

2013 DRAFTING REQUEST

Bill

Received: 7/25/2013 Received By: jkuesel
Wanted: As time permits Same as LRB:
For: Sheila Harsdorf (608) 266-7745 By/Representing: Matt Wuebke
May Contact: Drafter: jkuesel
Subject: State Finance - claims agnst st Addl. Drafters:
Extra Copies:

Submit via email: YES
Requester's email: Sen.Harsdorf@legis.wisconsin.gov
Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

Topic:

J&L Steel and Electrical Services claim

Instructions:

Per attached E mail, 7/23/13.

Drafting History:

| <u>Vers.</u> | <u>Drafted</u> | <u>Reviewed</u> | <u>Typed</u> | <u>Proofed</u> | <u>Submitted</u> | <u>Jacketed</u> | <u>Required</u> |
|--------------|----------------------|--------------------|-----------------------|----------------|----------------------|----------------------|-----------------|
| /? | jkuesel 8/22/2013 | evinz 8/23/2013 | jfrantze 8/23/2013 | _____ | | | |
| /1 | | | | _____ | mbarman 8/23/2013 | lparisi 8/26/2013 | State |

FE Sent For:

<END>

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|--------------|--------------------|------------------|--------------|----------------|------------------|-----------------|-----------------|
| 1/? | jkuesel 8/22/13 | 1 eev 8/23/13 | JL | 8/23 | | | |

FE Sent For:

<END>

Kuesel, Jeffery

From: Champagne, Rick
Sent: Tuesday, July 23, 2013 12:24 PM
To: Kuesel, Jeffery
Subject: Claims Draft for Sen. Harsdorf

Jeff, a claims bill draft.

From: Wuebke, Matt
Sent: Tuesday, July 23, 2013 12:14 PM
To: Champagne, Rick
Subject: Claims Board decision

Hi Rick,

Per the voicemail I just left for you, here is the report from the May 31st meeting of the Claims Board where the claim was considered: <http://claimsboard.wi.gov/docview.asp?docid=24628&locid=28>.

Please let us know if you have any questions.

Matt Wuebke
Office of Sen. Sheila Harsdorf
800-862-1092 or 608-266-7745

2. **J&L Steel and Electrical Services** of Hudson, Wisconsin claims \$217,499.00 for increased bid costs, expert witness fees and attorney's fees related to an allegedly incorrect interpretation of the bid/contract for a visual nurse call system at a new DVA skilled nursing facility. DOA ran the bidding process for the call system for the DVA facility. The claimant states that section 28 52 23 of the bid specifications called for a "Rauland Responder 4000 or approved equal system." The claimant points to the fact that the bid's general conditions required that substitutions be submitted for approval 10 days prior to bid but did not require the same pre-bid submission of "approved equals" to the Rauland system. The claimant notes that the general conditions also specified that bidding was not restricted to the Rauland system but that the brand name was only used to provide a standard of quality for the required system. The claimant states that it called both a Rauland system supplier and a Jeron system supplier for price quotes but that only the Jeron supplier called back. The claimant states that it based its bid on the Jeron supplier's verbal quote. The claimant won bid to provide the system. The claimant states that in July 2011, pursuant to the contract, it provided a submittal to the Division of Facilities Development (DFD, formerly the Division of State Facilities) showing the intended use of the Jeron system. The claimant states that at a September 2011 project meeting, both DFD and DVA approved use of the Jeron system. The claimant states that the Rauland system supplier contacted DFD in September 2011; erroneously alleging that the claimant's bid was non-responsive because the claimant did not submit the Jeron system as a "substitute" 10 days prior to bidding. The claimant believes this is a misunderstanding of the bid/contract documents and that because the Jeron system is equal to the Rauland system, pre-bid submittals were not required. The claimant notes that there is only one supplier for the Rauland system and the claimant believes the supplier's contact with DFD was improper and suspect, motivated by supplier's desire to obtain a windfall as the only source for the Rauland system. In October 2011, DFD rejected the claimant's proposed use of the Jeron system, indicating that it did not match "the manufacturer/vendor listed in the specifications" and was therefore not acceptable. The claimant appealed this rejection. The claimant notes that DFD's November 2011 response to the appeal stated "...this project was specified to provide a particular manufacturer and model (in this case Rauland Responder 4000)..." The claimant believes that this proves that DOA conducted an unlawful sole-source procurement in violation of WI law, DOA regulations and its contract with the claimant. The claimant states that if DOA wanted to conduct a sole-source procurement, it was required to obtain a sole-source waiver from the Governor and the State Bureau of Procurement prior to opening the project for bidding. The claimant notes that DFD has never provided a technical basis for rejecting the Jeron system. It was rejected only because it was not the Rauland system, which results in a de facto sole-source procurement in violation of WI law. The claimant believes that DFD is attempting to justify the rejection based on trivial technicalities. Finally, the claimant points to numerous examples in case law where courts have ruled that when a contractor proposes to use an "equal" component, it has a contract right to be granted approval of that component.

