

PREQUALIFICATION COMMITTEE
MINUTES – JANUARY 13, 2010
8:30 A.M. EDT

The following Committee members attended the meeting:

Martha Kenley	Director, Economic Opportunity Division; Chair and Non-Voting Member
Tiffany Mulligan	Attorney, Legal Division; Counsel to the Committee and Voting Member
Tony Hedge	Director, Accounting Division; Voting Member
Greg Kicinski	Manager, Office of Project Management; Voting Member
Grant Knies	Budget Analyst; Voting Member
Joe Novak	Construction Director, Crawfordsville District; Voting Member
Jim Stark	District Deputy Commissioner, Seymour District; Voting Member
Mark Miller	Director, Construction Management; Voting Member
Karen Macdonald	Prequalification Engineer, Contract Administration Division; Committee Secretary and Non-Voting Member

Also in attendance:

Kevin Resler	Contract Compliance Manager, Economic Opportunity Division; INDOT
Donna Poole	Program Director, Economic Opportunity Division; INDOT
Karen Harrington	Equal Employment Opportunity (EEO) Officer, Crawfordsville District; INDOT
Steve Heller	Compliance Investigator, Contract Administration; INDOT
Mike Rowe	Prequalification Auditor, Contract Administration; INDOT
Fred Bartlett	Prequalification Section, Contract Administration; INDOT
Joan Widdifield	Administrative Assistant, Contract Administration; INDOT
Paul Berebitsky	Indiana Construction Association

Nick Tsahas	Atlas of Lake Station
Rick Yates	Wirtz & Yates, Inc.
Ricky Yates	Wirtz & Yates, Inc.
Fred Harvey	George R. Harvey and Son, Inc.
Dick Harvey	George R. Harvey and Son, Inc.

The Committee reviewed the following agenda items:

1. Adoption of NOVEMBER 12, 2009 meeting minutes
2. Atlas of Lake Station – Prevailing Wage and Fringe Rate Compliance on Contracts B-28903 and B-28611
3. Update on internal committees

PREQUALIFICATION COMMITTEE MEETING
OPEN SESSION
JANUARY 13, 2010

Ms. Kenley, Committee Chair, called the meeting to order at 8:32 a.m. EDT. She facilitated introductions of all individuals present. All Committee members were present.

1. Adoption of November 12, 2009 Meeting Minutes

Ms. Kenley called for consideration of the meeting minutes from the November 12, 2009 meeting.

Mr. Stark moved to adopt the meeting minutes from the November 12, 2009 meeting. Mr. Hedge seconded the motion. All members voted in favor.

2. Atlas of Lake Station – Prevailing Wage and Fringe Rate Compliance on Contracts B-28903 and B-28611

Ms. Kenley asked Mr. Resler to introduce the item. Mr. Resler discussed the packet prepared by the Economic Opportunity Division (EOD). He stated that he and EEO Officer for the Greenfield District, Karen Harrington, were informed that employees of Atlas of Lake Station (Atlas) had not been paid for work on two INDOT contracts as represented in certified

payrolls Atlas submitted to INDOT. Mr. Resler stated that failure to pay its employees was in violation of INDOT's contract provisions and the Davis-Bacon Act. The payroll problem came to light when an Atlas employee, Nicola Loncar, informed Ms. Harrington that neither he nor the other laborers had been paid for their work on INDOT painting contracts: B-28903 and B-28611, both of which Atlas had completed its work on. In response to this complaint, Ms. Harrington contacted Atlas requesting copies of all cancelled paychecks for each employee on the two contracts. Ms. Harrington gave Atlas a deadline to submit the cancelled paychecks, and Atlas requested an extension. When she received copies of cancelled checks, she stated the check copies she received from Atlas (Exhibit J in the packet) were not payroll checks made out to the individual employees but appeared to be for materials, supplies, and utilities. Ms. Harrington stated that on Contract B-28903 each laborer is owed around \$3,000.

