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RE: Bid Protest Decision

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

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October 30, 2009

In re:

Town of Hanover
New Hanover High School Project

Protestors:

Laborers New England Regional
Organizing Fund
&
N.B. Kenney Co., Inc.

ATTORNEY GENERAL

BUSINESS & LABOR
BUREAU

BID PROTEST
DECISION

INVESTIGATION SUMMARY

Pursuant to M.G.L. c. 149, § 44H, the Bid Protest Unit conducted an investigation of the captioned matter to determine if a violation of the bidding requirements for public construction had occurred. The Protestors, Laborers' New England Region Organizing Fund (the "Laborers") and N.B. Kenney Co., Inc. ("Kenney") raised various challenges regarding the legitimacy of the Statement of Qualifications ("SOQ"), and consequently, the subsequent bid, received by the Town of Hanover (the "Town") from Callahan, Inc. ("Callahan") for the construction of the Town's new high school (the "project"). As part of this investigation, a hearing was held on September 30, 2009. Representatives of the

Town, Callahan, Laborers, Kenney and the New England Regional Council of Carpenters attended and presented documentary evidence and testimony. Post hearing submissions were received from the parties on or about October 5, 2009. Thereafter, Callahan filed a response to Kenney's post hearing brief. After investigation, the Protest is Allowed.

FACTS

In order to evaluate these claims, this office thoroughly reviewed all of the evidence submitted by all parties as well as the arguments they asserted. The evidence presented to the Town as well as to this office has been compiled and summarized to avoid repetition.

The project has an estimated value in excess of \$10 million (approximately \$38,000,000) and, therefore, is subject to mandatory prequalification procedures for contractors pursuant to M.G.L. c. 149, §§ 44D1/2 and 44D 3/4. Prequalification is a two-step process, according to which awarding authorities review contractors' qualifications in Step One, and then invite only those who have met their qualitative criteria to submit bids in Step Two. Prequalification is done on a project-by-project basis by each awarding authority's prequalification committee.

The Town received SOQs from prospective general contractors, including Callahan, and subcontractors, on or about June 5, 2009. On or about July 6, 2009, the Town published its list of general contractors which had been pre-qualified for the project (including their pre-qualification scores). The list revealed that of the eleven candidates for pre-qualification as general contractors, nine companies had been pre-qualified. Two contractors, J. K. Scanlan Company, Inc. ("Scanlan") and Plumb House, Inc. ("Plumb") were disqualified by the Town. The comments on the Register of General Contractors

Responders and Score Summary, compiled by the Town, indicate, in the comment section, the basis on which these two contractors failed to qualify. (Kenney brief, Ex. A).

Subsequently, general bids were submitted on September 11. At that time, the lowest base bids received by the Town were as follows:¹

- | | |
|--|--------------|
| (1) Callahan | \$37,099,999 |
| (2) J&J Contractors, Inc.
("J & J") | \$38,087,000 |

The SOQ is a questionnaire requiring detailed disclosure of each applicant's work history. Among the many questions and schedules, the SOQ request specific information on prior projects, corporate officers, previous claims and lawsuits against the contractor and other information regarding performance.

In the SOQ, Callahan referenced and relied upon the North Andover Project as its own. Callahan took credit for the entire construction project and the full amount of \$42M, the cost of the high school on Schedule C, the section of the SOQ in which contractors are required to list past similar project experience. Callahan also identifies itself as the successor to JTC. Under Schedule A-Business Owners, it identified Patrick Callahan as President, Michael Callahan as Vice President and Timothy Callahan as Vice President, Heavy Construction and reported that they all have 19 years of experience in these roles, the last five with Callahan and the earlier years with JTC. Michael Callahan is also identified as the Principal in Charge for 19 years, including a list of completed school projects (including the North Andover project) with the implication that he was the Principal in Charge of all listed projects. Rich Tardiff, who is listed as the Project

¹ The project specifications contained certain alternates and the Town has indicated that it intends to award the project with all of the alternates included. Regardless, Callahan would remain the low bidder with a bid differential with J&J Contractors, Inc. ("J&J") of \$785,743.00.

