this end, Allstate must show that it was treated differently on the basis of its race from other entities who were similarly situated. Id.; Johnakin v. City of Philadelphia, Civ. A. No. 95-1588, 1997 WL 381773, at *10 (E.D.Pa. June 27, 1997).

Both Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and 49 U.S.C. § 306(b) prohibit exclusion from participation in, denial of benefits of, and discrimination under programs or activities that receive certain types of federal financial assistance on the ground of race, color, or national origin. 42 U.S.C. § 2000d (1994); 49 U.S.C. § 306(b) (1994). While section 2000d applies generally to programs receiving any federal financial assistance, section 306(b) applies specifically

to programs financed through "section 332 or 333 or chapter 221 or 249 of this title [Title 49], section 211 or 216 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 721, 726), or title V of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 821 et seq.)." 49 U.S.C. § 306(b) (1994).⁷

The United States Court of Appeals for the Third Circuit has held that Title VI provides a private right of action for the purpose of securing injunctive or declaratory relief. Powell v. Ridge, 189 F.3d 387, 399 (3d Cir. 1999). In this proceeding, Magistrate Judge Charles B. Smith in a Memorandum and Order dated October 20, 1997, subsequently adopted and approved by the Court by Order dated February 13, 1998, concluded that section 306 also creates a private right of action. To maintain a claim under Title VI and section 306(b), a plaintiff must establish intentional discrimination. See Powell, 189 F.3d at 392.

Thus, the issue of intentional discrimination links all of the causes of action asserted in Counts II through V. The court must determine whether, upon viewing all of the facts and reasonable inferences to be drawn therefrom in the light most

⁷SEPTA admits receiving financial assistance in accordance with the Department of Transportation Act, 49 U.S.C. § 301, et seq., and from the US Department of Transportation for its Paratransit programs. (Answer ¶ 106, ¶ 115). Construing this in the light most favorable to Allstate, as the non-moving party, and in the absence of contrary evidence or argument, the Court concludes that both sections 2000d and 306 apply to SEPTA in the context of this case.

favorable to the plaintiff, there exists sufficient evidence to create a genuine issue of material fact as to whether the defendant intentionally discriminated against the plaintiff. Hankins v. Temple Univ. Health Sciences Ctr., 829 F.2d 437, 440 (3d Cir. 1987). In cases in which the plaintiff fails to produce direct evidence of discrimination, courts employ a three-step method of proof articulated first in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and later refined in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), and St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). Smith v. Borough of Wilkinsburg, 147 F.3d 272, 278 (3d Cir. 1998). Allstate does not identify the existence of any direct evidence of discrimination in this case.

Although the McDonnell Douglas method of analysis arose in the context of cases filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., courts generally apply it to cases arising under other statutes that similarly prohibit intentional discrimination. See Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989)(applying McDonnell Douglas framework to § 1981 cases); Powell, 189 F.3d at 393 (Title VI); McKenna v. Pacific Rail Service, 32 F.3d 820, 825-26 n.3 (3d Cir. 1994)(sections 1981 and 1983). The United States Supreme Court has endorsed this practice of employing the McDonnell Douglas framework in new contexts by characterizing the scheme as a

"carefully designed framework of proof to determine, in the context of disparate treatment, the ultimate issue of whether the defendant intentionally discriminated against the plaintiff."

Patterson, 491 U.S. at 186. Accordingly, the Court will apply the McDonnell Douglas framework to Counts II, III, IV, and V.

The McDonnell Douglas standard is a three-prong method that relies on presumptions and burden shifting to establish an employer's intent to discriminate. Dillon v. Coles, 746 F.2d 998, 1003 (3d Cir. 1984). Plaintiff bears the initial burden of proving by a preponderance of the evidence a prima facie case of discrimination. Burdine, 450 U.S. at 252; Hankins, 829 F.2d at 440. Once plaintiff has established a prima facie case of discrimination, the burden shifts to the defendant to articulate "some legitimate, nondiscriminatory reason for the employee's rejection." Burdine, 450 U.S. at 253; Hankins, 829 F.2d at 440. If defendant satisfies its burden of production, the presumption created by plaintiff's prima facie showing drops from the case. Burdine, 450 U.S. at 254-55; Hankins, 829 F.2d at 440. To meet its burden of persuasion, the plaintiff must then show by a preponderance of the evidence that the alleged reasons proffered by the defendant are pretextual, and that the defendant intentionally discriminated against the plaintiff. Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). The plaintiff may accomplish this "directly by persuading the fact-finder that a

discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence." Smith, 147 F.3d at 278 (quoting Burdine, 450 U.S. at 256). When the jury finds that the defendant's proffered justification for its actions is pretextual, the jury is permitted, albeit not mandated, to return a verdict in the plaintiff's favor. Id.

In support of each count, Allstate cites SEPTA's actions concerning both the administration of 1993 Contract, and the award and procedures of the 1996 RFP. Conversely, SEPTA argues that Allstate cannot make out a prima facie case of racial discrimination with respect to those allegations related to the 1996 RFP.⁸ Even if Allstate has presented sufficient evidence to meet the prima facie standard, SEPTA asserts that Allstate has not adduced any evidence that SEPTA's conduct was the result of its intent to discriminate against Allstate on the basis of race.

1. Prima Facie Case Concerning 1996 RFP

McDonnell Douglas sets forth the elements of a prima facie case of race discrimination in the context of a Title VII

⁸SEPTA does not challenge the sufficiency of Allstate's prima facie case with respect to the other allegations upon which Counts II through V rest. Allstate identifies a broad array of allegedly discriminatory conduct which would necessitate a painstaking prima facie analysis for each alleged incident. For that reason, the Court will not analyze the threshold question of whether Plaintiff has established a prima facie case with regard to the allegations that SEPTA does not challenge, but instead will focus on the intent issue, as SEPTA has done in its Motion.

employment discrimination case. McDonnell Douglas, 411 U.S. at 802. In that context, a plaintiff may prove a prima facie case by demonstrating that (1) he belongs to a protected category; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications, he was rejected; and (4) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. Id.; Fuentes, 32 F.3d at 763. However, courts recognize that the elements of a prima facie case may vary depending on the facts and context of the particular case. Pivirotto v. Innovative Sys. Inc. 191 F.3d 344, 352 (3d Cir. 1999). Since some of the allegations made in this case involve a public bidding situation, the McDonnell Douglas standard must be modified to fit that circumstance.

In public bidding cases, courts have altered the McDonnell Douglas standard in two ways. See Brown v. Amer. Honda Motor Co., 939 F.2d 946 (11th Cir. 1991); c.f. T & S Assoc., Inc. v. Crenson, 666 F.2d 722 (1st Cir. 1981). The United States Court of Appeals for the First Circuit modified the McDonnell Douglas prima facie standard by requiring the plaintiff to show that (1) the plaintiff is a minority-owned firm; (2) the plaintiff's bid met the specifications required of those competing for the contract; (3) the plaintiff's bid was significantly more

advantageous to the defendant than the bid actually awarded; and (4) the defendant selected another contractor. T & S Service, 666 F.2d at 725 (involving racial discrimination under section 1981). To satisfy the second element, the plaintiff must merely show that it was sufficiently minimally qualified to be among those bidders from whom a selection would be made. Id. at 726. The third element may be satisfied by showing that the plaintiff's bid was significantly more advantageous than the one accepted, either by price or some other relevant factor. Id. at 725. Allowing plaintiffs to allege the superiority of their bids in terms other than price enables qualified minority bidders with slightly higher bid prices, but with otherwise superior credentials, to allege a prima facie case of discrimination. Id.

This third element, however, presents a more rigorous standard than typically is used in other contexts in which intentional discrimination is alleged. See McDonnell Douglas, 411 U.S. at 802. The T & S Court explained its reason for requiring plaintiffs to prove that their bid was significantly more advantageous than others as follows:

In the public bidding situation, the fact that a qualified minority firm's bid was rejected would not in our view support an inference that it was more likely than not that the employer's decision was based on discriminatory criterion. ... If the minority firm's bid is no more qualified than the accepted bid, and offers no price or other significant advantages to the employer, then the employer's decision to reject the bid would not create an inference of discrimination.