Ms. Harrington also stated that previous to Mr. Loncar's complaint, she discovered that Atlas had worked on contract B-28903 on a Sunday that was not reflected in the certified payrolls submitted to INDOT for that time period. She asked Atlas to submit an updated payroll to include the Sunday work and copies of the employees' cancelled checks. Atlas provided a revised payroll and cancelled checks for the work performed on Sunday, November 2, 2008 (Exhibits D and G in the packet). Mr. Resler said that Mr. Loncar met with INDOT on December 11, 2009, during which he stated that after the employees received the paychecks for the work on that Sunday, they were asked to cash them and return the money to Atlas. Mr. Resler further said that INDOT has no documentation that this occurred.

Mr. Resler stated when Mr. Loncar met with INDOT on December 11, 2009, he provided an affidavit (Exhibit K in the packet) setting forth his allegations because he was leaving the country for the winter. Also during that meeting, Mr. Loncar played voicemail messages saved on his cell phone that he said were left by Nick Tsahas of Atlas. There were thirteen (13) voicemail messages, all of which threatened Mr. Loncar.

Mr. Resler played the recording of six (6) of the thirteen (13) voicemail messages received by Mr. Loncar. The following is a summary of the messages played: 1. threatened death, 2. explicit language and threatened death, 3. explicit language and threatened to fire him, 4. explicit language and threatened to fire him, 5. explicit language and threatened to get him, 6. explicit language and threatened to get him. Mr. Resler stated that the dates of the threatening messages appear to coincide with dates that Ms. Harrington contacted Mr. Tsahas.

Mr. Resler reiterated that Atlas failed to provide cancelled paychecks; therefore, it appears Atlas skirted the Davis-Bacon Act requirements on both contracts. He said that because of this and the statements by Mr. Loncar, he recommends the Committee take stringent action against Atlas.

Ms. Kenley asked if anyone had any questions. After hearing no questions, Ms. Kenley asked Mr. Tsahas if he would like to respond.

Mr. Tsahas produced copies of cancelled checks (\$18,000, \$10,000, and \$15,000) written to Five State Painting (Five State), which Atlas had already provided to the Economic Opportunity Division and are in Exhibit J of the packet.

Ms. Harrington stated that we asked for copies of employee payroll checks, not material checks.

Mr. Tsahas tried to explain the checks.

Ms. Kenley reiterated that we need the checks to the employees.

Mr. Novak stated he thinks Mr. Tsahas was saying that Five State was supposed to pay the employees. Mr. Tsahas concurred that Atlas gave the money to Five State to pay the employees who worked on the contract.

Ms. Harrington stated that because Atlas is the subcontractor, Atlas is supposed to pay the employees directly and not give the money to Five State to pay the employees. Mr. Tsahas said the money was two (2) times more than what they give the employees.

Ms. Kenley stated that Mr. Tsahas had previously told Ms. Harrington that he paid each employee directly. Mr. Tsahas said yes.

Ms. Mulligan stated that by paying Five State to pay the employees, Atlas is using Five State as a subcontractor to Atlas.

Ms. Kenley said that Mr. Loncar claimed the checks to Five State were for materials and supplies. Mr. Tsahas mentioned the money Atlas gave Five State was enough to cover employee labor.

Ms. Kenley stated that Ms. Harrington had said Atlas only provided canceled checks for materials. Ms. Harrington stated that was all that she received.

Mr. Tsahas asked if INDOT wanted him to pay more.

Mr. Resler mentioned it is not clear what the checks are for; one is to Waste Management and some are to people that did not work at the site.

Mr. Kicinski asked how many employees were working on the contract for Atlas. Mr. Resler responded four (4).

Ms. Kenley asked Mr. Tsahas if that was him on the voicemail messages speaking. Mr. Tsahas admitted it was him and he left the messages because he was nervous and upset. He said he paid the employees through Mr. Loncar.

Ms. Kenley stated that Atlas has worked on INDOT contracts before.

Ms. Tsahas said he was sorry and he will pay the employees directly if we want him to.

Ms. Kenley stated that Ms. Harrington asked for copies of what had been paid to the employees. Mr. Tsahas said that Atlas had paid them already, but if he has to he will pay again.

Ms. Kenley asked Mr. Tsahas why they did not follow INDOT procedures.