Manager, reports 19 years in that capacity, all with Callahan. It was further noted that the principals listed for Callahan, and the experience that they had in those corporate roles, do not comport with the incorporation papers filed by either company with the MA Secretary of State. JTC reports different officers than Callahan. Although they share the last name Callahan, there does not seem to be any common corporate officers between the two companies. Further, JTC is still incorporated as a general contractor so Callahan's assertion that it is a successor corporation is not supported by these mandatory filings.

Schedule D-Terminations, which requires the contractor to list "each and every project on which it was terminated or failed to complete the project" is blank. Schedule E-Legal Proceedings lists the 24 legal matters regarding Callahan, but none for JTC.

In the Schedule C component of its SOQ, wherein it was called upon to list "Similar Project Experience," Callahan listed as follows:

<i>Project Name & Location</i>	<i>Project Owner</i>	<i>Project Description</i>	<i>Original and Final Contract Amount and Explanation</i>	<i>Date Completed</i>
North Andover High School North Andover, MA	North Andover Public Schools	New Construction of a 200,000 sf High School, Demo of old School, extensive Site work and new Athletic Field	\$39,000,000 \$42,000,000	1/15/05

On its Schedule J, wherein Callahan was required to identify public projects completed *within* the past three years, Callahan provided the answer, "See Statement on Schedule C," again referring to the North Andover project, even though the North Andover project had not, in fact, been completed within the last three years. Counsel for

Callahan acknowledged at the hearing in response to a question that the answer to Schedule J should have been "None."

On Schedule C, Callahan placed the following reference:

***John T. Callahan & Sons. Inc., the company's predecessor of Callahan, Inc., built over 75 schools in Massachusetts in the last 20 years. Many of the same employees of JTC work for Callahan, Inc., including the owners. Their collective experience including numerous ground up and extensive renovations to primary and secondary schools throughout the Commonwealth with a total in place value in excess of _____.

The asterisk was not placed next to the North Andover project, nor was it placed next to any specific project listed above it and the total value of the "primary and secondary" school projects mentioned following the asterisk was left blank. No further explanation of the relationship between JTC and Callahan was provided in the SOQ. As such, nothing in the SOQ distinguished what work was performed by JTC, as opposed by Callahan.

JTC was awarded the contract to construct a school in North Andover and commenced the work in 2002. JTC ran into financial difficulties in the spring of 2004. Due to JTC's financial difficulties, Travelers, the surety for JTC, provided financial assistance for JTC to continue the North Andover project, but informed JTC's principals that JTC was no longer an entity with the capacity to do the work or complete the project. Accordingly, Travelers recommended the formation of a new business entity and JTC followed its advice, creating Callahan, Inc. Callahan was the entity that was responsible for completing the "last" approximately \$1.2 million of work on the project (whose overall value was listed as \$42 million). The documents offered as evidence indicate that

Callahan was technically acting as a subcontractor to JTC at the time of project completion (as evidenced by an invoice Callahan submitted through JTC).

Although it alludes to its project takeover in North Andover from JTC, Callahan fails to include or explain that on Schedule D, the section of the SOQ in which contractors are required to disclose projects that they did not complete. Further, Callahan failed to disclose any currently pending or adversely concluded legal proceedings against JTC, as required by Schedule E. Callahan was given further opportunity to provide this information in response to a direct question at the hearing, in its written response to Kenney's submission which alleged open and unreported legal proceedings against JTC. In a subsequent telephone call, Callahan indicated that a small number of lawsuits may have been pending against JTC at the time Schedule E was filed but argued that such information was not relevant.

