

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by
M.G. McLaren P.C. with respect to the procurement
for Bridge Diving Inspection and Fathometer Survey
for East and Downstate by the New York State
Department of Transportation
Contract Number D030585 (DiCesare)
Contract Number D030586 (Boswell)

Determination
of Bid Protest
SF-20090123
SF-20090124

July 9, 2009

This Office has completed its review of the above-referenced contracts awarded by the New York State Department of Transportation (hereinafter "DOT"). As outlined in further detail below, we have determined that the grounds advanced by the protestor are without sufficient merit to overturn the contract awards by DOT. We hereby deny the protest and are approving the DOT contract awards to Howard L. Boswell Engineer and Land Surveyor, P.C. (hereinafter "Boswell") and A. DiCesare Associates, P.C. (hereinafter "DiCesare")

BACKGROUND

Facts

On or about July 2, 2008, DOT advertised that it was seeking to obtain the services of engineering firms for "Bridge Diving Inspection and Fathometer Survey" for three projects: (i) Contract #D030584-West, DOT Regions 3, 4, 5 and 6; (ii) Contract #D030585-East, DOT Regions 1, 2, 7, 8, and 9; and (iii) Contract #D030586-Downstate, DOT Regions 10 and 11.¹ The advertisements stated that the projects would follow the Department's electronic consultant selection process, Process II.

The advertisement (hereinafter "Solicitation" or "procurement") required minimum experience for personnel, depending on the position, of either five or three years. Specifically, section 4, Guidance, states, in part, that the: (i) Quality Control Engineer shall have at least five years of recent experience; (ii) Team Leader shall have at least three years of recent experience; (iii) Diver shall have at least three years of recent surface-supplied-air diving experience; and (iv) Fathometer Surveyor shall have at least three years of recent bridge fathometer surveying experience.

The requirements for the composition of the consultant team stated that: "The

¹ The protest concerning Contract #D030584-West, DOT Regions 3, 4, 5 and 6 was summarily denied by this Office on April 9, 2009.

consultant team shall provide **one (1) primary AND at least one (1) alternate** diving inspection team **AND (1) primary AND at least one (1) alternate** fathometer survey crew for the duration of this contract. There shall be no overlap of personnel in these four teams. The consultant team must be prepared to supply additional team(s), if required, to meet inspection and/or survey schedules established by the Department."

Pursuant to the electronic consultant selection process, firms submitted proposals that were scored by an automated system that produced a "short-list" of the best qualified firms. M.G. McLaren P.C. (hereinafter "McLaren"), and DiCesare were two of the three short-listed firms for contract #D030585 and McLaren and Boswell were two of the four firms short-listed for contract #D030586.

The short-listed firms then submitted to DOT the "NYSDOT 255 Shortlist Submittal Form." Under the DOT process, the three members of the selection committee review the Form 255s and assigns two scores that are combined with the automated system score and then the firm with the highest score is recommended for designation by the Chief Engineer.

On contract #D030585, DiCesare received the highest score with a total score of 7.6600 and McLaren scored third with a total score of 6.9700. On contract #D030586, Boswell received the highest score with a total score of 9.4800 and McLaren scored fourth with a total score of 6.2700.

Protesting Party

The protestor, McLaren is one of the short listed firms who submitted a proposal on each of the above-referenced contracts and has performed these services in prior cycles.

SUMMARY OF BID PROTEST AND RESPONSES²

Protestor's position

McLaren's protest is based on the following grounds:

- DOT's procurement methodology utilized to make awards for Architect and Engineer contracts is "broken as offerors enjoy virtual license to exaggerate, misstate and falsify information concerning the firm and its personnel."
- Bidders overstated their DOT experience.
- Based on the information contained in the Form 255s (Shortlist Submittal Form, Architect-Engineer and Related Services Questionnaire for Specific Project) submitted by DiCesare and Boswell in connection with prior

² Neither DiCesare nor Boswell responded to the protest.

procurements, McLaren identified misstatements and inaccuracies, omissions and/or misrepresentations that, if continuing, should disqualify DiCesare and Boswell.³ They include:

DiCesare:

- Mr. DiCesare claimed fourteen years of prior experience with his current firm, which would include a period from 1990 to 2000 when he was employed by McLaren.⁴
- Projects identified as qualifying experience for both Mr. DiCesare and his firm were not projects undertaken by his current firm but by McLaren.
- DiCesare does not have sufficient staff to meet the requirements of the Solicitation with respect to the provision of additional teams as required by DOT.

