

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed with respect to
the acquisition of exercise equipment by the
State University of New York, College at Canton,
Bid Proposal #062998F

Determination
of Bid Protest
SF-0898/057

September 9, 1998

This Office has completed its review of the above-referenced procurement by the State University of New York, College at Canton ("SUNY Canton") for exercise equipment and the bid protests filed by American Sports & Fitness Services, Inc. ("American") and G&G Fitness Equipment, Inc. ("G&G"). For the reasons detailed below, we uphold the protests and return the purchase order to SUNY Canton unapproved.

BACKGROUND

Facts

SUNY Canton conducted a procurement for exercise equipment through the use of a Request For Quotation ("RFQ"). The RFQ listed a number of exercise and fitness items which fell within the following seven categories:

- 1) Cardio Area;
- 2) Cybex Galileo Circuit;
- 3) PHC Design TBD Cybex Modular 6 Stacks;
- 4) Free Weight Area;
- 5) Body Weight Area;
- 6) Plates-Bars-Dumbbells; and
- 7) York Rubber Dumbbells.

By its terms, the RFQ limited most items to Cybex, Trotter and York equipment. The RFQ stated, "Must Be Equipment Listed - No Substitutions." Pursuant to the RFQ, the award was to be based upon the "full package price." American submitted a bid, including substitutions, of \$85,748.80. G&G submitted two bids, including substitutions, of \$89,103.12 and \$97,387.12. Advantage Sports & Fitness, Inc. ("Advantage"), the only distributor of Cybex, Trotter and York equipment in the area, submitted two bids, without substitutions, of \$100,500.00 and \$102,500.00¹.

On July 14, 1998 at the bid opening, SUNY Canton found American and G&G to be

¹The higher bid by Advantage appears to have been a clerical error.

unresponsive and awarded the contract to Advantage at their lower bid of \$100,500.00.

Protesting Parties

American and G&G are two of three vendors which submitted bids in response to the RFP issued by SUNY Canton.

Procedures and Comptroller's Authority

The Comptroller is required by section 112 of the State Finance Law ("SFL") to approve all State agency contracts which exceed \$10,000 in amount before such contracts become effective. However, an agreement between SUNY and the Comptroller, as provided for in Education Law, §355(5), requires only contracts over \$50,000 entered into by the State University to be approved by the Comptroller. As this contract is for well over \$50,000, the Comptroller must approve it before it becomes effective. As a contract has already been signed by SUNY Canton, the Comptroller has reviewed these bid protests as part of his review of the contract award under the aforementioned law and agreements.

As part of the review by this Office, we considered the following: correspondence from Steven Joanis on behalf of American dated July 7, 1998, July 8, 1998, July 31, 1998, and August 17, 1998; correspondence from Ronald Wolniak on behalf of G&G dated August 10, 1998; correspondence from John Murray on behalf of Advantage dated August 13, 1998; and correspondence from Diane Para on behalf of SUNY Canton dated August 12, 1998. We also considered statements made at a meeting of all parties on August 5, 1998 held at the Office of the Comptroller and the following written submissions distributed at such meeting: correspondence from Diane Para on behalf of SUNY Canton to Joanne Fazioli at SUNY Central, undated; and letters of recommendation on behalf of Cybex and Trotter equipment dated July 27, 1998 through August 4, 1998 and distributed by SUNY Canton.²

ANALYSIS OF BID PROTEST

Protestor's position

Both American and G&G assert that the procurement was unfair because the highest priced bidder received the award. They both indicate that the RFQ prohibition of substitutions was unfair and was intended to reach only one bidder, Advantage. Both assert that the equipment offered by Advantage, namely Cybex/Trotter/York exercise equipment, is not superior to their own equipment.

²All of these letters were dated July 27, 1998 or later, after SUNY Canton completed the subject procurement on July 14, 1998, and therefore are of little evidence why SUNY Canton decided to limit the procurement to brand name products available from only one distributor.

Agency's response to the protest

While this procurement began in the form of a competitive procurement, SUNY Canton admits that their purpose was to acquire brand name equipment available from only one distributor. Therefore, they have submitted a sole source justification in regard to this procurement. SUNY Canton's sole source justification is based on the following rationale:

1. Cybex claims to offer "high-velocity performance", unlike other exercise machines;
2. Only the "high-velocity performance" can result in the "specificity of training" necessary for preparing college athletes;
3. Cybex/Trotter/York offers the best warranties;
4. Advantage, on behalf of Cybex/Trotter/York, has the most reliable service;
5. The higher price for Cybex/Trotter/York is worth it, in light of its benefits; and
6. They are motivated by the needs of the students, and not any other consideration, in acquiring the equipment from only one manufacturer and one distributor.

