

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Tully,
Impregilo/Salini, JV challenging the Determination
of the New York State Department of
Transportation concerning the Selection of
Shortlisted Contractors for the Kosciuszko Bridge
Project

**Determination
of Appeal**

SF20130339

August 17, 2013

The Office of the State Comptroller has completed its review of the process used by the New York State Department of Transportation (DOT) to select a shortlist of firms for the Kosciuszko Bridge Project and the Appeal filed by Tully, Impregilo/Salini, JV (JV) challenging that process. Based on the record currently before us, we have determined that the grounds advanced by the JV are insufficient to merit overturning the shortlist selections made by DOT and, therefore, deny the Appeal. Please be advised, however, that the issues raised in the Appeal may warrant further review by this Office when the full procurement is provided to this Office by DOT with any contract award resulting from this procurement process.

BACKGROUND

Facts

On January 23, 2013, DOT issued a Request for Qualifications (RFQ) seeking Statements of Qualifications (SOQs) from qualified firms interested in performing design, construction, quality control, construction inspection and other identified activities to complete Phase 1 of the Kosciuszko Bridge Project (Project). The Project involves the construction of a new 1.1 mile long eastbound bridge structure that will replace the existing Kosciuszko Bridge connecting Queens to Brooklyn. The RFQ indicated that a two-step best value procurement process would be undertaken. The first step of the selection process required firms to respond to the RFQ in order to be considered for a shortlist of firms that would continue on to the second step of the process. In the second step of the process, the shortlisted firms would submit proposals in response to an RFP, with the firm offering the best value being awarded the contract for the Project.¹ SOQs were due by February 28, 2013² with the anticipated announcement of shortlisted firms to be April 1, 2013.³

The objective of the RFQ step of the procurement process was to create a shortlist of the most highly qualified firms with the general capability, capacity and experience necessary to successfully undertake and complete the Project.⁴ The information submitted in response to the

¹ RFQ, Page 4.

² RFQ, Addendum 1.

³ SOQ Evaluation Plan & Shortlist Evaluation Plan Final, Page 8.

⁴ RFQ, Page 17.

RFQ would be evaluated by a Selection Committee reviewing both pass/fail factors and quality evaluation factors. If a proposal passed all the pass/fail evaluations, its SOQ would be further evaluated using quality rating factors. If a proposal failed any pass/fail requirement, the SOQ would be declared unacceptable, the quality factors would not be rated, and the proposal would be eliminated from consideration. After the evaluation, the Selection Committee members would assign SOQs with one of the following ratings: exceptional, good, acceptable, or unacceptable. Evaluators could use a plus or minus suffix to further differentiate the strengths or weaknesses within a quality rating.⁵

Upon completing its review of the SOQs, the Selection Committee would “establish a Short-list for the Project of an appropriate number (as determined by the Department) of the most highly qualified Proposers in order to ensure adequate competition (typically a minimum of three (3) and maximum of five (5)).”⁶ The Selection Committee could limit the shortlist to fewer than five firms if it determined that the quality level offered by lower ranked firms was significantly less than the other firms included on the shortlist.⁷

DOT received six SOQs in response to the RFQ and shortlisted four of those firms. The shortlist of firms was announced on May 13, 2013. The JV was one of the two firms not selected for the shortlist. On May 22, 2013, the JV filed a protest with DOT challenging its decision to not include the JV on the shortlist. DOT denied the protest on June 4, 2013 and the JV subsequently filed an appeal of that decision with the Commissioner of DOT on June 10, 2013. DOT denied that appeal on July 16, 2013, and the JV filed an appeal of that decision with this Office on July 23, 2013 (“Appeal”). The JV contends that the procurement process used by DOT to select shortlisted firms was flawed and that the procurement should be halted immediately.

Procedures and Comptroller’s Authority

Under State Finance Law §112(2), before any contract made for or by a state agency, which exceeds fifty thousand dollars in amount, becomes effective it must be approved by the Comptroller. We note in this instance there is not yet a contract before this Office for approval, rather this Office is reviewing the establishment of a shortlist of eligible bidders one of which will ultimately enter into a contract with DOT for the Project. The resulting DOT contract is subject to the approval of this Office and this Office considers the present Appeal as part of its review of the procurement record that will eventually be submitted to this Office by DOT with the resulting contract.⁸

To carry out its contract review and approval responsibilities under 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.⁹ These procedures govern initial

⁵ RFQ, Pages 18-20.