T & S, 666 F.2d at 725(internal citations omitted). SEPTA submits that the Court should apply the T & S standard in this case and argues that Plaintiff's claims fail thereunder.

The United States Court of Appeals for the Eleventh Circuit created a different standard for public bidding cases in Brown v. Amer. Honda Motor Co., 939 F.2d 946, 949 (11th Cir. 1991). Under Brown, a plaintiff must prove that (1) the plaintiff is a member of a protected class; (2) the plaintiff submitted an application or bid which met the requirements for an available contract; (3) the plaintiff's application or bid was ultimately rejected; and (4) the contract was ultimately awarded to an individual who is not a member of a protected class. Brown, 939 F.2d at 949; Reshan Int'l Inc. v. City of Kalamazoo, No. 4:96-CV-44, 1997 WL 327117, at *3 (W.D. Mich. May 5, 1997). The Brown standard thus mirrors McDonnell more closely by merely requiring proof that the bid met the minimum specifications and was rejected in favor of a non-minority bidder.

The Court concludes that the Brown elements represent the appropriate standard in public bidding cases. The rigorous T & S standard is not consistent with the spirit of the McDonnell Douglas structure in which the presentation of a prima facie case presents only a light evidentiary hurdle for the plaintiff. See Burdine, 450 U.S. at 252-53. In other contexts, the Court of Appeals for the Third Circuit has refused to impose onerous

burdens on plaintiffs as part of the threshold prima facie case of discrimination. See Iadimarco v. Runyon, 190 F.3d 151, 161 (3d Cir. 1999)(involving white male plaintiffs alleging "reverse" race discrimination). In Iadimarco, the Third Circuit refused to follow other courts in requiring white male plaintiffs to present evidence of "background circumstances" that establish that the defendant is "that unusual employer who discriminates against the majority" when establishing a prima facie case. Id. at 160. The Third Circuit stated that because anti-discrimination laws protect everyone from discrimination, white males should not have any extra burden, but should be able to state a prima facie case by merely showing that the defendant treated some people less favorably than others based upon a protected trait. Id. at 161-163.

In light of these considerations, the Court adopts the standard for a prima facie case established in Brown. Under the Brown standard, Allstate has presented sufficient evidence by which a reasonable jury could find that plaintiffs have established a threshold prima facie case of discrimination. (See Pl. Exh. H ¶¶ 1,8; Def. Exh. 6; Def. Exh. 8 at S02121).

2. Defendant's Nondiscriminatory Justification

Since Allstate has established a prima facie case of discrimination, the burden shifts to SEPTA to dispel this presumption of discrimination by articulating "some legitimate,

nondiscriminatory reason for the employee's rejection." See Burdine, 450 U.S. at 253; Hankins, 829 F.2d at 440. The defendant satisfies its burden of production by introducing evidence which, if true, would permit the conclusion that there was a nondiscriminatory reason for its unfavorable action. Fuentes, 32 F.3d at 763. The defendant need not prove that the tendered reason actually motivated its behavior, since the burden of proving intentional discrimination remains with the plaintiff. Id.

SEPTA has advanced legitimate, non-discriminatory reasons for all of its actions. For example, with respect to the 1996 RFP, SEPTA produced evidence that the members of the Evaluation Committee ranked Allstate's proposal fourth out of five submitted proposals because it would have required Allstate to expand its operations to an infeasible degree and in an unreasonably short time frame. (Def. Exh. 12 at S12812). Furthermore, the evaluators determined that Allstate did not demonstrate sufficient knowledge and experience to implement its technical proposal and expressed doubt as to Allstate's ability to obtain state inspection certification. (Id. at S12812, S13110). Regarding the 1993 Contract, SEPTA points to various contractual provisions that authorized its method of administering the contract. (See Def. Exh. 3).

3. Pretext/Intentional Discrimination

Since SEPTA has satisfied its burden of production, the burden shifts back to Allstate to show that SEPTA's explanations for its actions are pretextual, and that SEPTA intentionally discriminated against it. Fuentes, 32 F.3d at 763. A plaintiff who has made out a prima facie case may defeat a motion for summary judgment by either (1) discrediting the defendant's proffered reasons, either circumstantially or directly, or (2) adducing evidence that discrimination was more likely than not a determinative cause of the adverse employment action. Id. at 764. See also Watson v. SEPTA, Nos. 98-1832, 98-1833, 981834, 2000 WL 291159, at *1 (3d Cir. Mar. 20, 2000)(holding that in Title VII pretext cases the plaintiff must show that an illegitimate factor was a determinative factor in the defendant's adverse action). The plaintiff's evidence rebutting the defendant's proffered legitimate reasons must allow a factfinder reasonably to infer that each reason was either a "post hoc fabrication or otherwise did not actually motivate the employment action." Id. Where the plaintiff offers evidence that would allow reasonable minds to conclude that the evidence of pretext is more credible than the defendant's justifications, the defendant's motion for summary judgment must fail. Iadimarco, 190 F.3d at 166.

The plaintiff, however, must do more than simply argue that the fact-finder need not believe the defendant's explanations.

Fuentes, 32 F.3d at 765. Similarly, the plaintiff cannot merely show that the defendant's decision was wrong or mistaken "since the factual dispute at issue is whether discriminatory animus motivated the [defendant], not whether the [defendant] is wise, shrewd, prudent, or competent." Id. (citations omitted). However, the plaintiff need not produce evidence that directly contradicts the defendant's justification. Id. Rather, the plaintiff's evidence must only demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence," and hence infer that the defendant did not act for the asserted non-discriminatory reasons. Id. (citations omitted).

If the plaintiff submits as part of his prima facie case sufficient evidence to discredit the defendant's proffered reason, the plaintiff need not present additional evidence solely on the issue of pretext. Fuentes, 32 F.3d at 764. However, the plaintiff's rebuttal evidence must allow a factfinder to reasonably infer that each of the defendant's proffered justifications was either a post hoc fabrication or otherwise did not actually motivate the adverse action. Id.

Having outlined the standard of review of Plaintiff's burden of demonstrating pretext, the Court will discuss each of Allstate's contentions in turn.

a. 1993 Contract⁹

Allstate alleges that SEPTA discriminated against it on the basis of race in the manner and extent of work distribution under the 1993 Contract by underpaying Allstate for its services, reducing the number of trips made by Allstate, refusing to schedule customer trips, and refusing to promote Allstate's Paratransit services to the public in its advertising brochures. Furthermore, Allstate claims that SEPTA improperly imposed liquidated damages, in the form of credits, for substandard vehicles since the sanctioned vehicles were made according to faulty SEPTA specifications and contained manufacturer defects.¹⁰ Allstate further alleges that SEPTA made an unfairly disproportionate number of safety inspections of its vehicles and/or facilities. In addition, SEPTA allegedly discriminated against Allstate by refusing to allow Allstate to assign the 1993 Contract to another carrier, and by generally according

⁹"[A] discrimination analysis must concentrate not on individual incidents, but on the overall scenario." Shaner v. Synthes, No. 99-1037, 2000 WL 233333, at *11 n.9 (3d Cir. Mar. 2, 2000)(citation omitted). Where, however, allegations of discrimination are evidenced by discrete categories of conduct, some examination of each category is necessary to assess the merits of the case. Id. Mindful of this admonition, the Court will examine each category of improper conduct alleged by Allstate.

¹⁰Allstate also alleges that SEPTA, through its own internal investigation, knew that the vehicle specifications it had mandated in the 1993 Contract were faulty and contained manufacturer defects, but failed to notify Allstate of its findings.

preferential treatment to non-DBE carriers in the administration of SEPTA contracts.¹¹

Regarding the extension of the 1993 Contract, and SEPTA's failure to disclose manufacturing defects in the lifts, Allstate points to no evidence that is sufficient to demonstrate that a genuine issue of material fact exists as to pretext. Allstate theorizes that SEPTA's choice to extend the 1993 Contract rather than award the work to Allstate in the 1996 RFP demonstrates intentional discrimination. In essence, Allstate argues that because its contract was the only one extended, SEPTA must have been acting with the intent to discriminate. This assertion fails because Allstate produces no evidence that would permit a reasonable factfinder to discredit SEPTA's justification for extending the 1993 Contract or for rejecting Allstate's proposal under the 1996 RFP. (See e.g. Def. Exh. 3 at TS-A-10(a); Pl. Exh. W at 12434; Def. Exh. 12).

