STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by
Mason Tillman Associates Limited with
respect to the procurement of a consultant
to conduct a disparity study by the New York
State Department of Economic Development
Contract Number C004496

Determination
of Bid Protest
SF- 20080090

March 31, 2008

This Office has completed its review of the above-referenced contract awarded by the New York State Department of Economic Development ("DED"), including the Request For Proposals ("RFP") issued by DED, the proposal submitted by National Economic Research Associates ("NERA"), and the bid protest filed by Mason Tillman Associates Limited ("Mason Tillman"). As outlined in further detail below, we have determined that the procurement was fair and reasonable and conducted in accord with the law, and therefore the proposed contract with NERA will be approved.

BACKGROUND

Facts

On July 27, 2007, DED issued an RFP in order to obtain the services of an outside consultant to conduct a Disparity Study regarding the participation of Minority- and Woman-Owned Business Enterprises in New York State contracts (the "RFP").

The RFP stated that the method of award would be based on "best value"[1] taking into consideration technical and cost factors. The proposer with the highest composite score would receive the award. The RFP sets forth the technical and cost requirements that the proposal shall contain in order to demonstrate the contractor's ability to meet these requirements. Technical and cost sections would be evaluated separately, allowing a maximum of 70 technical points and 30 cost points. The proposer with the highest composite score would receive the award.[2] The RFP sets forth the minimum qualifications and technical and cost requirements that the proposal shall contain in order to demonstrate the proposer's ability to meet these requirements.

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1 *See* State Finance Law §163(1)(j) (defining "best value" as the "basis for awarding all service contacts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers").
2 DED retained the discretion to conduct oral presentations/interviews of finalists which could result in a re-scoring of the written proposals.

The proposers had to meet Minimum Qualifications that included:

- Being in business at least five years performing relevant quantitative analyses such as those described in the Scope of Services.
- Provision of at least three business references.
- Adequate financial resources and organizational capacity to perform the services in an efficient and effective manner, with financial resources to pay expenses in advance of receipt of payment from DED.
- Strict privacy protections to adequately protect the confidentiality of all data, including the employment of data encryption.

The RFP established technical criteria which included:

- Organization and staffing.
- Experience.
- References.
- Approach to providing the Scope of Services.

The Scope of Services included:

- Definitions identical to some contained in Executive Law Article 15-A, by which the engagement would be governed.
- A Workplan detailing the proposed design of the Disparity Study and describing the research and methodology the proposer would employ to meet the objectives of the Disparity Study.
- Data Collection on New York State contracts, above and beyond that data furnished by the State, pursuant to methods and sources identified by the proposers, as well as the means by which the data's integrity would be established.
- Data Collection on the existence of MWBEs within the State and within various regions of the State, along with a demonstration that the proposer has employed valid statistical sampling.
- A Disparity Analysis which would (i) define and calculate MWBE availability; (ii) segment the utilization analysis by region and by dollar amount of State contract, or other appropriate metrics; and (iii) conduct appropriate statistical or econometric analysis of the utilization data to determine the extent, if any, of the disparity. The Disparity Analysis would define, quantify and explain the availability of qualified MWBEs in each of the relevant market sectors and regions, broken down by gender, minority group membership, and MWBEs that qualify by both gender and minority

group membership. The contents of the analysis includes:

- To analyze availability of MWBEs, the analysis would (i) determine and report on criteria used to define qualified and available MWBEs; (ii) collect and provide data on MWBEs by region, including an assessment of information pertaining to business capacity, broken down by gender, race and minority group of owners of firms; and (iii) for each region of the State and within relevant market sectors, develop a business demographics profile showing the number of qualified, available firms owned by non-minorities, women, minorities and minority women, with the percentage of the total number of firms that each group represents.
- An analysis of utilization of MWBEs on State contracts, describing by market sector, size of contract and by gender and minority group membership within various regions the percentages of (i) qualified and available MWBEs actually utilized on State contracts; (ii) total number of State contracts awarded that were awarded to qualified and available MWBEs; and total dollars awarded in State contracts that comprised contracts awarded to qualified and available MWBEs.
- An appropriate statistical or econometrical analysis of the utilization data to determine whether a significant statistical disparity exists between the availability of qualified firms by race, gender and ethnicity and their utilization on State contracts.
- A definition of "significant statistical disparity" for the purposes of the analysis and the rationale underlying this definition.

