

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by
Pegasus Cleaning Corporation with respect to
the procurement of custodial services by the
State University of New York at Buffalo
Contract No. C-000804

Determination
of Bid Protest
SF- 20000052

This Office has completed its review of the above-referenced Request For Proposals ("RFP"), the contract awarded by the State University of New York at Buffalo ("UB"), and the bid protest filed by Pegasus Cleaning Corporation ("Pegasus"). As outlined in further detail below, we have determined that the determination of UB finding Pegasus to have submitted a non-responsive proposal was correct, and that the procurement was conducted in accordance with law, and therefore have approved the resulting contract to Advanced Facilities Services, Int'l, Inc. ("Advanced").

BACKGROUND

Facts

UB issued an RFP for custodial services for eight buildings on campus.¹ The RFP detailed the various types of custodial activities (e.g., floor care, walls, fixtures and furniture, etc.) and included a statement of "minimum cleaning frequencies," e.g., daily, weekly, monthly and annually. The RFP further stated that these frequencies "shall determine the schedule of cleaning for all times except (six listed) holidays."

The RFP established a scoring system whereby the total bid price, inclusive of labor, supplies and equipment would receive up to 47 points; staffing "at adequate levels" would receive up to 51 points; and the amount, type and condition of equipment and supplies would receive up to 2 points. The award would be based on the composite scores. Annexed to the RFP and made a part thereof was a prevailing wage schedule prepared by the New York State Department of Labor, which indicated that any contract resulting from this procurement must result in the payment of prevailing wages to the employees of the winning vendor.

The RFP stated, on page 4, that "[a] mandatory meeting..." would be conducted on campus. "The purpose of this meeting is to allow potential bidders an opportunity to present questions, obtain drawings of the facility, and obtain clarifications relative to any

¹This was a re-bid, as the Comptroller advised UB that its prior attempt to secure such custodial services by way of an Invitation To Bid was flawed. Upon receipt of the Comptroller's advice, UB agreed to a new procurement process, via the RFP now before us.

facet of this invitation." The protestor and each of the eventual bidders attended the meeting.

Pursuant to the RFP, eleven offers were received, including one from Pegasus, and one from Advanced. When the points were tallied, the offerer with the most points was Pegasus. However, an analysis performed by UB on the Pegasus proposal indicated that the proposal could not possibly be performed at the stated price with the stated number of staff hours without violating Prevailing Wage laws.

UB questioned Pegasus regarding this potential statutory violation. Pegasus responded that prevailing wage would be paid; that the staffing estimates provided in its proposal were purposely stated in a manner which "includes some over lapping (sic) of supervision, porter service, project work and also includes required weekend staffing too (sic). Our staffing levels will adjust accordingly to meet each facilities (sic) varied usage." The Pegasus attorney, in subsequent correspondence, stated , "the particular hours shown [in the Pegasus proposal] do not match the total labor charges for at least two reasons. First, some of the supervisors shown for each billing actually supervise employees in more than one building. Second, there are many days during the year, such as during summer and winter breaks, when acceptable levels of cleaning do not require a full staff." The Pegasus attorney continued that the bid forms were inadequate, inter alia, because they "do not have any place on the form where reduction in staff for periods when school is out of session can be recognized." Finally, in subsequent correspondence, the Pegasus attorney stated that his client provided "a sheet headed 'Proposed Staffing', which he advises was submitted with the bid of Pegasus... It clearly states at the bottom that the average daily man hours will be 240 hours per day. This was also stated on the summary cost sheet that was submitted with the bid."

In light of the Pegasus proposal and the explanations provided by Pegasus and its attorney, UB found the Pegasus proposal to be non-responsive. UB then awarded the contract to Advanced, the vendor whose proposal received the second highest number of points.

UB signed the contract with Advanced and forwarded it to this Office for approval. Pegasus then formally protested to this Office.

Procedures and Comptroller's Authority

The Comptroller is required by section 112 of the State Finance Law ("SFL") to approve all State agency contracts which exceed \$10,000 in amount before such contracts become effective. However, an agreement between the State University of New York and the Comptroller, as provided for in Education Law, §355(5), requires only contracts over \$75,000 entered into by the State University to be approved by the

Comptroller when a protest is filed.² As this contract is for well over \$75,000, the Comptroller must approve it before it becomes effective. As a contract has already been signed by UB, the Comptroller has reviewed this bid protest as part of his review of the contract award under the aforementioned law and agreements.