Allstate next references SEPTA's contracts with Metro and Triage as proof that SEPTA did not uniformly force extensions of Paratransit contracts without a corresponding increase in rates. (Pl. Exh. C; Pl. Exh. U at 62-65). However, the Metro and Triage

¹¹Allstate further alleges that SEPTA improperly increased Allstate's duties under the 1993 Contract without correspondingly increasing the contract price, and awarded a contract in 1998 pursuant to an RFP to a DBE owned by a white woman. Since Allstate presents no evidence in support of these charges, the Court will not consider them in its analysis.

contracts are not comparable to Allstate's situation. Metro's contract with SEPTA had already expired at the time Metro and SEPTA negotiated the increase in rates. (Pl. Exh. U at 62-65). In the case of Triage, SEPTA was negotiating changes to a contract inherited from Ketron that was still in effect. (Pl. Exh. C). Thus, any evidence relating to SEPTA's handling of the Metro and Triage contracts does not show any weakness, implausibility, inconsistency, incoherency, or contradiction in SEPTA's proffered justification of its administration of Allstate's contract. Similarly, Gerald Henderson's ("Henderson"), Allstate's owner and President, generalized affidavit statement regarding SEPTA's "long, invariable practice" as to contract extensions is insufficient by itself to show pretext. (See Pl. Exh. H ¶ 46).

Regarding SEPTA's failure to disclose manufacturing defects in Allstate's lift vans, Allstate fails to submit any evidence that other carriers were notified of the alleged defects. Evidence indicating that Allstate was not told about the defects, therefore, does not suggest disparate treatment or pretext.

However, the Court determines that Allstate has produced sufficient evidence to suggest pretext regarding its claims that SEPTA disproportionately inspected Allstate's vehicles, improperly assessed credits against Allstate, refused to allow Allstate to assign its duties under the 1993 Contract, and discriminated in the assignment of work under the 1993 Contract.

Allstate has submitted evidence supporting the allegation that SEPTA intentionally singled Allstate out for vehicle inspections while reducing the fines levied on other carriers for safety violations. (Pl. Exh. J ¶¶ 12-13). Allstate also adduces evidence indicating that SEPTA may have improperly increased the amount of credits due for sanctioned vehicles.¹² (Pl. Exh. OO). This is sufficient to raise an inference of pretext regarding SEPTA's proffered justifications.

Allstate's submissions are also sufficient to raise an inference of pretext with respect to SEPTA's refusal to permit assignment of the 1993 Contract, since the evidence shows that SEPTA allowed other carriers to assign similar contracts. (Pl. Exh. R; H ¶ 20). This evidence exposes a potential weakness or inconsistency in SEPTA's proffered justification that it was merely acting pursuant to its contract rights. SEPTA's alternate justification, namely that Allstate de facto assigned the contract despite SEPTA's refusal to consent, is related to the issue of damages, and not to the underlying issue of whether its refusal was due to invidious discrimination. As for the assignment of work under the 1993 Contract, since SEPTA advances no justification for the actual amount of work it gave to

¹²The 1993 Contract gives SEPTA the right to subtract a certain amount of credits from Allstate's monthly invoice when Allstate fails to meet specified equipment and service standards. (See Def. Exh. 3 at 13.)

Allstate, the evidence Plaintiff submits is sufficient to allow a reasonable jury to infer pretext. (Pl. Exh. H ¶ 34).

b. 1996 RFP

Allstate theorizes that SEPTA switched from an IFB to an RFP method with its concomitant subjective evaluation criteria in 1996 to facilitate the discriminatory award of Paratransit contracts. To support this contention, Allstate points to evidence that the RFP format may be a disapproved method for awarding Paratransit contracts. (Pl. Exh. A ¶ 18; Pl. Exh. I ¶ 12). Allstate further submits evidence that SEPTA failed to follow its own internal procedures in processing the submitted proposals. (Pl. Exh. L6 at 173-74, 180, 184, 202). According to Allstate, this evidence combined with the use of subjective criteria is sufficient to raise an inference of pretext as to SEPTA's justification for its awards of contracts in 1996. The Court disagrees.

Contrary to Allstate's position, none of this evidence exposes any weakness or implausibility in SEPTA's asserted justifications or raises an inference of pretext or intentional discrimination.¹³ Evidence that the evaluation criteria was subjective or undervalued certain attributes that Allstate deems important does not raise an inference of pretext where the same

¹³To the extent that Allstate asserts a theory of disparate impact, all such claims were dismissed in Magistrate Judge Charles B. Smith's Memorandum and Order, dated October 20, 1997.

criteria were applied to all submitted proposals.¹⁴ See Fuentes, 32 F.3d at 765 ("To discredit the employer's proffered reason, however, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent"); Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 530 (3d Cir. 1993).

Furthermore, evidence that SEPTA may have failed to follow its own regulations in evaluating the 1996 RFP proposals does not raise an inference of pretext.¹⁵ The Court recognizes that failure to adhere to internal rules or affirmative action programs in some circumstances may be relevant evidence of

¹⁴Allstate argues that as a matter of law, a defendant's use of subjective criteria is sufficient to create an inference of pretext, citing Hopp v. City of Pittsburgh, 194 F.3d 434, 437 (3d Cir. 1999). The Court disagrees with Allstate's construction of Hopp. In Hopp, the City of Pittsburgh developed a new hiring procedure to hire police officers by which candidates had to pass both a written and oral examination. Id. at 437. The plaintiffs, nine white applicants who performed well on the written test but were not hired after failing the oral exam, sued Pittsburgh alleging race discrimination pursuant to sections 1981 and 1983. Id. at 438. The court affirmed the lower court's denial of the defendant's Rule 50 motion not because the oral examination criteria was subjective, but rather because the defendant refused to explain why the plaintiffs failed the examination. Id. at 439.

¹⁵Specifically, Plaintiff proffers evidence that SEPTA failed to staff the evaluation panel, conduct site visits, and analyze the costs of each submitted proposal in accordance with its internal procedures. (See Pl. Exh. L6 at 173-74, 180, 184, 202).

discriminatory intent when combined with other evidence that casts doubt on the credence of the defendant's proffered justification. Antol v. Perry, 82 F.3d 1291, 1301 (3d Cir. 1996); Seeney v. Kavitski, No. CIV. A. 94-1649, 1995 WL 314735, at *5 (E.D.Pa. May 22, 1995). However, here, Allstate presents no evidence that SEPTA's procedural improprieties were related to its assessment of only Allstate's proposal. Rather, the cited procedural failures applied to all submitted proposals. Thus, there is no basis by which a reasonable juror could infer disparate treatment or pretext.

c. SEPTA's Negative Attitude towards DBEs¹⁶

The Court finds that Allstate has not produced sufficient evidence to demonstrate that a genuine issue of fact exists as to pretext for this claim. Evidence of unfriendly rapport is not direct or circumstantial evidence of discrimination nor is it sufficient to establish pretext. See e.g. Moore v. Grove North America, Inc., 927 F. Supp. 824, 829 (M.D.Pa. 1996); Miller v. Aluminum Co. of Amer., 679 F. Supp. 495, 502 (W.D.Pa.), aff'd, 856 F.2d 184 (3d Cir. 1988). Similarly, although Allstate submits evidence that SEPTA assisted other non-DBE carriers, it presents no evidence that Allstate asked for and was refused similar

¹⁶From Allstate's briefs, it is unclear whether Allstate is arguing SEPTA's unfriendly attitude towards Allstate and favorable attitude towards other carriers as direct or circumstantial evidence of disparate treatment or as evidence of pretext. The Court will treat it as both.

help.¹⁷ Allstate's evidence that SEPTA failed to comply with federal regulatory requirements to monitor other carrier's compliance with DBE goals, or take affirmative steps to assist DBEs is insufficient to establish pretext or raise an inference of intentional discrimination. See Williams v. City of Sioux Falls, 846 F.2d 509, 512-13 (8th Cir. 1988).