- Draft and Final Reports, together with work papers, records and documentation that detail, chronicle and support the methods, analysis and conclusions for each of the elements in the Disparity Study.
- While not labeled as being part of the Scope of Services, the RFP also required certain Deliverables which related to part of the Scope of Services, including progress reports, Workplan revisions, and a database of qualified MWBE and non-MWBE firms.

The RFP contained a template for the cost proposals, including the following categories:

- Personnel Costs
- Administrative Expenses
- Other Expenses.

Pursuant to the RFP, eight proposals were received, including one from Mason Tillman and one from NERA. DED determined that the NERA proposal offered the best value, and awarded a contract to NERA.

DED signed the contract with NERA on January 29, 2008 and then forwarded the

contract to the Attorney General's Office for review as to form, who then forwarded the contract to this Office. Mason Tillman then formally protested to this Office the award of the contract to NERA.

Procedures and Comptroller's Authority

The Comptroller is required by section 112 of the State Finance Law ("SFL") to approve State agency procurement contracts which exceed $50,000 before such contracts become effective. As a contract has already been signed by DED, the Comptroller has reviewed the bid protest by Mason Tillman as part of his review of the contract award.

In determination of this protest, the following correspondence/submissions from the parties were considered: From Mason Tillman, correspondence dated: January 11, 2008, January 31, 2008, March 3, 2008 and March 16, 2008; from DED, correspondence dated January 23, 2008, February 21, 2008 and March 10, 2008; and from NERA, correspondence dated March 10, 2008.

Protesting Party

The protestor, Mason Tillman, is one of eight vendors who submitted a proposal in response to the RFP.

ANALYSIS OF BID PROTEST

Protestor's position

The Mason Tillman protest is made on the following grounds:

- DED failed to comply with the NYS Procurement laws and guidelines requiring that (a) financial proposals be submitted and maintained in a sealed envelope, (b) an M/WBE Plan be contained in each proposal, (c) contract negotiations be suspended pending an appeal of the contract award, and (d) the contract award be based on best value.
- The Evaluation Committee's scoring system was extreme, inconsistent, and failed to provide explanations mandated by NYS Procurement Guidelines.
- NERA failed to meet the responsible business requirement because it is a wholly owned subsidiary of Marsh & McLennan Companies ("MMC"), a company that was indicted by Attorney General Eliot Spitzer and the attorneys general of other states for various criminal and civil malfeasance, including insurance bid-rigging, pension fraud, and health

plan mismanagement. In addition, six MMC chief executives have pleaded guilty to criminal charges in connection with their work for MMC.

- NERA's proposal was ranked number one, notwithstanding the fact that federal courts have found that several of its disparity studies failed to meet the relevant federal constitutional standards. NERA's number one ranking cannot possibly be justified in light of its history of producing constitutionally flawed disparity studies. This is in contrast to Mason Tillman, which has never had a disparity study challenged, nor an MWBE program based upon one of its disparity studies challenged.

Agency's response to protest

The DED response to the protest is as follows:

- The NYS Procurement Guidelines require that financial proposals be submitted in sealed envelopes only when a single team performs the evaluation. Here, where separate teams perform the evaluation, separate sealed financial proposals are not required.
- The NERA proposal contained an M/WBE Utilization Plan.
- The law does not require that contract negotiations be suspended pending an appeal of the contract award, and Mason Tillman abandoned this issue by not raising it in the protest appeal filed with DED.
- The contract award to NERA was awarded based upon best value, including a consideration of costs.
- The scoring system was neither extreme nor inconsistent; rather it was developed and adhered to in compliance with the NYS Procurement Guidelines and the post-interview scores were accompanied by written explanations.
- NERA is a responsible bidder and the past problems of its parent company are irrelevant.
- Mason Tillman mischaracterizes the Illinois and Florida court decisions relating to NERA's prior disparity studies. The Florida decision did not involve NERA but, rather, someone who subsequently joined NERA's staff and the decision was not related to a disparity study he authored. The Illinois decision involved not NERA's disparity study but rather its expert report for trial, and the court did not find that report to be the reason that the program was found to be unconstitutional.
- The fact that Mason Tillman never had a disparity study challenged in the courts raises concerns about Mason Tillman's experience and the quality of its studies.

