

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest
filed with respect to the procurement for
vending services conducted by
the Clinton Correctional Facility
Contract Number X000002

Determination
of Bid Protest
SF# - 20000001

This Office has completed its review of proposed contract award X000002 by Clinton Correctional Facility ("Clinton") for vending services, as well as the bid protest filed by A.S. Hardy Co., Inc. ("Hardy"). As outlined in further detail below, we have determined that the proposed award is in violation of law and, therefore, uphold the bid protest and return the contract unapproved.

BACKGROUND

Facts

Clinton published a "Request For Proposals"¹ ("RFP") seeking bids on the following items:

- Bottled Soda
- Coffee, Tea and Hot Chocolate
- Flavored Coffees
- Candy
- Chips and Pretzels
- Snacks
- "Better" Snacks
- Pastry/Bakery
- Side Orders
- Dairy
- Fresh Food, Cold
- Frozen Foods

The RFP requires the successful bidder "to provide all labor, material, services and equipment necessary for the vending machine services..." It further provides, "[p]roposals that are illegible or that contain any omissions... or that contain irregularities of any kind may be rejected as informal."

The RFP also requires the successful bidder to pay Clinton a monthly rental fee of

¹Although entitled "Request For Proposals," the document was actually the equivalent of an Invitation For Bids as commodities were being procured and price was the sole determining factor.

\$5.00 per free-standing machine, \$8.00 per machine requiring utilities, and 12 percent of gross sales.

Regarding the award process, the RFP provides for an award on the basis of the lowest prices to be charged to the users of the vendor's machines. Specifically, the RFP states, as follows:

"The contract will be awarded to the lowest responsible bidder, as he will best promote the public interest.² The agency reserves the right to evaluate and/or reject all bids, in whole or in part, to award to other than the low bidder, and to waive technicalities, irregularities, and omissions, or solicit new proposals if, in the agency's judgment, the best interest of the State will be served. The bid shall be made in the name of the firm or individual under which business is conducted and shall be signed by a duly authorized person. Corporations shall affix their corporate seal where indicated (sic), and the bid shall be notarized."

The RFP public bid opening on August 26, 1999 revealed that three bids had been received and that the lowest bid was submitted by Pepsi-Cola Keeseville Vending ("Pepsi"). The protester, Hardy, was the second lowest bidder. A proposed contract was immediately drafted between Clinton and Pepsi and signed by both parties. Subsequently, it was determined that the bid submitted by Pepsi lacked a signature. Clinton contacted Pepsi and Pepsi forwarded a signed bid, explaining that a clerical error led to the file copy having been originally submitted instead of the signed copy.

Protesting Party

Hardy is one of the vendors which submitted a proposal in response to the RFP for vending services, and was the second lowest bidder in such process.

Procedures and Comptroller's Authority

The Comptroller is required by section 112 of the State Finance Law ("SFL") to approve all State contracts which would exceed \$10,000 in amount before such contracts become effective. The Comptroller has reviewed the issues raised by the bid protest as part of his review of the contract award pursuant to section 112.³ As part of

²This is a revenue contract, i.e., a contract which does not involve payments by the State, but rather payments to the State. While this contract could be awarded based on maximum potential revenue to the State, given the nature of the contract it was reasonable to make the award based on lowest cost to the consumers of the vending machines.

³If this were a contract for the procurement of commodities or services by the State, we would review it pursuant to the technical requirements for competitive bidding contained in State Finance Law, §163. Here, however, since this is a revenue contract and not a contract for the

the review by this Office, we considered the protest letter dated September 15, 1999 filed by Hardy, and the response to such letter by Clinton, dated October 19, 1999.

ANALYSIS OF BID PROTEST

Protester's Position

Hardy's basic position is that the RFP required the bids to be signed and such requirement may not be waived by Clinton. Since Pepsi's bid was not signed, it was not responsive to the RFP and no award may be made to them.

Agency Response To Protest

Clinton responds that the omission of a signature by Pepsi was an honest mistake and may be forgiven, since the RFP allows Clinton to waive technicalities, irregularities and omissions.

CASE LAW

New York

There are no New York cases which address the issue of whether an unsigned bid may be accepted. As a general proposition, however, under New York law there are two grounds for not awarding a contract to an apparent low bidder or the apparent bidder providing best value: (1) non-compliance with the bid specifications or (2) a finding that the bidder is not responsible. In either of these situations the lowest bid may be rejected and the second lowest bid may be accepted (Patrick R. Brereton & Associates v Regan, 94 AD2d 886, 463 NYS2d 319 [3rd Dept, 1983], *affd* 60 NY2d 807, 469 NYS2d 699; Bortle v Tofany, 42 AD2d 1007, 348 NYS2d 215 [3rd Dept, 1973]).