In conclusion, with respect to all claims relating to the 1996 RFP and SEPTA's attitude towards DBEs, the evidence submitted by Allstate fails to demonstrate any weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in SEPTA's proffered legitimate reasons for its conduct. Similarly, Plaintiff fails to satisfy the Fuentes standard for demonstrating pretext with respect to claims related to the extension of the 1993 Contract, and SEPTA's failure to disclose manufacturing defects. However, because Allstate has presented sufficient evidence to raise an inference of pretext concerning SEPTA's refusal to allow assignment of the 1993 Contract, disproportionate inspections of Allstate's vehicles, the amount of credits assessed for substandard vehicles and discriminatory assignment of work under the 1993 Contract, the Court denies summary judgment on Counts II through V as to those

¹⁷Allstate's argument that SEPTA's failure to proactively offer help to Allstate is misguided. (See Pl. Exh. O at 230-31). Evidence that a defendant did not afford the plaintiff special or preferential treatment does not suggest pretext or intentional discrimination. See Pamintuan v. Nanticoke Mem'l Hosp., 192 F.3d 378, 387 (3d Cir. 1999).

four claims.

B. Count Six

In Count Six, Allstate asserts that SEPTA breached the 1993 Contract by intentionally underpaying Allstate for the value of its services, improperly imposing liquidated damages against Allstate, refusing to schedule customer trips, and refusing to promote Allstate's services to the public through Paratransit advertisements. SEPTA argues that all of Allstate's claims are barred by the clear and unambiguous language of the 1993 Contract. The Court in large part agrees. However, for the reasons that follow, the Court denies summary judgment on Count VI with respect to one claim, namely that SEPTA improperly increased the amount of credits levied pursuant to the 1993 Contract.

As a preliminary matter on summary judgment, under Pennsylvania law, the court must determine as a matter of law whether the written contract terms are clear or ambiguous. Polish American Machinery Corp. v. R.D. & D Corp., 760 F.2d 507, 512 (3d Cir. 1985). Only where the writing is ambiguous may the factfinder examine the relevant extrinsic evidence to determine the parties' mutual intent. Duquesne Light Co. v. Westinghouse Electric Corp., 66 F.3d 604, 613 (3d Cir. 1995). Otherwise, the court must presume that the parties' mutual intent can be ascertained by examining the writing. Id. Where the facts of a

contract are not in dispute and the terms of the contract are unambiguous, determining the meaning and legal effect of the contract is purely a question of law that is an appropriate matter for resolution on summary judgment. Glenn Distributors Corp. v. Carlisle Plastics, Inc. No. CIV. A. 98-2317, 1999 WL 695873, at *2 (E.D.Pa. Sept. 9, 1999).

A contract is ambiguous if it is "reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning." Samuel Rappaport Family Partnership v. Meridian Bank, 657 A.2d 17, 21-22 (Pa. Super. Ct. 1995)(internal citations omitted). A contract is not ambiguous if the court can determine its meaning based only on a knowledge of the simple facts on which the meaning depends. Id.

1. Underpayment and Imposition of Credits

Allstate first argues that SEPTA intentionally underpaid it for the value of its services by subtracting credits from its hourly paid rate in breach of the 1993 Contract. The Court finds this argument to be without merit.

It is undisputed that under the 1993 Contract, SEPTA was required to pay an hourly rate payment of \$22.49, which is the bid price originally submitted by Allstate. That price was to

remain fixed for the duration of the contracting period.¹⁸ (Def. Exh. 3; Pl. Resp. at 87; Def. Exh. 2 at 61). However, the 1993 Contract also contains a provision which entitles SEPTA to deduct money, in the form of credits, from Allstate's monthly invoice in the event of the latter's failure to perform any contract requirements ("Credit Provision").¹⁹ The 1993 Contract incorporates this Credit Provision.²⁰

¹⁸The 1993 Contract provides that "SEPTA shall pay to the Contractor, in consideration for performing the Work in conformity with the SPECIFICATIONS, the Firm Fixed Price(s) set forth in Exhibit A, attached hereto and made a part hereof." (Def. Exh. 3 at TS-A-1). Exhibit A sets an hourly rate of \$22.49 for proposal item number 3, described as "Lift Van, Standard Zones 2,3." (Def. Exh. 3).

¹⁹The 1993 Contract provides:

1. Credits Due SEPTA for Failure to Perform Contract Requirements.

The parties agree that if the Contractor fails to perform in any aspect required by the Specifications, and if after reasonable notice by SEPTA of a need to improve performance and as evidenced by observed conditions which have been monitored and documented by an authorized SEPTA representative, the Authority shall be entitled to a credit from the Contractor for failure to perform the work as stipulated in the Contract. This credit shall be in the amount of ten dollars (\$10.00) per each occurrence, except that the credit shall be in the amount of thirty dollars (\$30.00) per each occurrence of a turnback which results in reassignment of a trip. The credits shall be deducted from the Contractor's monthly invoice.

(Def. Exh. 3 at 13).

²⁰The 1993 Contract provides that the Contract documents include all attachments and exhibits attached to the main body of the agreement. (Def. Exh. 3 at TS-A-1). The Credits Provision is attached to the main Agreement. (Def. Exh. 3 at 1). Although Allstate insinuates that the attachment containing the Credit Provision is not part of the 1993 Contract, it produces no evidence to the contrary. (See Pl. Resp. p. 89).

The Court finds that these terms of the 1993 Contract are clear and unambiguous. Plaintiff's allegations do not constitute a breach because both the pricing term and the Credit Provision were clearly contained within the 1993 Contract and are internally consistent. See M. Barry Schultz and Co. v. Horsham Indus. Prop., 835 F. Supp. 820, 822 (E.D.Pa. 1993)(requiring courts to construe contracts to give effect to every provision). SEPTA was obligated to pay Allstate a certain amount of money per vehicle hour. Allstate had to pay to SEPTA a certain amount in the form of credits when it failed to perform its obligations. The imposition of credits may have had the effect of reducing Allstate's net remuneration. However, their imposition, if done in accordance with the terms of the Credit Provision, does not constitute a breach of the 1993 Contract.

Similarly, Allstate argues that the inclusion and disclaimer of another separate liquidated damages provision in the main body of the 1993 Contract precludes SEPTA from imposing any credits or damages in any form, including under the Credit Provision.²¹

²¹Part VII of the 1993 Contract ("Liquidated Damages Provision") states as follows:

VII. LIQUIDATED DAMAGES - (**Not Applicable**)

If the Work is not performed in accordance with the SPECIFICATIONS, on the day herein fixed as the completion date, N/A Dollars per day shall be paid to SEPTA by Contractor, or shall be deducted from any amount due to the Contractor by SEPTA as Liquidated Damages for every day or part thereof that the performance of this Contract shall remain incomplete after the completion date set forth in Exhibit A. All Liquidated Damages shall remain the property

This argument fails for similar reasons.

The meaning of the two provisions is clear and unambiguous. The Liquidated Damages Provision labeled "not applicable," was exactly that, not applicable. However, the Credit Provision contained no disclaimer and was incorporated into the 1993 Contract, as noted above. Thus, the Credit Provision applied to Allstate whereas the Liquidated Damages Provision did not.

Furthermore, the two provisions relate to different breaches by the contractor. The Liquidated Damages Provision relates to a contractor's failure to timely complete work, whereas the Credit Provision covers failures to meet equipment and service standards.²² Thus, the two provisions do not conflict.

Since the Liquidated Damages Provision and Credit Provision are clear and unambiguous, the Court may interpret them as a matter of law. As explained above, the 1993 Contract, to which

of SEPTA.
(Def. Exh. 3 at TS-A-2 (emphasis in original)).

²²The Credit Provision provides:
Credits shall be applicable to any failure by the Contractor: To meet standards for supplying and maintaining equipment; to report immediately to SEPTA service supervisors each serious service delay and each patron "No-Show;" to accept and carry out instructions of the SEPTA service supervisor including recording of control numbers; to train and, when directed by SEPTA, to retrain or to reassign, or to remove from service any driver; to provide drivers dressed in accordance with Contract requirements; to delivery [sic] service consistently on time; and to submit reports and documents in the form and at the time required.
(Def. Exh. 3 at 13.)

