

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by
US Filter Operating Services with respect to
the procurement of Wastewater Treatment
Services by Bedford Hills Correctional Facility
Contract No. C570332

Determination
of Bid Protest
SF- 20010084

March 30, 2001

This Office has completed its review of the above-referenced Request For Proposals ("RFP"), the contract awarded by the Bedford Hills Correctional Facility ("Bedford Hills") of the New York State Department of Correctional Services ("DOCS"), and the bid protest filed by US Filter Operating Services ("US Filter"). As outlined in further detail below, we have determined that the procurement was not conducted in accordance with law, and therefore have returned unapproved the proposed contract with Severn Trent Environmental Services, Inc. ("Severn Trent") to Bedford Hills for a new procurement which must consider both price and technical merit.

BACKGROUND

Facts

Bedford Hills is located on the Broad Brook, a Hudson River tributary which feeds the Croton Reservoir System in Westchester County. The Croton Reservoir System is part of the New York City Watershed, which ultimately provides unfiltered drinking water for 9 million people. The Croton Reservoir itself is the direct source of drinking water for 900,000 people and may, at times (during drought conditions), be the direct source of drinking water for 2.5 million people. The Reservoir currently suffers from serious water quality problems associated with phosphorus pollution.

In the late 1980s, Bedford Hills constructed a wastewater treatment plant ("plant"). The New York State Department of Environmental Conservation ("DEC") alleged that the plant was not constructed in accordance with State law and that its operation violated its State Pollutant Discharge Elimination System ("SPDES") permit. In May, 1990, DOCS signed a consent agreement with DEC to bring the plant into compliance with effluent limitations in the SPDES permit.

In August, 1991, the Hudson River Fisherman's Association filed a federal lawsuit against Bedford Hills and DOCS alleging discharges of effluent from the plant into the Broad Brook in violation of the SPDES permit and in violation of federal law. In

1992, in settlement of that lawsuit ("settlement agreement"), Bedford Hills and DOCS agreed to employ a licensed wastewater treatment plant operator and to observe all SPDES permit and legal requirements.

In early 1994, Bedford Hills contracted on an emergency basis with an entity that was eventually purchased by US Filter, to bring the plant into compliance with the law and to continue to run the plant.¹ In late 1994, Bedford Hills conducted a competitive procurement for such services. The US Filter entity won this procurement and has been running the plant ever since 1995.

In November, 2000, Bedford Hills issued an RFP to once again competitively procure such services. The RFP included the actual contract the successful bidder would be required to sign. The contract detailed the various types of services required to be performed by the successful bidder (e.g., 24/7 operational coverage, laboratory sampling and testing, report writing, record keeping, inventory, preventive and corrective maintenance and repairs, etc.). The contract requires that the plant be operated and maintained in accordance with all applicable laws, rules and regulations, and the above-referenced consent agreement and settlement agreement, so that the treated wastewater would be in compliance with the SPDES permit. The contract further requires that the successful bidder provide a performance bond to Bedford Hills/DOCS in the amount of \$500,000 and be responsible for any fines and/or civil penalties resulting from violations of the SPDES permit or the above-referenced consent agreement and settlement agreement.

The RFP established a system for evaluating the bids based solely on price per year. The technical merit of the proposals received no weight.²

Pursuant to the RFP, three bids were received, one from US Filter, one from QMS, and one from Severn Trent. US Filter bid \$318,600 per year, QMS bid \$262,248

¹ The contract was with Wheelabrator EOS, which was acquired by US Filter four years ago.

² By submitting a bid, the vendor was, by implication, indicating to Bedford Hills that it had the ability to perform the required services. Bedford Hills then verified that the winning vendor (low bidder) had the ability to perform such services.

per year, and Severn Trent bid \$257,670 per year.

Bedford Hills signed a contract with Severn Trent based on the low bid price, and forwarded this Office the contract for approval. The contract was received in this Office on February 26, 2001. US Filter then formally protested to this Office the award of the contract to Severn Trent.

Procedures and Comptroller's Authority

The Comptroller is required by section 112 of the State Finance Law ("SFL") to approve State agency procurement contracts which exceed \$15,000 in amount before such contracts become effective. As a contract has already been signed by Bedford Hills, the Comptroller has reviewed this bid protest as part of his review of the contract award.

In determination of this protest, the following correspondence/submissions from the parties were considered: From US Filter, correspondence and attachments dated: January 16, 2001, March 6, 2001, and March 20, 2001; From Severn Trent, correspondence and attachments dated March 2, 2001 and March 15, 2001; and from Bedford Hills, correspondence dated March 16, 2001.³

Protesting Party

The protestor, US Filter is the incumbent vendor providing the service at Bedford Hills and is one of the three vendors which submitted a proposal in response to the RFP issued by Bedford Hills.