The Town in assessing all the submissions in response to the SOQ, disqualified two, potential bidders, Scanlan and Plumb. With respect to Scanlan, the Town noted the following:

- Superintendent and PM have no school experience
- Elementary school and middle schools done < \$15M
- Numerous legal proceedings w/ "Matter Resolved: noted. Does not specify for or against J.K. Scanlan
- Revenue under contract seems to contradict info. in financial statement.

With respect to Plumb, the Town noted the following:

- Senior PM, PM, General Super, 10 2 Senior Supers, NO school experience
- 2nd Senior Super - 1 private school \$500,000 scope
- Two schools listed as similar experience,
- 1st 4th-5th Grade \$568,000 in 1993
- 2nd Elem/MS \$1.6M in 1991
- Both projects in Connecticut, not MA
- 1.34 Safety Record
- Packages mixed with Plumb filed submissions, PMA reviewed-could not get to other members.

Positions of the Parties

1. The Town and Callahan

Callahan asserts that a review of the resumes it submitted to the Town shows that nearly all, eight out of nine, key JTC management personnel ultimately went to work for Callahan and were there when the project was completed in 2004/2005. It further explains that it believes it was justified in listing the North Andover project when submitting its SOQ due to the circumstances surrounding the completion of that project. Specifically, Callahan submits that JTC started the North Andover project in 2002, but ran into financial difficulties in the spring of 2004 and at the recommendation of its surety, formed the new business, Callahan, Inc. Callahan argues that it was appropriate for it to list the North Andover project on Schedule C because it calls for a listing of projects a contractor has "completed" and North Andover literally qualifies as such since Callahan was the entity that was responsible for completing the "last" approximately \$1.2 million of work on the project (whose overall value was listed as \$42 million). Callahan justifies its reporting of the full project as its own because Schedule C asks the contractor to "list all similar projects your firm has **completed**". Callahan narrowly interprets this requirement, asserting that, as the last contractor on the job, it did actually complete the project.

The Town and Callahan argue that the Protestors have not met their burden to establish that the pre-qualification statement submitted by Callahan constitutes "fraud", as defined by previous decisions of this Office. As such, they argue, the decision of the Town's pre-qualification committee must stand. The Town further argues that the statement that Callahan *completed* the North Andover project is literally accurate and that

its SOQ and resume references to JTC were adequate to put the Town on notice of the relationship between the parties and the involvement of key personnel in both corporations. The Town also points to communications it received (after receiving the protests) from parties associated with the North Andover project indicating an awareness of the JTC/Callahan transition (and the involvement of the surety) and noting the awarding authority's satisfaction with the manner in which the project was completed. After the bid opening, in response to letters received from the Laborers and J&J, Callahan also provided the Town with detailed explanations of the history of the North Andover project and the connections between JTC and Callahan.

In sum, Callahan asserts that its submission meets all statutory standards, and that as it completed the North Andover project, it is entitled to take full credit for it. Further, Callahan argues that as a successor to JTC, and in view of the overlay of the management and staff between the two companies, it is entitled to use the experience, project limits, and history of JTC as its own.

2. The Protestors

The Protestors assert that Callahan's responses and failures to respond to various Schedules are fraudulent and allow Callahan to present itself as a contractor which has the requisite experience and credentials to get a job of this dimension. Yet when its connection to JTC would be to its detriment, Callahan declined to answer the questions asked or skewed its answers to distance itself from JTC's record. Thus, the Protestors assert that Callahan materially and knowingly misrepresented its relationship with JTC and to the North Andover project such that it rises to the level of fraud.

Specifically, the Protestors argue that Callahan had falsely reported to the Town during the pre-qualification process that it was responsible for all \$42 million of the North Andover high school project that was completed in January of 2005. The Protestors point out that Callahan was only responsible for \$1,264,685 of this total amount, which was earned from a punch list and a change order regarding the athletic field. The North Andover project had been awarded to the company JTC, not Callahan, which was a separate corporate entity in 2002, and remains so today, and that it was JTC, not Callahan, that performed the vast majority of the work in North Andover. The Protestors also cite to the fact that the North Andover project was completed on January 15, 2005, which is outside the three year look back period established by the Town. Thus, the Protestors argue that Callahan could not take credit for any amount over the \$1.2 M. and had it honestly reported its role in North Andover, it would likely not have been pre-qualified and allowed to bid on the project. Nor was Callahan able to identify any other school project it had done. The Protestors also noted that the Town had denied prequalification to Scanlan and Plumb, in part, due to their lack of school experience. The Protestors also cite to the fact that the North Andover project was completed in 2005, well past the information period required in schedule J, wherein Callahan was required to identify public projects completed *within* the past three years.