Allstate agreed, allowed SEPTA to require payment of credits in certain situations. Thus, the mere imposition of credits under the terms of the Credit Provision does not constitute a breach of the 1993 Contract.

However, imposition of credits in an amount or for violations different from those authorized in the Credit Provision could constitute a breach of the 1993 Contract. Allstate submits evidence that raises a genuine issue of material fact as to whether SEPTA applied credits consistently with the terms of the Credit Provision. (Pl. Exh. 00). Thus, the Court finds that SEPTA is not entitled to summary judgment on Count VI with respect to this particular issue.

2. Equipment Specifications

Allstate next claims that SEPTA breached the 1993 Contract by requiring Allstate to adhere to detailed equipment specifications that allegedly contained defects causing the maintenance problems for which Allstate was required to pay credits to SEPTA. Allstate further argues that SEPTA breached its duty to notify Allstate of its findings that a manufacturer's defect caused Allstate's maintenance problems.

Allstate fails to identify a provision in the 1993 Contract that requires SEPTA to bear the risk of faulty vehicle specifications or notify Allstate of manufacturing defects. Nor does Allstate cite legal support for any type of implied

contractual duty to that effect. Although Pennsylvania law allows a court to imply a promise or duty in a contract where necessary to prevent injustice when it is clear that the parties intended to be so bound, Amerikohl Mining, Inc. v. Mount Pleasant Township, 727 A.2d 1179, 1184 (Pa. Commw. Ct. 1999)(doctrine of necessary implication), Allstate presents no evidence from which a reasonable factfinder could find that SEPTA intended to be bound by the duty that Allstate wishes to infer. Therefore, this claim fails.

3. Trip Scheduling

Third, Allstate claims that SEPTA breached the 1993 Contract by refusing to schedule customer trips for Allstate. It is undisputed that the 1993 Contract is a requirements contract under which SEPTA was not bound to purchase any particular amount of work from Allstate. (Def. Exh. 3 at TS-A-10, 10(a)). Allstate admits that it was not entitled to any specific amount of work. (Pl. Resp. at 90). Furthermore, Allstate submits no evidence supporting its claim that SEPTA refused to schedule customer trips or reduced the number of customer trips. Given the unambiguous nature of this contract term and the lack of a genuine issue of material fact, the Court finds that Allstate may not base Count VI on this issue.

4. Marketing

Lastly, Allstate argues that SEPTA breached the 1993

Contract by refusing to promote Allstate's services to the public through advertisements for the Paratransit program. Allstate points to no provision in the 1993 Contract that required SEPTA to advertise for Allstate, nor identifies any legal basis or evidence supporting an implied contractual duty to do so. Allstate also fails to adduce any evidence supporting its allegation that SEPTA failed to advertise. For this reason, the Court finds no genuine issue of material fact as to this claim and determines that Allstate may not maintain a cause of action for breach of contract on this issue.

C. Count VII

Count Seven alleges that SEPTA breached its obligations under the 1993 Contract to comply with Title VI and its implementing regulations. The 1993 Contract provides:

[SEPTA] and its contractors agree to ensure that disadvantaged business enterprises as defined in 49 C.F.R. Part 23 have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with federal funds provided under this agreement. In this regard [SEPTA] and its contractors shall take all necessary and reasonable steps in accordance with 49 C.F.R. Part 23 to ensure that disadvantaged business enterprises have the maximum opportunity to compete for and perform contracts.

("DBE Clause")(Def. Exh. 3 at TS-EI-1).

The Court recognizes the incorporation of the aforementioned federal regulations into the contract to mean that SEPTA promised to comply with such regulations in connection with its relations

with Allstate. Based on the parties' submissions, the Court cannot conclude that no genuine issue of material fact exists as to this claim. Therefore, SEPTA is not entitled to summary judgment on Count VII. The Court will reach the relevant legal issues in the context of a motion pursuant to Rule 50 of the Federal Rules of Civil Procedure.

D. Counts VIII and IX

Counts VIII and IX of the Amended Complaint allege that SEPTA breached its contracts with US DOT and Penn DOT by discriminating against Allstate on the basis of race. Allstate claims that it was an intended third-party beneficiary of both contracts. Plaintiff does not submit evidence of any funding agreement between SEPTA and Penn DOT. Allstate cannot be an intended beneficiary of a nonexistent contract. Therefore, the Court finds that no genuine issue of material fact exists as to Count IX and accordingly grants summary judgment to Defendant on that count.

Plaintiff points to portions of section 117 of the Grant Agreement between US DOT and SEPTA ("Grant Agreement") as the source for Allstate's enforcement rights. (Pl. Exh. E at S00706 - S00709). SEPTA argues that it is entitled to summary judgment since Allstate is not an intended third party beneficiary of this Grant Agreement. The Court agrees.

Federal common law governs the agreement between SEPTA and

US DOT. D'Amato v. Wisconsin Gas Co., 760 F.2d 1474, 1478 (7th Cir. 1985); Nguyen v. United States Catholic Conference, 548 F. Supp. 1333, 1348 n.35 (W.D.Pa.), aff'd, 719 F.2d 52 (3d Cir. 1983). Federal courts in this Circuit apply the rules for government contracts established in the second Restatement of Contracts:

In particular, a promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to the member of the public for consequential damages resulting from performance or failure to perform unless

- (a) the terms of the promise provide for such liability; or
- (b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.

Restatement (Second) of Contracts § 313 (1981); Nguyen, 719 F.2d at 55. Generally, individual members of the public are treated as incidental beneficiaries unless the contract manifests a different intent. Restatement (Second) of Contracts § 313 cmt. (1981); Nguyen, 548 F. Supp. at 1348. The Court of Appeals for the Third Circuit has interpreted the Restatement to require that the contract at issue contain some specific language or provision reflecting the intent to make the party contracting with the government liable to third parties should it fail to perform. Nguyen, 719 F.2d at 55.

Something more than mere intent to benefit some third party must be shown for the third party to have actionable rights under the contract. There must be language evincing an intent that the party contracting with the government will be held liable to third parties in the event of nonperformance. Otherwise the third parties are merely incidental beneficiaries having no actionable rights under the contract. The fact that third parties will benefit more directly from performance of the contract than members of the public at large does not alter their status as incidental beneficiaries.

Nguyen, 548 F. Supp. at 1348 (internal citations omitted).

Section 117 of the Grant Agreement contains several provisions relating to the provision of equal employment opportunities, participation of disadvantaged business enterprises, and SEPTA's general compliance with Title VI and other US DOT regulations.²³ (Pl. Exh. at S00706 - S00709). The

²³The Grant Agreement contains the following provisions:

b. Disadvantaged Business Enterprise. The Recipient agrees to facilitate participation of disadvantaged business enterprises (DBE) as follows:

- (2) The Recipient agrees that it shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any U.S. DOT-assisted contract. The Recipient agrees to take all necessary and reasonable steps under 49 C.F.R. Part 23 to ensure that eligible DBE's have the maximum feasible opportunity to participate in U.S.-DOT assisted contracts. The Recipient's DBE program, if required by 40 C.F.R. Part 23 and as approved by the US DOT, is incorporated by reference in this Agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this Agreement. Upon notification to the Recipient of its failure to carry out its

Court finds no specific language within that section or the Grant Agreement as a whole indicating that SEPTA may be held liable to any third parties in the event of nonperformance. Thus, under the Nguyen test, Allstate is not a third-party beneficiary of the Grant Agreement. See also Iacampo v. Hasbro, Inc. 929 F. Supp. 562, 579 (D.R.I. 1996); Minor v. Northville Public Schools, 605 F. Supp. 1185, 1199 (E.D.Mich. 1985).

Plaintiff nonetheless argues that the language requiring SEPTA to comply with Title VI and US DOT regulations establishes its right to sue as an intended third party beneficiary.

Allstate cites D'Amato v. Wisconsin Gas Co., 760 F.2d 1474 (7th Cir. 1985), in which the Seventh Circuit Court of Appeals stated in dicta that section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and Title VI contain language that "suggests the creation of a right of enforcement in third parties." Id. at 1480-81.