The winning proposer's response to the protest

The NERA response to the protest is as follows:

- NERA's parent, MMC, was never indicted and no criminal charges were ever brought against it. Rather, a civil suit was initiated by the New York Attorney General relating to matters irrelevant to disparity studies conducted by NERA. That civil suit was settled with no admission of wrongdoing by MMC. The other civil suits referred to by Mason Tillman were greatly exaggerated. Neither MMC nor NERA is debarred. DED was within its discretion to find NERA a responsible bidder.
- Neither the Illinois federal court nor the Florida federal court decisions found a disparity study or any other work performed by NERA or current NERA employees to be constitutionally lacking. Unlike Mason Tillman, NERA is often employed by clients already involved in litigation and therefore the NERA studies or opinions are often discussed in such litigation.

Applicable Statutes and Guidelines

The requirements of competitive procurements are set forth in section 163 of the SFL, which provides that contracts for services shall be awarded on the basis of "best value" from a responsive and responsible offerer.[3] Best value is defined as the basis for awarding service contracts to the offerer which optimizes quality, cost and efficiency among responsive and responsible offerers.[4]

The SFL also requires that "[w]here the basis for award is the best value offer, the state agency shall document, in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria, which whenever possible, shall be quantifiable, and the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted."[5]

SFL section 161 establishes a "State procurement council," which is empowered to "...establish... guidelines concerning state procurement..."[6] Pursuant to this authority, the council has established "Procurement Guidelines."

DISCUSSION

The questions presented on this protest are:

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3 SFL §163(10).
4 *Id.* §163(1)(j).
5 *Id.* §163(7).
6 Id. §161(2)(d).

(1) Did DED violate procurement laws or the NYS Procurement Guidelines in regard to (i) receipt of financial proposals; (ii) receipt of an M/WBE Plan; (iii) the conduct of contract negotiations during the pendency of the protest; and (iv) the establishment of and proper use of a scoring system to arrive at best value.

(2) Was the Evaluation Committee's re-scoring of the technical proposals following the interviews "extreme" and inconsistent, and did the Evaluation Committee fail to provide explanations mandated by NYS Procurement Guidelines?

(3) Did DED properly find NERA to be a responsible bidder, in light of the allegations against, and actions taken against, its parent company MMC?

(4) Did DED properly find NERA to be the best value responsible proposer, in light of court cases that commented on previous work by NERA or individuals who are now on NERA's staff?

I. Were Certain Procurement Laws and Guidelines Violated?

A. Receipt of Financial Proposals

State Finance Law section 161 establishes a "state procurement council" ("the Council") whose mission is to "strive to improve the state's procurement process." The law continues that the Council shall "establish and, from time to time, amend guidelines concerning state procurement..." and "...establish ... guidelines for purchases of commodities" ... and "for the procurement of services and technology...." (the "Guidelines").

Section Seven of the Guidelines is entitled "Using a Request for Proposals." In Section Seven's introductory language, it is made clear that some of the RFP requirements are mandatory (those denoted with an "M") and others are optional.

Section Seven contains a subsection V, entitled "Developing the Evaluation Process." Within that process, an evaluation team or teams are to be established. Whether a "single team" process (where a single evaluation team scores both the technical and cost proposals) or a "separate team" process (where a technical evaluation team scores the technical proposals and a cost evaluation team scores the cost proposals) is utilized is optional. In the "single team approach", the Guidelines state "financial proposals must remain sealed until completion of the technical evaluation." In the "separate team approach," the Guidelines state "the technical evaluation team should not have access to any aspects of the Financial

Proposal." Neither caution about financial proposals is marked with an "M."

The record before us indicates that DED utilized a separate team approach and therefore did not violate the Guidelines by not requiring financial proposals to be separately sealed. The DED "Review Committee" was assigned to review and score the technical portion of each proposal (and conduct interviews of finalists, after which the finalists technical proposals could be re-scored). The DED "Contract Management Unit" was assigned to review the financial proposals and assign cost scores. Our audit indicates that the Review Committee had no access to the financial proposals until the re-scoring was completed. Therefore, DED satisfied the optional requirement of the Guidelines in this regard.

