

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by
Diversified Collection Services, Inc. with respect to
the procurement of Collection Services
by the Department of Tax and Finance
Request For Proposals No. 99-77

Determination
of Bid Protest
SF- 20010136

June 20, 2001

This Office has completed its review of the above-referenced Request For Proposals ("RFP"), the contract awarded by the Department of Tax and Finance ("Tax"), and the bid protest filed by Diversified Collection Services, Inc. ("DCS"). As outlined in further detail below, we have determined that the procurement was conducted in accordance with law, and therefore have approved the proposed contract with Allied Interstate ("Allied").

BACKGROUND

Facts

On March 6, 2000, Tax issued an RFP to competitively procure services for the collection of outstanding tax liabilities involving cases where the tax debtor is thought to be located within New York State. The RFP stated "[i]t is the Department's intention to award one contract for the initial period of two years commencing August 3, 2000 and ending August 2, 2002, however, the Department reserves the right to award multiple contracts."

The RFP detailed the magnitude of the project as follows:

The Department intends to place cases with the contractor exceeding \$500 in value which contain fully warranted assessments issued no earlier than 1990. There presently exists approximately 97,000 cases consisting of approximately 225,000 assessments totaling in excess of \$699,000,000 which meet the above parameters... Of the cases outlined above, the Department intends to initially place with the contractor... approximately 53,000 cases consisting of approximately 117,000 assessments totaling in excess of \$280,000,000... The full inventory of 97,000 cases... will be augmented in the future by additional... cases currently in active collection inventory and new cases created... [I]t is estimated that 5000 cases representing 13,500 assessments will join the available pool (of cases to be handled by the contractor) on an annual basis.

The RFP listed the following types of minimum qualifications the bidders must have to be deemed responsive:

- The Bidder must be in the business of debt collection since at least 1994.
- The Bidder must have handled a portfolio associated with one client with a minimum volume of 50,000 debtors annually and a placement value of \$250 million.
- The Bidder must be a financially stable entity such that they may initiate and perform their obligations through the duration of the contract.
- All staff must be bonded or insured against financial losses to (Tax) resulting from employee actions.
- The bidder must have current policies, procedures, controls, and software in place which, at a minimum, ensures both physical security and data security.
- The bidder must have accessible information sources necessary to support the ability to audit.

The RFP also listed the following experience which, while not mandatory, would impact the evaluation of the bidders' proposals:

- Experience in the field of collecting state and/or local federal governmental receivables since 1994.
- Compliance with ethical and legal collection practices.
- A competent and experienced staff which will work exclusively on this contract.

Finally, the RFP required the bidders to submit a comprehensive collection plan and their best solution for an information system that would meet the scope of the RFP.

On March 21, 2000, a Mandatory Bidders Conference was conducted by Tax. At the Bidders Conference, DCS submitted the following question:

"Considering the large size of the Department's portfolio and the many benefits of having multiple contractors, will the Department consider selecting more than one contractor for this contract?"

Tax responded to the question as follows:

"Yes, as the (sic) indicated on Page 1 of the RFP, the Department reserves the right to award multiple contracts."

Prior to the due date for the receipt of proposals, on April 28, 2000 Tax established, in writing, the formal Evaluation Criteria for proposals received pursuant to the RFP. Included in such criteria, under the heading "Final Proposal

Ranking,” is the following language:

“ The Department has concluded that internal resources required for initiating multiple contracts will negatively impact existing initiatives, and therefore will not award multiple contracts as a result of RFP 99-77.”

Thirteen proposals were received in response to the RFP, including one from Allied and one from DCS. One proposal was disqualified due to lateness. Two proposals were found to be non-responsive to the RFP and were not further analyzed. The remaining ten proposals were scored, pursuant to the evaluation system developed by Tax prior to the receipt of the bids. Allied received the highest score. DCS received the third highest score. Tax announced to the bidders, by letter dated September 5, 2000, that Allied was the sole awardee.

