

Excerpt from the State Contracting Standards Board draft minutes of the Board's February 5, 2021 meeting

Report from the CPA MIRA Special Committee

Chair Fox initiated discussion:

Executive Director Guay reported that the Special Committee focused at this time on the Connecticut Port Authority and will focus on the Materials Innovation and Recycling Authority next.

The Special Committee took a four-pronged approach.

1. Review of Applicable Statutes, by Executive Director Guay
2. A look into the Gateway Contract – Bruce Buff
3. A look at the Concession Agreement- Lauren Gauthier
4. Compilation of records and interviews- Xholina Nano

Executive Director Guay stated that his review of the applicable Statutes is complete, but he is seeking clarification of the extent of the Board's authority with the Connecticut Port Authority.

Bruce Buff reported:

Mr. Buff reported he initially looked at the consulting agreement between The Connecticut Port Authority and Seabury Maritime, since it seemed to encompass questions and concerns relative to the New London Pier project in general.

Mr. Buff explained that the agreement was executed on May 15, 2018 and provided for Seabury, a venture Capital company, to perform strategic advisory services and financial advisory services, (including review of Phase I Requests for Qualifications and development of an RFP to identify an operator and/or developer for the State Pier Facility, including but not limited to a qualified terminal operator and/or a deep-water wind energy development entity). Seabury was paid \$219,500 plus reasonable out-of-pocket expenses. In addition, the contract included a provision to pay Seabury a "Success Fee" to "assist the Authority in arranging or closing a Transaction but specifically excluding any Excluded Transactions..." This amount totaled \$523,000. Mr. Buff on behalf of the Board has asked what this fee was for (the contract is unclear to his reading) but reported the Board has not received an answer. Mr. Buff questioned whether this was a reward? Mr. Buff commented that it is difficult to understand why it is necessary or advisable to pay an additional fee to a consultant as a reward for providing a service for which they were already paid

According to Mr. Buff, apparently, Seabury provided procurement services for the RFP issuance and award, though they are not included on the evaluation team. Seabury is a venture capital firm. Mr. Buff explained it is difficult to understand why the CPA paid such a company over

\$700,000 to provide procurement guidance. Mr. Buff added an additional note, that sound procurement procedures require that evaluations of prospective bidders include identifying if any one of them had a conflict of interest, which was clearly not considered.

Mr. Buff explained the Harbor Development Agreement between the CPA, Gateway New London, and Northeast Offshore, LLC was executed on 2/11/20. Mr. Buff didn't look at whether any one potential bidder was provided an advantage over another, since he doesn't have actual details of that, nor did he look at what bidders may not have provided proposals due to their perception that one bidder may have an inside track. Mr. Buff did look at the contract's provisions. The first concern Mr. Buff reported is that the contract contains no penalties for missing key dates, nor does it contain any incentives for beating milestones and budget constraints. Another concern Mr. Buff has is that apparently no provision was made for a Project Manager to manage this project, ideally within the CPA organization. Mr. Buff noted there was a mention in the contract that the CPA would be given weekly updates by their contractors. Mr. Buff explained that this is insufficient for the successful completion of a project of this magnitude. Mr. Buff has seen projects go "off the rails" in a day. As a result of these and other issues, significant cost overruns and missed milestones have resulted.

Lauren Gauthier reported:

Ms. Gauthier reviewed the Concession Agreement between Gateway New London, LLC and the Connecticut Port Authority. The RFP was issued on June 7, 2018. Initial deadline for responses was August 10, 2018. The CPA extended the deadline to August 31, 2018 in a subsequent amendment.

Enstructure is the financial backer of the project, essentially hiring on Gateway to operate the terminal for their development. Enstructure was established as a business entity in Delaware on July 28th, 2018 and Gateway's response to the CT Port Authority's RFP was signed August 24th, 2018 by Enstructure founder and co-CEO Phillipe de Montigny and co-CEO Matt Satnick.

