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September 6, 2024

In re:

Service Agreement for Fire Alarm & Fire
Protection Inspection/Testing/Programming
(North Shore Community College)

Protestor

Foundation for Fair Contracting of
Massachusetts

ATTORNEY GENERAL
BID UNIT, FAIR LABOR DIVISION
BID PROTEST DECISION

INVESTIGATION SUMMARY

Pursuant to G.L. c. 149, § 44H, the Office of the Attorney General, through the undersigned, conducted an investigation to determine whether there was a violation of the public construction bid laws. The Protestor, Foundation for Fair Contracting of Massachusetts (FFCM), asserts that North Shore Community College (NSCC) violated the public bidding laws when it utilized Operational Services Division (OSD) statewide contract TRD03: Tradesperson Installation, Repair and Maintenance Services (TRD03) to procure its Service Agreement for Fire Alarm & Fire Protection Inspection/Testing/Programming (Project). In support of its use of TRD03 to bid the Project, NSCC argues that it acted consistent with then-current guidance on the

utilization of TRD03. OSD, though not a party to this dispute, participated in these proceedings and argues that NSCC appropriately used TRD03 to procure the Project.

As part of this investigation, a hearing was held on November 30, 2023, attended by representatives of FFCM, NSCC, OSD, Aetna Fire Alarm Service Co., Inc., and the National Electrical Contractors Association of Greater Boston, Inc. For the reasons that follow, I find that NSCC violated the public construction bid laws by bidding the Project under the umbrella of TRD03. The protest is therefore ALLOWED.

STATEMENT OF THE CASE

In the spring of 2023, NSCC issued a Request for Quotes (RFQ) soliciting responses from potential vendors for the Project. The RFQ provided that the scope of work would include “all labor, materials, tools, equipment and supervision to provide qualified Fire Alarm and Fire Protection, Inspectors, Technicians, and Programmers, at the College’s Danvers and Lynn locations.” The proposed contract term was July 1, 2023 to June 30, 2026, with two additional option years that could be exercised at the discretion of NSCC. The deadline for responses was June 20, 2023.

On July 11, 2023, FFCM filed a Notice of Bid Protest with this Office alleging that the estimated value of the Project possibly exceeded \$1,000,000 and was therefore ineligible to use TRD03, because use of OSD’s TRD03 contract is limited to projects valued at \$50,000 or less. On October 30, 2023, the AGO’s Bid Unit met with FFCM to discuss these concerns. On November 1, 2023, FFCM submitted a renewed protest, and a hearing was held on November 30, 2023.

As part of its evidence, FFCM furnished this Office with invoices submitted by vendors pursuant to the Project’s predecessor contract, which show that, between February 2023 and

March 2023, NSCC spent nearly \$24,000 on routine fire alarm inspections alone across five buildings. These invoices formed the basis of FFCM's million-dollar estimate. Post-hearing, OSD submitted email correspondence with this Office from December 2022 to buttress its assertion that NSCC was permitted to consider only labor costs when determining the value of the Project, which would put the Project value under \$50,000, meaning using TRD03 was permissible.

On February 23, 2024, FFCM, through its counsel, proposed to stay resolution of the bid protest until mid-March 2024 pending further discussions among the parties. After multiple postponements, on April 19, 2024, a meeting was held between FFCM, OSD, and the AGO to discuss the issues raised by the protest and hearing.¹ Subsequent to the meeting, FFCM and OSD were instructed to provide this Office with a proposed resolution for consideration. FFCM's proposed resolution was submitted on May 31, 2024. OSD declined to endorse FFCM's proposed resolution and offered no proposal of its own.

ANALYSIS

The issue in this case is whether NSCC violated the public construction bidding laws by procuring the Project pursuant to G.L. c. 149, § 44A(2)(B). For the reasons set forth below, I find that the Project should have been bid pursuant to G.L. c. 149, § 44A(2)(D) and was therefore improperly procured.