In determination of this protest, the following correspondence/submissions from the parties were considered: From Pegasus, correspondence and attachments dated: January 28, 2000, March 8, 2000, April 5, 2000, May 24, 2000 (including draft affidavit and exhibits), May 30, 2000, and June 29, 2000; From UB, correspondence and attachments dated January 13, 2000, February 25, 2000 (including exhibits), March 14, 2000, April 14, 2000, May 30, 2000 and June 1, 2000.

Protesting Party

Pegasus is a New York corporation and one of the eleven vendors which submitted a proposal in response to the RFP issued by UB.

ANALYSIS OF BID PROTEST

Protestor's position

The Pegasus protest is on the following grounds:

- The proposal submitted was in accord with the prevailing wage requirements of law.
- The proposal submitted indicated a correct understanding that full staffing would not be required on a year-round basis.
- The bid forms utilized by UB were vague.
- The average number of hours of staffing were provided in two attachments to the proposal submitted and were thus available to UB if questions arose.
- The RFP stated that staff experience was to be evaluated, but it never was evaluated by UB.

Agency's response to protest

The UB response to the protest is as follows:

- Because the proposal, as originally submitted by Pegasus, could not

²Without a protest, this limit is usually \$150,000..

- result in the payment of prevailing wage, the proposal is non-responsive.
- The Pegasus assertion that full staffing is not required on a year-round basis is incorrect; to the contrary full staffing year-round is required.
- The Pegasus double-counting of supervisors, porters and project work is tantamount to a willful attempt to mislead, thereby rendering the proposal non-responsive.
- The fact that Pegasus stated the average number of hours of staffing on one attachment to its proposal does not overcome the non-responsiveness of its proposal.
- There is no second document that had been submitted to UB which states an average number of hours of staffing; production of such document at this point amounts to fabrication.
- The language of the RFP does not provide that experience of staff will result in the award of points; rather, experience of staff was intended to be graded as a pass-fail.

Applicable Statutes

The requirements of competitive procurements are set forth in SFL, §163, which provides that contracts for services shall be awarded on the basis of "best value" from a responsive and responsible offerer (SFL, §163[10]). "Best value" is defined as the basis for awarding service contracts to the offerer which optimizes quality, cost and efficiency among responsive and responsible offerers (SFL, §163[1][j]). A "responsive" offerer is an offerer meeting the minimum specifications or requirements as prescribed in the solicitation issued by the State agency (SFL, §163[1][d]).

DISCUSSION

In order to resolve the issues presented by the protest, we must consider the following:

- (1) Was Pegasus a responsive offerer?
- (2) Was the scoring methodology consistent with the RFP and the law?

Responsiveness of the Pegasus proposal.

As a general proposition, 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], *aff'd* 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* 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 AD 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]).

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 [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.

Substantial information exists to uphold the determination of UB that the Pegasus proposal was materially variant from the RFP because it did not meet the minimum requirements and that therefore Pegasus was non-responsive. On its face, the Pegasus proposal did not purport to result in the payment of prevailing wage to its staff. This, on its own, was not fatal. We have previously held that the law does not require that prevailing wage be bid in a proposal responding to an RFP as long as the ultimate contract resulting from the procurement results in the payment of prevailing wage.³

³We held this in SF-0997/051, in the context of a procurement which required the bidders to specify wage rates in every category of labor in each of a number of regions. A bidder was found non-responsive by the procuring agency because the bidder did not bid prevailing wage for each and every category. Since it was reasonably possible for the bidder to pay prevailing wage in each category (while charging only the bid rates), we determined that the procuring agency must determine whether it is unlikely or impossible for the bidder to pay all its workers prevailing wage prior to finding the bidder non-responsive. Here, on the face of it there was no way that Pegasus could have paid prevailing wage to its workers overall, unless the numbers in

When UB inquired about the apparent lack of payment of prevailing wage (to give Pegasus the chance to prove that it would, somehow, pay prevailing wage -- see footnote 3, *supra*), the answer given by Pegasus was that the hours bid were for peak usage of the buildings; that their prior experience at the university indicated that fewer hours could be devoted to custodial service during summer vacations and other non-peak times. The result of this was that the Pegasus bid appeared to offer substantially more hours than they were actually willing to provide.