On January 22, 2001, DCS wrote to Tax to protest the award to Allied, on grounds including, but not limited to, Tax’s determination to select a sole vendor. DCS supplemented its protest via letter dated March 13, 2001. On March 16, 2001, Tax wrote to DCS, denying its protest.

Tax then signed a contract with Allied, and forwarded the contract to this Office for approval. The contract was received in this Office on March 28, 2001. DCS then wrote this Office on May 18, 2001 to formally appeal the determination by Tax.¹

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 Tax already denied the protest from DCS and signed a contract with Allied, the Comptroller has reviewed the appeal of the Tax determination as part of his review of the contract award.

In determination of this protest, the following correspondence/submissions from the parties were considered: From DCS, correspondence and attachments dated: January 22, 2001, March 13, 2001, March 14, 2001, and May 18, 2001; From Tax, correspondence dated March 16, 2001.

Protesting Party

The protestor, DCS, is one of the thirteen vendors that submitted a proposal in

¹ DCS also wrote to this Office on March 14, 2001 regarding its protest to Tax, prior to its receipt of the final determination by Tax. We have considered the material contained in this letter to be part of DCS’s appeal.

response to the RFP issued by Tax.

ANALYSIS OF BID PROTEST

Protestor's position

The DCS protest is made on the following grounds:

- The decision by Tax to award a \$700 million contract to a single vendor who had no apparent experience prior to 2000 collecting delinquent state taxes was irrational, arbitrary and capricious.
- The procurement process was flawed because at the bidders conference Tax affirmatively represented that it would consider more than one contractor. By publicly saying it would consider multiple vendors, while "secretly" (in the written evaluation criteria) concluding that it would award to a single vendor, Tax prejudiced all of the bidders except Allied. Had DCS known of Tax's decision to opt for a single vendor, it would have revised its proposal and bid lower fees.
- The determination to award to a sole vendor should have been made after the proposals were opened.
- Allied had an unfair advantage in the bidding process because Tax had previously selected it as the sole vendor for the contract to collect Tax's out-of-state debts. This gave Allied the opportunity to bring its systems and processes into alignment with Tax's systems and processes, giving Allied a "leg up" in terms of pricing and structuring its bid.
- The Tax justification for using a sole vendor, i.e., that its "internal resources required for initiating multiple contracts will negatively impact existing initiatives," is arbitrary and does not balance the cost of selecting multiple vendors against "the universally recognized benefits of doing so." By selecting a sole vendor, Tax puts New York "out-of-step with virtually every other state that out-sources collection services and every other state of comparable size and scope (in terms of the dollar amount of the assessments) to New York."

Agency's response to protest

The Tax response to the protest is as follows:

- The RFP clearly indicated that Tax intended to award to a sole vendor, even if it reserved the right to make multiple awards. At no time did Tax state it would award multiple contracts. Therefore, bidders were not

misled in formulating their proposal submission strategies.

- The determination to make a sole award was documented in the written evaluation criteria completed and secured prior to opening proposals, as required by statute and by the Procurement Guidelines.
- The determination to make a sole award was made appropriately, based on the opinion of Tax's Information Technology managers that their internal resources did not exist to support more than one vendor's system.
- Each bidder's proposal was evaluated equally and uniformly against the criteria developed for evaluation. The fact that Allied had been awarded the out-of-state collection contract had no impact on the evaluation process. In fact, Allied's proposal was scored higher than DCS's proposal not due to higher technical merit, but due to lower cost.

Applicable Statutes and Guidelines

The requirements for 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). "...Where the basis for award is the best value offer, the state agency shall document, in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria, which whenever possible, shall be quantifiable, and the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted." (section 163[7] of the SFL).