General Laws chapter 149, section 44A(2) mandates various procurement procedures for the construction of buildings by public agencies according to the estimated value of the construction contract. When determining the estimated value of a construction contract, we

¹ By email dated April 10, 2024, counsel for NSCC declined to participate, noting that the topic to be discussed was the application of the public construction bidding laws to TRD03, and NSCC had no authority over the interpretation or administration of G.L. c. 149, § 44A(2)(B) or TRD03.

consider the total value of the potential work under the contract. *See New England Building Components v. University of Massachusetts Building Authority*, DLI Bid Protest Decision (June 13, 1991) (“The value of the bid reasonably must mean the maximum amount of work that can be awarded under the resulting contract.”). The total value of the contract includes all the years in a multi-year contract, including option years. *See Foundation for Fair Contracting of Massachusetts v. North Shore Community College*, Attorney General Bid Protest Decision (July 24, 2017). The cost of materials is part of the ultimate value of a contract as well. *See Your Electrical Solutions, Inc. v. Boston Public Schools*, Attorney General Bid Protest Decision (August 16, 2012). The awarding authority determines the estimated cost of the contract, and its factual determination is not to be overturned absent arbitrary, capricious, or illegal conduct by the awarding authority. *See Capuano, Inc. v. School Building Committee of Wilbraham*, 330 Mass. 494, 496 (1953) (“[I]n the absence of illegal or arbitrary action [the awarding authority’s] conclusion as to matters of fact within [its] jurisdiction cannot be controverted.”). “A decision is not arbitrary and capricious unless there is no ground which ‘[a reasonable person] might deem proper’ to support it.” *T.D.J. Development Corp. v. Conservation Com’n of North Andover*, 36 Mass.App.Ct. 124, 128 (1994). The protestor bears the burden of establishing that the awarding authority acted in an arbitrary and capricious manner. *See Modern Continental Const. Co., Inc. v. Massachusetts Port Authority*, 369 Mass. 825, 828 (1976).

Sections 44A(2)(B) and 44A(2)(D) of Chapter 149 set forth the procurement methods for contracts for public construction by a public agency estimated to cost between \$10,000 and \$50,000 and in excess of \$150,000, respectively.

G.L. c. 149, § 44A(2)(B) states in relevant part:

Every contract for the construction, reconstruction, installation, demolition, maintenance or repair of any building estimated to cost not less than \$10,000 but not more than

\$50,000 shall be awarded to the responsible person offering to perform the contract at the lowest price. The public agency shall make public notification of the contract and shall seek written responses from no fewer than 3 persons who customarily perform such work. . . A public agency may utilize a vendor list established through a statewide contract procured through the operational services division to identify 1 or more of the persons from whom it will seek written responses for purposes of this paragraph. A public agency may also procure a blanket contract to establish a listing of vendors in certain defined categories of work that are under contract to provide services for multiple individual tasks of not more than \$50,000 each, and from whom written responses will be sought. Any such blanket contract procured by the awarding authority shall be procured pursuant to either section 39M of chapter 30 or sections 44A to 44J, inclusive, of chapter 149 which are applicable to projects over \$50,000... provided, however, that if the public agency obtains a minimum of 2 written responses from a vendor list established through a blanket contract or a statewide contract procured through the operational services division, and the lowest of those written responses is deemed acceptable to the public agency, public notification is not required

G.L. c. 149, § 44A(2)(D) provides:

Every contract for the construction, reconstruction, installation, demolition, maintenance or repair of any building by a public agency estimated to cost more than \$150,000, except for a pumping station to be constructed as an integral part of a sewer construction or water construction project bid under the provisions of section 39M of chapter 30, shall be awarded to the lowest responsible and eligible general bidder on the basis of competitive bids in accordance with the procedure set forth in section 44A to 44H, inclusive.

Thus, if a public agency contracts for building construction work, and the estimated value of the contract is between \$10,000 and \$50,000, the public agency must solicit three quotes pursuant to G.L. c. 149, § 44A(2)(B). If the value of the contract exceeds \$150,000, the contract must be publicly bid pursuant to G.L. c. 149, § 44A(2)(D).