UB clearly stated in the RFP that the cleaning frequencies "shall determine the schedule of cleaning for all times except (six listed) holidays." The RFP also referred, in capital letters, to the cleaning frequencies as being a "MINIMUM." Since Pegasus admitted in its response dated January 28, 2000 that the proposal it submitted did not meet the minimum frequency of cleaning required by the RFP, the Pegasus proposal was not responsive.⁴ Pegasus' admission on January 28 that it was also double counting staff in its bid is further evidence of non-responsiveness, because a fair reading of the RFP makes it clear that scores would be assigned based on the actual staff assigned to each building. Pegasus' argument that it knew better than UB how many hours were actually required during certain seasons is specious — that is for UB to decide.

Furthermore, the Pegasus bid, if unchallenged, gave it an advantage over other bidders in the scoring of the technical proposals, as the higher number of hours they bid, the more technical points they would be awarded. Because the proposal gave Pegasus an advantage over other bidders in the assignment of technical points, this non-responsiveness was a material deviation from the RFP and could not be waived by UB.

Pegasus asserts that the bid form, and not the bid, was at fault. It further asserts that information was contained in two attachments to its proposal clarifying the actual number of hours which would be provided.⁵ This argument is irrelevant since the

their bid were wrong.

⁴The January 28th letter states, in relevant part, "[a]s your (sic) well aware, staffing at these facilities fluctuates dramatically depending on the student population and activities. Our daily staffing levels will reflect these changes adjusting accordingly... Experience has shown us that the students usage drops by more than 80% during the summer months and by 95% over the winter break... Our staffing levels will adjust accordingly to meet each facilities varied usage." See also the subsequent responses from Pegasus and its attorney, excerpted *supra*, p.3.

⁵We note that in only one of the attachments in the procurement record, the "Proposed Staffing" sheet, is there a reference by Pegasus to a different number of hours than on the face of its proposal. This sheet is not a required part of the bid forms. UB has asserted that the second attachment referred to by Pegasus was altered for the purpose of this proceeding. We have in

attachments, when coupled with the Pegasus explanation of its proposal, simply documents that Pegasus would not meet the minimum cleaning frequency requirements of the RFP, and, therefore, is not responsive.

Pegasus correctly noted that there was no place on the forms to record the hours an administrative supervisor would be on campus. However, we do not believe this is fatal. Presumably, a bidder noting this deficiency would reasonably just add a notation to its bid detailing those hours.

Similarly, Pegasus is correct that the bid forms do not expressly state that the total hours per week in each building was supposed to be an average for the term of the contract. However, in the face of purported uncertainty as to the information called for by the bid form, Pegasus intentionally chose to report only the number of hours it would provide in "peak" cleaning season, along with a double-counting of staff. This decision inevitably resulted in the inflating of the Pegasus technical score. We find this a much less reasonable interpretation of the bid form than the one suggested by UB. By failing to provide, in the face of its alleged uncertainty as to what was required, a notation or other explanation of the hours it bid, the Pegasus technical score would have remained overweighted and but for the inquiry of UB in the light of a potential prevailing wage violation, would have enabled Pegasus to receive an award based on information which was misleading, even if unintentionally so.

Finally, as noted above, Pegasus and all other eventual bidders attended a meeting on campus, the purpose of which was "to allow potential bidders an opportunity to present questions... and obtain clarifications relative to any facet of this invitation." There is nothing in the record which asserts that Pegasus was unclear enough about the bid forms to ask questions or seek clarifications regarding their meaning. This inaction on Pegasus' part hardly buttresses its argument that its method of bidding was motivated by the lack of clarity of the bid forms.

In summary, we are not in a position to challenge the determination by UB that Pegasus was non-responsive, and that such non-responsiveness is material and unwaivable.

The scoring methodology.

