

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-000844

Determination
of Bid Protest
SF- 20010277

This Office has completed its review of the Request For Proposals ("RFP"), the above-referenced 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 be non-responsible was correct, and therefore have approved the resulting contract to One Source Facility Services, Inc. ("One Source").

BACKGROUND

Facts

UB issued an RFP for custodial services for twenty-four buildings/facilities on campus. The twenty-four buildings/facilities were divided into three "clusters," Cluster I, Cluster II and Cluster III.¹ Offerers could bid on all clusters or merely on any individual cluster. Offerers were required to submit a quote for each building within a cluster. A contract or contracts would then be awarded by cluster on the basis of the "best value" to UB.

The RFP detailed the various types of custodial activities and included statements that "staffing must be at adequate levels (as determined by the University) to support the successful execution of the contract... Staffing must be sufficient, in the sole opinion of the University, to meet the frequency specifications." However, the RFP did not detail the minimum numbers of hours that an offerer must provide, in order for its proposal to be deemed responsive to the RFP. Nor, as discussed below, did the evaluation criteria developed by UB prior to the receipt of offers detail such minimum number of hours.²

The RFP established a scoring system whereby the total bid price, inclusive of

¹ Cluster III, which is the cluster at issue in this proceeding, was let out to bid because the incumbent contractor for eight of the nine buildings in the cluster had been terminated due to poor performance.

² An entity at UB, called "Custodial Services" or "University Facilities" seems to have developed a document entitled "Estimated Staffing Hours Per Week" which appears to detail an estimated appropriate staffing plan for each cluster. However, this document was stated neither in the RFP nor in the evaluation criteria utilized by the UB Evaluation Committee.

labor and supplies would receive up to 47 points; staffing “at adequate levels” would receive up to 51 points; and the quantity, type and condition of equipment per building/facility and the amount and cost of supplies for such building/facility would receive up to 2 points. The award would be based on the highest composite scores per cluster.

Pursuant to the RFP, eleven offers were received for Cluster I, including one from Pegasus; eleven offers were received for Cluster II, including one from Pegasus; and nine offers were received for Cluster III, including one from Pegasus, one from Servco Industries, Inc. (“Servco”), and one from One Source. When the points were tallied on Clusters I and II, vendors other than Pegasus had the highest scores. When the points were tallied on Cluster III, the offerer with the highest score was Servco, the offerer with the second highest score was Pegasus, and the offerer with the third highest score was One Source. However, Servco ultimately withdrew from the competition, prior to commencing negotiation of a contract.

The Pegasus proposal on Cluster III offered staffing of 1,188 hours per week. UB determined, after receipt of such proposal, that such number of hours was insufficient.³ UB also reviewed its experiences with Pegasus on previous cleaning contracts for the campus and found the quality, quantity and accuracy of Pegasus’s performance to be lacking.

UB negotiated contracts for Clusters I and II, without protest. The Comptroller approved these contracts and work pursuant to them has commenced. However, in regard to Cluster III, UB found the Pegasus proposal to be non-responsive, made a determination that Pegasus was not a responsible offerer and awarded the contract to One Source. After negotiating and signing a contract with One Source, UB 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 \$15,000 in amount before such contracts become effective. However, pursuant to an agreement between the State University of New York and the Comptroller, as provided for in Education Law, §355(5), this monetary threshold has been increased to from \$15,000 to \$75,000 for contracts entered into by the State University, where a protest has been filed.⁴ 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

³ UB states that such number of hours is “18% less than the number of weekly hours SUNY has decided is necessary to properly clean the buildings.”

⁴ Pursuant to the agreement between the Comptroller and the State University, this threshold may be as high as \$150,000, for certain contracts for certain SUNY campuses.

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: July 10, 2001, August 24, 2001, August 26, 2001, September 14, 2001; From UB, correspondence and attachments dated July 27, 2001, August 10, 2001, September 7, 2001, September 20, 2001.

Protesting Party

Pegasus is a New York corporation and one of the nine vendors which submitted a proposal on Cluster III 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 staffing requirements of the RFP and was, therefore, responsive.
- Pegasus's prior record of performance and adherence to contractual requirements was good and did not give rise to a finding of non-responsibility.
- UB, in settling prior litigation, withdrew a prior finding of non-responsibility and agreed to allow Pegasus to compete in this procurement. Finding Pegasus non-responsible now violates that settlement agreement.
- UB, in rejecting Pegasus, "is motivated by something other than an attempt to secure competent janitorial services for its buildings" and should be investigated by OSC.

