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STATE COMPTROLLER



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ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

March 20, 2000

Andrew Pskowski
All State Distributors Northeast, Inc.
4 Service Merchandise Drive
Montgomery, NY 12549

Re: Orleans Correctional Facility Invitation For Bids - Commissary Products
Our File # SF - 20000035

Dear Mr. Pskowski:

This is in response to your letter of February 19, 2000 in which you protested the preliminary determination by Orleans Correctional Facility ("OCF") that your bid was late and therefore would be rejected.

OCF issued an Invitation For Bids ("IFB") on January 7, 2000 for commissary products for the period of 4/1/00 through 9/30/00, with option to extend the resulting contracts through 3/31/01. The IFB stated "[t]he bid opening will take place on February 9, 2000 at 2:00 P.M." While the IFB allowed bidders to attend the bid opening in person, such attendance was not required, and the following address was provided for bids to be sent by mail or other delivery method:

Orleans Correctional Facility
35-31 Gaines Basin Road
Albion, NY 14411

Your company ("ASDN") submitted a bid by US Postal Service, Express Mail, on February 8, 2000, to be delivered on February 9, 2000. According to US Postal Service records, the bid was received in the Albion Post Office on February 9, 2000 at 1:15 P.M. As Orleans had already made its once-per-day mail pickup at the Post Office prior to 1:15 P.M., it did not receive your delivery until the morning of February 10, 2000.

As a general rule, an agency has broad discretion to reject a bid which has been filed late unless such decision is irrational, dishonest or otherwise unlawful (George A. Nole & Sons, Inc. v Board of Education of the City School District of Norwich, 129 AD2d 873, 514 NYS2d 274 [1984]). Therefore, if the bid in question is, in fact, deemed to be a late

bid then the decision by the agency to reject the bid would be legally proper.¹ For the reasons outlined below, however, it is our conclusion that ASDN bid was not late.

Unknown to ASDN, and not mentioned in the IFB, OCF does not elect to have the Post Office deliver its mail. The Postmaster in Albion forwarded the following statement:

Due to the volume and the time of day the mail would be delivered, the Orleans Correctional Facility elects to call for their mail each morning at the Post Office. They do not wish to pick up mail in the afternoon or (sic) do they wish to have special service mail delivered to them in the afternoon.² As per their wish, any mail that arrives in the afternoon is held for the next morning when the facility driver comes to pick up that days (sic) mail.

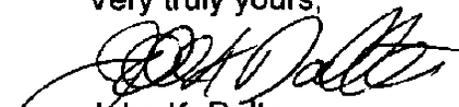
¹This does not mean, however, that an agency is required, in all cases, to reject a late bid or that it must, where it rejects a late bid, award to the next lowest bidder. While there are no New York cases directly on point, the courts in New York have recognized that agencies may waive non-material and non-substantial variances from bid specifications, where there is no possibility of fraud, corruption or favoritism (see LeCesse Bros. v Town Board of the Town of Williamson, 62 AD2d 28, 403 NYS2d 950, affd 46 NY2d 960, 415 NYS2d 413 [1978]). In this particular situation, the late bid was in the custody of an independent third party at the time of the bid opening, and, as a result, the bidder has no ability to retract or alter its bid. Under these circumstances, we believe a reasonable argument can be made that an agency could choose to accept such bid. This conclusion is supported by decisions in other jurisdictions, (see Power Systems Analysis, Inc. v City of Bloomer, 197 Wisc.2d 817; 541 N.W.2d 214 [1995] and Hewitt Contracting Co. v Melbourne Regional Airport Authority, 528 So.2s 122 [Fla. Dist. Ct. App. 5th Dis (1988)]). Similarly, even when an agency determines that it should reject a late bid, it is not necessarily required to award to the next lowest bidder. An agency could (and in some cases should) reasonably determine, in such circumstances, particularly where the late bid is sufficiently less expensive, to exercise its broad discretion to rebid.

²Orleans contests the Postmaster on the issue of special service mail (e.g., Express Mail), and states that the Postal Service can, in fact, deliver such mail to the facility. This is a moot point, however, since, as we discuss below, Orleans has, by its practices, designated the Post Office as its official address.

Therefore, by its practices, Albion has made the Post Office its official address for the delivery of mail. ASDN correctly forwarded the bid to the address provided by OCF. Since the ASDN bid was received at the official address for mail delivery prior to the February 9, 2000 2:00 P.M. bid opening, your bid was not late. We have fully discussed this matter with OCF and with the Counsel to the NYS Department of Correctional Services, and we are all in agreement that your bid will now be opened and will be appropriately evaluated.

Please contact me if you have any further questions regarding this matter.

Very truly yours,



John K. Dalton
Associate Counsel

cc: Anthony Anucci
Judy J. Seever
Joseph Alteri
Barbara Norton