B. Receipt of an M/WBE Plan

The relevant requirement concerning the submission of a workforce utilization plan is not contained in the Procurement Guidelines but rather in regulations adopted by DED pursuant to Executive Law Article 15-A. 5 NYCRR § 142.1 requires, in relevant part:

> (d) State agencies shall include in all State contracts and all documents soliciting bids or proposals for State contracts the following language:
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> * * * *
>
> (5) After an award of a State contract, the contractor shall submit to the contracting agency a workforce utilization report, in a form and manner required by the agency, of the work force actually utilized on the State contract, broken down by specified ethnic background, gender, and Federal occupational categories or other appropriate categories specified by the contracting agency.

Page 14 of the RFP states, in relevant part:

> After an award of this contract and upon request by the Department, the Contractor shall submit a Utilization Report in a form and manner required by the Department. The Contractor shall include in every subcontract in connection with this contract the requirement that subcontractors shall undertake or continue existing programs of affirmative action and, when requested, provide to the Contractor information on the ethnic background, gender, and Federal Occupational Categories of the employees to be utilized on this contract.

DED complied with the above regulatory requirement by including the above language in the RFP. Our audit confirms that NERA submitted the Utilization Report. Therefore, DED is in compliance with the relevant law.

C. Conduct of Contract Negotiations During Pendency of Protest

Mason Tillman filed its initial protest with DED on January 11, 2008. DED denied the protest on January 23, 2008 and indicated in its decision that Mason Tillman had ten days from receipt of the January 23rd determination to appeal. DED executed a contract with NERA on January 29, 2008. Mason Tillman filed its timely appeal to DED on January 31, 2008. DED denied this appeal on February 21, 2008 – well after it had executed the contract with NERA and forwarded the contract to OSC for review.

The purpose of accepting protests pursuant to a protest procedure is to allow the procuring agency to make a reasoned determination of any issues raised by a protestor. That includes contemplation of the possibility that the procurement result was erroneous and should be corrected either through a new procurement or through a new award consistent with the protest determination. The execution of a contract before the protest process has been completed by the agency may effectively preclude the agency from directly correcting any errors that it discovers – since it then has an executed contract.[7] Therefore, this Office strongly recommends that agencies which undertake their own review of a protest, not execute any contract until the agency level protest (including any internal appeals) has been completed.

However, there are currently no statutes or regulations that: (i) require a State agency to adopt a protest policy; or (ii) prohibit an agency which has adopted such a policy from executing a contract prior to the completion of the agency level protest. Therefore, DED's actions were not a violation of law. Furthermore, and most importantly, in the end, Mason Tillman was not prejudiced. The execution of this contract by DED and NERA did not create a binding contract. Rather, pursuant to Section 112 of the State Finance Law, no binding contract is created unless and until the Comptroller approves this contract. This Office will not act on a contract, with respect to which a protest has been filed, until it has completed its review of such protest. If it determines that the protest has merit, it will withhold its approval and return the contract unapproved. Only where, as here, this Office determines that the protest does not provide sufficient grounds to withhold our approval, and determines that the contract is otherwise proper and appropriate, will we approve the contract. As a result, if we were to have determined that Mason Tillman's protest had sufficient merit, we would not be approving the contract with NERA. Therefore, Mason Tillman was not prejudiced by the actions of DED in executing the contract before its protest process was completed.

D. Evaluation of Best Value

7 In theory, an agency in such circumstances could request that the Comptroller not approve the contract.

We recognize that Mason Tillman sought a variety of documents under the Freedom of Information Law ("FOIL") which DED denied. As we have previously opined, FOIL issues are not issues we will address in protests; nor will we suspend protest proceedings to allow parties to pursue document release via litigation. We will, however, utilize our own audit to confirm or deny allegations that a protestor asserts.

Here, our thorough audit of the procurement record, including the RFP, the winning proposal, and the evaluation methodology, indicates that:

- The RFP established in great detail the services that would be required of the proposer awarded the contract (see list on pp. 2-3, supra).
- The Evaluation Criteria was established prior to the initial receipt of proposals, as required by Section 163(7) of the State Finance Law.
- The Evaluation Criteria was crafted in such a way as to score the services listed in the RFP, utilizing the above-referenced categories (Organization and staffing, Experience, References, and approach to providing the Scope of Services), and the cost of such services.
- The Evaluation Criteria was fair and reasonable and was followed by the Evaluation Teams.