Ms. Gauthier attempted to compare the concession agreement, the CPA Request for Proposals and Gateway's response to the RFP. It was by and large difficult because Gateway's response to the RFP was heavily redacted. Redactions within the concession agreement that also made evaluation difficult include the redaction of a term in the definitions section, and presumably the redaction of that term in several areas of the agreement. In particular, it would seem that there is a time target of 12 years placed on the implementation of something (word/term redacted) that would relate to how fees would be assessed based on the something and "corresponding operations". Ms. Gauthier is concerned that the concession agreement isn't able to disclose what metric is actually being used to assess fees on the concessionaire in the middle of a 20-year contract.

Ms. Gauthier added, there is a specific value being placed on reimbursement of the CT Port Authority from the concessionaire for a feasibility study to not exceed \$74,000 so long as the something hasn't proceeded within two years of the effective date. What this feasibility study the CPA is supposed to front the cost for is unclear, due to redactions. And apparently, so long as whatever it is proceeds, the State will be on the hook for the full cost. Ms. Gauthier's question is, why is the CPA paying for a feasibility study for a development proposed by the concessionaire? Also, what is the state supposed to be studying the feasibility of?

Objectives of the RFP:

1. Maximize the overall economic benefit to Connecticut and the State Pier of New London
2. Maximize cargo and other marine activity flow through the State Pier Facility Sites
3. Develop the State Pier Facility Sites in collaboration with the CPA to provide practical solutions to cargo owners and shippers with a flexible facility that can serve a variety of cargo types and/or serve a variety of other marine services
4. Maximize both direct and indirect (i.e. jobs) economic impact of the State Pier Facility Sites
5. Minimize any potentially negative environmental impacts of increased cargo volume moving through the community
6. Optimize the long-term potential of the State Pier Facility Sites, including rail use
7. Maximize revenue from the State Pier Facility Sites to the CPA as well as provide a stable and predictable source of revenue from same
8. Serve the existing customers of the Port, as well as related businesses that are responsible for its ongoing success and growth.

Gateway's proposal claims that they will increase overall cargoes, existing and new; will utilize the rail network, and that's about it. The rest of the business plan is redacted (14/17 pages), including any mention of wind power operations if they exist in the proposal at all. The only mention of wind in the proposal is, "It is in no way our intention to shift current business from the State Pier to the Port of New Haven unless Bay State Wind requires us to do so." This acknowledges that the Bay State Wind project will potentially disrupt and significantly impact any other users at the State Pier, with preference going to this single user.

The concession agreement provides that, "The Concessionaire shall maintain sufficient cargo facilities on a public, nonexclusive basis and upon reasonable terms through the Concession Period" which should adequately address RFP objectives 2, 3, 8.

In the section 8.11.6 of the agreement, the concessionaire is required to get approval from the CPA for any sub-letting or subcontract relationship with any wind energy company for the use of the site and the port facilities for a range of services related to the "receiving, storage, transportation of concerning the generation, storage and transmission of wind-powered energy." The only other time that wind energy is mentioned in the concession agreement is in a redacted section referencing the reimbursement of a feasibility study.

Responsibility for the maintenance, repair and improvement of the Central Vermont Rail Pier is shared by the CPA and the concessionaire. Other sections require the use and promotion of rail facilities. This would satisfy RFP objective 6.

Other objectives related to economic benefit are difficult to assess to due to redactions and not necessarily within the purview of this review.

The concession agreement seems to comply well with the RFP requests, the rating of the proposal itself seems fair enough, as far as can be gathered from extensively redacted documents held by a public agency regarding a public asset being renovated in large part with public funds. The main issue lies in the discrepancies with what the concession agreement asserts and what is happening at the State Pier. Users are being excluded, there appears to be development of the pier that would be used by only one user, a wind energy company, and there is a question as to what is happening with the rail facilities, as they are currently being removed without knowledge of whether they are to be replaced to facilitate the intermodal cargo transportation repeatedly mentioned and supported in both the Gateway proposal and the concession agreement.

Being that the State Pier is a public asset, the Connecticut Port Authority a government entity, and the State of Connecticut pledging millions upon millions of state dollars to this deal, Ms. Gauthier is of the opinion that more transparency needs to be had in the exact arrangement of the State Pier development. Specifically, how is it being ensured that other users and cargoes will be brought through the port, how is it being ensured that the financial backers of the Gateway are keeping and arms-length when transacting with Eversource and Orsted and CPA employees and Board members, and how is this public asset being protected if and when it is no longer used as a wind energy hub. Ms. Gauthier added New London knows all too well the danger of promising government help and incentives to a large corporation and being devastated by the corporation backing out of a project. Connecticut needs to be more mindful of how state assets are being managed, how state dollars are being spent and how quasi-public agencies are being run.