Boswell:

- In the prior cycle, Boswell failed to identify team leaders for each of the diving teams. If the current Form 255 does not contain such information, it would not comply with the requirements of this Solicitation, and, therefore, should have been disqualified.
- Boswell's Form 255 submittal includes the resume for Matthew Daniels, and that resume includes exaggerations and misstatements, because projects are lumped together to create an illusion of experience that exceeds reality.

Agency's response to protest

DOT responded to the grounds raised in McLaren's protest as follows:

McLaren failed to show that DOT violated either SFL §136-a, or the process set forth in the Request for Qualifications, or DOT's administrative procedures. If a firm is found to have misrepresented information, it is possible the firm would not be allowed to participate on a project. DOT has procedures and a process in place to ensure that firms do not exaggerate information contained in their submittals to DOT including its Administrative Procedure for Firms That Misrepresent Data Used for the Electronic Selection of Consultants and its Contract Review Unit.

³ Because DOT did not provide McLaren with the current proposals, including the form 255s, submitted by DiCesare and Boswell, McLaren based its protest, in part on the information contained in the Form 255s submitted by DiCesare and Boswell in connection with the 2005 contract.

⁴ McLaren noted that from 1995 until 2000 Mr. DiCesare was a principal of what was, during that period, known as McLaren & DiCesare, P.C.

Regarding the allegations made against DiCesare, DOT investigated the representations made by McLaren related to the length of time with his current firm and found that DiCesare is a successor to McLaren & DiCesare Consulting Engineers, P.C. and, as such, has made no misrepresentation. Additionally, DOT reviewed the resumes submitted by DiCesare for the current contract and found that nine of the ten submitted resumes are DiCesare employees and the tenth is a sub-consultant, and that each one has the required experience for bridge diving inspection and/or fathometer surveys.

Regarding the allegations made against Boswell, DOT investigated the representations made by McLaren and, based upon DOT's review of Boswell's submission, confirmed that there was no overlap of staff provided by Boswell for each of the diving teams and Mr. Daniels possesses the required experience.

APPLICABLE STATUTES AND GUIDELINES

This procurement is governed by Section 136-a of the State Finance Law ("SFL"). It states that "[i]t is the policy of New York state to negotiate contracts for architectural and/or engineering services and/or surveying services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable fees."

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 the contracts have already been signed by DOT, the Comptroller has reviewed the issues raised in the bid protest filed by McLaren as part of his review of the contract awards.

In its determination of this protest, this Office considered the documentation contained in the procurement record forwarded to this Office by DOT with the DOT/DiCesare and DOT/Boswell contracts, correspondence/submissions from the parties concerning the protest and the correspondence between this Office and DOT.⁵

ANALYSIS

Initially, we note that McLaren sought a variety of documents from DOT under the New York State Freedom of Information Law (Public Officers Law Article 6, hereinafter "FOIL") which, presumably, McLaren would have utilized in framing and supporting the issues identified in its protest. McLaren states that it has been materially prejudiced by the withholding of the requested information and DOT's nondisclosure has no basis in law. Consistent with prior determinations of

⁵ In carrying out responsibilities proscribed by SFL §112, this Office has issued Contract Award Protest Procedures that govern the process to be used when an interested party challenges a contract award by a State agency subject to this Office's approval (see Comptroller's G-Bulletin G-232).

this Office, since issues raised in the FOIL process do not directly relate to the procurement process, this Office does not consider FOIL issues as part of its review of bid protests. This Office does, however, as part of our review process review allegations that a protestor might assert, based on documentation in the procurement record, whether or not that documentation was made available to the protestor.

The Utilized Process

This procurement is governed by SFL §136-a. SFL §136-a states that:

"It is the policy of New York state to negotiate contracts for architectural and/or engineering services and/or surveying services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable fees." The law further requires that "[t]he requiring state department shall negotiate a contract with the highest qualified professional firm for architectural and/or engineering services and/or surveying services at compensation which the department determines in writing to be fair and reasonable to the state of New York."