The authority to make multiple awards is granted explicitly to the Commissioner of General Services, who shall "determine the number and scope of centralized contracts for commodities to be let during any period, including the letting of multiple contracts to ensure the sufficient supply and variety and uninterrupted availability of commodities of state agency use" (section 163[3][b][ii] of the SFL). Such authority also explicitly extends to the purchase of services by the Commissioner of General Services and to state agency purchases of both commodities and services, pursuant to language in sections 163[4][d] and 163[10][c] of the SFL. The standard applicable to the Commissioner of General Services, in making the determination that a multiple award is required, is "to ensure the sufficient supply and variety and uninterrupted availability." Since section 163 does not set forth a standard for making a determination that a multiple award is required, other than the language cited above with respect to the purchase of commodities by the Commissioner of General Services, we believe, by implication, that this standard is also applicable to the purchase of services by the Commissioner of General Services and to the purchase of both commodities and services by state agencies, pursuant to sections 163[4][d] and 163[10][c] of the SFL.

The authority to make single awards is not accompanied by similar standards. Rather, single awards are treated by the law as the default situation – single awards are anticipated by the law, absent the unusual determination to make multiple awards, and need not be specially justified by looking at issues regarding supply, variety and uninterrupted availability.

DISCUSSION

The questions presented on this protest are:

- (1) Was the Tax determination to award to a single vendor in technical violation of SFL section 163 requirements?
- (2) Was the Tax determination to award to a single vendor contrary to the best interests of the State?
- (3) Did Allied have an unfair advantage?
- (4) Was DCS or any other vendor unduly prejudiced by the process utilized by Tax?

The single vendor determination – requirements of the State Finance Law

As discussed above, Tax need not meet a specific legal standard for its determination to make a single award as opposed to a multiple award. Rather, the determination of whether to contract with a single vendor or with multiple vendors is part of the evaluation criteria and the manner in which the award will be made. Pursuant to section 163(7) of the SFL, all such criteria, and the manner in which the evaluation will be conducted and the award of a contract made, must be stated in the Evaluation Criteria created and documented prior to the opening of bids. As a result, the Evaluation Criteria must document whether there will be a single award or multiple awards and how such award or awards will be made.² There is, however, no legal requirement that such determination must be announced in the RFP (although it certainly can be disclosed), except where such information concerning a multiple versus single award will materially affect the bidders and their bids or proposals.³ Based upon the foregoing, we must reject the DCS assertion that the determination of

² An agency might, in its evaluation criteria, in an appropriate case, leave open the possibility of a single award or of multiple awards – provided that such criteria document the objective and quantified and quantifiable basis upon which such determination will be made (e.g., a single award, except that multiple awards will be made if one or more vendors are within 1% of the price of the lowest bidder).

³ DCS claims that its bidding strategy was predicated on its reading of the RFP as contemplating multiple awards. As we discuss below, however, we do not believe that a bidder could, based upon the record of this procurement, reasonably structure its bid on the assumption that there would be multiple awards since the RFP stated the agency's intention to make a single award – while leaving open the possibility of multiple awards. A more difficult question would have been raised if Tax had chosen to go with multiple awards, and a bidder could establish that its reasonable reliance on the stated intent to make a single award materially affected its proposal.

whether to make a single award or multiple awards should have been made after all bids were opened. Further contrary to the claims by DCS, the setting of the Evaluation Criteria need not be a public event – although an agency may choose to make it so. As Tax correctly notes, such criteria become part of the procurement record.

The Evaluation Criteria may not, however, contradict the RFP or statements interpreting the RFP made at the bidders conference. Here, there was no contradiction. The RFP stated “[i]t is the Department’s intention to award one contract for the initial period of two years commencing August 3, 2000 and ending August 2, 2002, however, the Department reserves the right to award multiple contracts.” Merely reserving the right to award multiple contracts does not contradict an eventual decision to award a single contract. At the bidders conference, in answer to the question of whether Tax would consider a multiple award, it responded, “[y]es, as the (sic) indicated on Page 1 of the RFP, the Department reserves the right to award multiple contracts.” Again, reiterating that it reserved the right to make a multiple award did not contradict the eventual decision to award a single contract. As discussed earlier, however, Tax was obligated to document in the evaluation criteria, prior to the receipt and opening of the proposals, its eventual determination to make a single award, and Tax did so.