Agency's Response to Protest

The UB response to the protest is as follows:

- Based upon an inadequate number of staffing hours submitted by Pegasus in its proposal, the proposal is non-responsive.
- Based upon poor prior performance and a lack of adherence to contractual requirements, Pegasus is not a responsible vendor.
- The settlement of prior litigation with Pegasus has not been violated.

Such settlement is irrelevant to this new finding of non-responsibility against Pegasus.

- The Pegasus claims of “bias” are unsupported by the facts.

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]). The term “responsible” or “responsibility” is defined, by the law, as having “the same meaning as such terms have been interpreted prior to the effective date of this article.” (SFL, §163[1][c])

DISCUSSION

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

- (1) Was Pegasus a responsive offerer?
- (2) Was Pegasus a responsible offerer?
- (3) Was the UB finding that Pegasus is not responsible a violation of the agreement settling litigation between the two parties?
- (4) Was UB motivated by bias or any other factor unrelated to the qualifications of Pegasus to perform janitorial services?

Responsiveness of the Pegasus Proposal.

As a general proposition, there are two grounds for awarding a contract to a vendor other than the apparent low bidder or the apparent offerer providing best value: (1) non-compliance with the bid specifications or (2) a finding that the bidder/offerer is not responsible.⁵ In either of these situations the lowest bid or best value proposal may be rejected and the second lowest bid or second best value proposal may be accepted (Patrick R. Brereton & Associates v Regan, 94 AD2d 886, 463 NYS2d 319

⁵ A state agency may also, for good cause, reject all bids/offers and conduct a re-bid or cancel the procurement.

[3rd Dept, 1983], *affd* 60 NY2d 807, 469 NYS2d 699; Bortle v Tofany, 42 AD2d 1007, 348 NYS2d 215 [3rd Dept, 1973]).

UB argues that the Pegasus proposal was inadequate because it did not propose to work the minimum number of hours that UB had determined were “enough to meet all of the rigorous cleaning frequency specifications in the RFP.” UB asserts that the Pegasus proposal fell short of the required minimum number of hours by 18%. The RFP, however, did not require any such minimum number of hours. Pegasus argues that all bidders should have been notified in advance of UB’s calculation of minimum hours. UB rejects this argument, stating, “[i]f that were the case, what bidder would ever be inclined to bid more hours than the published minimum?”

We are persuaded by the Pegasus argument. It is elementary that an offerer may only be found non-responsive where its proposal fails to comply with a requirement stated in the RFP. If a minimum number of hours is to be used to determine the responsiveness of offerers, then it must be stated in the RFP. Absent such specification, there is no “non-compliance with bid specifications” which would give rise to a finding of non-responsiveness. We reject UB’s argument that stating the specification would deter offerers from proposing more hours than the minimum. To the contrary, in a competitive, best value procurement, where points are awarded for both cost and technical factors, the more hours proposed by an offerer, the greater should be the technical points awarded to such proposal by the procuring agency, all other factors being the same.

Because the Pegasus offer did not vary from the specifications announced in the RFP, such offer cannot be deemed non-responsive.

The Responsibility of Pegasus

As stated above, the law is clear that a contract may not be awarded to the offerer whose proposal offers the best value to a State agency if such offerer is not responsible. The above-cited statute, however, offers little clarity on what the terms “responsible” or “responsibility” mean.

New York case law offers us clearer guidance. 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).

UB alleges that Pegasus has a record of poor performance in the previous provision of janitorial services on the UB campus very much similar to those called for in the procurement at issue. UB asserts the following:

- Under Contract C-000826, Pegasus failed to provide the amount of staff hours it had bid every single week of the contract period. For an eleven-week period in 2001, under Contracts C-000826 and C-000726, Pegasus, by its own work rosters, was 1,763.25 hours short out of 11,880 hours required by its bid (almost 15% short⁶). By UB's records, Pegasus was 3,054.25 hours short on such contracts. UB frequently advised Pegasus of the work shortages.
- Pegasus repeatedly failed to submit proper work rosters to UB, notwithstanding frequent complaints by UB. Work rosters were grossly inaccurate. They included sick or even previously terminated employees.
- Pursuant to contract, Pegasus was required to provide an Administrative Supervisor, but failed to do so.
- Over the course of its last three contracts with UB, the Pegasus performance in providing cleaning services was grossly deficient.

UB has supplied voluminous documentation of the above, including counseling memos and a detailed log of inspector's notes regarding cleaning service deficiencies.

