

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Lancaster Development, Inc., with respect to the Procurement For the Reconstruction and Bridge Replacement in Orange County of NYS Route 17 at Exit 122 in the Town of Walkill conducted by the New York State Department of Transportation

**Determination
of Bid Protest**

SF-20110086

Contract Number – D261655

This determination is made in response to the Bid Protest filed by Lancaster Development, Inc., challenging the New York State Department of Transportation's award of Contract D261655. Based upon our review of the relevant facts and the applicable law, we do not find a sufficient basis to withhold our approval of the contract under State Finance Law §112. The protest, therefore, is denied.

Facts

On February 9, 2011, DOT issued a "Notice of Highway Lettings" for the reconstruction and bridge replacement in Orange County of NYS Route 17 at Exit 122 in the Town of Walkill (the Project). The primary objectives of the Project are to improve Exits 121 and 122 to meet interstate standards and to address safety and operational deficiencies in the I-86 corridor. The construction costs of the Project are estimated to be \$100 million. Phase One of the project, budgeted at \$60 million, was scheduled to begin in mid-summer of 2011 and to be completed by the winter of 2013/2014. Phase Two of the Project, budgeted at \$40 million, is scheduled to begin in the fall of 2015 and be completed by the winter of 2017/2018.

On March 11, 2011, DOT amended the specifications to require the awardee of the contract to enter into a Project Labor Agreement (PLA) negotiated by DOT with the Hudson Valley Building and Construction Trades Council Heavy and Highway Division (HVB&CTC). The PLA consists of certain concessions to be agreed to by HVB&CTC on behalf of the participating unions and their members. Specifically, the PLA provided, among other things, that there shall be no strikes, lockouts or picketing on the project, expedited arbitration, procedures for grievances and arbitrations, immediate resolution of jurisdictional disputes, limits on overtime pay, and an apprentice ratio of 3:1.

In deciding whether to adopt a PLA for the Project, DOT hired an expert consultant to conduct a Due Diligence Impact Study (DDIS) consistent with standard procedures. The primary purpose of the DDIS was to evaluate whether entering into a PLA for the Project would be economical and in the best interests of the State and, ultimately, to make a recommendation as to whether or not DOT should require the use of a PLA. In preparing the DDIS, the consultant

spoke with representatives from DOT, project engineers, union representatives, a union labor specialist, and other professionals who could offer assistance in the evaluation.

Based upon the evidence compiled, the consultant concluded that a PLA's tools for managing the risk of labor disharmony and ensuring workforce continuity would be of material benefit to the public owner and the taxpayers of New York. The consultant recommended a PLA for the Project because it will help to ensure the urgent completion of the Project and because key PLA provisions hold the potential for cost savings. Based upon the consultant's findings and after consultation with the Federal Highway Administration, DOT decided to require the use of a PLA pursuant to Labor Law §222.

The DOT opened bids on March 24, 2011, and identified Lancaster as the lowest bidder with a proposed project cost of \$67,819,127.09. A. Servidone, Inc./B. Anthony Construction Corp. (Servidone) was identified as the second lowest bidder with a proposed project cost of \$72,349,627.98. The contract was not awarded to Lancaster, however, because of qualifying language in its bidding documents providing that it would not be bound by the PLA requirement contained in the bid specifications. As a result, DOT declared Lancaster's bid informal (i.e., nonresponsive). On April 4, 2011, Lancaster wrote to DOT asking that it reconsider its decision. DOT responded on April 15, 2011, advising Lancaster that its request for reconsideration was not being treated as a bid protest and subsequently awarded the contract to the lowest responsive bidder, Servidone. On May 12, 2011, Lancaster filed the Protest with this Office.

Positions of the Parties

Lancaster challenges the contract award on the following grounds:

- The DOT violated the New York State Labor Law §220(3)(c) in that it advertised the contract without the required provision of schedules of prevailing wages and supplements.
- The DOT violated SFL §139-j in that it proceeded to adopt a PLA during the "restricted period" and made unauthorized contacts with an offeror.
- Legislative Law §1-n(i) and the Procurement Lobbying Law (SFL §139-j) were violated in that unauthorized contacts were made involving a registered lobbyist, Todd Diorio, President of the Hudson Valley Trades.
- The DOT did not have sufficient justification for the use of a PLA under Labor Law §222, because the determination is required to be supported by more than a rational basis.