⁶ RFQ, Page 21.

⁷ SOQ Evaluation Plan & Shortlist Evaluation Plan Final, Page 10.

⁸ The RFQ outlines the process to be used by an unsuccessful bidder to challenge DOT’s shortlist determination and expressly provides that, after availing itself of the DOT protest and appeal procedures, a protestor may challenge the shortlist by submitting a written protest to this Office. RFQ, Page 36.

⁹ Comptroller’s G-Bulletin G-232.

protests to this Office of agency contract awards and contract awards made by this Office and appeals of agency protest determinations. Since this is an appeal of DOT's protest determination, this Appeal is governed by Section 4 of the Contract Award Protest Procedures.

In the determination of this Appeal, this Office considered:

1. The documentation contained in the partial procurement record forwarded to this Office by DOT;
2. The correspondence between this Office and DOT arising out of our review of the Appeal; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
 - a. The JV's Protest to DOT, dated May 22, 2013;
 - b. DOT's Protest Determination, dated June 4, 2013;
 - c. The JV's Appeal to the Commissioner of DOT, dated June 10, 2013;
 - d. DOT's Appeal Determination, dated July 16, 2013;
 - e. The JV's Appeal to OSC, dated July 23, 2013;
 - f. DOT's Answer to the Appeal, dated August 2, 2013; and
 - g. The JV's Reply to DOT's Answer, dated August 5, 2013.

DISCUSSION

In its Appeal, the JV asserts that the procurement process undertaken by DOT to select firms for the shortlist was flawed. Specifically, the JV makes two arguments. First, the JV argues that DOT issued flawed evaluation criteria to the evaluation teams and that as a result of these flaws in the evaluation criteria, it was not selected for the shortlist. The alleged flaws in the evaluation criteria include: (a) failing to take into account significant factors that would affect a firm's performance on the contract; and (b) evaluating the claims history on past projects performed by the firms. Second, the JV argues that it was not ranked high enough with respect to: (a) the managing partner's experience; (b) understanding the project; (c) its patent on a Cable Stay Cradle System; (d) EMR Safety Rating; and (e) experience of the proposed personnel.

1. Evaluation Criteria

a. Failure to Account for Significant Factors Affecting a Firm's Performance

The JV argues that significant strengths of the JV that were relevant to a firm's qualifications were not taken into account or evaluated, such as a firm's: long-term construction experience in Queens and Brooklyn; ability and experience to self-perform utility relocation in and around New York City; established relationship with New York City unions; ownership and operation of asphalt plants within five miles of the Project site; ownership and operation of environmental cleanup companies that have worked in and around the location of the Project; ownership and operation of material processing centers within five miles of the Project site;

specialty in maintenance and protection of traffic in heavily traveled corridors; ownership of large tracts of land within five miles of the Project site on which to store materials and implement site logistics; and reliability and performance with respect to responding to national disasters and extreme conditions.

DOT asserts that the evaluation criteria included in the RFQ were appropriate, in compliance with the Infrastructure Investment Act (“Act”)¹⁰, had a logical basis and connection to the Project, and applied equally and without bias to all proposals.

With respect to the issues in dispute regarding the evaluation criteria used by DOT, we believe selection of this criteria is within DOT’s expertise. Under the Act, DOT is one of the authorized state entities permitted to utilize and execute design-build contracts for capital projects related to the State’s physical infrastructure, including the State’s bridges. The Act provides for a two-step method in selecting a contractor for a design/build project, step one being to generate a shortlist of capable entities. The Act specifically provides that the generation of the shortlist shall be based upon an authorized agency’s “review of responses to a publicly advertised request for qualifications. . . . The authorized state entity’s [RFQ] shall include . . . the selection criteria to be used in generating the list. Such selection criteria shall include the qualifications and experience of the design and construction team . . . and such other qualifications the authorized state entity deems appropriate which may include but are not limited to project understanding, financial capability and record of past performance.”¹¹ Accordingly, the Act specifically permits DOT to develop evaluation criteria for design/build projects that it deems appropriate to determine the most capable proposer.