ANALYSIS OF BID PROTEST

Protestor's position

The US Filter protest is made on the following grounds:

³A letter was received from US Filter dated March 7, 2001 with material attached which purported to be confidential proprietary information, not to be shared with others. We affirmatively reject consideration of such letter, as consideration of material which other parties cannot contest would result in a violation of due process. We also received a letter from an environmental organization named Riverkeeper, dated March 19, 2001, which raises responsibility issues. As is more fully discussed on pp. 6-7 below, because we are rejecting this contract due to the flawed procurement, there is no need for us to consider the responsibility of any vendor at this time, and, therefore, we have not considered the March 19 submission in reaching this determination.

- The evaluation methodology utilized by Bedford Hills in the RFP was not in accordance with the State Finance Law because it was based solely on price and gave no weight to technical merit, except on a pass/fail basis.
- The bid submitted by Severn Trent was unrealistically low, giving rise to an expectation that Severn Trent could not successfully perform the services at the bid price.
- Bedford Hills failed to consider the technical, managerial and financial competence and experience of Severn Trent and QMS. In particular, Severn Trent's performance may be less than satisfactory on the operation of other wastewater treatment plants.

Agency's response to protest

The Bedford Hills response to the protest is as follows:

- Both the SFL and the Draft Procurement Guidelines issued by the NYS Procurement Council recognize that, in determining best value, price alone may be considered when performance standards are adequately set forth in the RFP. Here, Bedford Hills did adequately set forth such performance standards, in particular by referencing the SPDES permit requirements and the consent agreement and settlement agreement referred to above.
- The selection of a low bid does not necessarily indicate that such bid is irresponsibly low. There is no evidence that the Severn Trent bid is so low that it places performance of the contract in jeopardy.
- Bedford Hills has no basis to find any of the three offerers non-responsible.

Winning bidder's response to protest

The Severn Trent response to the protest is as follows:

- The selection criteria utilized by Bedford Hills is consistent with section 163 of the SFL. There is no absolute requirement that a state agency engage in a comparison of the relative technical, managerial and financial experience and competence among otherwise qualified and responsible vendors in situations such as the one at issue, where the RFP sets specific performance standards and clearly outlines the scope of services.
- US Filter is barred from objecting to the selection criteria utilized by Bedford Hills because it did not object to the method of award prior to

submitting its proposal.

- The Severn Trent proposal clearly offers the best value to the state, as required by the law.
- Severn Trent is a responsible vendor with an impeccable record of environmental compliance.
- Even if Severn Trent does not make a profit from the performance of the contract at the price it bid, this does not mean that it cannot successfully perform the services required by the contract.

Applicable Statutes and Guidelines

The requirements of competitive procurements are set forth in section 163 of the SFL, which provides that contracts for services shall be awarded on the basis of "best value" from a responsive and responsible offerer (section 163[10] of the SFL). "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 (section §163[1][j] of the SFL).

The New York State Procurement Council, created under section 161 of the SFL, has issued Procurement Guidelines⁴. Section IV, pp. 9-10 of the Procurement Guidelines states, "...it is expected that there will be occasions when it makes sense to boil down a best value award for services to a lowest price determination. Specifically, best value can be equated to lowest price in those cases when: price is the only criterion for making the decision among responsive and responsible offers; 'quality' and 'efficiency' requirements have been fully defined in the specifications; and price equals cost. In these cases, while the award will still technically be made on the basis of best value, best value will be interpreted to mean the offer having the lowest price that meets specifications among responsible offerers."

DISCUSSION

The questions presented on this protest are:

- (1) Was US Filter untimely in its protest?
- (2) Was the Severn Trent bid so unrealistically low as to guarantee non-performance?
- (3) Does the evidence submitted preclude an award of a contract on the

⁴ These Guidelines do not have the force and effect of law, but are, rather, meant to assist agencies in conducting procurements.

basis of non-responsibility?

(4) Was the scoring methodology utilized by Bedford Hills consistent with the law?

Timeliness of US Filter protest

Severn Trent suggests that US Filter is barred from objecting to the selection criteria utilized by Bedford Hills because it did not object to the method of award prior to submitting its proposal. Severn Trent cites section 3.2 of the RFP, which provides that “[p]rospective contractors should note that all clarifications and exceptions including those relating to the terms and conditions of the contract are to be resolved prior to the submission of a proposal.” Because US Filter did not challenge the award being based solely on price prior to submitting a proposal, Severn Trent argues that it may not now make such challenge. We disagree. We know of no statute or regulation that would prevent an unsuccessful bidder from challenging the legality of an award at either the protest stage or, if necessary, in court (assuming the appropriate statutes of limitation have not yet run). Even if US Filter was, somehow, untimely in making this protest, this Office, in our protest determination role which emanates from our contract approval role, may consider any argument whether or not such argument is raised by a party to the protest. Therefore, it is clear that we may now consider all of the issues before us.