Mr. Tsahas said Atlas paid Five State to pay the employees, but if he has to, he'll pay them again. He said he would do whatever he needs to do.

Mr. Resler asked about the \$10,000 check to Five State and if it was for materials and labor or just labor. Mr. Tsahas responded it was only for labor. Mr. Resler asked Mr. Tsahas if the checks paid to Five State were for payroll, then when were the laborers working to earn the money. Mr. Tsahas responded July or August.

Mr. Resler asked if the last day of work was July 19th. Mr. Tsahas responded yes.

Mr. Resler asked if they ended work in mid-July, but they were not paid until half-way through the next month. Mr. Tsahas responded yes, it was paid.

Mr. Resler asked if Mr. Tsahas understands that they are to pay employees weekly. Mr. Tsahas responded yes.

Mr. Resler asked if Mr. Tsahas understands that he needs to follow INDOT rules and procedures. Mr. Tsahas responded yes.

Mr. Novak asked if Mr. Loncar is with Five State. Ms. Mulligan responded it is Mr. Loncar's signature endorsing the checks to Five State.

Mr. Novak asked how Atlas knew what amount to put on the checks. Mr. Tsahas responded that Mr. Loncar told him.

Mr. Stark asked if the four (4) people listed on the certified payroll are his employees. Mr. Tsahas responded they are friends of Mr. Loncar.

Mr. Stark asked if the employees filled out W-4's for Atlas. Mr. Tsahas responded yes.

Mr. Stark commented that if the employees are on Atlas' payroll, then why doesn't Atlas have copies of the cancelled checks. Mr. Tsahas responded that the employees were Mr. Loncar's friends.

Mr. Stark asked if they were Atlas' employees or not. Mr. Tsahas responded yes.

Mr. Novak questioned how Atlas could do their taxes and how Atlas would know that the employees were paid. Mr. Tsahas responded that he was sorry and said he would have paid them directly if he knew he would have this kind of problem.

Ms. Harrington mentioned that Atlas has been before the Prequalification Committee before so Mr. Tsahas should know it is Atlas' responsibility to pay its employees directly in accordance with the certified payrolls. Mr. Tsahas responded he knows and he is sorry.

Mr. Kicinski stated that we still have no cancelled checks from employees and asked if Atlas would now pay the employees directly. Mr. Tsahas responded yes, he will pay the employees directly.

Mr. Miller mentioned there are three (3) certified payrolls in the packet and asked Mr. Tsahas if Atlas has records that support the employees were paid and the taxes were withheld. Mr. Tsahas responded yes, but his bookkeeper is not here.

Ms. Kenley reiterated that Atlas did not give INDOT records that employees were paid.

Mr. Tsahas mentioned that he told Ms. Harrington that his bookkeeper was not available.

Ms. Mulligan asked if Atlas pays their employees directly or to Five State. Mr. Tsahas responded he paid to Five State.

Ms. Kenley asked Mr. Tsahas if the certified payrolls were true.

Ms. Harrington asked if he had read the back of the certified payrolls. Mr. Tsahas responded no. Mr. Tsahas stated he paid Mr. Loncar directly.

Ms. Kenley asked if Atlas paid the employees directly as he certified to by signing the certified payroll. Mr. Tsahas responded he paid Mr. Loncar at Five State. He said it was his problem because he paid Mr. Loncar.

Ms. Kenley asked if Atlas submitted certified payrolls that were not true. Mr. Tsahas responded yes.

Ms. Kenley mentioned that Mr. Tsahas has done work for INDOT before and asked if he has paid his employees through another company before. Mr. Tsahas responded no.

Ms. Harrington asked if Mr. Tsahas asked for the money back from the employees for the checks he paid. Mr. Tsahas responded no.

Mr. Novak asked if Atlas paid the employees directly on Sunday, November 2nd. Mr. Tsahas responded yes. Mr. Novak pointed out that Atlas knew to pay the employees directly for the Sunday work but still did not pay the employees directly for the rest of the work.

Ms. Harrington asked Mr. Tsahas if she asks the employees if he paid them, will they say what you said. Mr. Tsahas responded yes.