Mason Tillman contends that it offers a better value than NERA because while its costs may be higher, it charges those costs based upon the provision of substantially more staffing.

First, our audit indicates that DED utilized a proper cost conversion formula which converted a proposer's cost (price in dollars) into a weighted point score based upon its relationship to the lowest cost proposal. The 30 cost points were allocated in the following manner. After a determination was made that a proposal met the minimum qualifications, DED's Contract Management Unit calculated the cost scores utilizing the cost methodology outlined in Section 7(V)(B)(3)(b)(i) of the Procurement Guidelines. Rand as the lowest bidder received a score of 30.00; respectively, the NERA cost proposal received a score of 18.57 and Mason Tillman received a score of 12.10.[8]

Second, our audit indicates that DED followed the RFP Selection Criteria by assigning 70 points to technical merit of the proposals. Contrary to the apparent

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8 Rand, having proposed the lowest cost ($202,559) received the 30 maximum points, after applying the conversion formula, and Miller 3 having proposed the highest cost ($2,956,695) received the lowest cost score, 2.06. Mason Tillman was the second highest cost ($1,966,782) receiving a score of 12.10. This was derived by applying the conversion formula as follows: 30 X (1.0 – (1,966,782– 202,559)/2,956,695). NERA's cost score of 18.57 was derived by applying the conversion formula to its cost proposal ($1,328,690) as follows: 30 X (1.0 – (1,328,690– 202,559)/2,956,695).

belief of Mason Tillman, not all of the 70 points were assigned to staffing hours. Rather, in accord with the RFP, the 70 points included an evaluation of the Workplan and the "experience of the staff to be assigned." Within the category of "experience," one element for consideration (among a number of other elements) is that part of the proposal where the proposer meets the following requirement: "Consultant must identify the resources it plans to utilize to complete the Study, including staff..." Therefore, even though, as Mason Tillman suggested and our audit confirms, the Mason Tillman proposal provides for considerably more staffing hours, that by itself would not result in a proportionate increase in its technical score. This was evident from the RFP.

Therefore, DED achieved "best value," in a manner that is in accord with the categories described to all competitors in the RFP.

II. Was the Scoring and Rescoring by the Review Committee Appropriate?

As stated above, we conducted a thorough audit of the procurement record, including the RFP, the winning proposal, and the evaluation methodology. Our audit indicates that the Evaluation Committees utilized the Evaluation Criteria in arriving at their scores. The substance of Mason Tillman's complaint relates to the changing of the Technical Scores following the conduct of interviews.

Our audit does indicate that the technical scores were adjusted substantially following the interviews. That scores could be adjusted following interviews was contemplated by both the RFP (pp. 11, 12) and the Evaluation Criteria. Mason Tillman does not challenge the ability of DED to make adjustments; rather, it challenges the amount of upward adjustment made to NERA's technical score as contrasted with the more modest upward adjustment made to Mason Tillman's technical score. Mason Tillman also asserts that the adjustment to NERA's score was not accompanied by a detailed written explanation, as required.

In particular, Mason Tillman questions the actions of one evaluator who increased NERA's technical score by 57 percent, in contrast to the two other evaluators who increased NERA's technical score by only an average of 8 percent.

Our audit indicates that the adjustment to NERA's score was, in fact, accompanied by a written explanation that includes enough detail to understand what was on the mind of this evaluator. He carefully explained that some elements of the NERA written proposal raised concerns, resulting in his initial low scoring. These concerns disappeared when he obtained clarifications at the interview. When he raised his score of the NERA proposal, it resulted in his score being consistent with

the score of the other two evaluators.[9] This explanation is credible and satisfies all documentation requirements.

III. Is NERA a Responsible Vendor?

SFL section 163 requires that "[s]ervice contracts shall be awarded ... to a ... responsible offerer..." An agency decision that a vendor is responsible is one part of the procurement record that is forwarded to the Comptroller for review in determining whether the contract may be awarded to that vendor, pursuant to State Finance Law section 112.