The Protestors also argue that although it alludes to its project takeover in North Andover from JTC, Callahan failed to include this information on Schedule D and failed to disclose information on pending and concluded legal proceedings against JTC on Schedule E. The Protestors essentially argue that Callahan committed fraud in its knowing and intentional misrepresentations regarding its role in the North Andover

project, as evidenced by its failure to fully embrace JTC as a predecessor company and doing so only when advantageous. The Protestors further note that but for taking credit for the work performed by JTC, Callahan would not have prequalified for the project.

ANALYSIS

The central issue in this case is whether Callahan's prequalification should be overturned as a result of its response to the Town's RFQ. Prequalification committees have a considerable degree of discretion under Massachusetts law: "The decisions of the prequalification committee shall be final and shall not be subject to appeal except on grounds of arbitrariness, capriciousness, fraud or collusion." M.G.L. c.149, §44D½(h). This standard is echoed in the accompanying regulation which provides that "the burden shall be on the appealing party to prove by a preponderance of evidence that such fraud or collusion existed." 810 CMR 10.11(2). This Office has previously held that fraud by a bidding contractor can form the basis for overturning prequalification committee's decision. See *In re: W.D. Fowler, Inc. v. City of Revere*, Attorney General Bid Protest Decision (August 10, 2006), *In re: IBEW Local 103 v. City of Everett*, Attorney General Bid Protest Decision (November 2, 2006). The awarding authority does not have the discretion to waive such fraud. *In re: W.D. Fowler, Inc. v. City of Revere*, Attorney General Bid Protest Decision (August 10, 2006).

Since there has been no allegation of collusion between Callahan and the Town, the merit of the Laborers' protest is dependent on whether Callahan's submission of and omission of certain information on its prequalification documents constitutes fraud.

Although the prequalification statute does not define fraud, this Office has previously described the applicable test:

“fraud” requires, by a preponderance of the evidence, proof of
[1] a statement, act or omission relating to a material fact,
[2] that has the natural tendency to be relied upon by or to influence the average person,
[3] that is knowingly false or misleading, and
[4] intended to mislead the prequalification committee or awarding authority.

In re: W.D. Fowler, Inc. v. City of Revere, Attorney General Bid Protest Decision (August 10, 2006), *In re: IBEW Local 103 v. City of Everett*, Attorney General Bid Protest Decision (November 2, 2006).

A misrepresentation of fact or an omission is material if it undermines the objectives of the competitive bidding laws. This standard was expounded in *In re:*

Wastewater Treatment Plant Improvements for CSO Abatement, Greater Lawrence Sanitary District, Attorney General Bid Protest Decision (July 22, 2005):

The errors or omissions that we have identified as “material” are those that threaten an objective of the competitive bidding statute. They hide something that *could*...cause an awarding authority to reject a bidder as not responsible. In other words, material errors or omissions hide information that could or would affect the awarding authority’s selection of a contractor. (emphasis added).