Mr. Kicinski asked if Mr. Loncar provided documents of what the money was for. Mr. Resler responded yes.

Ms. Kenley mentioned that Mr. Loncar is out of the country and we have an affidavit stating Atlas did not pay any employees.

Ms. Harrington asked a representative from Wirtz and Yates if Mr. Loncar had provided the equipment and supplies. The representative replied yes and stated he had heard that Mr. Loncar was charging four (4) times higher than the average cost for equipment rental.

Mr. Stark asked Mr. Tsahas if he understood that he was before the Committee for not following the rules. Mr. Tsahas responded that he understands now what documents we need. He said he was sorry and he will pay if he has to.

Ms. Mulligan asked Ms. Macdonald to report on Atlas' prequalification status. Ms. Macdonald responded that Atlas' prior prequalification expired on June 30, 2009. She stated Atlas submitted an application to INDOT last month. INDOT's Prequalification Section has processed the application but not approved it pending the Committee's decision on this situation. The pending worksheet is in the Committee members' packets as confidential information.

Ms. Kenley asked for a motion and expressed concern that Mr. Tsahas did not provide the proper documents. She mentioned we need to maintain the integrity of the process and asked for Committee response.

Ms. Mulligan said that when viewed in the best light for Atlas, the facts show Atlas has a gross misunderstanding of INDOT rules and procedures; when viewed in the worst light to Atlas, they show a blatant disregard of INDOT rules. She mentioned she is also concerned with the threatening messages.

Mr. Tsahas said he was sorry.

Ms. Kenley mentioned that Mr. Loncar had said the other laborers want to work for Mr. Tsahas in the future, but they were afraid to come forward. Mr. Tsahas said they had said nothing to him. He said he would pay if he has to.

Ms. Kenley asked the Committee if a motion was appropriate based on the rules.

Ms. Mulligan discussed the options available to the Committee under INDOT's Prequalification rules.

Ms. Kenley called for a motion.

Mr. Kicinski suggested we check the business practices of Atlas to make sure this doesn't happen again.

Mr. Novak mentioned that it looks like this situation is second tier subcontracting.

Mr. Hedge asked what the timeline is for the Prequalification Section to act on an application. He asked if the Committee can delay action. Ms. Macdonald replied the rules state INDOT must act on an application within thirty (30) days. Ms. Mulligan read the appropriate section in the rules and confirmed it is thirty (30) days.

Ms. Kenley mentioned we have to be concerned if an employee is not being paid. She also mentioned that sending threatening phone calls elevates the severity of the issue. She mentioned Mr. Tsahas has worked with INDOT for many years.

Mr. Kicinski referred to some of the qualifications that an applicant should have as listed in 105 IAC 11-2-1(f) and mentioned that Atlas lacks several of the requirements, such as organization, financial condition and quality of financial information, and attitude towards the department rules and the general public.

Mr. Miller mentioned that prequalification is not required to work as a subcontractor.

Ms. Kenley asked if we should allow them to work on future INDOT contracts at all.

Mr. Hedge mentioned that whatever action we take, these problems need to be resolved.

Mr. Stark mentioned that certified payrolls are submitted to INDOT to show employees have been paid; however, that does not prove that they were paid. Since we are aware that the employees were not paid correctly, then we need to do extra work to make sure they are in compliance.

Mr. Miller mentioned we have to take some action. He said a motion is in order. We just need to word it properly.

Ms. Kenley asked Mr. Miller what he thinks we need to do. Mr. Miller replied that Atlas should be barred from business and we need to address Mr. Stark's concern to follow-up and make sure the problem is resolved.

Mr. Hedge asked if we should wait to make sure this is resolved first before we proceed. Ms. Mulligan said we should deny the prequalification application now and also ensure the problems with the employees are resolved before allowing Atlas to work on INDOT contracts.

Ms. Harrington mentioned she would like to get copies of the canceled checks and talk to each employee after Atlas pays them.

Ms. Mulligan mentioned that Atlas would still have to wait the minimum 90 days to submit another application. At that time we can check to see if Atlas has corrected the problems.