Plaintiffs' reliance on this statement is misplaced, since the D'Amato court made that statement in illustration of a

approved program, the U.S. DOT may impose sanctions as provided for under 49 C.F.R. Part 23.

- c. Title VI of the Civil Rights Act of 1964. The Recipient agrees to comply with, and assure the compliance by its third party contractors and subcontractors under this Project, with all requirements of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; U.S. DOT regulations, "Nondiscrimination in Federally-Assisted Programs of the Department of Transportation - Effectuation of Title VI of the Civil Rights Act," 49 C.F.R. Part 21.

(Pl. Exh. E at S00708-S00709).

circumstance under which a court may infer a private cause of action under a federal statute, not within a government contract to which the plaintiff is not a party. Id. at 1481. In fact, the D'Amato Court went on to hold that a disabled plaintiff could not assert a claim as a third party beneficiary under section 503(a) of the Rehabilitation Act, 29 U.S.C. § 793, which requires government contractors to include affirmative action provisions in their contracts. Id. at 1483. Other cases in which courts have allowed a party to recover as a third party beneficiary for breach of a government funding contract are also readily distinguishable. See Sandoval v. Hagan, 7 F.Supp.2d 1234, 1263 (M.D. Ala.), aff'd, 197 F.3d 484, 507 (11th Cir. 1999)(concluding that third parties retain a private right of action against government contractors based on promises to comply with Title VI regulations in federal funding contracts only with respect to claims of disparate impact); Organization of Minority Vendors, Inc. v. Illinois Central Gulf R.R., 579 F. Supp. 574, 600 (N.D. Ill. 1983)(articulating different test for third party beneficiary status).

Under the standard endorsed by the Third Circuit in Nguyen, 719 F.2d at 55, Plaintiff is not a third party beneficiary of SEPTA's funding contract with US DOT. Therefore, the Court grants summary judgment in favor of SEPTA as to Count VIII.²⁴

²⁴Having resolved the merits of this Count on this ground, the Court declines to address SEPTA's alternate arguments.

E. Count Ten

Count Ten of the Complaint seeks recovery for breach of contract for SEPTA's alleged failure to comply with a promise to assign additional work to Allstate on a theory of promissory estoppel. Allstate submits evidence that George Hague, Assistant General Manager of SEPTA's Paratransit Division, orally promised Allstate that SEPTA would assign any vehicle trips that could not be immediately handled by those carriers receiving awards under the 1996 RFP to Allstate, and that SEPTA failed to provide this additional work. (Pl. Exh. H ¶¶ 43-44; Pl. Exh. L2 at 426-27).

Pennsylvania law recognizes the doctrine of promissory estoppel. Thatcher's Drug Store of West Goshen, Inc. v. Consol. Supermarkets, Inc., 636 A.2d 156, 160 (Pa. 1994). Under the theory of promissory estoppel, "a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Id. (quoting Restatement (Second) of Contracts § 90(1)(1981)). Thus, promissory estoppel makes otherwise unenforceable agreements binding. Crouse v. Cyclops Indus., No. 56 W.D. Appeal Dkt. 1998, 2000 WL 91925, at *3 (Pa. Jan. 28, 2000). To maintain a cause of action for promissory estoppel, the plaintiff must establish that: (1) the defendant made a promise that he should have reasonably expected to induce

action or forbearance on the part of the plaintiff; (2) the plaintiff actually took action or refrained from taking action in reliance on the promise; and (3) injustice may only be avoided by enforcing the promise. Id.

Under Pennsylvania law, where a public contract states a procedure by which the contract may be changed or modified, no claims regarding work changes or extra work are allowed unless the contract procedure has been strictly followed. Nether Providence Township School Auth. v. Thomas M. Durkin & Sons, Inc., 476 A.2d 904, 906-7 (Pa. 1984). Waiver of public contract provisions regulating change orders "can be accomplished only by a formal written action (i.e. a new contract) by the public body authorized to enter into the contract, or the express ratification of the extra work claim by resolution of the public body." Id. at 907.

The 1993 Contract provides:

No change, modification or amendment to the Contract shall be binding upon either party unless set forth in writing and signed by the proper officials of both parties and, where applicable, concurred in or approved by any government of [sic] agency or instrumentality thereof which provided financial assistance for the Project. Variations, additions, or exceptions to the terms and conditions set forth in the Contract Documents shall not be considered part of this Contract unless expressly agreed to in a writing signed by SEPTA and by a proper official of Contractor, if necessary, and incorporated herein.

A. A Change Order is a written order to the Contractor, signed by SEPTA's Contract Administrator, issued in accordance with

SEPTA's standard procedures and, authorized either by its Chief Operations Officer/General Manager or by its Board, as appropriate, after the execution of the Contract, which makes a Change in the Work or an adjustment in the Contract sum or the Contract Time. A change Order shall also be signed by the Contractor if he agrees to the adjustment in the Contract Sum or the Contract Time. The Contract Sum and the Contract Time may be changed only by Change Order.

- B. SEPTA hereby reserves the right, at any time, to make additions, deletions or revisions to the Work. Any such changes will be authorized in writing by Change Order issued by SEPTA and sent to the Contractor who shall proceed to execute the necessary changes.

(Def. Exh. 3 at TS-A-2, TS-A-6).

Allstate provides no evidence that the procedures outlined in the 1993 Contract for modifying the contract or the work were followed. Therefore, SEPTA is entitled to summary judgment on this count.

F. Count Eleven

Count Eleven alleges that SEPTA breached the implied covenants of good faith and fair dealing in its performance of various aspects of the 1993 Contract. Section 205 of the Restatement (Second) of Contracts provides that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205 (1981). This good faith obligation allows enforcement of the contract terms in a manner that is consistent with the parties' reasonable expectations. Killian v.

McCullough, 850 F. Supp. 1239, 1250 (E.D.Pa. 1994).

Good faith is defined as "honesty in fact in the conduct or transaction concerned." Slagan v. John Whitman & Assoc., No. Civ. A. 97-3961, 1997 WL 587354, at *4 (E.D.Pa. Sept. 10, 1997). Generally, the covenant of good faith involves an implied duty to "bring about a condition or to exercise discretion in a reasonable way." USX Corp. v. Prime Leasing, 988 F.2d 433, 438 (3d Cir. 1993)(citation omitted). Although conduct breaching the duty of good faith and fair dealing cannot be precisely defined, it includes "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." Somers v. Somers, 613 A.2d 1211, 1213 (Pa. Super. Ct. 1992).

Although Pennsylvania courts have generally adopted this rule, Creeger Brick & Bldg. Supply, Inc. v. Mid-State Bank & Trust Co., 560 A.2d 151, 153 (Pa. Super. Ct. 1989), exceptions do exist. Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 701 (3d Cir. 1993)("Under Pennsylvania law, every contract does not imply a duty of good faith"). For example, there is no implied duty of good faith where a plaintiff has recourse to an independent cause of action to vindicate the same rights with respect to which the plaintiff invokes the duty of good faith. Id. at 702 (concluding that no duty of good faith attaches where

an adequate remedy at law already exists); Fremont v. E.I. Dupont DeNemours & Co., 988 F. Supp. 870, 874 (E.D.Pa. 1997).

Furthermore, the implied duty of good faith cannot defeat a party's express contractual rights by imposing obligations that the party contracted to avoid. Creeger Brick, 560 A.2d at 153. Thus, there can be no implied covenant as to any matter specifically covered by the written contract between the parties. USX Corp. v. Prime Leasing, Inc., 988 F.2d 433, 439 (3d Cir. 1993).

Allstate first argues that SEPTA's attitude towards DBEs and preferential treatment of other carriers violates SEPTA's implied duty of good faith and fair dealing in the 1993 Contract. In support, Allstate submits evidence that SEPTA failed to comply with DBE regulations by failing to adequately monitor contractor compliance with their contractual DBE goals. (Pl. Exh. B). Allstate also presents admissions by SEPTA officials that SEPTA treated Allstate as it would any other contractor, as opposed to giving it preferential treatment. (Pl. Exh. O at 91). Lastly, Allstate provides deposition testimony which it believes indicates that SEPTA limited DBE's to a subcontractor role, as opposed to that of a prime contractor. (Id. at 72, 146-47; Pl. Exh. G at S14529-30). None of this evidence supports a cause of action for breach of implied duty of good faith and fair dealing. SEPTA's failure to enforce or monitor other contracts with third

parties has no relevance to any right or obligation in its 1993 Contract with Allstate. Similarly, evidence of SEPTA's beliefs on the role of disadvantaged business and treatment of other carriers is not relevant to any contract term or obligation to Allstate.