Here, the allegedly false statements made by Callahan relate to information that is expressly required by the RFQ and the statute. Accordingly, they are intrinsically “material.” See *University of Massachusetts v. Cameron Painting*, Attorney General Bid Protest Decision (May 3, 2005). False responses to questions in an RFQ are material as they upset the “equal footing” principle, which is central to the competitive bidding laws. *In re: IBEW Local 103 v. City of Everett*, Attorney General Bid Protest Decision (November 2, 2006). Callahan’s identification of the North Andover project in the RFQ

as one for which it was responsible in the full amount of the project was a misstatement in terms of both (1) Callahan's corporate responsibility for that project and (2) the amount of the work for which the new corporate entity was required to perform. Since Callahan took credit for JTC's work and leadership, it had a concomitant obligation to disclose the information requested on the various Schedules. Callahan's failure to fully disclose this information on the various Schedules regarding JTC which were adverse to its interest are omissions relating to a material fact. In the absence of a full explanation of the circumstances of that project, which included all information, regardless of its advantage to Callahan, the information on Callahan's SOQ constituted a material misrepresentation.

The second prong of fraud is to show the misleading or false statement has a "natural tendency to be relied upon by or to influence the average person." *In re: IBEW Local 103 v. City of Everett*, Attorney General Bid Protest Decision (November 2, 2006). The circumstances surrounding responses to an RFQ naturally call for reliance upon them. The purpose of such documents is to assess the credentials of the submitter, and the document must be signed "under the pains and penalties of perjury." Based on the statutory purpose and the potential consequences of a misrepresentation, an awarding authority would naturally rely upon or be influenced by such a response.

A review of the pre-qualification process used by the Town evidences that prior similar project experience was a critical factor. In fact, the Town disqualified two contractors due to insufficient school building experience. It is evident that Callahan, by referencing the North Andover project throughout its submissions, provided the Town with information it relied upon in assessing Callahan's qualifications for the construction

of the project at issue here. Thus, the Town relied on Callahan's representations which were presumably a major basis on which Callahan was pre-qualified.

The next question is whether Callahan's statements were "knowingly false or misleading." *In re: W.D. Fowler, Inc. v. City of Revere*, Attorney General Bid Protest Decision (August 10, 2006), *In re: IBEW Local 103 v. City of Everett*, Attorney General Bid Protest Decision (November 2, 2006). Callahan's submission effectively takes claim for a \$42 million project for which a separate (albeit family related) corporate entity was essentially responsible. Notably, Callahan did not identify the North Andover project as one that had been largely performed by JTC. Rather, it not only remained silent as to that significant information, but affirmatively took credit for "[d]emo of old school" and "extensive site work". Callahan submits that the listing was justified by the fact that Callahan was the *completion* contractor for the job even though most of the work had been performed under the auspices of JTC and it was only responsible for \$1.2 million of the \$42 million project. But demolition of the old school and site work is work that took place at commencement of construction – not at the end, or completion of the project. It also relies on the extensive overlap in key personnel between the two companies to explain why it believes it was entitled to offer the North Andover project to Hanover as an example of a similar project performed by Callahan, the applicant for the project in Hanover. However, the identification of these key personnel in Schedule B lacks transparency. While the principals of Callahan apparently worked for JTC, they did so in lesser roles, unidentified in the record. The principal officers of JTC are different than those listed for Callahan. As such, the implied assumption that Patrick Callahan, Michael

Callahan and Timothy Callahan have served as president, Vice President and Vice President Heavy Construction of a general contractor for 19 years is false.

In addition, even if Callahan could claim the North Andover project as its own, the project was outside the relevant experience window required in the SOQ. The language of Section J clearly calls for projects performed *within the past three years*, Callahan chose to reference a list of older projects performed by another entity (and one that was dissolved for serious financial reasons), when the accurate answer to the required Schedule J listing was "None."² It is also notable that whereas, in listing similar projects Callahan included a project done predominantly by JTC, in listing pending legal proceedings it limited its disclosure to those related to Callahan.² The obfuscation of corporate responsibility for the North Andover project, during which JTC was plagued to such a degree by financial difficulties that its surety informed its principals that it was no longer an entity with the capacity to complete the project, recommending formation of a new business, and for which Callahan, itself, performed but a fraction of what it takes credit for, appears to be an intentional attempt to mislead the awarding authority about Callahan's true project history.