Pursuant to the New York State Transportation Law (Transportation Law), DOT is charged with coordinating the planning and development of 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.¹² Further, DOT is charged with the power and duty to prepare the plans, specifications, designs and estimates to construct and reconstruct the bridges and grade separations that are under DOT’s jurisdiction¹³ and to formulate and execute contracts to perform such duties.¹⁴ DOT, as the agency responsible for administering these duties on behalf of the State, executes and implements countless bridge and highway contracts and possesses vast knowledge of the highway construction industry. This Office generally gives significant deference to agency determinations, both with respect to appropriate technical requirements and scoring, where such determinations relate to matters within the technical expertise of the agency. Consistent with this principle, we will defer to DOT’s engineering expertise with respect to the development of the appropriate evaluation factors to be utilized in determining the most qualified firms to be shortlisted for the Project. Therefore, we will not question the criteria developed by DOT in this case.

¹⁰ Part F of Chapter 56 of the Laws of 2011.

¹¹ Act §5.

¹² Transportation Law §10.

¹³ Transportation Law §14(15)(c).

¹⁴ Transportation Law §14(14).

b. Evaluation of Claims History on Past Projects

The RFQ required bidders to submit a narrative providing an explanation for any claims, dispute proceedings, litigation and arbitration proceedings listed in the Vendor Responsibility Questionnaire submitted with the SOQ.¹⁵ The JV argues that DOT should not have evaluated damages and claims resulting from projects on which firms performed in compliance with the contract terms. The JV further argues that evaluating this information created a bias and gave DOT the opportunity to “cherry pick”¹⁶ negative information as opposed to positive. The JV also asserts that the evaluation of claims history resulted in lowering the JV’s score substantially.

In its Answer to the Appeal, DOT states that the JV failed to disclose the existence of current claims, delays and liquidated damages as required by the RFQ.

We find no merit to the JV’s arguments. As stated above, the Act expressly includes “past performance” as a criterion to be evaluated in determining the most capable proposer on a design/build project. Therefore, we do not believe that simply requesting information relating to performance on prior projects is inappropriate.¹⁷

The RFQ expressly stated that with respect to the solicitation of this information, “failure to provide this information, conditional or qualified submissions to requests or questions posed . . . incomplete or inaccurate submissions or non-responsive submissions may, in the sole discretion of [DOT] lead to a low evaluation rating for this evaluation factor . . .”¹⁸ Bidders were clearly made aware of the possibility of a low evaluation rating for the failure to submit claims history information as required by the RFQ. Accordingly, consistent with the evaluation criteria set forth in the RFQ, the JV’s failure to submit the claims history requested in the RFQ properly resulted in a negative evaluation rating for this category.

2. Ranking of Proposals

The JV argues that its proposal was not ranked high enough with respect to certain categories including: a) the managing partner’s experience; b) understanding the project; c) its patent on a Cable Stay Cradle System; d) EMR Safety Rating; and e) experience of the proposed personnel. The evaluation of the responses with respect to these categories generally involves engineering judgments that fall within DOT’s expertise. As noted previously, this Office generally gives significant deference to agency determinations with respect to scoring, where such determinations relate to matters within the technical expertise of the agency. Therefore, affording significant deference to DOT’s factual assessments, we find no reason to disrupt DOT’s ranking of the JV in these specific categories.

¹⁵ RFQ, Pages 32-33.

¹⁶ JV Appeal to OSC, Page 4.

¹⁷ The JV appears to assert that requesting information concerning claims submitted by a contractor on prior projects may be inconsistent with federal requirements or statutes. However, the JV does not provide any specific authority for this assertion. Furthermore, as outlined in the September 17, 2013 email from DOT, it appears that federal regulations expressly authorize the use of such information in the evaluation of SOQs (see 23 C.F.R. 636.204 and 23 C.F.R. 636.205).

¹⁸ RFQ, Page 32.

CONCLUSION

For the reasons outlined above, we find that the issues raised in the Appeal are of insufficient merit to overturn DOT's shortlist selections and, therefore, the Appeal is denied.

As noted at the opening paragraph, this Determination of Appeal is based upon our review of the partial record that has been provided to this Office by DOT. Accordingly, this Office reserves its right to consider the issues raised by the JV in its Appeal, as well as any other issues identified by this Office in our review of the shortlist process conducted by DOT, at such time as DOT submits the full procurement record to this Office with any contract award resulting from this procurement process.