The DOT contends that the Protest should be rejected and the award upheld because:

- Lancaster's protest fails to contain specific factual or legal allegations.
- The DOT did not violate Labor Law §220(3)(c) because the bid documents contained the required prevailing wage rate schedules.
- The DOT did not violate the Procurement Lobbying Law or Legislative Law §1-n(i) because any contacts made with DOT were made with the designated contacts, and, as such, the contacts were permissible under the law.

- Lancaster's allegations of Procurement Lobbying Law violations do not belong in a bid protest, but rather, are to be determined by the proper officials in those agencies having jurisdiction.
- The challenge of DOT's inclusion of a PLA in a contract is more properly the subject of a CPLR Article 78 proceeding and not a bid protest.

Servidone, the bidder determined to be the lowest responsive bidder, contends that the Protest should be rejected and the award upheld because:

- Lancaster lacks standing to file a bid protest because it did not submit a valid bid.
- The issue of whether the PLA was appropriately adopted for the Project is not an issue to be addressed in a bid protest but rather in the State Supreme Court.
- The DOT did not violate Labor Law §220(3)(c) because the bid documents contained the required prevailing wage rates.
- The DOT did not violate the Procurement Lobbying Law because no contact was made with Servidone during the restricted period. Additionally, any contacts made with the unions and their members would not be prohibited by the Procurement Lobbying Law as they are not "offerrors" as defined in SFL §139-j.
- The DOT did not violate Legislative Law §1-n(i) because no proof exists that Todd Diorio was acting as a lobbyist when DOT made contact with him.

Analysis

Scope of the Comptroller's Authority

The DOT argues that a bid protest is not the appropriate forum to challenge the use of a PLA. We disagree. The Comptroller is the State's constitutional officer responsible for safeguarding the public fisc. One of the duties imposed on the Comptroller is to review and approve State contracts pursuant to State Finance Law §112. This Office's Contract Award Protest Procedures, the scope of which DOT disputes, derives directly from the Comptroller's SFL §112 mandate and are intended to ensure, among other things, that such contracts comply with relevant statutory requirements (e.g., the competitive bidding laws, the prevailing wage law, etc.) and promote the State's best interest. In this case, the Protest challenges DOT's determination to include a PLA requirement in the bid specifications for a major public work contract. Labor Law §222 provides express authority for the use of a PLA, but only where it is determined that a governmental entity's "interest in obtaining the best work at the lowest possible price, preventing favoritism, fraud and corruption, and other considerations such as the impact of delay, the possibility of cost savings advantages, and any local history of labor unrest, are best met by requiring a project labor agreement." As such, the issue of whether the requirements of this statute are met is within the scope of the Comptroller's review under SFL §112 and is an appropriate subject of a bid protest.

Lancaster's Standing to File a Protest

Servidone argues that Lancaster does not have standing to file a protest. We disagree. The Protest Procedures define an "interested party" as "a participant in the procurement process and

those whose participation in the procurement process has been foreclosed by the actions of the contracting agency.” In this case, Lancaster maintains that its participation in the procurement process for Contract D261655 has been foreclosed by the PLA bid specification. Specifically, prior to bidding on the contract, Lancaster submitted a letter dated February 22, 2011, to DOT, asserting that a PLA, if used, would have the ultimate effect of precluding it from competing for the Project because it had its own Department of Labor approved health and welfare, pension and apprentice benefit programs and could not compromise them by asking its employees to join a union. Thus we find that Lancaster is an “interested party” and can challenge the propriety of the PLA requirement.

Alleged Violation of Labor Law §220(c)(3)

Lancaster alleges that the contract for the Project was advertised without the required provision of schedules of prevailing wages and supplements as required by Labor Law §220(c)(3). The law requires that a schedule of supplements and wages to be paid to workers and laborers on a public project be annexed to the specifications for the work and that the schedules be filed with the procuring agency at the time the advertisement for bids is placed.

The DOT asserts that the schedule of Davis Bacon wages and supplements, required for federally funded contracts, was included in the bidding documents at pages 973-1001. Additionally, a note advising all contractors of their obligation to pay the current New York State prevailing wages and supplements was included in the solicitation at page 1002. Further, a series of pages incorporating by reference the project specific New York State prevailing wage schedule established for this contract were included in the solicitation at pages 1003-1009. The DOT also asserts that the process of electronic attachment of prevailing wage schedules was approved by the Department of Labor and incorporated by the Engineering Bulletin.