A governmental agency may decline bids which fail to comply with the literal requirements of the specifications or may waive a technical non-compliance with the bid specifications if the deviation is minor or not substantial, but a bid must be rejected if the non-compliance is material or substantial (Le Cesse Bros. Contracting, Inc. v Town Board of the Town of Williamson, 62 AD2d 28, 403 NYS2d 950 [4th Dept, 1978], *affd*

purchase or exchange of goods or services, it is our opinion that section 163 does not apply. While the statute does not require competitive bidding, the Comptroller, in fulfilling his statutory duty of assuring that state contracts are awarded in the best interest of the State, requires a competitive process, using a fair and impartial procurement process which assures a level playing field for all bidders and pursuant to the specified requirements in the RFP. As a result, we believe that an agency cannot make an award to a bidder which does not comply, in all material aspects, with the RFP.

46 NYS2d 960, 415 NYS2d 413 [1979]). Non-material variances may be disregarded in awarding bids; material variances may not. Entering into a contract which materially varies from the bid specifications would have the effect of altering the specifications after the bidding process and would give the successful bidder an unfair advantage (see, e.g. Progressive Dietary Consultants v Wyoming County, 90 AD2d 214, 457 NYS2d 159 [4th Dept, 1982]).

A variance is material or substantial when it would impair the interests of the agency, place the successful bidder in a position of unfair economic advantage, or place other bidders at a competitive disadvantage (Cataract Disposal, Inc. v Town of Newfane, 53 NY2d 266, 440 NYS2d 913 [1981]; Application of Glen Truck Sales & Service, Inc. v Sirigano, 31 Misc 2d 1027, 220 NYS2d 939 [1961]).

Included among those variances which, in proper circumstances, have been held to be not material are: late filing of non-collusion statement (A.J. Beaudette Construction Co. v City of Syracuse, 62 Misc2d 564, 309 NYS2d 517, *affd* 34 AD2d 734, 313 NYS2d 356 [1970]; Consolidated Sheet Metal Works, Inc. v Board of Education, 62 Misc2d 445, 308 NYS2d 773 [1970]; Bailey v Colonna, 73 Misc2d 299, 341 NYS2d 359 [1972]; 1986 Opns St Comp No. 86-62, p 97); substitution of cash and an indemnity agreement as performance security in lieu of a surety bond (Cataract Disposal, Inc. v Town of Newfane, *supra*); failure to timely file and provide the proper amount of bid security (Frank Nowak Construction Co. v County of Suffolk, 233 NYS2d 627 [1962]; Rockland Bus Lines, Inc. v Board of Education, 43 Misc2d 1060, 252 NYS2d 712 [1964]; Superior Hydraulics v Town Board of Islip, 88 AD2d 404, 453 NYS2d 711 [2nd Dept, 1982], *appeal dismissed* 58 NY2d 824; L.J. Coppola v Park Mechanical Corp., 131 AD2d 641, 516 NYS2d 722 [2nd Dept, 1987]; see also McCord v Lauterbach, 91 App Div 315, 86 NYS 503 [1st Dept, 1904]); submission of multiple rather than single performance and payment bonds (De-Con Mechanical Contractors, Inc. v Koch, 156 AD2d 263, 548 NYS2d 652 [1st Dept, 1989], *appeal denied* 76 NY2d 702, 559 NYS2d 239 [1990]); failure to list the total bid where unit prices were listed and the total amount was readily ascertainable (D.F. Allen & Co., Inc. v E. Williston UFSD, 143 AD2d 662, 533 NYS2d 19 [2nd Dept, 1988]); slight deviation in performance or structural requirements (see, e.g. Hopkins v Hanna, 135 Misc 750, 239 NYS 489 [1930]); and late filing of financial statements (Harran Transportation Company v Board of Education, 71 Misc2d 143, 335 NYS2d 971 [1972], *on reargument reversing* 71 Misc2d 139, 335 NYS2d 465).