In making awards under section 136-a, DOT utilizes a process whereby firms submit a proposal containing a description of its experience and the experience of the personnel that would be assigned to the project. These proposals are submitted electronically and scored via an automated system. These scores are utilized to create a shortlist of firms that are then invited to submit DOT's Form 255 that includes information such as the firm's personnel by discipline, project implementation, organizational charts and staff resumes. The shortlisted firms are then scored by the selection committee. Both the automated scores and the selection committee scores are combined for a total score and the highest total score is recommended for award.

McLaren asserts that the system utilized by DOT is broken based on the fact that the Form 255 submittals are done so on an "honor system," and that, because DOT does not verify the information by interview, contacting references or any other means, firms engage in puffery or outright misrepresentations to gain a competitive advantage to obtain a contract award. McLaren then cites examples it found in the Form 255s for the prior cycle for these services in support of its claim.

Nothing in section 136-a expressly, or impliedly, requires that agencies independently verify every statement made by the professional firms submitting statements under that section. Where legitimate issues are raised concerning the accuracy of information submitted, we believe that an agency should review and resolve any issues concerning the accuracy of such information. As detailed

below, DOT has done so in this case.⁶

DiCesare Submission

McLaren asserts that it has identified numerous misrepresentations regarding DeCesare's [prior] submission.

Experience of DiCesare and Mr. DiCesare

One such challenge focus on the fact that DeCesare was incorporated on or about January 2001. Although the firm was incorporated in January of 2001, Mr. DiCesare's claims fourteen years with his present firm and the list of projects he included for experience occurred when he was an employee of McLaren. As a result, McLaren argues that DiCesare should be disqualified.

Pursuant to its Procedure for Firms that Misrepresent Data, DOT conducted an investigation and determined that DiCesare did not make any misrepresentations. DOT provided documentation from one of its prior audits that established Mr. DiCesare "purchased all the outstanding shares he did not own of a related corporation, McLaren & DiCesare Consulting Engineers, P.C. making him sole owner of the company. In September 2002, an election was made to merge the two companies into A. DiCesare Associates, P.C." DOT also contacted DiCesare and asked it to respond to the allegation. In a letter dated November 19, 2008 Arthur DiCesare addressed the misrepresentation allegation. He stated his claim of thirteen years experience with his current firm is based on the fact of the merger of DiCesare and McLaren & DiCesare Consulting Engineers, P.C. Additionally, Mr. DiCesare provided documents that had been filed with the State of Connecticut stating DiCesare is the "successor to McLaren & DiCesare Consulting Engineers, P.C." and provided contractual correspondence for the predecessor firm dating back to 1995 evidencing that the firm was, in fact, in operation at that time.

DiCesare is apparently the corporate successor to McLaren & DiCesare Consulting Engineers, P.C. As such, there is a continuity of services provided by Mr. DiCesare and DiCesare. Based upon this evidence, we agree with DOT that Mr. DiCesare personally, and the firm DiCesare did not misrepresent any data or

⁶ One of the evaluated factors is prior experience with New York State. All three proposers McLaren, DiCesare and Boswell claim prior experience with DOT and many of their personnel have completed the "NYSDOT Bridge Inspection & BIPPI Training." Also, many of the personnel proposed for these contracts are the same people that have performed the services in the past. Therefore, it is apparent to us that DOT has familiarity with these firms, its personnel and the quality of work it performs. Any attempt to misstate or misrepresent experience on a DOT contract (such as the amount of time spent on a contract) would likely be caught and dealt with by DOT in its proscribed procedures that may result in a firm's disqualification and also have lasting vendor responsibility implications.

information in its submission of the Form 255.⁷

DiCesare Employees

McLaren notes that the Solicitation requires that the consultant must be prepared to provide additional team(s) if required by DOT and in light of this requirement, and in light of the limited number of employees claimed on DiCesare's Form 255 with the prior 2005 contract, McLaren questions whether DiCesare will be able to provide additional teams. DOT is satisfied that DeCesare will be able to meet this requirement, and we note that DiCesare is contractually obligated to do so.