The DOT provided this Office with copies of the above referenced documents and we have verified that the required wage and supplement schedules were contained in the bid documents. As such, we find that DOT is not in violation of Labor Law §220(c)(3).

Alleged Violations of the Procurement Lobbying Law and Legislative Law

Lancaster alleges that DOT adopted the PLA requirement during the restricted period in violation of the requirements of the Procurement Lobbying Law (State Finance Law §139-j(3)(a) and Legislative Law §1-n(i)). Specifically, Lancaster alleges that HVB&CTC was an “offerer” and that there was a “contact” with this offerer during the “restricted period”. Lancaster further asserts that “DOT’s adherence to the PLA requirement, which resulted from the statutory violations of the State Finance Law and Legislative Law, confirms that those violations were knowing and willful. . . .”

The DOT responded to this allegation stating that nothing in the Procurement Lobbying Law prohibits amendments to the contract documents, or the adoption of a PLA, during the restricted period. In addition, DOT takes the position that representatives of HVB&CTC are not “offerers” and even, assuming that HVB&CTC was an offerer and its responses to inquiries from DOT were impermissible contacts, “any penalty for a violation of law would be visited upon that

individual or the organization that he represents, not on the named lowest responsible and responsive bidder in this case.”

We note that the issue of whether there has been a violation of the requirements of the Procurement Lobbying Law is under investigation by DOT and is the subject of complaints filed with the New York State Inspector General, the New York State Attorney General, and the Inspector General of the United States Department of Transportation. We defer to their investigations. For purposes of resolving this Protest, we note only that since the alleged violation does not pertain to Servidone, the proposed contract awardee, DOT was not required to conclude its investigation of this matter prior to contract award.¹ Moreover, this issue need not be resolved for purposes of resolving the Protest or approving DOT’s contract award to Servidone since the resolution of the issue concerning HVB&CTC would not in any way impact on the validity of the award to Servidone.

Appropriateness of the PLA Requirement

Lancaster argues that DOT did not have a sufficient justification for requiring a PLA with respect to the Project. Lancaster supports this argument by asserting that, as a matter of law, DOT must show that its determination to require a PLA was justified by more than a rational basis. In support of its position, Lancaster cites *New York State Chapter, Inc., Associated General Contractors of America v. New York State Thruway Authority et al. and Matter of General Building Contractors of New York State v. Dormitory Authority of the State of New York*, 88 N.Y.2d 56, 68-69 (1996)(“*Associated General Contractors*”), in which the Court of Appeals stated that “[a]s applied particularly to PLAs . . . more than a rational basis must be shown.”

We believe the Court’s statement must be understood in the context of the state of the law at the time the decision was rendered. The *Associated General Contractors* case involved a challenge to the inclusion of a PLA in bid specifications for a public work projects *without any express statutory authorization or standards for the use of PLAs*. Subsequent to the Court’s decision, however, the Legislature enacted Labor Law §222 in 2008, providing that a governmental entity may require the use of a PLA where it determines that “its interest in obtaining the best work at the lowest possible price, preventing favoritism, fraud and corruption, and other considerations such as the impact of delay, the possibility of cost savings advantages, and any local history of labor unrest, are best met by requiring a project labor agreement.” We believe given the enactment of Labor Law §222, the traditional rational basis standard for judicial review applies to an agency’s determination to require the use of a PLA.

The reason we address what we believe to be the appropriate standard of judicial review is because a fundamental purpose of our SFL §112 approval function is to ensure that State contracts are awarded in compliance with all relevant laws. The standard of judicial review is relevant in determining whether an act taken pursuant to law (e.g., awarding a contract with a PLA requirement) complies with the law. However, it is important to note that it is not the

¹ We note that our determination on this issue is consistent with the guidance provided by the Advisory Council on Procurement Lobbying (see FAQ 12.10 issued by the Advisory Council on Procurement Lobbying).

standard for judicial review (e.g., rational basis, substantial evidence, etc.) that dictates our review of a contract award under SFL § 112. In determining whether to approve a contract under SFL § 112, this Office exercises its own independent judgment to fulfill the Comptroller's role of guardian of the public fisc. As such, this Office may decline to approve a contract award even if the agency had a rational basis for awarding the contract. However, in exercising this broad grant of authority, this Office generally gives significant deference to agency determinations regarding factual issues which are within an agency's expertise.