A closer question involves the language of the RFP regarding the elements of the scoring system. If the scoring system is materially flawed, a new procurement would be necessary, regardless of whether the result of overturning this could be an

front of us, for the purpose of this proceeding, no evidence which would enable us to make a determination regarding alleged alteration of documents or fabrication of evidence.

award to Pegasus.⁶

An RFP need not describe in detail the scoring system. It need only state 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." SFL §163(9)(b). However, once the scoring system is detailed in the RFP, the scoring must be accomplished in accord with such statement. On pages 7 and 8 of the RFP, the "Method of Award" was described. It stated, in relevant part:

The Technical and Cost sections of each Bidder's proposal will be evaluated against the criteria described below. After completion of the Technical and Cost Evaluation, a composite score will be assigned to each proposal with the Technical and Cost Evaluation, with the Technical score weighted at 53% and Cost score weighted at 47%.

Cost was defined as "[t]he total bid price inclusive of labor, supplies and equipment..." Technical was divided into two categories: Staffing, which would receive 51 points, and Supplies and Equipment, which would receive 2 points. The allotment of points for staffing was described as follows:

Staffing must be at adequate levels (as determined by the University) to support the execution of their contract. Staffing must be indicated as part of this bid. Adequate staffing is determined by the total hours per week of supervisory, employee staffing coverage and experience of staff.

If this language were to be fairly interpreted as requiring the assignment of points for staff experience, this procurement would have to fail as UB did not so assign points.⁷ However, the RFP language referring to the experience of staff, though included under the "staffing" heading which was allotted 51 points, appears to us to be a "staffing" pass-fail statement, i.e., if staffing was inadequate due to lack of hours bid or inexperience of staff, the proposal would be deemed non-responsive.

This reading of the RFP is strongly supported by the design of the bid sheets. There was no place on the bid sheets for a statement of staff experience. Rather, the only place in the solicitation where staff experience could possibly have been communicated by the vendors was in the "References" section, which was under the heading "Minimum Qualifications (PASS/FAIL)". We believe the scoring system set sufficient guidelines to allow for a fair competitive process and will not disturb it. The

⁶As a non-responsive bidder, the argument that "experience of staff" points would have assisted Pegasus in winning is irrelevant.

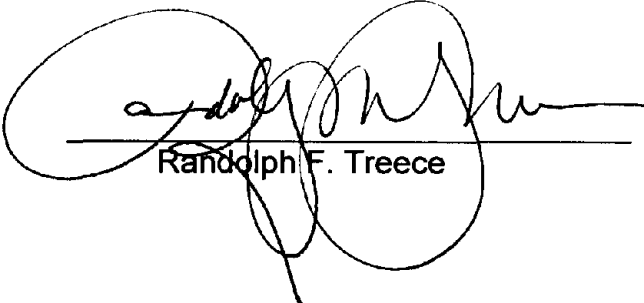
⁷Clearly, if the RFP expressly allotted points to "experience of staff," UB would have been required to evaluate and award points based upon staff experience.

language stated in the RFP, when read in conjunction with the bid sheets, was clearly understood by both the community of vendors who submitted proposals and the evaluator(s) who assigned the points.

Since we find that there was no requirement that points be assigned to staff experience, the scoring system detailed in the RFP was appropriately applied by the evaluation committee. As the RFP required, the higher the number of staffing hours that were stated on the proposal, the higher the number of staffing points were assigned to that proposal, up to 51 points. Again, we note that the bidder community did not seem to be confused by this language. In fact, as discussed above, the protestor seems to have been all too aware that stating a higher number of staff hours would result in the allotment of a higher number of points. As this scoring system was in place prior to the receipt of proposals and was fairly and objectively executed, and was consistent with the RFP, we have no grounds to overturn it.

CONCLUSION

UB has demonstrated that the protestor's proposal was correctly disqualified on the issue of responsiveness, and that the process which led to the award of the contract to the responsive and responsible vendor whose proposal offered the best value was in accord with law. Therefore, the protest is dismissed and the contract with Advanced is approved.



Handwritten signature of Randolph F. Treece, written in black ink over a horizontal line.

Randolph F. Treece