**Washington State Department of Transportation**

**Douglas B. MacDonald**
Secretary of Transportation

**Washington State Ferries**
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W. Michael Anderson
Assistant Secretary of Marine Operations
Executive Director

**DATE:** **DECEMBER 21, 2006**

**TO:** **INTERESTED PARTIES**

**RE:** **NEW 144 - AUTO FERRIES**
**DESIGN - BUILD CONTRACT NO. 00-6674**

## NOTICE NO. 21

A letter from J.M. Martinac Shipbuilding Corp. dated December 14, 2006 is attached. For record purposes, this letter is designated as Question No. 17.

A copy of WSF's response dated December 21, 2006 is also attached.

Sincerely,

David H. Humphreys
Vessel Project Engineer
New 144-Auto Ferries Project
Washington State Ferries

Attachments

Question #17
12-14-06 1:35 pm

Martinac

J.M. MARTINAC SHIPBUILDING CORP. 401 EAST 15TH STREET, TACOMA, WASHINGTON 98421 253-572-4005 FAX: 253-627-2816

December 14, 2006

Washington State Ferries, a division of
Washington State Department of Transportation
David H. Humphreys, Project Engineer (WSF Representative)
2901 Third Ave., Suite 500
Seattle, WA 98121

Re.: 144 Car RFP—Request for Clarification

Dear Mr. Humphries:

We have received Notice 20 and Addendum 22. In accordance with the RFP particulars, we are seeking clarification of what appears to be a procedural irregularity in regards to Notice 20.

**The Request for Clarification**

As you know, section 1.4.3 of the RFP documents require that any requests for clarification had to be submitted by October 31, 2006. Section 5 specifies the "exclusive protest procedures" applicable to the RFP. At section 5.1 the RFP states: "Protests pursuant to this sub-section shall be filed only after a Proposer has submitted a written request for clarification in an effort to remove the grounds for protest....Protests pursuant to this sub-section shall be filed ...no later than [October 2, 2006]....A Proposer who fails to strictly comply with the requirements of this sub-section shall be deemed to have fully and unconditionally waived any protest, of any form or nature, regarding the terms of the RFP Documents." Section 5.3 of the RFP mandates that any appeal from WSF's final decision on a protest must be filed within five days of the final decision and the section expressly provides: "Failure by the Proposer to timely file and serve such petition shall be deemed a waiver of any right of the Proposer to seek judicial review of WSF's decision on its protest."

This is what your RFP documents require. Here is what has happened.

On September 6, 2006, Todd Shipyards wrote to WSF with a number of objections to the RFP. This was, essentially, a request for clarification and was treated as such by you. In that letter, Todd specifically raised the issue of change orders. On behalf of WSF, you responded on September 15, 2006. You essentially rejected Todd's request for clarification and stated: "[WSF] will not place any limitation on the owner's customary right to direct changes in the scope of the work which WSF deems appropriate." On October 2, 2006, Todd timely submitted its Protest and incorporated, by reference, its September 6 objection concerning the change order

provisions, or lack of same. On November 6, 2006, you, on behalf of WSF, responded to Todd's (and Martinac's) protest with a "final written decision" denying the protest in all of its particulars. In that denial you expressly stated: "WSF will require compliance with [Section 1.4.3]."

And so the five day limitation period for filing an appeal from WSF's final decision began to run on November 6, 2006. As you know, Todd did not appeal the final decision. Martinac did.

This brings me to the issue which gives rise to this request for clarification. Todd's letter of November 21, 2006, which led to WSF publishing Addendum 22 to the RFP, is a nearly verbatim reiteration of its September 6, 2006 request for clarification and its October 2, 2006 protest. No new issues have been raised in that correspondence. Todd chose not to appeal from the WSF's final denial of that protest. They are, by the terms of the RFP, barred from any further protest or appeal. And yet you and WSF have allowed the letter, have obviously considered the contents thereof, and have now issued Addendum 22.