Similarly, in completing Schedule D with regard to projects which the contractor "was terminated or failed to complete" Callahan does not reference the fact that by its own assertion, JTC failed to complete the North Andover project because of its financial problems. Callahan's submits that it did not list the many public projects of JTC as part of its portfolio of similar projects, and therefore, it was consistent not to list projects

² At the hearing Callahan acknowledged that it had not disclosed any litigation related to JTC. In response to a post-hearing allegation by Kenney that a large number of cases remained open involving JTC, Callahan responded informally that it believed only one litigation remained open. A preliminary review of the electronic dockets indicates that a small number of cases remain open involving JTC.

which did not technically get completed by JTC. However, the selectivity with which Callahan integrates JTC's and Callahan's respective histories is suggestive of an intention to present information in a less than candid fashion. By referencing the North Andover project, Callahan did risk that the Town could learn of the turbulent history of that project in terms of JTC's alleged insolvency and construction-related liabilities

However, the proper means for the Town to become aware of that history would have been via direct disclosure by Callahan. Furthermore, to the extent that Callahan wishes to take credit for the entirety of the North Andover project based, in part, on the overlap of key personnel, it must also be prepared to acknowledge problems associated with the management of that entity. It also strains credulity for Callahan to assert that being the contractor responsible for completing \$1.2 million worth of work on a project is the same as having completed the entire \$42 million project itself. An awarding authority in the position of reviewing Callahan's SOQ would have reasonably expected to find that Callahan had performed all of the work on the North Andover project.

Having knowingly presented potentially misleading information, the only remaining question is whether the information so presented by Callahan was "intended to mislead the prequalification committee or awarding authority." *In re: W.D. Fowler, Inc. v. City of Revere*, Attorney General Bid Protest Decision (August 10, 2006), *In re: IBEW Local 103 v. City of Everett*, Attorney General Bid Protest Decision (November 2, 2006).

On its face, Callahan's presentation of misleading information leads to an inference of an intent to mislead. A fact finder may infer from circumstantial evidence that one party intended another party to rely on inaccurate information. *Wetlands Group, Inc. v. Lawlor* 2005 WL 1683887 (Mass. Super.). The evidence presented here leads to an inference

that Callahan was seeking to enhance its chances of being prequalified by presenting itself in a more favorable light than it would by a more candid disclosure. A more candid disclosure would have consisted of an acknowledgement that it (1) had completed no similar public projects in the last three years and that (2) the last comparable public project done by a somewhat related corporate entity was one on which financial difficulties necessitated the formation of a new company and (3) one on which it only performed a small fraction of the work originally awarded to JTC. It was readily foreseeable that such a disclosure would have made the Town's prequalification committee and ultimately the awarding authority reluctant to award Callahan the contract for this significant project. The disqualification of at least two other contractors in part based on their limited record of comparable projects is evidence of the importance of conveying to the prequalification committee a history of comparable projects. Had Callahan disclosed only its actual role in the North Andover project, it too would have likely been disqualified.

Therefore, I find that all four factors in the applicable test to determine fraud under the prequalification statute have been proven, and accordingly, I find that Callahan should not have been prequalified and therefore can not be awarded the bid.

Kenney also raises the issue as to whether the post-bid decision of the Town to accept the prequalification and bid of Callahan even after receiving more accurate information regarding its history should be deemed an arbitrary and capricious decision. This argument presumes that the Town shared the conclusion of the Protestors that the statements of Callahan constituted material misrepresentations and omissions of material information. The Town has made it clear that it did not consider the information as

presented by Callahan to constitute material misrepresentations or omissions. As I have found that Callahan has acted intentionally to mislead the Town's pre-qualification committee, and since fraud cannot be overlooked by an awarding authority, I need not reach the question of whether the Town's post-bid decision was arbitrary or capricious.

Accordingly, for the reasons set forth above, the Protest is Allowed.

Respectfully submitted,



Deborah A. Anderson
Assistant Attorney General