Second, Allstate asserts that the use of an RFP method to award contracts in 1996, and an award to a different DBE under an RFP in 1998, constitutes a breach of SEPTA's duty of good faith and fair dealing. Since Allstate fails to produce any evidence regarding the 1998 RFP, the Court will not consider that allegation. Furthermore, neither of those actions implicate the terms of the 1993 Contract, which is the only contract entered into by the parties. Thus, these acts cannot form the basis of a breach of an implied covenant arising from the 1993 Contract.

The Court further concludes that Allstate's claims under the 1993 Contract regarding the levying of credits, manufacturing defects in the vehicle specifications, assignment of work, and extension of the contract do not support a cause of action here because all of these duties, rights, and obligations are expressly covered by written terms of the 1993 Contract. See USX Corp., 988 F.2d at 439; Creeger Brick, 560 A.2d at 153.

Finally, Allstate claims that SEPTA's failure to assign it enough work breached the implied covenant of good faith. Although Pennsylvania law does recognize a limited duty of good faith in

some requirements and output contracts, no duty may be implied in this case. Good faith requires that a party under a requirements contract cannot pretend to lack any requirements in order to avoid the obligation under the contract. Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp., 130 F.2d 471, 473 (3d Cir. 1942); Dorn v. Stanhope Steel, Inc., 534 A.2d 798, 804 n.6 (Pa. Super. Ct. 1988). However, both Fort Wayne and Dorn involved exclusive dealing contracts, or at least contracts guaranteeing a minimum purchase amount. Fort Wayne, 130 F.2d at 472 (contract required purchase of at least 90% of buyer's requirements); Dorn, 534 A.2d at 801 (exclusive brokerage relationship). This case, which involves no such minimum guarantee or exclusive dealing arrangement, is distinguishable. Furthermore, Allstate presents no evidence supporting its claim.

For the foregoing reasons, Allstate cannot maintain its cause of action on these grounds. Therefore, the Court grants summary judgment in favor of Defendant on Count XI.

G. Count Fifteen

Count XV of the Amended Complaint states a claim for unlawful retaliation in violation of Title VI and 42 U.S.C. § 1983. Allstate argues that as a result of its filing of the instant lawsuit in February 1997, SEPTA has engaged in a continuing course of retaliatory conduct by failing to take action on Allstate's application for recertification as a DBE and

intentionally altering the design of its 1997 RFP to preclude Allstate from bidding. Both Allstate and SEPTA seek summary judgment on this count. For the reasons that follow, the Court grants summary judgment in favor of SEPTA on Allstate's retaliation claims brought pursuant to section 1983, denies SEPTA's motion for summary judgment on the claims concerning DBE recertification brought under Title VI, and denies Allstate's request for partial summary judgment.

1. Section 1983

SEPTA argues that Allstate has no standing to assert a claim for retaliation under section 1983 because the alleged retaliation had no relation to any existing contract with SEPTA, but only with regard to contracts or relationships for which Allstate was a potential bidder. The Court agrees.

Section 1983 prohibits retaliation against public employees for the exercise of First Amendment rights. Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)(holding that the First Amendment's guarantee of freedom of speech protects government employees from termination because of their speech on matters of public concern); Anderson v. Davila, 125 F.3d 148, 161 (3d Cir. 1997). Filing a lawsuit against a government entity is protected activity under the First Amendment, so long as the lawsuit is not frivolous. Anderson, 125 F.3d at 161-62. However, for independent contractors, any such protections are

limited to cases in which the public entity terminates an existing, ongoing relationship in retaliation for the contractor's exercise of First Amendment rights. McClintock v. Eichelberger, 169 F.3d 812 (3d Cir. 1999), cert. denied, 120 S.Ct. 182 (1999); see also Board of County Commissioners Wabaunsee County, Kansas v. Umbehr, 518 U.S. 668, 685 (1996)(holding that independent contractor plaintiff was protected from the government's retaliatory termination of his contract only "[b]ecause Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government").

The retaliation that Allstate claims, namely SEPTA's alleged failure to act on Allstate's application for DBE recertification and the design of the 1997 RFP, are unrelated to Allstate's prior 1993 Contract with SEPTA and did not have the effect of terminating the prior contract. Therefore, the Court concludes that Allstate may not maintain a retaliation claim pursuant to 42 U.S.C. § 1983.

2. Title VI

Title VI prohibits intentional racial discrimination against participants in, applicants for, or intended beneficiaries of a federally funded program. 42 U.S.C. § 2000d (1994); Wood v. Cohen, Civ. A. Nos. 96-3707, 97-1548, 1998 WL 88387, at *11 (E.D.Pa. Mar. 2, 1998). The first question is whether Title VI contains a cause of action for retaliation since it contains no

explicit language to that effect. For the following reasons, the Court concludes that it does.

Several courts have held that Title VI impliedly supports a cause of action for retaliation. Belgrave v. City of New York, No. 95-CV-1507 (JG), 1999 WL 692034, at *37 (E.D.N.Y. Aug. 31, 1999); Philippeaux v. Fashion Inst. of Tech., No. 93 Civ. 4438, 1996 WL 164462, at *5 (S.D.N.Y. Apr. 9, 1996), aff'd, No. 96-7533, 1996 WL 734038, at *1 (2d Cir. Dec. 23, 1996). Title VI language mirrors that of Title IX, 20 U.S.C. § 1681, under which courts in this district have inferred a claim for retaliation. Kemether v. Pennsylvania Interscholastic Athletic Assoc., Inc., No. CIV. A. 96-6986, 1999 WL 1012948, at *26 (E.D.Pa. Nov. 8, 1999)(citing Preston v. Commonwealth of Virginia, 31 F.3d 203, 206 n.2 (4th Cir. 1994)); Linson v. The Trustees of the University of Pennsylvania, No. CIV. A. 95-3681, 1996 WL 637810, at *4 n.5 (E.D.Pa. Nov. 4, 1996); see also Gebser v. Lago Vista Independent School District, 524 U.S. 274, 286 (1998)(stating that Title IX parallels Title VI and operates in the same manner). Furthermore, the federal regulations promulgated under Title VI expressly provide that "[n]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part..." 49 C.F.R. § 21.11(e) (1998). Courts have referenced identical

language included in Title IX regulations to justify inferring a retaliation cause of action under Title IX. See Preston, 31 F.3d at 206 n.2. Thus, the Court concludes that Title VI, 42 U.S.C. § 2000d, does support a claim for retaliation.

SEPTA next argues that any claim for retaliation under Title VI by Allstate is barred by the McClintock doctrine, namely that independent government contractors are protected from retaliation only where the public entity terminates an existing contractual relationship. The Court disagrees. Unlike section 1983, Title VI rights were specifically created by Congress to prevent discrimination on the basis of race by anyone who receives federal funds. Title VI language prohibiting "exclusion from participation in ... federally assisted programs" naturally includes applicants for participation in federally funded programs. See Wood, 1998 WL 88387, at *11 n.15 (citing NAACP v. Medical Center, Inc., 599 F.2d 1247, 1252 (3d Cir. 1979)). To disallow claims for retaliation based on the filing of a complaint that alleges violations of Title VI would eviscerate the statute's protections by allowing federally funded programs or entities to discriminate indirectly through retaliatory conduct when they could not do so directly. In the case at bar, Allstate asserts its rights under Title VI to be free from intentional discrimination in the award of Paratransit contracts. SEPTA should not be able to take adverse action against Allstate

simply because Allstate has attempted to enforce its statutory rights. Thus, Allstate's Title VI claim is not barred.