COMPLIANCE WITH STATUTORY REQUIREMENTS³

Applicable Statutes

SFL, §160(3) defines commodities as "...material goods, supplies, products, construction items or other standard articles of commerce other than technology which are the subject of any purchase or other exchange." SFL, §163(3) permits the Office of General Services ("OGS") to purchase commodities on a centralized basis for State agency use. If OGS has not conducted centralized purchasing for a given commodity, or if a State agency can procure the commodities at a price lower than under the OGS centralized contract, the agency may proceed to procure the commodity on its own.

SFL, §163(10) states, in relevant part, "[c]ontracts for commodities shall be awarded on the basis of lowest price..." State Finance Law, §160(6) states, in relevant part, "[p]rice'... means the amount of money set as consideration for the sale of a commodity... and may include... delivery charges, installation charges and other costs. State Finance Law, §160(5) states, in relevant part, "[c]osts'... shall be quantifiable and may include, without limitation, the price of the given good or service being purchased; the

³There is an issue of whether SUNY is exempt, under the Education Law and the State Finance Law, from the competitive bidding requirements of SFL, §163 for purchases below the thresholds agreed to between SUNY and this Office. We need not resolve this issue since SUNY's own regulations require competitive bidding in substantial accord with SFL, §163. See 8 NYCRR Part 316; SUNY Administrative Procedures Manual, Item 300.

administrative, training, storage, maintenance or other overhead associated with a given good or service; the value of warranties, delivery schedules, financing costs and foregone opportunity costs associated with a given good or service; and the life span and associated life cycle costs of the given good or service being purchased..."

SFL, §163(1)(g) states, "'Sole source' means a procurement in which only one offerer is capable of supplying the required commodities or services." SFL, §163(10)(b) states, in relevant part, "...sole source procurements for services or commodities... may be made without a formal competitive process and shall only be made under unusual circumstances and shall include a determination by the... state agency that the specifications or requirements for said purchase have been designed in a fair manner."

DISCUSSION

Analysis as Non-Competitive (Sole Source) Procurement

While this procurement began in the form of a competitive procurement with the receipt of three bids, SUNY Canton admits that it was attempting to acquire brand name equipment from only one distributor, and has submitted a sole source justification. Therefore, we must analyze this matter based not on its form but on its substance, i.e., as a sole source procurement.

In determining the validity of brand name, sole source procurement, we must look at the law developed by the Courts. New York courts are wary of this type of procurement, absent a public interest justification. The lead case in this area is Gerzof v Sweeney, 16 NY2d 206, 264 NYS2d 376 (1965), where contract specifications issued by a village for purchase and installation of electric power equipment were drawn in such a way as to reach only one manufacturer. The Court of Appeals, in rejecting the contract, stated, "[s]uch a scheme or plan is illegal in the absence of a clear showing that it is essential to the public interest." The Court further elaborated:

"We do not mean to suggest that specifications for public projects are illegal merely because they tend to favor one manufacturer over another. More must appear in order to render the specifications and the contract based thereon illegal, since a particular product, that is, one manufactured by only one manufacturer, may be required in the public interest. However, an objectionable and invalidating element is introduced when specifications are drawn to the advantage of one manufacturer not for any reason in the public interest but, rather, to insure the award of the contract to that particular manufacturer." (Emphasis added) 264 NYS2d 380-381.

This Office has previously interpreted the public interest test, both in the context of municipal procurements and state procurements. Opns St Comp, No. 83-105 involved a

village which wanted to dispense with competitive bidding in sewer repair work, to procure a specific patented process available only through certain licensed contractors. We stated:

“...[i]f a municipality, acting in good faith, and without any intent to restrict or inhibit competition, determines that services utilizing a patented process which may be obtained only from certain licensed bidders or from a single source uniquely serves the public interest, it may specify the patented process. If, in fact, such services may be obtained from only one source so that no possibility of competition exists, a contract may be entered into without competitive bidding (citations omitted). In making the necessary determinations, we believe the municipality should be prepared to show, among other things, the unique benefits to the municipality of the patented process as compared to other available services; that no other process provides substantially equivalent or similar benefits; and that acquisition of the process is relatively cost effective, that is, that the price paid is reasonable in comparison with other methods when the particular benefits of the patented process are considered.” (Emphasis added)

In reviewing a State procurement, SF-0996/076 was a determination of a bid protest regarding an award by OGS for “a paver placed surface treatment process” -- an ultra-thin hot mix pavement overlay, patented and only available in New York through one licensee. Our opinion stated:

“While the competitive bidding statutes require that specifications for State procurements be designed in a manner which will enhance competition..., the competitive bidding process should not deprive the State of the ability to obtain “state of the art” or otherwise high quality goods or services available from only a limited universe of suppliers, if necessary in the public interest... (The protester) has not questioned OGS’ representations that unique advantages are afforded by the use of this patented process, and that no other process provides substantially equivalent or similar benefits... OGS states that the paver placed surface treatment process, one of many different processes utilized by OGS, is a new and innovative ultra-thin hot mix overlay with no generic equivalent. OGS has identified the following unique benefits resulting from the use of this patented process... Based upon the uncontroverted record before this Office, OGS has demonstrated that it has acted in good faith without intent to arbitrarily inhibit or restrict competition, and that in certain cases the use of the paver placed surface treatment process may uniquely serve the public interest.” (Emphasis added)

Therefore, the following issues need to be addressed in determining whether the public interest test has been met:

1. Was the procuring agency operating in good faith? Was it motivated without intent to arbitrarily restrict or inhibit competition? Was it motivated without intent to reward one particular manufacturer or dealer?
2. Is the product/service unique? Does it have a generic equivalent?
3. Are the benefits from the product/service unique? Does any other product/service have substantially equivalent or similar benefits?
4. Is the price paid reasonable in comparison with other products/services when the particular benefits are considered?

Findings

As stated in SFL, §163(1)(g), a sole source procurement is appropriate in the unusual circumstance where only one offerer is capable of supplying the required commodities or services. SUNY Canton asserts a need for only Cybex/Trotter/York and Advantage appears to be the only distributor of Cybex/Trotter/York in this area. Using our four-prong public interest test, we find the following:

1. There is no evidence that the decision by SUNY Canton to award a sole source contract to Advantage was motivated by anything other than a legitimate business purpose to acquire exercise equipment which would best meet the needs of their students. There was no attempt to arbitrarily restrict or inhibit competition.

2. We cannot say that SUNY Canton was unreasonable in finding Cybex products unique and without a generic equivalent. Their Athletic Director indicates that the "high-velocity performance" claimed to be offered by Cybex and not by its competitors made it unique. However, in regard to Trotter and York equipment, SUNY Canton has offered no evidence of uniqueness, other than in regard to warranties and service.

3. While the Cybex products themselves are unique, the benefits offered by Cybex can be achieved in other ways. All vendors admit that the "specificity of training" necessary for training the inter-collegiate athletes can be achieved by free weights coupled with any of the exercise machines offered herein. As free weights are a part of this procurement, it is clear that they are available to the athletes. Furthermore, at SUNY Canton the athletes in need of the "specificity of training" are in comparison a distinct minority of the entire student population.⁴ The vast majority of users of the equipment do not need the

⁴The equipment is being purchased by SUNY Canton, for the availability of all students, via the use of student activity fee monies.

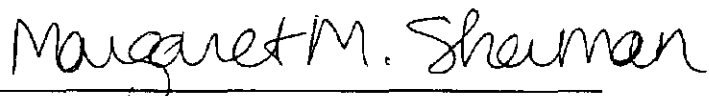
advantage allegedly offered by Cybex. The suggestion that users of free weights need additional supervision and training is outweighed by the small proportion of students who need such "specificity of training" and the school's apparent ability to offer such supervision and training to inter-collegiate athletes by coaching and athletic department personnel. Therefore, the burden on the school of utilizing non-Cybex equipment, if any, is minimal, and does not outweigh the stringent burden announced by the Court of Appeals in Gerzof, supra, upon those who wish to procure only brand name equipment.

Nor are the warranties and service offered by Cybex/Trotter/York unique. Warranties are distinguishable only by breadth and length. If the Cybex/Trotter/York warranties are better than other warranties due to its breadth and length, this is a matter that can be quantified as an element of price in a competitive procurement. A competitive commodity procurement may consider any element listed in the above two subdivisions of Section 160. The value of "warranties" are expressly allowed in determining costs. The same is true about service, as the value of "maintenance" is expressly allowed in determining costs. The assertions that Advantage is a known provider of good service and that American and G&G are unknowns in the service area is not a tenable argument. Service requirements can be specified in the context of a competitive procurement, and are enforceable pursuant to the resulting contract.

4. In light of the relatively slight advantage of procuring Cybex equipment, due to the availability of free weights and the small percentage of inter-collegiate athletes who need what is special about Cybex, SUNY Canton had no basis to find that the higher price of Cybex equipment was worth it, without quantifying that advantage, along with the other elements of cost, via a competitive procurement.

CONCLUSION

SUNY Canton did not have a valid basis to undertake a sole source procurement for Cybex/Trotter/York equipment. Thus, we uphold the protests and return the contract with Advantage to SUNY Canton unapproved.



Margaret M. Sherman
Assistant Deputy Comptroller