Mr. Stark asked Ms. Harrington if in her duties she asks all contracted employees if they are paid. Ms. Harrington replied that it is a constant regardless of who we work with.

Ms. Mulligan moved that the Committee recommend to the Commissioner that he order INDOT's Prequalification Section to deny Atlas of Lake Station's pending prequalification application and bar Atlas from serving as a subcontractor on INDOT projects until the following two conditions are met: 1. ninety (90) days have expired and 2. the Committee has reviewed any request by Atlas for a change in its prequalification status and has determined that Atlas has resolved the issues on the contracts to the satisfaction of INDOT.

Mr. Hedge seconded the motion. All Committee members voted in favor.

Mr. Miller asked if INDOT has a list of barred subcontractors. He mentioned we have a list of approved prequalified contractors. Ms. Kenley replied that she will notify the district EEO officers once a final decision is made.

Ms. Mulligan stated the Commissioner will receive the Committee's recommendation and make the final decision. INDOT will send Atlas a letter explaining the Commissioner's decision.

Ms. Harrington asked if we should have a deadline for when the employees are paid. Ms. Mulligan replied that it is an issue for the Economic Opportunity Division to decide.

A representative from George R. Harvey and Son (Harvey) mentioned he is concerned if this does not get resolved and wanted to know if it would fall on his company to pay the employees again and back taxes. He said he has no recourse except holding the final payment to Atlas. Ms. Kenley responded that Harvey should encourage Atlas to pay the employees to close out the contract.

The Harvey representative mentioned that the laborers would not have worked all summer without getting paid. Ms. Kenley replied that if we get proof, it will work out the best.

The Harvey representative asked who they needed to talk to resolve this issue. Mr. Novak suggested they talk to their bond company. Mr. Novak mentioned that all involved parties are guilty on this. Ms. Mulligan responded that Harvey as the prime contractor is ultimately responsible for the contract.

Mr. Tsahas, representatives from the prime contractors, and others left the meeting.

Mr. Kicinski mentioned that we should be concerned that Atlas will quickly pay the employees and provide proof, then want to continue doing business with INDOT. He asked how the Prequalification Section determines a company handles their organization. Ms. Macdonald responded we review CR-2's and past history.

Ms. Mulligan mentioned the Prequalification Committee or staff can request a work improvement plan or other documentation from Atlas before making a decision on any future requests from Atlas for prequalification.

Ms. Kenley thanked Ms. Harrington for all her work on this case.

Mr. Berebitsky asked if Atlas will be able to work. Ms. Mulligan replied that if they are already approved as a subcontractor on any contracts, then they can continue work on those contracts, but we should closely watch these contracts. If the Commissioner approves the Committee's recommendation, INDOT will not approve Atlas for future contracts.

Mr. Kicinski asked if we have a list of what contracts they are currently involved in. Ms. Macdonald responded that we can get that information.

Ms. Kenley asked if the Committee can terminate a contract. Ms. Mulligan replied that the Commissioner can; the Committee can only make a recommendation.

3. Update on Internal Committees

Ms. Kenley asked for an update on internal committees.

Ms. Mulligan mentioned the internal committee to extend the Prequalification Committee to cover consultants has proposed language to add to the Consultant Prequalification Manual. INDOT's Chief Legal Counsel has reviewed the proposal and made some recommendations for changes. Ms. Mulligan said she will send the proposal to the Committee by the next meeting.

Mr. Stark asked if the proposed language has gone to the consultant community yet for comments. Ms. Mulligan responded that it has not yet gone to the American Council of Engineering Companies (ACEC), but INDOT will send it to ACEC soon.

Mr. Berebitsky asked if this will require revision to the administrative code. Ms. Mulligan responded we may consider adding it to the Indiana Administrative Code in the future; however, now we propose amending the Consultant Prequalification Manual.

Ms. Mulligan stated there is no update on the internal committee to consider revisions to the prequalification rules at this time.

Ms. Kenley moved to adjourn the meeting, Ms. Mulligan seconded. All members voted in favor of adjourning the meeting.

Ms. Kenley adjourned the meeting at approximately 10:05 a.m.