

THOMAS P. DINAPOLI
STATE COMPTROLLER



110 STATE STREET
ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

January 28, 2010

Via email and USPS

Mr. Michael McCarthy
Director, Office of Contract Management
Department of Transportation
50 Wolf Road
Albany, New York 12232

Dear Mr. McCarthy:

Re: Contract D261253 L&L Painting Company

With this letter the Office of the State Comptroller (OSC) is returning the above-referenced federal stimulus contract non-approved. We are also rescinding from the Department of Transportation (DOT) the previously agreed upon alternative vendor responsibility documentation standards.

I. Non-Approval of Contract D261253.

The reasons for OSC's non-approval are the significant vendor responsibility issues, namely L&L's involvement in the Rose Contracting investigation, that remain unresolved and require additional agency review and assessment. These responsibility issues are especially significant given the size of the contract (\$26.8 million), and are heightened by the fact that this is a federal stimulus contract, to which Comptroller DiNapoli has committed greater scrutiny.

OSC received this contract initially on November 19, 2009 as a "Quick" contract, accompanied by the standard Quick Certification form. This form stated that DOT had "undertaken an affirmative review of the contractor's responsibility and has reasonable assurance that the contractor is responsible." The DOT provided no other vendor responsibility documentation with the transaction.

As part of OSC's Vendor Responsibility review, OSC requested from DOT the vendor's CCA-1, which disclosed the following:

- Disqualification by the New York City School Construction Authority (SCA);
- 16 serious OSHA violations totaling \$33,500;
- Involvement in an investigation by the US Attorney, the FBI, the US DOT and others of a company, Rose Contracting, owned by vendor's principals' sister. The investigation resulted in Rose Contracting accepting a deferred prosecution agreement (DPA);
- Investigation of the vendor's relationship with a labor union involving wage rates for weekend and shift work;
- An IPSIG (Independent Private Sector Inspector General) agreement and monitoring agreement for work with the Port Authority of New York/New Jersey.

Based on these disclosures, OSC required DOT to provide additional documentation and assessment of the issues. With each of OSC's three requests, DOT reaffirmed its determination of L&L as a responsible vendor and passed along to OSC the vendor's response, without an independent analysis of the responses. However, on January 5, 2010, after publication of a newspaper article mentioning L&L Painting, DOT contacted OSC to request that the contract be returned because they recently learned that this firm is being investigated by the FBI and wanted to hold the contract pending the outcome of the investigation. While OSC agrees that such information justifies and necessitates further review, as we had been prompting DOT for six weeks, this particular item of information was not new in that it was disclosed by the vendor on its CCA-1, which was submitted to DOT on May 22, 2009, and highlighted by OSC in its communications with DOT on November 25, 2009. On January 13, 2010 DOT again reaffirmed its support of L&L as a responsible bidder after receiving confirmation from the vendor that the investigation noted in the newspaper article is the same as had been disclosed to DOT in May 2009. Unfortunately, the record indicates that DOT has still not performed the independent analysis and follow-up investigation one would expect when such integrity challenges come to light.

The OSC, at this point, requests that this contract be thoroughly reviewed by DOT's Contract Review Unit (CRU). Should DOT, after diligent independent research, verification and assessment of the multiple and significant issues with this vendor, decide they wish to proceed with this contract, OSC will require, at a minimum, a **written assessment** of each of the specific issues disclosed in the vendor's CCA-1, including but not necessarily limited to:

- Details of the labor union issue;
- DOT's review of any monitoring reports produced by Thacher Associates;
- Clarification of L&L's role in the matter that prompted the Rose Contracting investigation, which would likely require DOT to discuss the matter with L&L principals or others involved in the matter to understand the extent of their involvement and knowledge of the matter.

II. Rescission of DOT's Alternative Vendor Responsibility Documentation Standards.

The OSC is dismayed that despite the apparent gravity of L&L's CCA-1 disclosures, DOT did not provide any agency assessment of the issues nor any additional documentation with the initial contract submission. While DOT is not normally required to provide such documentation under an alternative documentation standard afforded Council of Contracting Agencies (CCA) members, this standard only applies when there are no known potential responsibility issues. Where, as here, responsibility issues are known to the agency, OSC requires the agency to provide additional documentation including, but not limited to, a vendor responsibility profile and questionnaire. In addition, the Quick contracting process is only allowed on contracts where there are no known responsibility issues. This was obviously not the case for this particular contract. However, DOT submitted it as a Quick contract.

Over a number of months, OSC has observed numerous DOT contracts with potential vendor responsibility issues submitted with only an agency certification. This is an inaccurate interpretation of the alternative standard. Such an interpretation results in an incomplete and inadequate procurement record for vendor responsibility issues. While DOT has provided the Vendor Responsibility Profile and CCA-1 when specifically requested by OSC, this process delays the overall contract review process. Were OSC to commence the contract audit with knowledge of information DOT has already considered, duplication of efforts and unnecessary communication between our staffs would be minimized, resulting in a timelier contract review.

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Furthermore, the State and contracting agencies are rightfully vulnerable to public criticism when the procurement record reviewed and approved by the State Comptroller lacks documentation of the contracting agency's awareness, consideration and resolution of potential responsibility issues. The DOT's failure to adequately document known issues indicates a lack of commitment to vendor responsibility and provides OSC with little assurance that DOT has actually performed a vendor responsibility review. Federal stimulus monies are subject to recoupment where contracts are inappropriately awarded. OSC will not jeopardize federal stimulus money in light of a clear failure of agency due diligence.

Based on the above concerns and deficiencies, OSC is rescinding the alternative documentation standard for DOT. Effective for contracts received at OSC on or after March 1, 2010, DOT is required to submit a Vendor Responsibility Profile and CCA-2 (or other vendor responsibility questionnaire) for all new contract transactions over \$100,000. Please note, OSC does not require submission of paper questionnaires for those entities that file responsibility questionnaires online via the VendRep System.

Furthermore, OSC also requests that DOT keep us apprised of any decision by DOT to hold a responsibility hearing or other administrative decisions regarding the proposed contract with L&L Painting.

Your attention to this matter is greatly appreciated.

Sincerely,

Charlotte E. Breeyear
Director, Bureau of Contracts

CEB:mea

cc: Margaret N. Becker
Joan M. Sullivan