Mason Tillman asserts that NERA is not a responsible vendor because its parent company, MMC, engaged in insurance bid rigging and had actions taken against its employees and the corporation itself (both criminal and civil, respectively) by the New York State Attorney General. We do not take vendor responsibility issues lightly and need to independently resolve this matter based on the facts and the record.[10]

According to the published records of the Attorney General, the following occurred:

- On October 14, 2004, the Attorney General brought suit against MMC, alleging that it had steered unsuspecting clients to insurers with whom it had lucrative payoff agreements, and that the firm solicited rigged bids for insurance contracts. Major insurance companies were named in the complaint as participants in steering and bid rigging, and two insurance executives pleaded guilty (in a related criminal proceeding) to participating in the illegal conduct.

- On October 25, 2004, the Attorney General announced that actions taken that day by the Board of MMC would permit movement toward a full civil resolution of the litigation. According to the Attorney General, MMC's actions included "adoption of dramatically new business procedures, installation of new leadership, a full examination of prior wrongdoing and a pledge of restitution to those harmed." The Attorney General concluded, "realizing these goals, while also allowing March & McLennan to retain a viable role in the marketplace, makes corporate criminal prosecution

9 It should be noted that the same evaluator gave Mason Tillman the highest post-interview technical score of all the evaluators. In fact, this evaluator in his re-scoring gave Mason Tillman the maximum number of points available.

10 DED asserts that its finding that NERA is a responsible vendor may only be disturbed if such finding is irrational, and that it (DED) is the final arbiter whose decision must be upheld by the Comptroller if supported by a rational basis. We strongly disagree. The Comptroller retains independent authority to review the record supporting the agency's decision and, if he deems it appropriate, to conduct a de novo review of the vendor's responsibility. See Konski Engineers P.C. v. Levitt, 69 A.D. 2d 940 (3rd Dept 1979), aff'd 49 N.Y. 2d 850.

unnecessary."

- On January 2, 2005 and February 15, 2005, the Attorney General announced convictions of MMC executives, bringing the total criminal consequences arising out of the investigation to nine guilty pleas from executives at four different companies, including MMC.

- On February 24, 2005 the Attorney General announced that another MMC executive pleaded guilty to criminal charges.

Based on the above information, it is clear that MMC had a serious integrity challenge, and that if MMC had not agreed to resolve the dispute with the Attorney General, its responsibility would be suspect, and even the responsibility of its subsidiaries could be impacted. However, on January 31, 2005 the Attorney General announced the State's settlement with MMC, alluded to in the Attorney General's prior statement of October 25, 2004. MMC agreed to:

- Pay $850 million in restitution to its policyholders who were harmed by its actions.
- Adopt a new business model designed to avoid conflicts of interest.
- Apologize for "unlawful" and "shameful" conduct.
- Adopt reforms, including an agreement to limit its insurance brokerage compensation to a single fee or commission at the time of placement, a ban on contingent commissions, and a requirement that all forms of compensation will be disclosed to and approved by its clients.

While a verdict of guilty was rendered against MMC employees as recently as February 22, 2008 for conduct preceding the settlement agreement, there is no public record that the settlement agreement was violated or that there was subsequent wrongdoing in New York by MMC. While not dispositive of MMC's responsibility, we note that since 2005, NERA has been awarded five contracts by the Office of the Attorney General for expert testimony in the field of economics. This is an additional indication that the Office of the Attorney General believes this matter has been settled to their satisfaction. [11]

Furthermore, as stated above, while a parent corporation's integrity challenges could impact the responsibility of its subsidiary[12], here the parent's responsibility issues do not appear to have a great impact on the subsidiary. NERA is not involved in the insurance business. NERA, while being a wholly-owned subsidiary of MMC, is separately incorporated and has a separate federal taxpayer ID number.

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11 The New York Attorney General's Anti-Trust Bureau confirmed that the Attorney General has taken no action against MMC alleging a violation of the settlement agreement.

12 Infiltration of a parent company by organized crime influences would impact the integrity of that parent's subsidiaries.

NERA's own integrity has not been called into challenge, nor has its ability to do business in New York or its organizational or financial capacity to carry out this assignment. Therefore, as long as NERA's record of past performance in the conduct of disparity studies is satisfactory, we cannot say that it lacks responsibility. The discussion that immediately follows addresses this last responsibility issue (which is also an issue that bears on the appropriateness of the technical score assigned to NERA and whether best value was achieved).

