

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed with respect to
the provision of FBO Service at Republic Airport,
by the Department of Transportation

Determination
of Bid Protest
SF-19990045

July 20, 1999

This Office has completed its review of the above-referenced process by the Department of Transportation ("DOT") to enlist a firm to provide Fixed Base Operation ("FBO") services at Republic Airport, and the bid protest filed by Flightways of Long Island, Inc. ("Flightways"). For the reasons detailed below, we deny the protest and approve the contract.

BACKGROUND

Facts

DOT conducted a process, through the use of a Request For Proposals ("RFP"), to enlist a firm "interested in leasing aviation facilities and providing (FBO) services over a twenty-year term for Republic Airport." The FBO services would be provided to "based and itinerant general aviation aircraft utilizing the Airport at reasonable and competitive prices." As DOT was already under agreement with Flightways for the provision of these services on the south side of the airport, this process was limited to operations on the "northside general aviation facilities and attendant aircraft ramp." The RFP called for no expenditure of state moneys. Rather, revenue collected by the winning offeror would be used to compensate the offeror and to pay the State a "minimum rental rate" of "\$307,000 annually plus fuel flowage fees." Additionally, each offeror was required to submit a "facility improvement plan, which includes plans for the construction of new facilities and/or the rehabilitation of existing facilities. Therefore, the winning offeror had to utilize revenues to invest in State-owned infrastructure.

The RFP listed "technical, cost and programmatic criteria" which would be evaluated by DOT. However, it also stated that "[c]ost and programmatic criteria would not be scored." It further stated, "[a]ward shall be made to the offeror whose proposal in NYSDOT's judgment represent the best overall value to the state, considering all technical, cost and programmatic evaluation factors." Six "technical" criteria would result in a score, as follows:

1. Quality, extent and relevance of current and prior experience of the firm (including partners, subcontractors, etc.) In providing and marketing the full range of FBO services, and operating and maintaining fuel storage facilities (both Jet A and Avgas).

¹The proposed contract with the successful bidder is for twenty years, with an option for renewal for another ten years.

2. Quality, extent and relevance of experience, education and training of key personnel (including partners, subcontractors, etc.), including the appropriateness of their assigned roles and responsibilities, particularly the General Manager.

3. Completeness, appropriateness and quality of submitted operations, marketing and management plans for providing the proposed FBO services at the Airport.

4. Reasonableness of proposed facility improvement plan and schedule for the construction of new facilities and/or rehabilitation of existing facilities; extent and reasonableness of proposed level of investment, funding source(s) and infrastructure requirements.

5. Reasonableness and quality of (i) described approach for providing proposed FBO services at the Airport and (ii) the proposed process for insuring customer satisfaction and improving service levels; understanding of NYSDOT's objectives for FBO services at the airport.

6. Reasonableness and completeness of submitted pro forma statements, including key assumptions, proposed activities and improvements underlying the statements.

The RFP did not list what weight would be assigned to each of the six "technical" criteria. Four cost and two programmatic criteria were listed but did not result in a score.

Pursuant to this RFP, three firms submitted timely proposals: Flightways, Long Island Jet Center ("LIJC") and NorthEastern Aviation Corp. ("NEAC"). A five person evaluation committee was assembled to consider all proposals, and to assign scores to the proposals on the six "technical" criteria.

The committee was instructed to rate the proposals, within each criterion, as follows: The score of 0 would be assigned to unacceptable proposals; 1-2 for poor proposals; 3-5 for average proposals; 6-8 for good proposals; and 9-10 for excellent proposals.

Additionally, a weight was assigned to each criteria as follows: The raw scores assigned by the evaluators to criteria numbers 1, 3 and 5 were to be multiplied by 20; the raw scores assigned by the evaluators to criteria numbers 2 and 4 were to be multiplied by 15; the raw scores assigned by the evaluators to criterion number 6 was to be multiplied by 10.

Using this system, the maximum number of points an evaluator could give to a vendor was 1000 ($[10 \times 20 \times 3] + [10 \times 15 \times 2] + [10 \times 10 \times 1]$). On December 29, 1998, DOT awarded the contract to LIJC, based on the average of the cumulative evaluations

of five DOT evaluators, as follows: LIJC - 745, Flightways - 571, and NEAC - 451.²

Protesting Party

Flightways is a firm that submitted a proposal which was not selected by DOT. Flightways has already been providing some form of the services at Republic Airport. Following notification of the award to LIJC, Flightways protested to the Comptroller on January 22, 1999.³ As no contract had yet been signed, the Comptroller yielded to DOT to commence an in-house proceeding of its Contract Review Unit. The DOT unit made its determination on June 17, 1999, upholding the award to LIJC. DOT then signed the contract and forwarded it to the Comptroller for approval. Flightways has filed a timely appeal of the DOT determination to the Comptroller.

Procedures and Comptroller's Authority

The Comptroller is required by section 112 of the State Finance Law ("SFL") to approve all State contracts which exceed \$10,000 in amount before such contracts become effective. We consider the issues raised in this bid protest as part of our contract review function pursuant to such section of law.

