



State of Ohio
Office of the Inspector General

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REPORT OF INVESTIGATION

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AGENCY: Ohio Department of Transportation

BASIS FOR INVESTIGATION: Inspector General Initiative

ALLEGATION: Possible Misuse of Public Funds

INITIATED: March 16, 2010

DATE OF REPORT: April 16, 2010

EXECUTIVE SUMMARY

File ID No. 2010107

On February 1, 2010, *The Columbus Dispatch* reported that the Ohio Department of Transportation (“ODOT”) was going to pay \$1 million apiece to two unsuccessful bidders for the contract to design the new I-90 Inner Belt Bridge. After obtaining documentation from ODOT and conducting research, the Ohio Inspector General’s Office (“OIG”) initiated its investigation on March 16, 2010. Based on our investigation, we have serious concerns about ODOT’s plans to award \$1 million stipends to unsuccessful bidders. ODOT intends to pay the stipends without documentation of the bidders’ actual costs and expenses, or any evidence that the bidders’ designs are worth \$1 million or will even be useful. We are unable to find wrongdoing on ODOT’s part because it has not yet awarded or paid the stipends. However, because we believe that the payment of the \$1 million stipends would constitute an unjustified expenditure of public funds, we have made three recommendations on how ODOT can rectify the situation.

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I. BASIS FOR INVESTIGATION

On February 1, 2010, *The Columbus Dispatch* reported that the Ohio Department of Transportation (“ODOT”) was going to pay \$1 million apiece to two unsuccessful bidders for the contract to design the new I-90 Inner Belt Bridge. After obtaining documentation from ODOT and conducting research, the Ohio Inspector General’s Office (“OIG”) initiated an investigation on March 16, 2010.

II. ACTIONS TAKEN IN FURTHERANCE OF INVESTIGATION

We interviewed ODOT employees. We also reviewed numerous documents pertaining to the “design-build” concept and the Inner Belt Bridge project, as well as the statutes and regulations for Ohio and other states and federal regulations.

III. DISCUSSION

Background

The Inner Belt Bridge project will involve the construction of a new westbound bridge to carry Interstate 90 traffic in the Cleveland, Ohio area. The construction of the new bridge, which is expected to begin in 2011 and conclude in 2014, will alleviate congestion that resulted when ODOT restricted traffic on the existing bridge in October 2008 due to structural stress and strain. Of the \$450 million allocated for the project, \$85 million will be American Recovery and Reinvestment Act (“ARRA”) funds. (Exhibit A.)

ODOT decided to utilize the “design-build” concept for the Inner Belt Bridge project. Design-build is a process that combines the design and construction phases of a project into a single contract. The designer and contractor function as a team, expediting delivery. (Exhibit B.) According to ODOT, the design-build process is particularly useful on large or complex projects because it reduces the project’s duration, increases quality, and minimizes costs in the long run. (Exhibit B.) ODOT’s general authority to use the design-build process is set forth in Ohio Revised Code § 5517.011. (Exhibit C.) ODOT has used the design-build concept on numerous projects since 1998; however, none of the past design-build projects have reached the scope, magnitude, or cost of the Inner Belt Bridge project. (Exhibit D.) The Inner Belt Bridge project

is the first project in which ODOT is utilizing a value-based selection process, in which both cost and technical proposals are considered.¹

In implementing the design-build concept on the Inner Belt Bridge project, ODOT intends to pay a \$1 million stipend to both of the unsuccessful bidders, provided that they obtain a minimum of 70 out of 100 points during ODOT's scoring of the submitted technical proposals.² (See Exhibit F.) ODOT has never awarded stipends on any other design-build project. Yet, according to ODOT, the \$1 million stipends will: 1) increase competition among bidders, resulting in better design proposals; 2) compensate the bidders for some of the time and effort expended in preparing their design proposals; 3) increase cooperation and communication between the design and contracting components of the design-build team; and 4) enable ODOT to purchase quality design ideas that would otherwise be proprietary information and use them for the Inner Belt Bridge construction, as well as other projects in the future. ODOT further stated that the stipends will enable each design-build team to investigate problems at an earlier stage in the development process. This, in turn, will lower risk for both the design-build team and ODOT, resulting in projected savings of \$5.2 million (or projected net savings of \$3.2 million after the stipends are awarded) on the project. Because the \$1 million stipends are less than one-fourth of one percent of the total project costs, and will allegedly result in net savings of \$3.2 million, ODOT claimed that the stipends are both cost-effective and efficient. (Exhibits B and E.)

On or about March 23, 2010, ODOT selected the three design-build teams that would compete for the Inner Belt Bridge project. The teams were: 1) "Lane/Brayman, a Joint Venture, LLC," consisting of design firm FIGG Engineering Group (Tallahassee, Florida), Lane Construction Company (Cheshire, Connecticut) and Brayman Construction Corp. (Saxonburg, Pennsylvania); 2) "Trumbull-Great Lakes-Ruhlin, a Joint Venture, LLC," consisting of design firm Parsons Transportation Group (Pasadena, California), Trumbull Corp. (Pittsburgh, Pennsylvania), Great

¹ This value-based selection process was authorized by the Ohio General Assembly in 2009.