DCS alleges that the fact that the award was made to Allied makes the single contract determination arbitrary and capricious, stating that Allied “had no apparent experience prior to [the year] 2000 [in which they commenced] collecting delinquent state taxes.” The award to Allied was made in accordance with the above RFP provisions and Evaluation Criteria, as required by the law. Allied passed the pass-fail portion of the RFP by meeting the minimum qualifications that included, notably, the requirement that “the Bidder must have handled a portfolio associated with one client with a minimum value of 50,000 debtors annually and a placement value of \$250 million.” Allied had experience performing similar services as those called for in this procurement and received the highest combination of technical and cost points, as determined by the evaluation committee. Accordingly, Allied’s proposal was the best value proposal submitted, as documented in conformity with section 163(10) of the SFL.

Therefore, the determination to award to Allied as a single vendor is supported by the record and comports with section 163 of the SFL, assuming it is not contrary to the best interests of the state.

The single vendor determination – best interests of the state

When a state agency determination regarding a contract is challenged via litigation, the court must uphold the determination of a factual issue if it had a rational

basis, i.e., it was not arbitrary or capricious.⁴ The review by this Office, however, is not so narrowly confined. As DCS correctly states, the Comptroller may reject a contract that is not in the best interests of the State (see, e.g., City of New York v. State, 87 NY2d 982 [1996]). We do not employ this power lightly, however, and are reluctant to substitute our judgment for that of a state agency on factual or business matters within the expertise of such agency, where the agency's determination is not, on its face, contrary to the best interests of the state.⁵

In support of its determination to award to a single vendor rather than multiple vendors, Tax states that it received "input from our IT managers who were of the opinion that internal resources do not exist to support more than one vendor's system for this initiative. This was a decision that our IT managers are extremely well qualified to make and we did not need to reach out to the bidder pool for advice." This Office has no reason to look behind this explanation in this case. DCS has supplied us with no information that would contradict the Tax explanation. Nor are we in a position, in this case, to suggest to Tax that they increase their internal resources to allow for multiple vendors.⁶

DCS supplies a report by KPMG Peat Marwick, LLP ("KPMG") which "recommends using a minimum of two or three contractors for most debt portfolios... This ensures competition and allows the client to provide incentives to all by offering rewards to the highest performing contractors." While we are not in a position to argue this point with KPMG, its reasonable-sounding opinion does not make the action by Tax contrary to the best interests of the state. Indeed, KPMG could, reasonably, have the same opinion about any of a number of state contracts that have nothing to do with debt collection.⁷

DCS, in its submission of January 22, 2001, included a chart indicating the practices of other states in procuring debt collection services. DCS indicates that other states, when faced with a high debt portfolio, hire multiple contractors. DCS bases this

4 If the court is reviewing the determination of a legal issue, the rational basis test does not apply. Rather, the court may freely substitute its view of a legal issue for that of a state agency.

5 While recognizing that legally this Office is not required to defer to agency determinations of fact (see, Konski v. Levitt, 69 AD2d 940 (3rd Dept, 1979), aff'd 49 NY2d 850, cert den 449 US 840), as a matter of policy we believe it is generally appropriate to give deference to agency factual determinations which are reasonably supported by the record. By contrast, we will generally not give deference to agency legal determinations, particularly those concerning the interpretation of the procurement statutes.

6 That is not to say that we could not, in appropriate cases, look beyond an assertion of lack of state agency resources as a reason for an agency determination.