The Severn Trent low bid

US Filter argues that the Severn Trent bid was so unrealistically low that it all but guarantees non-performance of the services required by the contract. Its analysis suggests that Severn Trent cannot possibly profit at the bid price. Therefore, they believe we should consider such bid to be irresponsibly low. We disagree. The State of New York welcomes low bids in its system of competitive bidding. Whether a vendor can profit from a resulting contract is not our concern, unless there is clear and convincing evidence that the company will not perform the services required. A vendor could, arguably, establish a price which is likely to result in a loss on one job to build their reputation in the state and win other jobs in the future. We know of no reason that an entity as large as Severn Trent, which appears to have world-wide operations and substantial resources, would fail to perform required services just because they offered a bid which negates or cuts their profit margin.⁵

Responsibility of vendors

US Filter alludes to reports of operating results at facilities operated by Severn

⁵ We make no judgment whether it is possible for Severn Trent to make a profit based on its bid price.

Trent in the Croton watershed which allegedly suggest a less than satisfactory record of performance by Severn Trent. Severn Trent cites its own 99.84% compliance record through the 1999-2000 calendar years in the New York City watershed area, and a 99.10% compliance record over the same time period in other parts of New York State. Severn Trent alludes to "numerous and more severe types of violations which have occurred under US Filter's watch." Riverkeeper (which is not a party to this proceeding – see fn. 3) has offered us further information regarding environmental compliance of the vendors who are the parties to this proceeding. We take all of these statements very seriously. However, because we are today rejecting the contract on other grounds, there is no reason for us to consider the responsibility of any vendor. We are forwarding the information we have received to Bedford Hills/DOCS and when Bedford Hills enters into future agreements with vendors for both the interim and the eventual long-term performance of the services required, we expect that they will fully consider all allegations of non-responsibility raised therein.

The evaluation methodology

"In awarding a contract for services, a State agency generally cannot rely solely on price as the determinative factor but must engage in a cost-benefit analysis since State Finance Law §163(10) provides that such a contract must... be awarded on the basis of best value, a method that optimizes quality, cost and efficiency among responsive and responsible bidders." Transactive Corporation v. New York State Department of Social Services, 236 AD2d 48, 53 (1997); *aff'd* on other grnds, 92 NY2d 579 (1998). While the Draft Procurement Guidelines (cited above) do permit, in limited circumstances, the award of service contracts on the basis of price alone, they permit such an approach only where qualitative and efficiency requirements have been so fully defined in the specifications that there is little room for technical variances between proposals which will have any value to the procuring agency. Thus, the Guidelines permit such an approach only where, consistent with the holding in Transactive, such approach effectively represents a cost-benefit analysis. In this case, however, the technical specifications issued by Bedford Hills (summarized above) were limited to a requirement that the bidders not violate the law. This, in effect, is a search for a minimally qualified vendor. We do not believe that technical specifications which essentially require minimal professional competence satisfy the requirements of the Procurement Guidelines or section 163, except where the services being procured are of such a routine nature that a minimally qualified vendor could perform them as adequately as a highly qualified vendor.⁶

⁶ Generally, we believe that an RFP for the procurement of services must prescribe both required technical qualifications and required components for the offerers' technical proposals.

The basic question which we must resolve in this protest is whether the services which must be performed under the contract are so routine that a minimally qualified vendor could perform them as adequately as a highly qualified vendor, without impacting on the value of the benefit received under the contract, e.g., by creating a potential problem for the State agency, the State of New York, and the People of the State of New York.⁷ If, indeed, the services required can be performed without a wide variation in the quality of the services provided and the frequency of problems which may be encountered, then no violation of State law or guidelines would occur if the procuring agency carefully specifies those services but only scores the price. If, on the other hand, the performance of these services are not routine; if, instead, there could be a wide variation in the quality of the services provided and in the frequency of problems encountered, then technical qualifications of the vendors and the technical merit of their proposals should have been scored.