In this Protest, FFCM challenges NSCC's cost estimate for the Project, asserting that when the value of the three contract years and two options years are added, the total contract value may exceed \$1,000,000. OSD argues that based on prior guidance, NSCC was authorized to bid the Project under TRD03 pursuant to G.L. c. 149, § 44A(2)(B) because the value of labor on the contract does not exceed \$50,000 for any "task." As discussed in detail below, I disagree with OSD's interpretation of the statute.

Section 44A(2)(B) sets forth two requirements for public construction contracts estimated to cost between \$10,000 and \$50,000: public notification and solicitation of written responses. The statute also provides three means of soliciting the required quotes. First, an awarding authority can “cold call” no fewer than three contractors who customarily perform the work that is the subject of the contract. Second, rather than cold calling contractors, an awarding authority may utilize a vendor list on an OSD statewide contract to solicit quotes from persons performing such work. As a third means, an awarding authority can procure its own blanket contract to establish a list of trade contractors who are under contract to provide services for individual tasks not exceeding \$50,000. The word “tasks” is not used in the sentence referring to statewide contracts, but rather it is used exclusively in the sentence describing the permissible use of a blanket contract. Accordingly, “tasks,” as it is used in G.L. c.149, § 44A(2)(B), does not apply to OSD statewide contracts such as TRD03.²

If the awarding authority obtains at least two written responses from vendors listed on an OSD statewide contract, public notification is not required, provided that the lowest of the responses is acceptable to the awarding authority.³ Thus, the purpose of using OSD statewide contracts under G.L. c. 149, § 44(A)(2)(B) is to provide an easier means for awarding authorities to solicit quotes from potential vendors and to eliminate the need of public notification,

² As the only question before this Office is whether materials costs were improperly excluded when estimating the value of the Project solicited through an OSD statewide contract, we take no position as to whether G.L. c. 149, § 44A(2)(B) permits the exclusion of materials costs when estimating the value of a construction contract that is solicited through a blanket contract.

³ G.L. c. 149, § 44A(2)(B) defines public notice as “posting at least 2 weeks before the time specified in the notification for the receipt of responses, the contract and scope-of-work statement: (1) on the website of the public agency, (2) on the COMMBUYS system administered by the operational services division, (3) in the central register published pursuant to section 20A of chapter 9 and (4) in a conspicuous place in or near the primary office of the public agency.”

streamlining the procurement process for lower value construction contracts. Further, the value of the resulting contract may not exceed \$50,000, as established by G.L. c. 149, § 44A(2)(B).

Henceforth, when estimating the cost of a construction project that will utilize an OSD statewide contract pursuant to G.L. c. 149, § 44A(2)(B), awarding authorities must include in their cost estimates all costs, including but not limited to construction labor, materials, and non-construction labor.

Applying these principles to the facts before me, I find that FFCM has met its burden of demonstrating that NSCC's cost estimate for the Project was arbitrary and capricious. NSCC provided no evidence to explain how in a two-month period in 2023 it could be invoiced for nearly \$24,000 in fire alarm inspection services alone, and yet estimate that between 2024 and 2028 it would not spend more than \$50,000 on all services under the contract. Nor has NSCC furnished any evidence to suggest there has been a dramatic decrease in scope between the predecessor contract and the Project's contract that would justify its cost estimate. Simply put, NSCC's cost estimate for the Project is not supported by the record. Therefore, I find NSCC's decision to procure the Project through G.L. c. 149, § 44A(2)(B) was arbitrary and capricious and in violation of the public bidding laws.

CONCLUSION

Based on the foregoing, the Protest is allowed. OSD is instructed to revise the TRD03 user guide and any other outreach or instruction materials in possession, custody, or control containing language inconsistent with this decision. OSD must demonstrate compliance with this decision no later than October 31, 2024. This decision is prospective from September 6, 2024.

Respectfully submitted,

/s/ Justin M. Polk

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