7 We also note that "ensuring competition" is not part of the standard discussed above for the making of multiple awards, although one might argue that the "supply and variety" standard could loosely be interpreted to include an analysis of "ensuring competition." This Office has found that competition is usually best enhanced by all competitors knowing that a single award will be made and sharpening their pencils to make the most competitive offer possible.

argument on the premise that the contract at issue is for the collection of \$700 million. However, as the RFP clearly indicates, this contract is for the initial collection of approximately \$280 million. This would place the New York contractor in roughly the same position as the contractors in two of the other states on the listing provided by DCS, who are all handling individual portfolios of roughly the same size as that which the single New York contractor would be handling. This serves to add to our inability to challenge the Tax determination as being contrary to the best interests of the state.⁸

Prejudice against DCS or any other vendor

DCS alleges that Tax prejudiced all other vendors but Allied, because had DCS (and the other vendors) known of Tax's decision to opt for a single vendor, it would have revised its proposal and bid lower fees.⁹ We disagree. While Tax did leave open the possibility of a multiple award, the RFP clearly stated that "[i]t is the Department's intention to award one contract." The statement of Questions and Answers distributed by Tax following the bidder's conference was consistent with the RFP and specifically referred to the RFP. Under these circumstances, it would, in our opinion, be unreasonable for a bidder to structure its bid on the assumption that multiple awards would be made. Furthermore, there is no evidence that Allied knew more about Tax's intentions than DCS. Although DCS had a higher technical score than Allied, Allied bid the best value by bidding lower fees, which DCS also was invited to do.

Potential advantage to Allied

DCS asserts that Allied had an unfair advantage in the bidding process because Tax had previously selected it to collect Tax's out-of-state debts, thereby giving Allied the opportunity to bring its systems and processes into alignment with Tax's systems and processes. We disagree. The evaluation committee allotted technical points based on the requirements of the RFP. If Allied had more relevant experience than any other vendor due to a prior or current contract with Tax, it would be appropriate for Allied to receive more technical points in such experience categories. It is fully reasonable for a state agency to give more technical points to a vendor with more related experience than to one with less experience.¹⁰ Notably, as stated above, regardless of the other Allied contract with Tax, DCS received more technical points

⁸ This Office has the power to perform management audits of previously approved contracts to gauge the performance of the state agencies and the contractors. If it comes to our attention in the future that this single vendor arrangement has not worked well, we could issue a report to that effect and take action with respect to future procurements.

⁹ This is even more evidence of our observation that multiple awards seem to lessen, rather than enhance, competition.

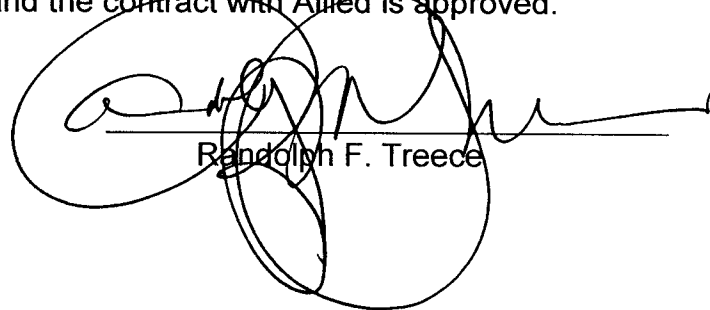
¹⁰ This is not to say that a vendor can receive a higher score for experience solely because such experience was on a New York contract – as opposed to a fully comparable contract with another state or another procuring entity.

than Allied.

All DCS had to do to win this contract was to bid a lower price than it did. Whether Allied had an advantage in pricing its bid due to the other contract with Tax is mere conjecture. Even if it did have such an advantage, we know of no law that would make a state agency reject a lower bid because the bidder offering it had previously worked on another agency contract. To the contrary, such an attempt by the state agency would be in violation of section 163[10] of the SFL, which requires service contracts to be awarded to the offerer whose proposal presents the best value. Under the circumstances, we see no undue advantage to Allied.

CONCLUSION

We find that the determination by Tax was in accord with the State Finance Law and is not, based on the evidence before us, contrary to the best interests of the state. Therefore, the protest is denied and the contract with Allied is approved.



Handwritten signature of Randolph F. Treece, written in black ink over a horizontal line. The signature is highly stylized and cursive, with large loops and flourishes.

Randolph F. Treece