

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest
filed by GATEWAY BUILDING SERVICES
with respect to the procurement for
custodial services by the Office of General Services
Invitation For Bids #1012

Determination
of Bid Protest
SF-20000042

This Office has completed its review of the proposed contract award by the Office of General Services ("OGS") for custodial services, pursuant to Invitation For Bids ("IFB") #1012, as well as the bid protest filed by Gateway Building Services ("Gateway"). As outlined in further detail below, we have determined that the protest is without merit and we will approve the contract with JBH, Inc. d/b/a Carpetmaster Cleaning ("JBH").

BACKGROUND

Facts

OGS issued an IFB seeking bids for custodial services for the Corning Tower Building and P-1 Level Areas and Adjacent Loading Docks at the Empire State Plaza in Albany. The IFB provides for an award on the basis of the lowest price to a responsive and responsible bidder. Specifically, the IFB stated:

"The Contractor shall have had previous experience and possess financial resources and the necessary organization as herein specified to perform the type, magnitude, and quality of work specified. The Commissioner shall have the right to reject bids of any Contractor who is unable to provide satisfactory evidence as to the above qualifications." Emphasis Added.

"The contract will be awarded to the lowest responsible qualified Contractor having the lowest aggregate price for the first two (2) years of the contract for Schedule 'A' and Schedule 'B' work." Emphasis Added.

The IFB bid opening on January 25, 2000 revealed that ten bids had been received and that the lowest bid for the first two years of the contract for both Schedule "A" and Schedule "B" work was submitted by the protester, Gateway. However, due to a number of complaints regarding Gateway's service in the custodial services contract for Agency Buildings 1-4, OGS proposed awarding the contract to JBH, the second lowest bidder.

OGS convened a responsibility hearing for Gateway on March 16, 2000. At this hearing, OGS presented Gateway with 945 complaints which had been collected

between January, 1999 and February 22, 2000. OGS and Gateway disagree whether this is the first time the majority of complaints had been shared with Gateway; Gateway denied prior knowledge.

Protesting Party

Gateway is one of the vendors submitting a proposal in response to the IFB for custodial services, and was the lowest bidder. Gateway is also the incumbent contractor providing custodial services in state Agency Buildings 1-4 in Albany.

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.

As part of the review by this Office, we considered the "Minutes of Gateway Responsibility Meeting" dated March 16, 2000; the response to OGS by Gateway, dated March 20, 2000; the determination of non-responsibility by OGS to Gateway, dated March 21, 2000; the protest letter to the Comptroller from Gateway, dated March 28, 2000; the additional complaints (from the Office of Parks, Recreation and Historic Preservation, from the Governor's Correspondence Unit, from the Department of Public Service, and from the Office of the Attorney General) faxed by OGS to the Comptroller on March 28, 2000; and the response to such complaints by Gateway to the Comptroller, dated March 30, 2000.

ANALYSIS OF BID PROTEST

Protester's Position

Gateway asserts that:

- Most, if not all, of the problems that have been encountered in the performance of this contract have been a result of a failure of the inspection process and the communication of needs between the parties.
- Some of the complaints result from "Schedule B" work, for which separate requests and additional compensation is required. Therefore, these complaints cannot be held against the protester without proof of such requests and compensation.
- The contract for services at Agency Buildings 1-4 has been extended three times based on performance, with no hint of performance problems.
- The 900+ complaints were actually a combination of service orders, requests, complaints, repair orders and duplications.
- For numerous reasons, the complained-about performance was not the fault of the protester, e.g., lack of notice of access code changes, lack of entry access,

- homeless persons living in restrooms, State employee abuse of facilities, etc.
- The time-frame for the protester to respond to OGS to the 900+ complaints of only four-days after the responsibility hearing was inadequate.

Agency Response To Protest

OGS responds that:

- Its analysis of the 900+ complaints indicate that 80% of the items do indeed represent complaints related to defective performance and are not merely service calls.
- The contact at Agency Buildings 1-4 required, based on Gateway's original winning proposal for the award of that contract, 592 man hours per week; Gateway appeared to be utilizing only 458 man hours per week.

RELEVANT STATUTE

SFL §163(10) states, in relevant part, that "contracts for services shall be awarded on the basis of best value from a responsive and responsible offerer."