Having reached the foregoing conclusions, the Court will proceed to assess the merits of Allstate's claim. To make out a cause of action for retaliation, Allstate must prove that (1) Allstate engaged in protected activity; (2) SEPTA responded with an adverse action; and (3) a causal link exists between the protected activity and the adverse action. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1299 (3d Cir. 1997). The third element of causation requires that the protected activity be a determinative factor for the defendant's adverse action. Watson v. SEPTA, Nos. 98-1832, 98-1833, 98-1834, 2000 WL 291159, at *9 (3d Cir. Mar. 20, 2000); Woodson v. Scott Paper Co., 109 F.3d 913, 931 (3d Cir. 1997). A plaintiff may demonstrate a causal connection by "evidence of circumstances that justify an inference of retaliatory motive." See Foster v. Township of Hillside, 780 F. Supp. 1026, 1041 (D.N.J.), aff'd, 977 F.2d 567 (3d Cir. 1992).

Once the plaintiff satisfies these elements, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its actions. Woodson, 109 F.3d at 920 n.2; Foster, 780 F. Supp. at 1042. The defendant's burden may be satisfied without proving that the articulated reason actually motivated the action. Woodson, 109 F.3d at 920 n.2. If

the defendant meets this burden then the inference of discrimination arising from the plaintiff's prima facie case drops out and the plaintiff, who bears the ultimate burden of persuasion, must demonstrate that the alleged non-discriminatory reason was merely pretextual and that the defendant intentionally retaliated against the plaintiff. Jalil v. Avdel Corp., 873 F.2d 701, 706 (3d Cir. 1989). The plaintiff may satisfy its burden either directly by persuading the factfinder that a discriminatory reason more likely motivated the defendant, or indirectly by showing that the defendant's justification is unworthy of credence. Jalil, 873 F.2d at 706. To demonstrate pretext, the plaintiff must point to implausibilities, inconsistencies, contradictions or incoherencies in the defendant's justification so as to enable a rational factfinder to decide that the defendant's reason is unworthy of credence. Robinson, 120 F.3d at 1302 n. 16 (citation omitted).

To prevail on a motion for summary judgment, a defendant can either show that the plaintiff has failed to establish its prima facie case, or offer a legitimate non-discriminatory reason for its actions to which no genuine issue of material fact exists and show that the plaintiff cannot establish a genuine issue of material fact as to pretext. Jalil, 873 F.2d at 707. Summary judgment is inappropriate if the plaintiff establishes a prima facie case and counters the defendant's proffered explanation

with evidence raising a factual issue about the defendant's true motive. Id.

Both parties have moved for summary judgment as to this Count. The Court will address each motion in turn. See Williams v. Philadelphia Housing Authority, 834 F. Supp. 794, 797 (E.D.Pa.), aff'd, 27 F.3d 560 (3d Cir. 1994)(requiring courts consider cross-motions for summary judgment separately).

1. Plaintiff's Motion for Partial Summary Judgment

Allstate first argues that SEPTA's inclusion of a provision which requires a prospective waiver of civil rights claims violates Title VI and constitutes per se retaliation as a matter of law.²⁵ The Court rejects this argument. There is no authority supporting such a proposition. See DiBiase v.

²⁵The 1997 RFP contains the following provision:

With submission of a proposal, the Proposer agrees to accept all decisions by SEPTA regarding this RFP and further agrees not to challenge SEPTA with regard to any part of this process. With submission of a proposal, Proposer, on behalf of itself, its subcontractors, and any other person claiming by, under, or through them, or any of them, remises, releases and forever discharges SEPTA, its officials, officers, employees, agents and consultants from any and all claims arising out of (i) the use of any information contained in this RFP and/or (ii) participation in this RFP process. In the event of any such claim(s) Proposer shall indemnify, defend, and hold harmless SEPTA, its officials, officers, employees, agents and consultant from and against any and all losses, costs, damages, and expenses (including litigation costs and counsel fees) incurred by SEPTA and or its officials, officers, agents, employees, and consultants.

(Pl. Exh. C at 14).

SmithKline Beecham Corp., 48 F.3d 719, 727 (3d Cir. 1995).

Next, Allstate claims that SEPTA cannot establish a legitimate non-discriminatory justification for its inclusion of a waiver of civil rights claims in the 1997 RFP, nor for its failure to act on Allstate's application for DBE recertification. Even if SEPTA can satisfy its burden of production, then Allstate submits that it has adduced sufficient evidence such that the Court can find pretext as a matter of law.

After reviewing the parties' submissions as to this Motion, the Court concludes that SEPTA has offered a legitimate non-discriminatory reason for both of its actions. (Def. Exh. 17; Def. Exh. 34; Def. Exh. 35); See DiBiase, 48 F.3d at 728 n.10. For the reasons discussed below in the context of Defendant's Motion for Summary Judgment, the Court determines that Allstate does not present sufficient evidence to create a genuine issue of material fact or to enable a juror to reasonably find pretext as to SEPTA's design of the 1997 RFP. Although Allstate does submit sufficient evidence of pretext with respect to the recertification issue, genuine issues of material fact exist regarding retaliatory intent. Summary judgment in favor of Allstate on this Count is therefore inappropriate.

2. SEPTA's Motion for Summary Judgment

SEPTA argues that Allstate cannot demonstrate a causal connection and thus establish a prima facie case, and has not

produced sufficient evidence to allow a reasonable jury to find pretext. The Court agrees that Allstate has not submitted sufficient evidence to establish a genuine issue of material fact as to pretext regarding its claims about the 1997 RFP, but disagrees with respect to the issue of DBE recertification.

Concerning the DBE recertification allegations, Allstate's evidence regarding the timing of SEPTA's review and request for more information mirrors the unusually suggestive facts that the Third Circuit Court of Appeals found to satisfy a prima facie case in Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir.), cert. denied, 493 U.S. 1023 (1990). See also Robinson, 120 F.3d at 1302. Similarly, Allstate's evidence that a general waiver was included in the 1997 RFP because of the pending litigation, including Allstate's suit, is sufficient to prima facie establish a causal connection.

SEPTA has produced legitimate and nondiscriminatory justifications for both its design of the 1997 RFP and its handling of Allstate's recertification application. Concerning the 1997 RFP, the Court concludes that no genuine issue of material fact exists as to pretext. Allstate has not presented sufficient evidence by which a reasonable factfinder could infer pretext or retaliatory intent in SEPTA's design of the 1997 RFP. See DiBiase, 48 F.3d at 728 n.10 (requiring proof of specific intent to target the plaintiff to overcome the defendant's

legitimate justification for inclusion of a general waiver in an employee separation agreement where the defendant's professed motive was to protect against lawsuits arising from the agreement). Conversely, the Court determines that Allstate has pointed to weaknesses, implausibilities, inconsistencies, contradictions and incoherencies in SEPTA's explanation of its administration of Allstate's application for DBE recertification sufficient to create a genuine issue of material fact and allow a factfinder to rationally infer pretext. (See e.g. Pl. Exhs. DD at 78, EE, FF at 158-60, and GG). The Court, therefore, denies SEPTA's Motion for Summary Judgment on this count as to the recertification issue.

In conclusion, the Court denies Plaintiff's Motion for Partial Summary Judgment. Defendant's Motion for Summary Judgment is granted with respect to Counts Eight through Eleven. The Court denies Defendant's Motion as to Counts Two through Seven and Count Fifteen, subject to the limitations stated herein.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALLSTATE TRANSPORTATION	:	CIVIL ACTION
COMPANY, INC.	:	
	:	
	:	
v.	:	
	:	
	:	
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY	:	NO.97-1482

O R D E R

AND NOW, this day of March, 2000, upon consideration of Defendant's Motion for Summary Judgment (Doc. No. 44), Plaintiff's Response thereto (Doc. No. 46), and Defendant's Reply (Doc. No. 56); Plaintiff's Motion for Partial Summary Judgment (Doc. No. 43), Defendant's Response thereto (Doc. No. 47), and Plaintiff's Reply (Doc. No. 51), **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion is **DENIED**;
2. Defendant's Motion is **GRANTED** in part and **DENIED** in part;
3. **JUDGMENT** is entered in favor of Defendant and against Plaintiff on Counts VIII, IX, X, and XI;
4. Plaintiff may proceed to trial, subject to the limitations stated in the accompanying Memorandum, on Counts II, III, IV, V, VI, VII, and XV.

BY THE COURT:

John R. Padova, J.