Among the variances which have been held to be material are: failure to include required detailed declarations of a bidder's qualifications (A.I. Smith v City of Long Beach, 158 AD2d 454, 551 NYS2d 48 [2nd Dept, 1990]; see also Cave-of-the-Winds v Niagara Frontier St. Park, 64 AD2d 818, 407 NYS2d 301 [4th Dept, 1978]; Ajay Glass & Mirror Co., Inc. v County of Erie, 155 AD2d 988, 547 NYS2d 790 [4th Dept 1989]); a 5,000 pound differential in gross weight of a truck (Application of Glen Truck Sales & Service, Inc., *supra*); failure to include information required by the specifications concerning manufacturers whose equipment would be installed in connection with a

construction project (Le Cesse Bros. Contracting, Inc., supra); submission of a bid price conditioned on a progress payment schedule not called for in the specifications (Sanford Fire Apparatus Corp. v Board of Fire Commissioners, 81 Misc2d 922, 367 NYS2d 891 [1975]); and stating bids as a flat dollar amount when a percentage bid was required (Amana Credit Services, Inc. v Erie County Medical Center, 148 AD2d 1006, 539 NYS2d 237 [4th Dept, 1989]).

Finally, in the case of AT&T Communications v County of Nassau, 214 AD2d 666, 625 NYS2d 592 [2nd Dept, 1995], AT&T's bid was rejected in part based upon a clause inserted into the bid which provided for the payment of a termination charge in the event that the contract was terminated on grounds other than AT&T's own material default. The county found this to be a material deviation from the bid proposal. The court held that this termination clause provided AT&T with protection not afforded to other bidders and had the county accepted a bid with this clause, the other bidders would have been disadvantaged since they did not know at the time that they submitted their bids that they, too, could have included such a clause in their bids. The court concluded that the determination by the County that this additional clause was a material variation was rational and also that AT&T could not withdraw the termination clause in post-bid negotiations so that it might become the lowest responsive and responsible bidder, since this would have been unfair to the other bidders.

Thus, a general principle which emerges from these cases is that a deviation may not be waived where to do so would give that bidder a substantial advantage not enjoyed by other bidders who comply with the specifications.

Other Jurisdictions

While there are no New York cases which directly address the effects of a unsigned bid, this issue has been considered in a number of decisions in other states and in the federal courts (with respect to U.S. government procurements). Based upon our review of these cases it appears that there are a number of decisions which hold that the failure to sign the bid is fatal and requires that the bid be rejected (see, e.g., A.A.B. Electric, Inc. v. Stevenson Pub. Sch. Dist. No. 303 [1971] 5 Wash. App. 887, 491 P. 2d 684; Whitemarsh Township Auth. v. Finelli Bros., Inc. [1962] 408 Pa. 373, 184 A.2d 512; Superior Oil Company v. Udall [D.C.Cir. 1969] 409 F.2d 1115). There are also a number of cases which have upheld action by governmental entities waiving the failure to sign the bid (see, e.g., Menafee v County of Fresno, 163 Cal. App.3d 1175, 210 Cal. Rptr. 99; Farmer Const. v. State Dept. Of Gen Admin [1983] 98 Wash.2d 600, 656 P.2d 1086; Eastside Disposal Co. v. City of Mercer Island [1973] 9 Wash. App. 667, 513 P.2d 1047; Prendergast v. City of St. Louis [1914] 258 Mo. 648, 167 S.W. 970; Interstate Power Co. v. Incorporated Town, etc. [1941] 230 Iowa 42, 296 N.W. 770; Spawglass Construction Corp. v. City of Houston, 974 S.W.2d 876). While these two lines of cases would appear at odds with each other, we believe that they can

be reconciled. In every case but one where the courts allowed a waiver of an unsigned bid, there was some other document signed by the bidder (cover letter, bid bond, etc.). The courts in these jurisdictions viewed the signature of the bidder on such document as legally binding the bidder to its bid under the contract laws of that jurisdiction. As the court stated in Menafee v County of Fresno, *supra*, "waiver should not be allowed if the irregularity would give the bidder an unfair advantage by allowing him to withdraw his bid without forfeiting the bid bond... If [the low bidder who did not sign] could use the absence of an executing signature on their bid to avoid a contract, then they had an unfair advantage -- the opportunity to back out -- not given to other bidders who signed their bids properly. If they could not use the absence of the signature to avoid their bid, then they did not gain any advantage from the defect, and waiver should be permitted." Menafee, 163 Cal. App.3d at 1180-1181, citing Williams v Bergin, *supra*, 129 Cal. 461, 62 P. 59.

Thus, we believe the principle that emerges from all of these cases is that an unsigned bid must be rejected except where, as a matter of law, such bidder would not otherwise be permitted to disavow his bid and thus would not gain any advantage over those bidders who have signed their bids.⁴ This result would appear to be consistent with the New York case law, which, as discussed previously, requires that a failure to comply with the requirements of a solicitation must result in the rejection of such bidder where such bidder's deviation from the bid specification provided it with an unfair advantage over other bidders who complied with the bid specifications.