We find that the factual issues in dispute regarding DOT's decision to require the use of a PLA are within its expertise. The DOT is charged with coordinating the planning and development of the facilities and services required to ensure that adequate, safe and efficient transportation facilities and services are provided at a reasonable cost to the people of the State (Transportation Law §10). Further, DOT is charged with the power and duty to prepare the plans, specifications, designs and estimates to construct and reconstruct the highways, public ways, bridges and grade separations that are under DOT's jurisdiction (Transportation Law §14(15)), and to formulate and execute contracts to perform such duties (Transportation Law §(14)(14)). The DOT, as the agency responsible for administering these duties on behalf of the State, executes and implements countless contracts and possesses vast knowledge of the defining features of the highway construction industry. As such, we conclude that DOT possesses expertise with respect to assessing factors relevant to determining this Protest, namely, the need to eliminate work stoppages and the impact of delay of the Project, as well as the potential for cost savings on the Project.

Giving appropriate deference to DOT's expertise, we reviewed the record to determine whether it reasonably supports DOT's determination to require the use of a PLA, as permitted under Labor Law §222. We find that it does.

The record shows DOT decided to use a PLA for the Project, believing that a PLA would eliminate risk of work stoppages, reduce the risk and adverse effects of delays to an important project and result in cost savings to the State. The decision is predicated in large part on the findings of the DDIS conducted by its outside consultant. The DDIS is an objective assessment of the competing arguments regarding the use of a PLA for the Project. Indeed, the DDIS candidly states that "[e]vidence exists to suggest that the Project could be built without a PLA and achieve similar results" (i.e., on-time, on-budget completion of the size and scope of the Project) (DDIS, p. 3). Ultimately, however, the weight of the evidence compiled by the consultant led it to conclude that "a PLA's tools for managing the risk of labor disharmony and ensuring workforce continuity would be of material benefit to the public owner and the taxpayers of New York. We recommend a PLA for the Exit 122 Project because it will help to ensure the urgent completion of the Project and because key PLA provisions hold the potential for cost savings" (DDIS, p. 3).

Specifically, the DDIS analyzed three different aspects of the project: (1) quantifying the potential economic value of a PLA for the Project; (2) evaluating the urgency of the Project; and, (3) determining whether the bidding process would be fair, open and inclusive. The consultant calculated that of the Project's \$36 million labor costs, a savings of approximately \$1.5 million resulting from the use of a PLA. Lancaster contests the validity of the projected cost savings by

arguing that its bid was approximately \$4.5 million lower than the next lower bid conclusively proves that the cost savings projected in the DDIS were erroneous. In light of the factors which the DDIS and DOT evaluated, we do not conclude that the existence of a lower bid which does not employ a PLA establishes that use of a PLA is not the most cost effective solution with respect to this Project. Further, the consultant found that the Project was urgent in that Route 17 was designated a high priority when federal designation for Interstate 86 occurred and currently does not meet interstate standards. The Project's timely completion is essential in improving important transportation arteries, stimulating commerce and development, and improving safety. As to the nature of the anticipated bidding process if a PLA were used, the consultant concluded based on the available evidence that the competitive bidding process would not be affected (adversely or beneficially) by the use of a PLA. The DOT accepted the consultant's findings and conclusions. We find no reason in this case to substitute our judgment for that of DOT.

Further, to the extent the Protest broadly challenges the anti-competitive effect of the PLA requirement on the bidding process, we find the argument is essentially a challenge to the policy decision made by the Legislature in enacting Labor Law §222. The law recognizes that in particular instances, there may be efficiencies to be gained by using a PLA that promote the underlying interests of the State's competitive bidding laws and therefore expressly authorizes PLAs in certain circumstances. To the extent that, as asserted in the Protest, there are contractors who will not bid on contracts requiring a PLA, we presume that the Legislature was aware of such possibility, but nonetheless concluded that PLAs can, in certain circumstances, further the State's underlying interests.

Conclusion

We find the grounds upon which the Protest is based are not of sufficient merit to warrant the withholding of our approval of the contract. Therefore, the Protest is denied and DOT's award of Contract D261655 to Servidone is approved.