CASE LAW

A bidder's past performance on a similar contract is recognized as an appropriate basis for determining responsibility. A record of numerous complaints of poor performance, even if accompanied by proof of the contractor's efforts to improve performance, is sufficient to support a determination of non-responsibility. Anchor Equipment Co., Inc. v. New York State Office of General Services, 66 A.D.2d 987, 411 N.Y.S.2d 783 (4th Dep't, 1978). A record of numerous complaints concerning a contractor's performance during a sample portion of the contract term is a sufficient basis for a finding of non-responsibility. Dellwood Foods v. Board of Education of Hendrick Hudson School District, 97 Misc.2d 751, 412 N.Y.S.2d 247 (Sup. Ct., Westchester Co., 1978) (milk delivered late on 15 of 36 school days during a two-month portion of a 2-year contract). A record of poor performance justifies rejecting a bid on grounds of non-responsibility. Miller v. Greene County, 40 A.D.2d 738, 336 N.Y.S.2d 730 (3d Dep't, 1972); see also, J.N. Futia Co. v. Office of General Services, 39 A.D.2d 136 (3d Dep't, 1972).

DISCUSSION

In order to resolve the issues presented by this protest, we must consider whether the record presented sufficient evidence of poor performance to justify the

determination by OGS that Gateway was not responsible. We also must consider whether Gateway was given an adequate opportunity to contest the determination of non-responsibility.

The minutes of the March 16, 2000 meeting between OGS and Gateway clearly demonstrate that there were 945 potential complaints collected between January 1999 and February 22, 2000. Although Gateway disputed whether all of the 945 potential complaints were actual evidence of poor performance, Gateway was unable to explain away all of the complaints and conceded that some of the complaints were justified. Specifically, Gateway admitted, in its March 20, 2000 response to OGS, that Gateway employees failed to empty wastebaskets as required ("A new person or a [sic] on-call person either missed baskets under a desk or make [sic] a mistake on schedule [sic] day of pickup") and that Gateway employees failed to clean floors as required ("Objects such as a penny or paper clips are placed in hard to reach places and . . . were not pick-up [sic] due to oversight or the cleaner didn't want to break the vacuum . . . In some cases a vacuum would break down or a new employee or an on-call person would vacuum wrong floors for that night."). In the same letter, Gateway generally conceded that it had "at no time claimed to be prefect [sic] in the ability to satisfy the wide range of needs of the client base in Agency 1, 2, 3, 4."

According to Schedule A of the contract, Gateway was obligated to remove "Rubbish" on a "Daily" basis from "Wastepaper baskets, cigarette urns, [and] trash cans." Schedule A also obligated Gateway to "Vacuum all carpeted areas daily." Thus, by Gateway's own admission, it failed to fulfill its contractual obligations. Gateway's arguments about Schedule B services are not material to the question of non-responsibility, since the failure to perform as required by Schedule A is sufficient, on its own, to support the finding of non-responsibility.

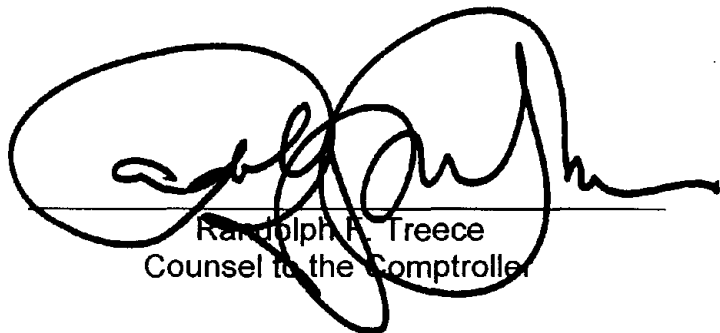
In spite of Gateway's explanations, it is clear that many of the 945 complaints were justified and that OGS properly concluded that Gateway's performance was not responsible.

Gateway's protest complains that it did not have adequate time to respond to the possibility of being found non-responsible. However, the record indicates that Gateway was informed that its performance was unsatisfactory on numerous occasions during the term of the contract, both by OGS and by the agencies occupying the offices that were supposed to be cleaned by Gateway. Although it appears that Gateway was not formally notified until the March 16, 2000 meeting that it faced the possibility of disqualification for non-responsibility, OGS gave Gateway another four days to respond in writing. While Gateway might have preferred to have more time, it is clear that it received reasonable notice and an opportunity to be heard.

Accordingly, we are satisfied that the determination of non-responsibility of the Office of General Services dated March 21, 2000 provided a sufficient basis to find *Gateway non-responsible*. *In the course of our review, however, OGS provided additional evidence in the form of summaries of Gateway's performance prepared by the responsible officials representing the client agencies which occupy offices in the buildings serviced by Gateway. Although Gateway was given an opportunity to respond to that additional evidence, and we carefully considered Gateway's response, we believe that this documentation provides compelling justification for a determination of non-responsibility.*

CONCLUSION

We are satisfied that OGS has compiled a sufficient record to support its determination that Gateway's previous contract performance was inadequate and non-compliant. Gateway's protest does not present an adequate basis for this Office to reject the OGS determination of non-responsibility. Therefore, the protest is DENIED.



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