Since this Office does not have the technical expertise to fully resolve all of the issues raised above, we turned to the Office of the Attorney General, New York City Watershed Inspector General ("OAG"), for technical assistance. Based upon our discussions with the OAG, we are satisfied concerning the following:

- Wastewater treatment facilities generally require a significant level of technical proficiency and there is a significant variation in the technical abilities of providers who meet minimum levels of professional competence.
- Such variations will significantly impact upon the overall operations of the facility in which the wastewater plant is located.
- It appears that the Bedford Hills wastewater treatment plant is rather large (involving up to 500,000 gallons of wastewater per day) and its operation quite complex.
- The plant operation should become substantially more complex and costly to maintain on May 1, 2002, a date which is squarely within the term of this contract.⁸

⁷ An example of such routine services could be a trash-removal contract, where the dates and times and frequency of trash pickup is specified and there is no expectation that one vendor will give added value to the agency through offering "better performance."

⁸ The OAG has alerted us to the fact that regulations promulgated by the New York City (15 RCNY Chapter 18) and by the New York State Department of Health (10 NYCRR Part 128) for wastewater treatment plants located within the New York City drinking water Watershed require significant improvements to wastewater treatment plants discharging into surface waters of the Watershed by May 1, 2002. These improvements include phosphorus removal, sand filtration, disinfection, microfiltration or an equivalent technology, standby power, power alarm, automatic start-up capability, disinfection back-up,

- Failure to perform the services required by the contract in a satisfactory manner could have direct and serious consequences for the health and safety of the people who rely on drinking water from the Croton Reservoir.
- Further, violation of the relevant laws may make Bedford Hills/DOCS and the State of New York subject to rather substantial monetary penalties. There is a schedule of penalties which arise out of violation of the DEC consent order, ranging from \$100 per day to \$850 per day, depending on the duration of the violation. In addition, however, certain violations may make the State liable for up to \$25,000 per day. A performance bond of only \$500,000, while useful, would hardly protect Bedford Hills/DOCS and the State from a vendor's poor performance.

Based upon the foregoing, we do not believe this is a case where "it makes sense to boil down a best value award for services to a lowest price determination." Price is not the only criterion for making the decision among responsive and responsible offerers. Quality and efficiency requirements have not been fully defined in the specifications. Only duties have been defined. Quality and efficiency are of dire financial, health and safety consequence. Accordingly, we believe it is clear that the award of this contract on the basis of price alone did not reflect the cost-benefit analysis required by section 163 (see Transactive Corporation v. New York State Department of Social Services, *supra*).

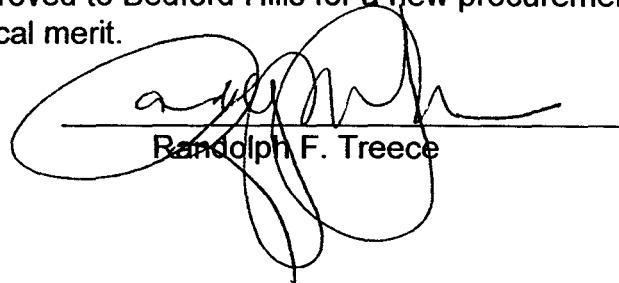
Severn Trent cites Transactive as support for its position. In that case the State agency issued an RFP with extensive technical requirements, and established criteria for the evaluation of both the technical and cost proposals, but established an award methodology whereby the technical merits of the proposals would be evaluated only with respect to those proposals which were within ten percent of the cost of the lowest cost proposal from a responsive and responsible offerer. While in that procurement the technical merits of the bids may have been somewhat diminished, it was not ignored, i.e., within the ten percent competitive range established by the agency, technical merit was designed to be the deciding factor. As the Court stated, the agency's use of "a competitive range was permissible because such procedure embodies a cost-benefit analysis as it reflects a determination that where a price proposed by a responsive and responsible bidder is lower than a price offered by another bidder by a stated percentage, any increase in value embodied in the higher price will be offset by the cost savings of the lower priced proposal." Transactive, 236 AD2d 48, 53. In contrast, in the present situation, we believe it is clear that the award methodology used by Bedford Hills does not reflect the required cost-benefit analysis.

etc. These improvements are generally referred to as "tertiary" treatment with microfiltration or equivalent technology.

Severn Trent argues that the fact that Bedford Hills, subsequent to opening the bids, verified that it was a highly qualified vendor, somehow excuses Bedford Hills from having considered technical merit during the competitive process. We disagree. Failing to appropriately evaluate all necessary criteria in the determination of best value during the competitive process is a fatal flaw. Indeed, without considering the technical merit of all proposals, we cannot say which proposal offered best value. Therefore, this competitive process was not conducted in accord with the law.

CONCLUSION

We find that the evaluation methodology employed by Bedford Hills was not in accord with the State Finance Law. Therefore, the protest is upheld and the contract with Severn Trent is returned unapproved to Bedford Hills for a new procurement which must consider both price and technical merit.



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

Randolph F. Treece