DISCUSSION

In order to resolve the issues presented by this protest, we must consider whether the failure of the low bidder to sign their bid gives that bidder an unfair advantage and therefore renders the bid non-responsive.

We believe a strong argument can be made that a bidder who has not signed his

⁴ As noted in the text, there is one case where a court held that a bidder should be allowed to correct its unsigned bid, notwithstanding the fact that there was no signed document from such bidder (DeMat Air, Inc. v United States, 2 Cl. Ct. 197). This case, however, involved an RFP where the successful proposal would not be apparent at the opening of the proposals. The court stated that under such circumstances, prior to the evaluation of the proposals, the bidder should be afforded the opportunity to cure the defect in its bid by signing its bid. The court reasoned that under such circumstances the bidder would not be afforded any advantage over other bidders since it would have to sign its bid before the contents of the other proposals were known and the evaluation began. Thus, we believe that even this case is consistent with the general principle which emerges from all of the cases. See also Footnote 6, *infra*.

bid, but has signed some other document in the bid package, is bound to his bid⁵, and therefore would not gain an advantage over other bidders. In this case, however, Pepsi did not sign any document in the bid package and therefore gained an unfair advantage from its failure to submit a signed bid. Without a signature on the bid, where required, or anywhere else within the bid package, Pepsi had the right to walk away from the bid after its acceptance by Clinton. No other bidder had this advantage.

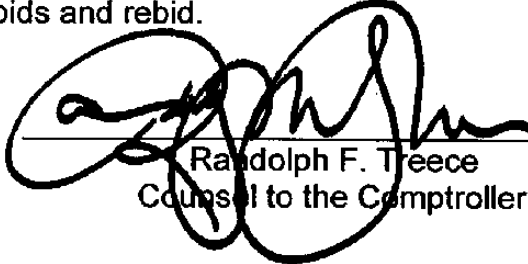
As stated above, it is our opinion that waiver should not be allowed if the irregularity would give the bidder an unfair advantage by allowing him to withdraw his bid. If the low bidder who did not sign could use the absence of an executing signature on its bid to avoid a contract, then they had an unfair advantage — the opportunity to back out — not given to other bidders who signed their bids properly. In this case Pepsi enjoyed such an advantage.

CONCLUSION

Since Pepsi received an unfair advantage from its failure to submit a signed bid, the defect was material and Clinton did not have the authority to waive it. Therefore, we

⁵ In some jurisdictions, a signature on a bid bond or a signature on a cover letter accompanying a bid has been held to bind the bidder to its bid (offer) and therefore to suffice. In New York, no case law exists to answer the question directly, although in 19 Op. State Compt. 313 (#63-520) this Office held that a town board could legally accept an unsigned bid, finding that since the bidder had duly executed a bid bond, he had bound himself to the bid. Furthermore, there are analogous cases interpreting New York's Statute of Frauds (General Obligations Law, § 5-701), concerning the writings required to determine the existence of a binding contract (as opposed to a binding bid), which are in accord with these cases from other jurisdictions. New York courts follow the "Crabtree Rule," as enunciated by the Court of Appeals in Crabtree v. Elizabeth Arden Sales Corp., 305 NY 48, 110 NE2d 551(1953), which states "[t]he statute of frauds does not require the 'memorandum * * * to be in one document. It may be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject-matter and occasion.' (citations omitted) Where each of the separate writings has been subscribed by the party to be charged, little if any difficulty is encountered. (citations omitted) Where, however, some writings have been signed and others have not — as in the case before us — there is basic disagreement as to what constitutes a sufficient connection permitting the unsigned papers to be considered as part of the statutory memorandum... [A] sufficient connection between the papers is established simply by a reference in them to the same subject matter or transaction... [T]his court has on a number of occasions approved the rule, and we now definitively adopt it, permitting the signed and unsigned writings to be read together, provided that they clearly refer to the same subject matter or transaction." *Id.*, 305 NY at 54, 55. Therefore, we believe a signature on a bid bond or on a cover letter accompanying the bid would, indeed, suffice.

are upholding the protest and returning the contract to Clinton unapproved.⁶ Clinton should determine whether it is in the best interest of the State to make an award consistent with this decision or reject all bids and rebid.



Randolph F. Teece
Counsel to the Comptroller

⁶Our decision in this protest is based upon the specific facts presented, particularly, the fact that the award of the contract was made solely on the basis of price and, therefore, the successful bidder was apparent and ascertainable at the bid opening. We need not consider at this time whether a different decision would result where, as in an RFP situation, after the bids are received an extensive evaluation process is conducted (see, DeMat Air, Inc. v United States, supra).