DOA recommends denial of this claim. Section 28 00 00 of bid specifications (Division 28 of contract) states, "Where the Contractor wishes to use equipment or methods other than those listed by name, that equipment must be approved by the Engineer." Section 28 further states that that submittal "shall be received in the Engineer's office 10 business days prior to bidding." DOA states that the claimant did not submit its intent to use the Jeron system until over four months after the bid opening, which violated the contract and denied DFD the opportunity to make the existence of the Jeron system known to other contractors, which would have improved competition. DOA notes that the claimant submitted information on the Jeron system to the Architectural and Engineering firm but did not submit that information or a Request for Submittal Approval form to DFD as required by Articles 16 and 17 of the General Conditions. DOA also notes that although the claimant cites various court cases in support of its position, none of the cases are applicable to the facts from which this claim arose. DOA states that the claimant failed to follow the proper procedures in the contract related to approval of the Jeron system and in doing so, denied DFD the opportunity to protect the interests of the public in a competitive bidding process. DOA does not believe the claimant should be rewarded for failing to follow the terms of the contract.

The Board concludes this claim would best be resolved in a court of law. Therefore, weighing the equities, this claim is denied. *[Member Murray not participating. Members Leibham and Marklein dissenting.]*

3. Clear Channel Outdoor, Inc. of Pewaukee, Wisconsin claims \$385,812.95 for loss of three billboard structures and future revenue allegedly caused by DOT's revocation of the claimant's permit for the billboards. Since 1999, the claimant has maintained and operated three billboards in the Town of Wayne. The claimant states that it justifiably relied on three outdoor advertising permits previously issued by DOT for the billboards. DOT revoked those permits in 2010, stating that they were granted in error, and ordered the claimant to remove the billboards. The claimant appealed the permit revocation but in August 2012, the Division of Hearings and Appeals upheld DOT's decision. The claimant notes that although the administrative law judge held that, as a matter of law, the claimant could not invoke estoppel against DOT, the ALJ recognized the merits of the claim and directed the claimant to make a claim with the Claims Board for compensation. The claimant requests reimbursement for the loss of the billboards and the loss of future revenue that would have been generated by leases which ran until 2018 (two billboards) and 2020 (one billboard).