Our review of the procurement, as noted by DOT, discloses no requirement that the prime contractor must provide additional teams from its own employees. Sub-consultants could be utilized for this purpose. A review of the Form 255s for DiCesare, AIA Engineers, LTD, PLLC and KS Engineers, PC discloses that although DiCesare may only employ 18 total employees, DiCesare and its sub-consultants have a total of 159 employees, many of whom appear to possess, by discipline, the necessary skills to perform on this contract. Therefore, there is nothing in the procurement record that leads this Office to conclude that DiCesare could not satisfy this requirement of the Solicitation.

Boswell Submission

In connection with the Boswell submission, based upon the Form 255 submitted with the 2005 contract, McLaren identified two specific issues.

Requirement for Separate Teams

The first issue concerns the requirements of the Solicitation that stated:

The consultant team shall provide **one (1) primary AND at least one (1) alternate diving inspection team AND (1) primary AND at least one (1) alternate fathometer survey crew** for the duration of this contract. There shall be no overlap of personnel in these four teams.

A bridge diving inspection team shall consist of one Team Leader (TL) and two Divers. * * * A fathometer survey crew shall consist of

⁷ In SF20080412 this Office determined that a bidder met the five years experience requirement of an RFP even though the current company by itself had not been in business for five years where: (i) the owner and president of the company was one of two partners in a former company that had been providing the same services; (ii) combined, the new company and the former company had the requisite experience; (iii) upon dissolution of the partnership, the partners divided the assets and clients; and (iv) there was no break in the performance of services. As such, we agreed with the agency that the current company was responsive as it was the functional successor to the former firm and had succeeded to its interests in a number of business relationships.

one Fathometer Surveyor (Party Chief), one Instrument Person and one Rod Person.

In light of Boswell's [prior] submission, McLaren speculates that Boswell may be non-compliant and non-responsive to the present procurement.

DOT responded that it reviewed the Form 255 submission on this procurement and Boswell did, in fact, comply with the terms of the Solicitation. Specifically, Boswell provided two distinct dive team leaders and two fathometric surveyors. Each team is composed of different divers, and/or instrument men and/or rod persons, with no overlap between the teams. We have also examined Boswell's organization chart and agree that two separate team leaders are identified, Mr. Naumchevski primary, and Mr. McDermid alternate and two separate fathometric surveyors are identified, Mr. Daniels and Mr. Giacchi and, in addition, there is no overlap between the teams.

Boswell Employees

McLaren asserts that a review of Matthew Daniels' resume illustrates that Mr. Daniels' resume may reflect double counting of the same time periods for different projects and that, as a result, Mr. Daniels may not have the experience required by the Solicitation.

In its answer to the protest, DOT reviewed Mr. Daniels' resume and determined that he is well qualified for this project. This Office requested additional information from DOT to address the issue whether Mr. Daniels' resume reflected double counting of multiple projects for the same time period. DOT provided a chart that Boswell provided in its response to "Special Factor 6" wherein Mr. Daniels' experience was broken down by: (i) Agreement Number; (ii) Region(s); (iii) Time Period; (iv) Field Months; and (v) Total Qualifying Experience. A copy of DOT's response, and the attachment thereto were provided to McLaren. When we examined the chart, it was consistent with the length of diving seasons in the Northeast and required experience in the Solicitation. The chart did not, however, conclusively establish that there was no double counting of time. Therefore, we requested that DOT provide additional information that would show what months and years were claimed for each project, so that we could verify that there was no double counting and that Mr. Daniels met the experience requirements of the Solicitation. DOT, by an e-mail from William Howe, provided a more detailed chart breaking down the actual months and corresponding year of Mr. Daniels' experience, which we have forwarded to McLaren's attorney. Based upon the documentation provided, we are satisfied that there is no double counting of time by Boswell on Mr. Daniel's submission.⁸

⁸ We note that Mr. Daniels is now employed by McLaren and DOT has informed this Office that, as permitted by the Solicitation, Boswell has replaced Mr. Daniels with a similarly qualified substitute approved by DOT, and further, that Boswell would still have received the highest total score if its score had been calculated utilizing the substitute, rather than Mr. Daniels.

Conclusion

We find that the issues raised in the protest are not of sufficient merit to overturn the awards by DOT to DiCesare and Boswell and, therefore the protests are denied. We are, therefore, today approving the contracts.