² ODOT advertised for Requests for Qualifications on February 2, 2010 and set a March 2, 2010 deadline for the submission of quotes. The selection of the three design-build teams on ODOT's "short list" was announced on March 23, 2010. ODOT will require the teams to submit technical and price proposals by August 5, 2010, announce the technical scores and open the price proposals by September 9, 2010, and award the contract by September 17, 2010. (Exhibit E.)

Lakes Construction Company (Hinckley, Ohio), and the Ruhlin Company (Sharon Center, Ohio); and 3) “Walsh Construction,” consisting of design firm HNTB (Kansas City, Missouri) and Walsh Construction (Chicago, Illinois).

Because of its decision to award the stipends to the unsuccessful bidders through consultant agreements, ODOT determined that it must obtain the prior approval of Ohio’s Controlling Board. (Exhibit B.) ODOT plans to appear before the Controlling Board in May of 2010.

Allegation: ODOT’s award of one million dollar stipends to unsuccessful bidders on the Inner Belt Bridge project constitutes a misuse of public funds.

During the investigation, ODOT stated that it would *not* be using ARRA funds to pay for the stipends, but would instead draw from non-ARRA federal funds. Nevertheless, we must still determine whether the payment of the \$1 million stipends constitutes a misuse of public funds, and if not, whether it is still an imprudent use of public funds.

While Ohio Revised Code § 5517.011 gives ODOT the authority to use the design-build process for highway and bridge projects, it does not explicitly grant the authority to pay stipends.³ ODOT argues that five other states (Florida, Utah, Minnesota, Washington, and Virginia) pay stipends on design-build projects. (Exhibits B and E.) However, four of the five states (Florida, Utah, Minnesota, and Washington) have statutes or administrative code rules that grant them clear authority to pay stipends. ODOT believes that it can pay the stipends because the statute does not expressly prohibit it from doing so; however, there is no legal foundation for this belief. While the absence of clear statutory or rule authority to pay the stipends is not necessarily dispositive, we believe that it highlights the need to closely scrutinize ODOT’s actions.

³ ODOT cited Ohio Revised Code Chapter 5526 (which gives ODOT general authority to enter into professional services contracts with qualified firms) to support the proposition that it can purchase the designs/intellectual property of the unsuccessful bidders via stipend. However, the statutory provisions in Chapter 5526 allow for the ranking of a minimum of three firms that are the most qualified to perform a professional service and the selection of the firm that receives the highest ranking; none of the lower-ranked firms are considered or selected for a contract unless ODOT is unable to successfully negotiate with the most qualified firm. (See Exhibit G.) Nothing in Chapter 5526 authorizes the payment of stipends to unsuccessful bidders after the highest-ranked design-build firm has been selected.

Although ODOT has never awarded stipends on any other design-build project, it contends that paying stipends is necessary because firms will not expend the resources, time and effort to design plans for such a mammoth project unless ODOT agrees to “share the risk” and reimburse them for a portion of their costs. In support of this contention, ODOT cited 23 C.F.R. § 636.113, which recommends that stipends be used on large federal projects “where there is substantial opportunity for innovation and the cost of submitting a proposal is significant” in order to encourage competition, compensate unsuccessful bidders for a portion of their costs, and ensure that smaller companies are not placed at a competitive disadvantage.⁴ (Exhibit H.) However, ODOT failed to present any concrete data or evidence showing that design-build teams will shy away from competing for the \$450 million project without a stipend. Indeed, ODOT officials could not cite a single example of a past project that suffered because a stipend was not offered. Given the economic climate in the nation and the State of Ohio, we believe that firms should be expected to assume both the risk and potential reward of bidding on the Inner Belt Bridge project.

Even assuming for the sake of argument that ODOT has legitimate grounds for awarding stipends to unsuccessful bidders on this project, it is unclear why ODOT has to award them *\$1 million* apiece. By its own admission, ODOT did not engage in any in-depth analysis prior to selecting the \$1 million amount. The decision to pay \$1 million (as opposed to a lesser amount) was based solely upon the calculation of percentages; ODOT determined that each \$1 million stipend amounted to “less than one-fourth of one percent” of the total construction costs. (Exhibit B.) ODOT further claimed that the stipends could have been much higher had it followed the recommendations of the Federal Highway Administration (“FHWA”), stating:

FHWA recommends that the stipend amount be one third to one half of the cost of anticipated proposal development. . . The current construction cost estimate for the Cleveland Innerbelt project is \$450 million. Total design costs for this project are estimated to be between 3 and 6 percent of the construction cost; or \$13.5 to \$27 million.

⁴ Ironically, the three design-build teams selected for the “short list” included some of the biggest and most influential design and construction firms in the country. This suggests that the promised stipends did not benefit smaller companies during the bidding process as intended.