DOT recommends denial of this claim. The claimant is a worldwide outdoor advertising specialist doing business in 29 countries and across the US. In the late 1990's, the claimant purchased two billboards from Cochran Sign Company and then applied for a permit for a third sign. The two original sign permits were approved based on false and misleading application materials regarding zoning submitted by the signs' original owner. The claimant repeated that false and misleading zoning information when it applied for the third sign's permit. In 2010 a subcontractor of the claimant, Good Tree Care, requested a permit to cut down trees on the highway near the billboards. In its permit application, Good Tree Care correctly identified the lands' proper zoning category for purposes of outdoor advertising control. DOT states that this was the first time the claimant or the prior owners of the billboards disclosed the true zoning category of the property. DOT states that it investigated the discrepancy between Good Tree Care's application and the original sign applications made by the claimant and prior billboard owners. DOT's investigation concluded that the property was not eligible for billboard permits under state or federal law and DOT revoked the permits. Although the claimant attempts to blame DOT for the fact that the permits were issued in violation of the law, in fact, the permits were issued because the original applicant and Town of Wayne officials acted to circumvent state law. DOT notes that it is not uncommon for sign owners to "cheat" in order to erect illegal signs. DOT points to the fact that the claimant is a sophisticated actor in the industry and was aware of the risk when it purchased the signs. DOT believes that the claimant should have investigated the property prior to purchasing the signs. DOT states that the claimant can pursue a warranty claim against the company from which it purchased the signs or, if it waived warranty claims against the seller, then the claimant assumed the risk that the signs were illegal. Finally, DOT states that the claimant's claim for the "loss" of the signs is baseless. The claimant has removed the signs, still owns them, and may erect them in a legal location. In addition, the claim for lost profits has no merit. The claimant has no right to make revenue from illegal billboards and should not seek to augment already ill-gotten gains by hitting up Wisconsin taxpayers for another \$400,000.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one with the state should assume and pay based on equitable principles. *[Member Leibham dissenting.]*

4. Wisconsin & Southern Railroad Company of Milwaukee, Wisconsin claims \$160,371.86 for expenses incurred as part of the High Speed Rail project between June and November 2010. The claimant believes it is entitled to reimbursement under the principle of equitable estoppel. The claimant states it was assured by DOT that it would be reimbursed for the costs incurred assisting DOT with the High Speed Rail project on an expedited basis. The claimant states that it relied on these assurances given by DOT before and throughout the negotiation process. The claimant states that the expedited timeframe for the negotiations was



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-2775/1

JTK.....

Heev

Feb 8/23

~~PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION~~

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AN ACT ...; relating to: expenditure of \$217,499 from the general fund in payment of a claim against the state made by J & L Steel and Electrical Services.

Analysis by the Legislative Reference Bureau

This bill directs expenditure of \$217,499 from the general fund in payment of a claim against the Department of Administration (DOA) by J & L Steel and Electrical Services. The claimant installed a visual nurse call system at a skilled nursing facility located at the Wisconsin Veterans Home at Chippewa Falls in 2011. The bid specifications called for a Rauland Responder 4000 or approved equal system. The bid's general conditions required that substitutions be submitted to DOA for approval at least ten days prior to the bid deadline but did not require pre-bidding submission of approved equals to the Rauland system. DOA declined to approve the system upon which the claimant based its bid. DOA asserts that the bid specifications require that substitutions to specifications be submitted to the project engineer at least ten days prior to bidding and the claimant did not comply with the specifications. The claimant asserts that DOA used a sole-source procurement process without obtaining the proper approval for its use as required by law. The claimant claimed \$217,499, representing increased bidding costs, witness fees, and attorney fees incurred resulting from DOA's incorrect interpretation of the bid specifications. The claims board denied this claim on June 19, 2013 (see *Senate Journal*, p. 302).

bidding

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1. Claim against the state.**

2 (1) There is directed to be expended from the appropriation under section
3 20.505[✓] (4) (d) of the statutes, as affected by the acts of 2013, \$217,499 as payment of

4 a claim against the state made by J & L Electrical Steel and Electrical Services,
5 Hudson, Wisconsin, as reimbursement for work performed on a visual nurse call
6 system in 2011 at a skilled nursing facility for the Wisconsin Veterans Home at

7 Chippewa Falls that was installed by the claimant but for which the Division of State

8 Facilities declined ^{to} ~~the~~ approve payment because the the system did not conform to
9 the division's interpretation of relevant specifications for the facility. Acceptance of

10 this payment releases this state and its officers, employees, and agents from any

11 further liability resulting from work performed by the claimant on the construction

12 of the skilled nursing facility at the Wisconsin Veterans Home at Chippewa Falls.

13

(END)

Parisi, Lori

From: Wuebke, Matt
Sent: Monday, August 26, 2013 10:14 AM
To: LRB.Legal
Subject: Draft Review: LRB -2775/1 Topic: J_L Steel and Electrical Services claim

Please Jacket LRB -2775/1 for the SENATE.