

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Magic Touch Exterminating Co. with respect to the procurement of Pest Control Services conducted by the Office for People With Developmental Disabilities.

Contract Number – C540176

**Determination
of Bid Protest**

SF - 20160161

July 03, 2017

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the Office for People With Developmental Disabilities (OPWDD) for pest control services. We have determined the grounds advanced by Magic Touch Exterminating Co. (Magic Touch) are insufficient to merit the overturning of the contract award made by OPWDD and, therefore, we deny the Protest. As a result, we are today approving the OPWDD contract with Jove Pest Control, Inc. (Jove).

BACKGROUND

Facts

OPWDD's Long Island Developmental Disabilities Service Office (LIDDSO) advertised a procurement opportunity for pest control services at its Long Island program sites on May 11, 2016. The Contract Reporter advertisement stated that LIDDSO was procuring these services through an Invitation for Bids (IFB) and provided vendors with an "Important Notice: **Pre Bid Meeting and Site Visits are mandatory** and attendance will be taken" (emphasis in the original). The advertisement further noted the date of such mandatory pre bid meeting as May 24, 2016, and instructed interested vendors to email the LIDDSO Business Office for a full bid package. The IFB itself also provided a schedule of "Event Dates" leading up to award, including a "Pre-Bid meeting and Mandatory Site Visit" on May 24, 2016 (IFB, at pg. 1).

Magic Touch claims in its Protest that a company representative went to the LIDDSO office on May 30th to request a full bid package, but the agency refused to provide it at that time (Magic Touch Protest Letter, dated June 2, 2016, hereinafter Protest). At the bid opening on June 2nd, Jove was determined to be the lowest bidder and was notified of such. On June 7, 2016, this Office received a letter from Magic Touch protesting the award to Jove (Protest, at pg. 1). OPWDD responded to the Protest via email, dated July 18, 2016, as well as in a letter dated June 29, 2017 (OPWDD Answer). On August 3, 2016, our Office received a letter from Jove, asserting that the proposed contract award should stand (Jove Answer).

Comptroller's Authority and Procedures

Under State Finance Law (SFL) § 112(2), with certain limited exceptions, before any contract made for or by a state agency, which exceeds fifty thousand dollars, becomes effective it must be approved by the Comptroller.

In carrying out the contract approval responsibility prescribed by SFL § 112, this Office has issued a Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency.¹ This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because this is an initial protest to this Office, the Protest is governed by section 3 of the OSC Protest Procedure.

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by OPWDD with the Jove contract;
2. the correspondence between this Office and OPWDD arising out of our review of the proposed Jove contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Magic Touch's Protest dated June 2, 2016;
 - b. OPWDD's email dated July 18, 2016;
 - c. Jove's Answer dated August 3, 2016; and
 - d. OPWDD's letter dated June 29, 2017.

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, Magic Touch challenges the procurement conducted by OPWDD on the following grounds:

1. The procurement schedule set forth by OPWDD was too tight to allow potential bidders to meaningfully participate; and
2. Magic Touch was unfairly deprived an opportunity to bid.

¹ OSC Guide to Financial Operations, Chapter XI.17, <http://www.osc.state.ny.us/agencies/guide/MyWebHelp/>. During the pendency of this Protest, our Office formally promulgated regulations that update and codify the Contract Award Protest Procedure for contract awards subject to the Comptroller's approval (2 NYCRR part 24, effective January 25, 2017).

Agency Response to the Protest

In its Answer, OPWDD reaffirmed its decision to preclude Magic Touch from bidding on the following grounds:

1. Magic Touch missed the mandatory pre-bid meeting on May 24th.

Winning Bidder Response to the Protest

In its Answer, Jove contends the Protest should be rejected and the award upheld on the following grounds:

1. The procurement opportunity and mandatory pre-bid meeting date was widely advertised both in the New York State Contract Reporter and certain local newspapers; and
2. The procurement process was fair and open.

DISCUSSION

In its Protest, Magic Touch claims that it was unfairly deprived of an opportunity to bid when the agency refused to provide it with the IFB on May 30th and, generally, the procurement schedule set forth by OPWDD was too tight to allow potential bidders to meaningfully participate (Protest, at pg. 1). LIDDSO counters that the vendor was denied the IFB package because it missed the mandatory pre-bid meeting on May 24th and, in any event, could not have come to the Office on May 30th seeking an application as that date was a state holiday (and, presumably, the Office would have been closed) (OPWDD Answer). Jove argues that the procurement opportunity and mandatory meeting date were sufficiently advertised both in the New York State Contract Reporter and local newspapers, and that the procurement process was fair and open (Jove Answer).