Xholina Nano Reported:

Ms. Nano's work focused on conducting thirty minutes to an hour-long interview with members of the public who raised a complaint regarding the CPA before the board to identify their top areas of concern. Comments from the interviews with Mr. Blacker, Mr. Fryxell, Mr. Farrelly, and Mr. Olsen were shared with the Board members tasked with this initial review and the Board's Executive Director. Additionally, the work included gathering and reviewing supporting documents.

Lawrence Fox, Chair Comments:

Chair Fox explained the Board has had a significant amount of cooperation from the folks from the CPA in the Board's request for information. The Board is aware of the shakeup at the CPA

with their management. The initial staff that was involved has been replaced. DAS and OPM has stepped up in major ways. A lot has been done to correct some bad behavior. There is a new Chair for the CPA Board of Directors and Executive Director. It is important for the Board to understand that lot of action has been taken to correct some of the issues that have occurred.

Chair Fox explained he is mindful as the Chair of the Board to be clear about what the lane of our Board is because there are an incredible amount of passionate feelings, particularly in Southeast Connecticut and across the state about how people feel about this project. The mission at the SCSB is to focus on procurement practices. It is not the Board's mission to get caught up in the policy decisions being made by the CPA. What is relevant for the Board to understand is how these agencies or authorities are doing their procurement and if they are consistent with the statutes and obligations. The Board's lane is an important lane, which is that the state uses the best procurement processes for these endeavors.

Executive Director Guay referenced the statutes that are relevant for the board. Chair Fox asked Executive Director Guay to check with the Attorney General's office for clarification. Until and unless a specific issue comes before us, we would not normally look at the CPA statutes and authority. Nested in state statute C.G.S Section 15-31b(15) is the authority for the CPA to "invest in, acquire, lease, purchase, own, manage, hold and dispose of real property and lease, convey or deal in or enter into agreements with respect to such property on any terms necessary or incidental to carrying out the purposes of C.G.S Sections 15-31a to 15-31i, inclusive, provided such transactions shall not be subject to approval, review or regulation by any state agency pursuant to title 4b or any other provision of the general statutes." In other words, it seems like they have specifically been given an exception from review by the State Contracting Standards Board. Chair Fox added that is an unusual provision. It is very significant in a number of ways.

Chair Fox state that the Board clearly has the authority to make recommendations to the governor and legislature on proper procurement policies. One of the alarms the Board needs to send to the legislature is whether or not it is in the public interest of the state to strip the CPA of the kind of accountability that the Board could provide and the kind of redress that our Board could give. The fact that there has been a history at the CPA points to the fact that problems can and do arise when you don't have accountability. The OPM interventions in the last few years are a testimony of that. The Board may or may not have the authority to go deeper into this, but it raises a bigger issue about whether or not the legislature needs to take a look at these carve outs because have we at the alter of nimbleness stripped accountability from these authorities and is that really what the legislature had in mind or did they not understand the implications of it. We are waiting for an opinion on the from AG office.

Upon the suggestion of Robert Rinker, motion made by Lauren Gauthier and seconded by Stuart Mahler to request a formal opinion from the Attorney General on whether the State Contracting Standards Board has any authority over procurement engaged in by the Connecticut Port Authority? If so, what authority does the State Contracting Standards Board have?

Comment made by Stuart Mahler supporting Mr. Rinker's comments and mentioned proposed HB #6194 An Act Concerning the Competitive Bidding and Oversight of Quasi-public Agency Contracts being introduced by the legislature.

Comment made by Lauren Gauthier on asking for clarification from AG office the other quasi-public agencies carveouts.

Comment made by Lawrence Fox, Chair, supporting the proposed motion for a formal opinion on this be sent to the AG's office.

Discussion comments by Lauren Gauthier for the Board to look into creating a separate working group to look into quasi-publics.

Discussion comments by Chair Fox for the Board to first get clarity on this issue before working on creating a separate work group.

All voted in favor of the motion.