As part of the review by this Office, we considered the following: correspondence on behalf of Flightways dated January 22, 1999 (along with papers submitted to the court), June 9, 1999, June 24, 1999, and "June" 9, 1999 (presumably July 9, 1999); and correspondence from DOT dated June 18, 1999.

ANALYSIS OF BID PROTEST

Protestor's position

Flightways asserts that the award by DOT was flawed for the following reasons:

1. The RFP violates the Procurement Stewardship Law (State Finance Law, Section 160 et. seq.), especially SFL, §163, because the key criterion in selecting a vendor is based on subjective, rather than objective, criteria.

2. The Evaluation Committee did not judge the bidders fairly and in accord with the RFP, especially because factors entered into their determination which were prejudicial to

²These scores are revised scores. Initial ratings by the evaluation committee resulted in the following average scores: LIJC - 712, Flightways - 612, and NEAC - 505. The committee was then given the opportunity to revise their individual scores, and based on discussions that ensued the final scores were arrived at.

³Flightways also filed a lawsuit in Supreme Court, Suffolk County, seeking to enjoin the award of the contract to LIJC. DOT moved to dismiss the CPLR Article 78 proceeding on February 19, 1999. The decision of the court is still pending.

Flightways (e.g., the need for competition at the airport, the need for improvement of facilities).

3. Outside influences (e.g., the Federal Aviation Administration ["FAA"], the Empire State Development Corporation ["ESDC"]) wrongfully impacted the determination of DOT. Flightways requests that the Comptroller hold hearings and subpoena testimony to find evidence which would help determine the weight of these assertions.

Agency's response to the protest

DOT asserts that the award was in full compliance with the law. It responds to the protest as follows:

1. The RFP included objective and measurable technical criteria which was reasonably related to the ability to perform the services needed at the airport.

2. The Evaluation Committee properly considered the requirements of the RFP and was not swayed by any prejudice against Flightways or in favor of anyone else.

3. In connection with its acceptance of federal grants since 1982, DOT is bound by its Sponsor Assurances to the FAA, which include a competitive solicitation program for the vendor who operates the FBO. This did not improperly prejudice them against the possibility of Flightways winning the award. The ESDC did not influence DOT in making the award.

APPLICABLE STATUTES

SFL, §160(3) defines "commodity" 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, §160(7)) defines service as "the performance of a task or tasks... which is the subject of any purchase or other exchange."

SFL, §163(4)(d) states, in relevant part, "[s]ervice contracts shall be awarded on the basis of best value to a responsive and responsible offeror."

SFL, §163(1)(j) states, "[b]est value' means the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers. Such basis shall reflect, whenever possible, objective and quantifiable analysis.

SFL, §163(9)(b) states, in relevant part, "[w]here appropriate, the solicitation shall identify the relative importance and/or weight of cost and the overall technical criterion to be considered by a state agency in its determination of best value."

DISCUSSION

Failure to Adhere to SFL, §163 and Conduct of Evaluation Committee

The first issue raised by the protestor could be problematic if this contract were for the procurement of commodities or services. There is a serious question whether the procedures utilized by DOT comply with certain procedural mandates of SFL, §163. DOT stated in the RFP that while "cost" would be analyzed, it would "not be scored." This is troubling, as SFL, §163(1)(j) and SFL, §163(9)(b) mandate the scoring of cost.

We need not address this issue, however, since it is our opinion that SFL, §163 does not apply to this procurement, as this is not a contract for the purchase or other exchange of goods or services. Rather, it is a revenue or concession contract, i.e., a contract which generates revenue for the State without any expenditure of State funds. While there is no case law which expressly addresses the scope of coverage of SFL, §163, the scope of coverage of the predecessor section of law, SFL, §174 was the topic of a number of Opinions of the Attorney General. 1966 Atty. Gen. 47 (inf.) analyzed whether the predecessor statute to SFL, §163 (SFL, §174) required a State agency to competitively bid the grant of a concession on state land. The Attorney General found that the provisions of State Finance Law, §174 requiring competitive bidding applied only to "purchase contracts", that is contracts for "articles to be supplied". Quoting from 1930 Atty. Gen. 123, 124, the Attorney General stated, "[t]hough such award [of a concession] would be a contract, it is not such a contract for 'articles to be supplied' as is referred to in section 120 of the State Finance Law [the predecessor statute to SFL, §174], requiring State contracts to be let to the lowest responsible bidder." Similar findings were issued by the Attorney General in 1936 Atty. Gen. 261 and 1944 Atty. Gen. 373.

The Attorney General's opinions are in accord with court determinations analyzing other competitive bidding statutes. In Citiwide News v. NYCTA, 62 NY2d 464, the Court of Appeals determined that a "license agreement having as its predominant focus the use of real property and the operation of a specific business thereon", is not subject to competitive bidding requirements for public work contracts under the Public Authorities Law, "for such a (license) contract does not ordinarily involve an expenditure of public money." 62 NY2d at 468, 470. ⁴ See also Bustop Shelters v. City of NY, 99 Misc 2d 198, where the Court, in analyzing competitive bidding requirements under the General Municipal Law and the New York City Charter, stated, "... it does not appear that competitive bidding is required in granting a franchise, since the award of the franchise does not involve the payment or expenditure of funds out of the city treasury," 99 Misc 2d at 203.

