

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest
filed with respect to the procurement for
Xerox laser printer maintenance conducted by
the Office of Temporary and Disability
Assistance ("OTDA") in conjunction with the
Human Services Application Services Center ("HSASC")
Contract Number 008605

Determination
of Bid Protest
SF-0898/059

September 9, 1998

This Office has completed its review of proposed contract award 008605 by OTDA in conjunction with HSASC for Xerox laser printer maintenance, as well as the bid protest filed by Anacomp, Inc. As outlined in further detail below, we have determined that the bid protest is without merit and, therefore, the contract has been approved.

BACKGROUND

Facts

The previous contract for Xerox laser printer maintenance had been awarded to Granada Corporation, which assigned the contract to Unisys. Unisys subcontracted to Anacomp to perform the service for the contract period terminating on June 30, 1998.

OTDA/HSASC published an RFP for a new contract period, to commence on July 1, 1998. The RFP required, in relevant part:

- Two hour/ Four hour (depending on equipment) response to all problem calls initiated weekdays, during the Principal Period of Maintenance ("PPM") from 8am to 5pm
- Preventive maintenance to be performed outside PPM
- Off hours/Out-of-Scope service
- A dedicated on-site technician
- The posting of a \$50,000 irrevocable letter of credit to ensure performance during the first 12 months of the contract

The RFP also states, in accord with the State Finance Law requirements of dealing only with entities which are responsible and responsive, that "[n]egotiations may be undertaken with Offerors whose proposals show them to be qualified, responsible and capable of

Agency Response To Protest

While OTDA/HSASC did not respond to the July 27, 1998 letter of protest, Anacomp did include material which indicates the OTDA/HSASC position in this matter. Such materials from the procuring agency were already part of the procurement record we consider in our contract approval review and are thus available to us for consideration in this protest.¹ OTDA/HSASC found WWM/Vari-Lease to be fully compliant with the RFP. OTDA/HSASC notes that the RFP never stated that adequate staffing levels be in place prior to the contract effective date. They state that WWM/Vari-Lease's performance is guaranteed, in part, by a \$50,000 letter of credit. Finally, they indicate that their comment concerning the possibility of the successful bidder hiring away Anacomp's Albany area service technician did not impact their award determination.²

Competitive Procurements

The purchase of goods and services by State agencies is generally governed by Article XI of the SFL (SFL §§160 *et seq*). The requirements of competitive procurements are set forth in section 163 of the SFL. Section 163 provides that contracts for services shall be awarded on the basis of "best value" from a responsive and responsible offeror (SFL, §163[10]). "Best value" is defined as the basis for awarding service contracts to the offeror which optimizes quality, cost and efficiency among responsive and responsible offerors (SFL, §163[1][j]). A "responsive" offeror is an offeror meeting the minimum specifications or requirements as prescribed in the solicitation issued by the State agency (SFL, §163[1][d]).

DISCUSSION

In order to resolve the issues presented by this protest, we must consider the following:

- (1) Must an offeror, in response to a procurement of services, have adequate staffing levels in place at the time of the offer, prior to the date for the commencement of services? Is the failure to have such staffing levels in

¹These materials were responses to Anacomp from OTDA/HSASC which predated the protest to us and to which Anacomp has had the opportunity to respond via its protest.

²OTDA/HSASC states that in the past, the successful offeror has hired staffers away from the contractor whose contract term has ended.

place at the time of the offer evidence of unresponsiveness to the RFP?

(2) Is the suggestion by the procuring agency that one offeror hire away staff from another offeror evidence that the first offeror is unresponsive to the RFP?

(3) What impact does the filing of a lawsuit by the unsuccessful offeror against the successful offeror alleging misappropriation of trade secrets, breach of fiduciary duties, and interference with contract, have upon the State agency's or the Comptroller's determination as to whether the successful offeror is responsible?

As stated above, "responsive" means an offeror meeting the minimum specifications or requirements as prescribed in the solicitation issued by the State agency. Nowhere in the RFP was there a requirement of staffing levels being in place prior to the effective date of the contract. We recognize that an agency could disqualify a company where it determines the company is not capable of performing the service. Here, however, we cannot say that WWM/Vari-Lease, through their response to the RFP, did not provide enough information to OTDA/HSASC to satisfy it as to their prior service experience, their financial wherewithal and their ability to provide adequate staffing upon the date of required performance. In light of their lower price and their fully-compliant response to the RFP, it was reasonable for OTDA/HSASC to consider the WWM/Vari-Lease offer to be responsive and to offer the "best value" to the State.³

OTDA/HSASC has explained that their suggestion to WWM/Vari-Lease after the award that WWM/Vari-Lease hire away Anacomp's staffer did not impact the award determination. We have no evidence to the contrary. Should contract performance issues arise, the State has adequate remedies at law, which are partially secured by the \$50,000 letter of credit mentioned above.

Finally, the filing of the above-described lawsuit by Anacomp against WWM/Vari-Lease does not require a finding by this Office of lack of responsibility. "The awarding agency may investigate and consider the background of the bidder, and in the absence of illegality, fraud, collusion, corruption or bad faith" its determination of responsibility will be upheld. Kayfield Construction v Morris, 15 AD2d 373, 378 (1st Dept, 1962). If, however, illegality, fraud, collusion, corruption or bad faith was brought to the attention of this Office, we could investigate further and/or find the bidder to be irresponsible. Here we merely have an allegation of unfair business practices brought by one bidder against another in the context of a lawsuit. This is not enough to require that we find WWM/Vari-Lease not

³In light of OTDA/HSASC determining that WWM/Vari-Lease is the best value, both in terms of its pricing and its responsiveness to the RFP, we need not consider the issue of the impact on the agency's determination of Anacomp's exceptions to the RFP.

responsible.

CONCLUSION

In light of the above, we cannot overrule the decision of OTDA/HSASC that its award to WWM/Vari-Lease, based on its fully-compliant response to the RFP and its lowest price, was based on best value and was made to a responsive and responsible offeror. Therefore, the protest is denied.

Margaret M. Sherman

Margaret M. Sherman
Assistant Deputy Comptroller