For the record, Martinac wants to note its objection to Addendum 22—essentially the same objection raised in response to Addendum 18. Addendum 22 is an acknowledgement by WSF that the RFP, in its present form, contemplates change orders. Change orders will, as you well know, result in more risk allocation to the taxpayers. SHB 1680 prohibits letting a contract which results in allocating risk to the taxpayers. Ergo—these vessels must be built without changes and change orders. The only way for the shipbuilder to design and build the ferries without changes is for WSF to honor the mandated design-build partnership. If this RFP proceeds on the design-build partnership path as contemplated in SHB 1680, there will be no changes and the change order issue raised by Todd will be rendered moot.

Martinac has followed your mandated procedure to the letter, at great expense. It is unfair to allow Todd to circumvent the appeal procedure and to be afforded the opportunity to back door its protest while Martinac is compelled to proceed in the contentious and costly appeal forum. Our Request for Clarification is whether the rules you set forth in the RFP for requests for clarification, protests and appeals have been withdrawn and, if so, what are the rules going forward?

We look forward to your reply.

L. E. Bronson, P.E.
Chief Engineer

Cc: J. Martinac
Counsel

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Michael Anderson
Executive Director

**Washington State Department of Transportation**

**Douglas B. MacDonald**
Secretary of Transportation

December 21, 2006

J. M. Martinac Shipbuilding
401 East 15th Street
Tacoma, WA 98421

Re: New 144 - Auto Ferries
Design - Build Project

Attn: L. E. Bronson, P.E.
Chief Engineer

Subj: J.M. Martinac Shipbuilding Corporation Correspondence Dated December 14, 2006

This letter responds to your correspondence dated December 14, 2006. As set forth more fully below, Martinac confuses the proposer question and answer process under RFP Vol. II, §1.4.3 with the protest procedures under §5.1 and further overlooks WSF's right to modify the RFP documents by addenda at any time where deemed appropriate.

**PROPOSER QUESTIONS AND ANSWERS – RFP VOL. II, § 1.4.3**

RFP Vol. II, §1.4.3 addresses questions by proposers during Phase II of the RFP process. This section requires such questions to be submitted, or subsequently confirmed, in writing and limits the right to submit those questions to proposers participating in the RFP. This section further provides that WSF will respond in writing and may elect to issue an addendum modifying the RFP documents if WSF deems such action appropriate. This provision is consistent with WSF's statutory right under RCW 47.60.814(3) to modify the terms and conditions of the RFP at any time prior to the submittal of bids in Phase III.

In its protest letter of October 2, 2006, Todd requested the proposer question and answer process be modified to provide for a meeting among WSF and the proposers and an oral question and answer session, a request also made by Martinac. WSF's response dated November 6, 2006, rejected that request for the reasons explained on page 2 and stated in part as follows:

> RFP Vol. II, Section 1.4.3 provides a means by which proposers can communicate directly with WSF through a written question and answer format. WSF will continue to require compliance with that process.

Washington State Ferries

In the schedule established under Addendum 17, issued August 28, 2006, the deadline for submission of proposer questions under RFP Vol. II, §1.4.3 was December 1, 2006, and the Final Technical Proposal Due Date was set for June 4, 2007. In recognition for the need for an ongoing question and answer and communication process, during the remainder of Phase II, Addendum 21, issued on November 17, 2006, extended the deadline for proposer questions under RFP Vol. II, §1.4.3 to May 1, 2007.

**PROTEST PROCEDURES - RFP VOL. II, §5**

The protest procedures for the RFP are not addressed in §1.4.3. Rather, they are found in §5 of Vol. II. As Martinac recognizes, protests brought under §5.1 on the grounds allowed therein, were due sixty days after the initial publication of RFP Vols. II-V, except that addenda may be protested for the reasons allowed under §5.1 within five calendar days after their issuance. §5.1 requires, as a prerequisite to any such protest, "a written request for clarification in an effort to remove the grounds for a protest."

Martinac confuses the question and answer process under §1.4.3 with the requirement for a request for clarification as a prerequisite to a protest under §5. The need for an ongoing question and answer process in a procurement of this complexity and magnitude should be apparent to Martinac. The RFP documents have always contemplated that proposer questions and answers would extend beyond the deadline for a formal protest under §5.1. There is nothing in the RFP documents which preclude a proposer from submitting later questions that could have been raised earlier as a written request for clarification during the initial sixty day protest period. However, what the proposer foregoes under such circumstances is the right to file a formal protest related to such question(s). WSF may also revise the RFP documents via addenda any time prior to submission of Phase III bids as it deems appropriate in light of issues raised by such a question and answer process.

