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STATE COMPTROLLER



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STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

November 3, 1998

Steven Joanis
American Sports & Fitness Services, Inc.
6707 Higginsville Road
Durhamville, New York 13054

Re: Bid Protest of Office of General Services Bid Proposal #3320-G for exercise equipment, Our File No. SF-19980083

Dear Mr. Joanis:

This is in response to your bid protest regarding the above-referenced statewide procurement by the Office of General Services ("OGS") for exercise equipment. Your protest was received while we were considering other protests you filed regarding the procurement of similar brand name exercise equipment by two colleges of the State University. As you are aware, we did not identify your objections to the OGS statewide contract, which was pending approval at that time, as a separate protest. We did, however, take your arguments into account and communicated our concerns to OGS. Specifically, as discussed below, even though we determined the contract was legally sufficient, we conditioned our approval on OGS agreeing to undertake a second and broader procurement of exercise equipment which would supplement the contract before us for review. As you know, the original OGS contract is now in effect, and OGS is presently undertaking an expanded procurement of exercise equipment.

In approving this contract,¹ we applied the standard enunciated by the Court of Appeals in Gerzof v Sweeny, 16 NY2d 206, 264 NYS2d 376 (1965), that is, whether the brand name procurement is necessary in the public interest. As we explained in our prior decisions regarding procurements by SUNY Canton (SF-0898/057) and SUNY Oneonta

¹The contract is with each of three vendors -- one for each product line awarded, as follows: Cybex International, Inc. for the Cybex/Trotter product lines; Advantage Sport & Fitness, Inc. for the York, USA product lines; and PMR Products, Inc. for the Quinton/Monark product lines. While the procurement also sought bids for the Champion, Seaway and Tunturi product lines, no awards were made for these items.

(SF-0898/056), in applying the public interest test to brand name procurements by individual State agencies or individual municipalities we consider the following four factors:

1. Was the procuring agency operating in good faith? Was it acting without intent to arbitrarily restrict or inhibit competition? Was it acting without intent to reward one particular manufacturer or dealer?
2. Is the product/service unique? Does it have a generic equivalent?
3. Does the product/service offer unique benefits reasonably needed by the agency? 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?

However, since this procurement was for an OGS statewide contract, i.e., for use by any State agency which is in need of the types of exercise equipment included in the contract, the third and fourth standards must be somewhat modified. Since the award by OGS merely places the vendors under contract, but does not actually effectuate a purchase of any equipment, OGS need not show that every agency which desires exercise equipment could document a reasonable need for the unique benefits provided by the products of the original awardees. Rather, the third issue to be considered is whether the product/service offers unique benefits reasonably needed by some agencies which may buy under the contract. The fourth standard (the reasonableness of the price in light of the particular benefits) only becomes relevant at the time of each purchase by a state agency.

Applying the public interest test, we find the following:

1. There is no evidence that the decision by OGS to procure brand name equipment was motivated by anything other than a legitimate business purpose to acquire exercise equipment which would best meet the needs and desires of the state agencies surveyed. There was no attempt to arbitrarily restrict or inhibit competition.

2. Based on prior proceedings conducted by this Office, we are aware that Cybex brand name products may reasonably be found to be unique and without generic equivalents. As we determined in SF-0898/056 and in SF-0898/057, *supra*, the State University Athletic Directors found the "high velocity performance" claimed to be offered by Cybex and not by its competitors to be a unique feature. In regard to the York USA and the Quinton/Monark product lines, OGS had a rational basis to determine they were unique based on its survey of the desires of various state agencies which specifically requested these brand names.

3. We found in the SUNY Canton matter, *supra*, that while Cybex had unique features its purchase was not justified as comparatively few students needed such advantage and those students who did need it could achieve it with free weights coupled with other brands of exercise equipment.² OGS, however, had good reason to believe that other State agencies may reasonably need the unique benefits. Indeed, we believe that certain SUNY schools with sports teams or certain SUNY schools with physical education/physical therapy programs may qualify, as may the Olympic Regional Development Authority, since these agencies may have a high percentage of serious competitive athletes for whom the free weight combination is not a feasible alternative, or may train professionals who need knowledge of Cybex equipment. In light of this potential reasonable need by some agencies, it was appropriate for OGS to procure these specific brand name products.

4. As no determination of reasonableness of price is possible until the time of actual purchase, this part of the test is irrelevant at this time. The "reasonableness of price" test will, as a practical matter, be subsumed into the determination of need pursuant to SFL, §163(5) and the "most practical and economical alternative" test pursuant to SFL, §163(10)(c), discussed below.

Accordingly, we were satisfied that OGS had satisfied the public interest test with respect to the statewide contract for exercise equipment. Because, however, we recognized that the unique features of this equipment may not be needed in many situations, and that at least the Cybex was more expensive than other equipment in the SUNY Oneonta and SUNY Canton procurements, as a prerequisite to approving the OGS contract, we indicated to OGS that it would be in the best interests of the State to broaden the procurement. OGS agreed and proceeded to broaden the procurement by soliciting information from distributors of other brands of exercise equipment. On August 28, 1998, OGS formally agreed to begin a procurement for a variety of commercial grade exercise equipments. Such additional procurement has begun.³ The revised broader procurement is a legitimate use of the Commissioner's powers under SFL, §163(3)(b)(ii) to award multiple contracts for a variety of similar commodities. Based upon all of the foregoing, we did not have a basis to reject such contract, and could not delay its implementation. Therefore, we must reject your protest.

We recognize that you are concerned with the potential for agencies to purchase

²Indeed, many agencies may be unable to justify its purchase. For example, it is doubtful that a correctional facility could document a reasonable need for the unique benefits of these products.

³Multiple contract awards will be made in each of the three categories for which a single vendor now has a contract.

from the OGS contract in the period prior to the award of multiple contracts. This office does not have the power to review such purchases in advance. It is our view, however, that during this interim period,⁴ an agency may utilize such contract upon a determination of need pursuant to SFL, §163(5), that is where they determine such equipment is "in the form, function and utility" needed by the agency.

Very truly yours,



John K. Dalton
Associate Counsel

cc: Paula L. Chester
Kristina A. Burns
Files

⁴Once the multiple award contracts are in place, agencies, in selecting equipment from such contracts, must also observe the requirements stated in SFL, §163(10)(c), "that the basis for selection among multiple contracts at the time of purchase shall be the most practical and economical alternative and shall be in the best interest of the state."