⁴The court further held that any incidental expenditure by the NYCTA to accomplish this license agreement does not change the outcome as "an examination of this arrangement reveals its total character as a license agreement." 62 NY2d at 473. Similarly, any incidental expenditures by DOT in this contract would not change our view of this agreement.

Additionally, there are Comptroller opinions interpreting the General Municipal Law counterpart to the State Finance Law, GML §103. 1988 Opns-St Comp No. 88-60, states:

"Contracts by which a license or concession is granted are not, generally, subject to the competitive bidding requirements of General Municipal Law, §103, since they do not ordinarily involve an expenditure of public moneys... Nonetheless, the courts have noted that it is the duty of public officials to let out such contracts under terms which are fair and reasonable (*Blank v Browne*, 217 App Div 624, 216 NYS 664). Accordingly, we conclude that a true license or concession arrangement, which does not involve a direct or indirect expenditure of public moneys and the total character of which is neither a purchase nor contract for public work, is not subject to competitive bidding. However, public officials have a duty to secure fair reasonable terms for such arrangements."

We have also addressed this issue in prior State Finance Opinions of the Comptroller. (See, e.g., SF-19980084, involving a procurement by the NYS Department of Motor Vehicles, a copy of which is enclosed.)

Given the well-established interpretation by the courts, the Attorney General, and this Office, that predecessor State statutes and the municipal and public authority counterpart statutes apply only to "purchase contracts" or contracts involving the expenditure of public funds, we believe it is reasonable to assume that absent some express language in SFL, §163 expanding the former SFL, §174 coverage of the law to include revenue contracts, the current law does not require competitive bidding of revenue contracts. In 1995 the Procurement Stewardship Act took effect, moving competitive bidding requirements from section 174 to section 163. We are not aware of any language in the Procurement Stewardship Act which would appear to reflect a legislative intent to add revenue contracts to the list of those transactions covered by competitive bidding requirements. Nor are we aware of any other State law applicable to DOT revenue contracts. To the contrary, SFL, Art. 11 is entitled "State Purchasing" and SFL, §163 is entitled "Purchasing services and commodities". We therefore believe it is reasonable to assume that the Legislature did not intend to expand the scope of the bidding statutes to include concession or revenue contracts.

While Article 11 does not require competitive bidding of this contract, the Comptroller, in fulfilling his statutory duty of assuring that State contracts are awarded in the best interest of the State, requires competition for all revenue contracts susceptible to bidding over \$10,000, pursuant to a fair and impartial process. There must still be a reasonable and fair process which assures a level playing field for all bidders and the evaluation process must still comply with the RFP. In light of these non-statutory standards, we will proceed to analyze Flightways' assertions.

As stated above, the RFP listed six "technical" criteria and assigned both points and a weighting to those criteria. Contrary to Flightways' assertion, these categories were objective and measurable. They were appropriately designed to measure the skill and experience of staff and plans for provision of services, maintenance of facilities, marketing, and investment in infrastructure.

The Evaluation Committee appears to have followed the process set out in the RFP. Points were assigned to each criteria and weights were multiplied, as advertised. No offeror was prejudiced by the failure of DOT to assign scoring to "costs." In fact, one of the "technical" criteria actually included cost (criterion number 4, above), as it evaluated the "proposed level of investment" in airport facilities. We cannot conclude that this process was not reasonable and fair.

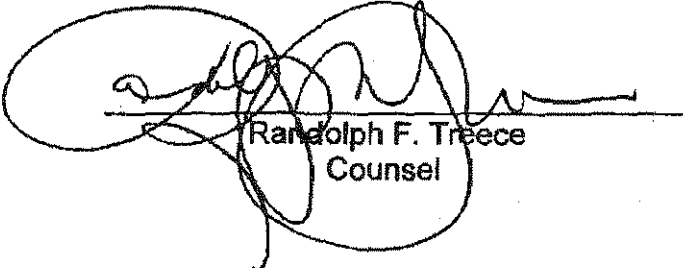
Outside Influences

Nothing submitted by Flightways indicates that any improper outside influence was brought to bear on the process. We note that the mere assertion of improper conduct, coupled with a request that the Comptroller hold a hearing and subpoena testimony to buttress the asserting party's position is woefully inadequate. The allegation that ESDC somehow tainted the process, merely due to their informing another losing bidder that the process would take place, is unconvincing. Encouraging competition is the goal of competitive bidding in New York. No prejudice can be determined from such encouragement.

Nor do we believe the contacts with the FAA and the impact of those contacts on the process herein were in any way improper. The FAA wanted competition in this process, and under these circumstances DOT is required to comply with the FAA mandate. Such compliance is necessary, appropriate, and wholly in the public interest.

CONCLUSION

Based on the foregoing, we deny the protest and approve the contract.


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