Approximately 30 percent of the total design work for the project will have been completed prior to the ODOT's Request for Proposals. It is expected that each short-listed Design Build Team will need to increase this design development by at least 35 percent in order to develop their Technical Proposal and to determine reasonably accurate quantities for their Price Proposal. This development is estimated to cost between \$4.7 million and \$9.5 million (35 percent of the anticipated design costs).

Following FHWA's recommendation, a stipend of \$1.6 to \$4.8 million (one-third of \$4.7 million to one-half of 9.5 million) could easily be justified for the Cleveland Innerbelt project.

(Exhibit B.)

However, there is no indication that FHWA's recommendations are binding upon ODOT, or that ODOT cannot deviate from such recommendations. 23 C.F.R. § 636.112 provides that the decision of whether unsuccessful bidders receive stipends should be left up to each state, and "should be based on [an] analysis of the estimated proposal development costs and the anticipated degree of competition during the procurement period." (Exhibit H.) 23 C.F.R. § 636.113 further states that stipends on large projects compensate unsuccessful bidders for "a portion of their costs (*usually* one-third to one-half of the estimated proposal development cost)" [Emphasis added]. (Exhibit H.) Since ODOT is clearly not required to pay stipends, it is logical to conclude that ODOT is not required to abide by any recommended amounts set forth in Section 636.113. During our investigation, ODOT conceded that it did not make any effort to determine whether a lesser amount would achieve the same or similar results as a \$1 million stipend. Because it did not do so, ODOT cannot convincingly argue that the payment of \$1 million stipends to unsuccessful bidders is necessary, or even advisable.

Further, ODOT stated that it would not seek any documentation of the unsuccessful bidders' actual costs and expenses, noting that this was not standard practice for the other states that paid stipends. Thus, as ODOT conceded, a theoretical bidder who only incurred \$500,000 in costs and another bidder who incurred \$3 million in costs would both receive the \$1 million stipend. The first bidder would not have to present any invoices, purchase orders, or other documents in order to receive the stipend; it would receive \$1 million even if it was twice the amount of its

actual costs and expenses. It is ODOT's position that a bidder's costs will never be less than \$1 million, and may even be as high as \$9.5 million. However, these figures are only *estimates*. Given the uncertainty surrounding these projections, it is difficult to see why ODOT would not seek documentation of actual costs and expenses prior to paying the \$1 million stipends—especially when one of the stated purposes of the stipends is to reimburse bidders for a portion of their costs.

Finally, ODOT admitted that it does not have any procedures for evaluating the value or utility of the unsuccessful bidders' designs. ODOT also conceded that the designs of the unsuccessful bidders could *duplicate* that of the selected design-build team, and thus be of little value. As for ODOT's statement that the designs of the unsuccessful bidders can be used on future projects, we believe that this claim is speculative. ODOT indicated that, in the future, a second bridge parallel to the Inner Belt Bridge will be built to further relieve traffic and congestion. However, absent evidence that this second bridge will be similar to the Inner Belt Bridge (which dwarfs any of ODOT's past projects in both cost and complexity), it is unclear whether the designs will be useful on the new bridge project.

Based upon the foregoing, we believe that the payment of the stipends under these circumstances would constitute an unjustified expenditure of public funds. However, because ODOT has not yet awarded or paid the stipends, it has not engaged in misuse of public funds or other unlawful activity.

Accordingly, we find that no wrongful act or omission has occurred at this time.

IV. CONCLUSION

We have serious concerns about the payment of the \$1 million stipends to unsuccessful bidders on the Inner Belt Bridge project. The mere fact that each stipend is “one fourth of one percent” of the total construction costs for the Inner Belt Bridge project, and that ODOT could have awarded a much larger amount, does not mean that the stipend payments are appropriate. If the

payment of the stipends is wasteful, ODOT's reasoning that "the amount could have been larger" is not persuasive. ODOT has essentially decided to award \$1 million stipends to unsuccessful bidders without any documentation of the bidders' actual costs and expenses, or any indication that their designs will be worth \$1 million or will be useful during the Inner Belt Bridge construction, or even on future projects. While we can find no wrongdoing at this juncture, we believe that the payment of the stipends under these circumstances would constitute a misuse of public funds.

V. RECOMMENDATIONS

Based upon the results of this investigation, we make the following recommendations and ask that ODOT respond to this Office within the next sixty (60) days with a plan stating how these recommendations will be implemented:

1. Assuming that ODOT wants to pay stipends on future design-build projects, it should seek explicit statutory authority to pay the stipends or, at minimum, draft and implement criteria and procedures for determining when stipends will be used and the amount of such stipends.
2. ODOT should not pay any stipends until it has first: a) obtained expense forms or other documentation of the unsuccessful bidders' actual costs and expenses; and b) evaluated the utility and economic value of the bidders' designs and verified that they can be used on the Inner Belt Bridge project or on future projects.
3. ODOT should ensure that the stipends, if paid, do not exceed the bidders' actual costs and expenses and the value of the designs.