The requirements applicable to this procurement are set forth in SFL Article 11 which provides that contracts for services shall be awarded on the basis of “best value” to a responsive and responsible offerer (*see* SFL § 163[10]). Best value is defined as “the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers” SFL § 163[1][j)].² A “responsive” offerer is an “offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency” (SFL § 163[1][d]).

² In *Transactive Corporation v. New York State Department of Social Services* (236 AD2d 48, 53 [1997]; *aff'd on other grnds*, 92 NY2d 579 [1998]), the Appellate Division, Third Department, held that, while a State agency typically may not award a best value contract solely on the basis of price, it could be permissible when such approach effectively represents a cost-benefit analysis (*see also* New York State Procurement Guidelines, Sections IV[A]; V[B][11] “[f]or certain services procurements, best value can be equated to low price.”). Applying the rationale in *Transactive*, this Office has upheld awards of service contracts based on lowest price where the solicitation sufficiently defined the technical requirements, and the services were routine in nature (*see e.g.* Comptroller Bid Protest Decisions 20020035 and 20100434). Although Magic Touch did not raise this issue, based on our review of the procurement record, we are satisfied that OPWDD’s award of this contract based on lowest price undertook the requisite cost-benefit analysis.

SFL § 163(9)(b) provides that the “solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted.” As noted above, LIDDSO advertised this procurement opportunity on May 11, 2016 and expressly stated in the advertisement that the pre-bid meeting and site visit, to be held on May 24th, were “mandatory.” Interested bidders were instructed to contact the agency via email for the full IFB and the IFB cover page also expressly stated that the May 24th site visit was “[m]andatory.” Accordingly, it appears from the procurement record that attendance at this event was a condition that was required in order to be considered responsive to the IFB.

A key step in many State procurements is a pre-bid site visit and conference. As the New York State Procurement Council (the Council) has advised, the purpose of this is “to ensure that bidders are aware of site conditions [and] to allow bidders to ask questions and/or exchange information with agency staff. The solicitation must identify the date, time and location of such events, if planned, and whether attendance is mandatory in order to bid” (NYS Procurement Guidelines, at pg. 24). In addition, the Council provides that, prior to confirming an award to an apparent low bidder under an IFB, “the agency must verify that: 1) the winning bid is responsive by meeting all mandatory requirements and specifications of the IFB; and 2) the winning bidder is responsible. If the apparent low bidder is not found to be responsive or responsible, the bid must be rejected and the next lowest price bid must be reviewed” (*Id.* at pgs. 24-25). Even in the context of a Request for Proposals, the Council has reaffirmed that, where the agency decides to conduct a pre-bid conference, “[a]ttendance must be defined as optional or mandatory; if attendance is mandatory, proposals may only be considered from offerers who participated” (*Id.* at pg. 29).

Here, it is undisputed that LIDDSO provided notice to potential bidders that a mandatory pre-bid site visit and meeting was to be held. It is further undisputed that Magic Touch failed to attend. Given that waiving this mandatory requirement for Magic Touch could have placed other bidders at a competitive disadvantage, LIDDSO was within its discretion to determine that Magic Touch’s failure was material and to deny its inclusion in the process at that time (*see Hungerford & Terry, Inc. v Suffolk County Water Auth.*, 12 AD3d 675, 676 [2nd Dept. 2004]; *see also Matter of Cataract Disposal v Town Bd. of Town of Newfane*, 53 NY2d 266, 272 [1981]; *Le Cesse Bros. Contr. v Town Bd. Of Town of Williamson*, 62 AD2d 28 [4th Dept. 1978]). Accordingly, we are satisfied that LIDDSO acted properly in rejecting Magic Touch’s request for the IFB after the date of the mandatory event had passed.

Finally, turning briefly to Magic Touch’s argument that LIDDSO’s procurement schedule was too tight in order to provide potential bidders with sufficient time to respond, Magic Touch asserts “[e]verything was supposed to be done in 5 business days for a 5 year contract” (Protest, at pg. 1). This assertion is factually incorrect. The advertisement was published on May 11, 2016, interested bidders had until May 20th to submit questions and the mandatory meeting and site visit was not until May 24th. Moreover, Economic Development Law § 143 provides that procuring state entities must submit information to enable publication of the procurement opportunity in sufficient time to allow a minimum of fifteen business days between publication of such notice and the date on which a bid or proposal is due, except where a shorter period is specifically authorized by law. Here, the statutory notice period was met and, in light of the fact

that OPWDD received seven bids in response to the IFB, we find no evidence to support Magic Touch's assertion that the agency did not provide a sufficient amount of time for bidders to request the IFB package and respond.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the contract award by LIDDSO. As a result, the Protest is denied and we are today approving the LIDDSO contract with Jove for pest control services.