**TODD NOVEMBER 21, 2006 CORRESPONDENCE**

WSF views Todd's recent November 21, 2006 correspondence as submitted pursuant to the question and answer process established by RFP Vol. II, §1.4.3. WSF's Notice 20, dated December 8, 2006, published Todd's letter for the participants and public to view and designated it as Question No. 16. To the extent that Todd's November 21 letter restates grounds or issues previously submitted by it and made a part of its formal protest dated October 2, 2006, Todd may not file a new protest on such basis or grounds. Neither may Todd's November 21 letter properly constitute a request for clarification under the protest procedures of RFP Vol. II, §5.1 in regard to new issues; since the deadline for such a protest has passed as Martinac notes. However, Todd may address issues previously raised by it, or even new issues, through the question and answer process and has elected to do so here. In this regard its November 21 correspondence adds further detail and argument in support of positions previously advanced by it.

Based on Todd's comments, WSF has determined that it is reasonable and appropriate to make certain limited revisions to the RFP documents which are reflected on Addendum 22. These are essentially confined to a revised definition of working drawings and revisions to Article 17.6.10 of the Design - Build Contract, regarding the negotiated change order composite hourly rate. However, Todd has no administrative or legal recourse to challenge WSF's action, or inaction, as the case may be, except in regard to the specific revisions to the RFP made by Addendum 22, provided Todd filed a timely protest, which it did not.

**SHB 1680 DOES NOT PROHIBIT CHANGE ORDERS TO THE PHASE III DESIGN - BUILD CONTRACT**

Martinac's December 14, 2006 correspondence raises a new issue never previously asserted by it. In this regard, Martinac's letter states that SHB 1680 prohibits a contract which results in allocating risk to the tax payers and that the new vessels must be built without changes or change orders. No such prohibition exists within the statutory scheme. Therefore, Martinac's December 14 letter cannot provide a specific applicable statute in support of this assertion.

Moreover, the change order clause within any construction contract is first and foremost for the benefit and protection of the owner, here the State and its tax payers. Without the right to require changes to the scope of the work which are discovered to be necessary during the course of construction, the State would be at the mercy of the shipbuilder who could refuse to perform essential changes or agree to do so only upon payment of an exorbitant sum. WSF does anticipate that the number and magnitude of changes that will be found necessary during the course of construction in Phase III will be substantially less on this project due to the role of the proposers in the design process. However, it is wholly unrealistic to conclude no changes or change orders of any form will be required on a procurement exceeding $200 million in value and requiring construction of four major vessels.

For these reasons, Article 17.1 of the Design - Build Contract published with RFP Vol. III on August 2, 2006 has always afforded WSF the right to authorize and require changes to the scope of the work and issue change orders. This section of the RFP documents remains as originally published and has not been revised. Your December 14 letter acknowledges this fact and recognizes that WSF's September 15, 2006 correspondence to Todd stated that "[WSF] will not place any limitation on the owner's customary right to direct changes in the scope of the work which WSF deems appropriate.". Other portions of Article 17 address in considerable detail the pricing of change orders. Thus, it was evident to Martinac long before the issuance of Addendum 22 that the RFP contemplated change orders. Martinac now appears to have belatedly concluded that it wishes to take issue with this aspect of the RFP documents. Martinac lacks any bona fide substantive basis to do so. Martinac has also failed to timely raise or protest this issue and may not do so now for that reason as well.

In summary, WSF has even handedly and properly implemented the rules set forth in the RFP for requests for clarification, protests and appeals. Such rules have not been withdrawn and remain as stated in the RFP documents.

Yours truly,

David H. Humphreys
Vessel Project Engineer
New 144-Auto Ferries Project
Washington State Ferries

cc: Steve Reinmuth, WSDOT
Daniel W. Galvin, AAG
Mike Anderson, WSF

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