IV. Do Prior Court Decisions Regarding NERA Render Them Unfit to Perform the Services Herein?

Mason Tillman asserts that NERA's previously-performed disparity studies have been found by courts to be unconstitutional, and cites two cases discussed below to prove this. If this is an accurate statement, it would, in the determination of vendor responsibility, raise serious issues concerning NERA's past performance. It would also test the appropriateness of the technical scores that NERA received from the DED Review Committee.

A. In Builders Ass'n of Greater Chicago v. City of Chicago, 298 Fed. Supp. 2d 725[13], the City legislatively established an affirmative action set-aside program for City procurement, encompassing construction, goods and services. The City produced witnesses as to the continuing need for the program. One of them, as noted by both Mason Tillman and NERA, was Dr. David G. Blanchflower, whom both Mason Tillman and NERA describe as a NERA consultant. It is apparent from the case that Dr. Blanchflower's role was not as the author of the original disparity study for the initial adoption of the program but rather as an expert regarding the need to continue the program in 2003, when the case came to trial.
It is clear from the Court's lengthy opinion that the City's showing of a need to continue the program in 2003 did not fail due to Dr. Blanchflower's testimony. Rather, his testimony buttressed the notion that some level of discrimination existed. Instead, the program failed for two other reasons. As the Court noted, "[t]he City concedes that it has not determined the number of M/WBEs who are qualified, willing and able to perform on construction contracts for the City as subcontractors..." and "...I cannot conclude that the present program is narrowly tailored to remedy past discrimination and the discrimination demonstrated to now exist."

B. In Engineering Contractors of South Florida v. Metropolitan Dade County, 122 F.3d 895, the County enacted three programs providing for the use of race-, ethnicity- and gender-conscious measures in awarding County construction projects. The programs allowed the County to utilize set asides,

13 The citation first provided by Mason Tillman in its appeal (see Appeal, fn. 22), 256 F.3d 642 is incorrect – that is the citation to Builders Ass'n of Greater Chicago v. County of Cook.

subcontractor goals, project goals, bid preferences and selection factors, each aimed at increasing M/WBE participation.

The lower court had held that the MBE programs were not narrowly tailored to serve a compelling governmental interest in remedying past or present discrimination on the basis of race or ethnicity, even if sufficient evidence of discrimination had been demonstrated, and that the WBE program was not substantially related to an important governmental interest in remedying past or present discrimination, even if the evidence had been sufficient to support the existence of such discrimination.

On appeal, the Court reviewed the evidence provided to the lower court. The County had put forward two types of evidence in support of its M/WBE programs: (1) statistical evidence and (2) nonstatistical or "anecdotal" evidence. The statistical evidence was constituted from (1) County contracting statistics; (2) County subcontracting statistics; (3) marketplace data statistics; (4) The Wainwright Study; and (5) The Brimmer Study.

The Wainwright Study was conducted and presented by Dr. Jon Wainwright, now head of NERA's national disparity study practice. The Court found the disparities identified in the Wainwright study to be substantial and statistically significant. However, the Court also found that the lower court was within its discretion to reject Dr. Wainwright's theory that any significant disparities that exist after accounting for the identified human and financial capital variables must be due to the ongoing effects of current and past discrimination, in light of other evidence tending to show that disparities in construction business ownership are not attributable to discriminatory barriers to entry. Essentially, the Court stated that Dr. Wainwright's testimony recognized the limitation of the data he was able to produce. This does not mean that he or his methods were incompetent.

It is noteworthy that neither NERA nor its current or past consultants appear to have had a role in the establishment of the programs that were the subject of these court cases. Rather, they appear to have been brought in as expert witnesses to defend previously established programs. The fact that such programs were held to be unlawful cannot be deemed to be the result of expert witness testimony, when those experts were not involved in the architecture of the programs, nor does such holding necessarily mean that the expert witnesses performed in an unsatisfactory manner.

Furthermore, in light of the number of studies conducted by NERA and numerous instances of testimony given by its staff, we must reject Mason Tillman's assertion that these two cases somehow taint NERA's record of past performance for the purpose of assessing its responsibility or for the purpose of lowering the technical score assigned to its proposal by DED.

CONCLUSION

We find that the procurement process followed by DED was fair and reasonable and conducted in accord with the law. Therefore, the protest is denied and the contract with NERA will be approved by the Comptroller's Bureau of Contracts.

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