Pegasus responds that it has been providing cleaning services to UB continuously for seven years under various contracts, and has had one contract extended as recently as September 1, 2000. It cites examples, supported by documentation, where various persons at UB indicated to them that their efforts were satisfactory and in accord with the contracts. Pegasus also asserts:

- Regarding UB's claims that it worked insufficient hours, Pegasus denies some of UB's assertions and admits others, but states that where short it was within 92% of the average weekly hours required, and that this would eventually level off when more than the average weekly hours were eventually worked in the future, i.e., that the weekly hours bid were not a minimum but an average.
- Regarding UB's claims that it submitted improper rosters, Pegasus asserts that they were submitted in the same manner for six and one-half years and that no

⁶ Pegasus responds that it was only 8% short. See Pegasus response, *infra*, this page.

- deficiency was ever made an issue by UB until recently.
- Regarding UB's allegations of poor cleaning service, Pegasus notes the following:
 - Buildings that are in constant use will never be in pristine condition and cleanliness is often a matter of opinion and judgment
 - For six and one-half years, until January 15, 2001, all feedback from UB was very positive.
 - The buildings Pegasus had to clean commencing January 15, 2001 were in a "sad state of neglect" when the contract commenced due to poor performance by a prior contractor. Pegasus could not be expected to correct in a short period of time a situation which had been allowed to occur over six months or more. Deficiency reports dated anytime near January 15, 2001 were not the fault of Pegasus.
 - Many of the deficiency reports were inaccurate or minor or not the responsibility of Pegasus.
 - Reported deficiencies became fewer over time.
 - UB staff was new and inexperienced at administering contracts. This led to deficiency reports written at the beginning or middle of shifts rather than at the end of shifts.
 - Some deficiency reports submitted by UB in this proceeding had already been withdrawn after having been deemed inaccurate by UB.

A procuring agency must be in a position to administer a contract. When all is said and done, the entity paying for services (and procuring them in the future) must set the rules and the entity providing the services must abide by the rules.

UB has set rules. UB alleges that Pegasus has failed to follow those rules. Pegasus disputes many, but not all of the UB allegations. For the reasons outlined below, it is not necessary for us to determine the accuracy of each disputed claim. Rather, for the purposes of this decision, we will assume that everything that Pegasus says on the disputed matters is true and accurate.

The rules set by UB and included in its contracts with Pegasus require that Pegasus provide the amount of staffing hours contained in the offer submitted by Pegasus. The RFP for Contract C-000826 stated, in Section IV(C)(3), "[t]he contractor will be required to maintain the staffing level as indicated in the bid."⁷ Pegasus admits violating this rule, but states that where short it was within 92% of the average weekly hours required. Indeed, it is striking that Pegasus now asserts that alleged cleaning deficiencies after January 15, 2001 were not its fault because buildings were in bad

⁷ As we held in a prior bid protest determination (SF-20000052), UB had the right to insist on minimum weekly cleaning frequencies. Having so required this minimum, it was not up to Pegasus to determine that a lesser amount was needed at times and that they would eventually live up to the agreement, in terms of average hours.

repair and it would take Pegasus months to remedy this. Pegasus makes this assertion at the same time that it tries to justify working fewer hours than bid. If a building is in bad repair, it would make sense for a contractor to work at least the hours per week bid under a contract to try to rectify the apparent problems.

Additionally, the rules, as reflected in the RFP and therefore in the contract, required that Pegasus provide an Administrative Supervisor. The RFP for Contract C-000826, in Section IV(C)(2) stated, "an administrative supervisor shall be on campus between the hours of 8 a.m. and 12 p.m. Monday through Friday to receive notices, reports, or requests from the University." Nowhere in its papers does Pegasus challenge UB's assertion that it did not provide an Administrative Supervisor.

The same rules also required that Pegasus submit accurate work rosters. The RFP for Contract C-000826, in Section IV(C)(3) stated, "[t]he contractor shall supply the University with a listing and work schedule of all custodial personnel used for the performance of work at the beginning of the contract and weekly thereafter. Upon review of this list, the University shall determine whether the planned level of staffing is adequate to fulfill the contract. The contractor shall keep the list updated and maintained on a daily basis." Pegasus admits that its work rosters included the names of sick and previously terminated employees.⁸

There are more than enough unchallenged claims on the record to justify the UB determination. Assuming for the purposes of our analysis that everything Pegasus says on the disputed matters is true and accurate, the record before us nevertheless indicates that Pegasus was not a responsible offerer on this procurement. Under these circumstances, we need not address the matters in dispute between the parties.⁹

Effect of the Settlement Agreement

Pegasus correctly notes that it discontinued litigation with UB regarding a previous procurement pursuant to a settlement agreement.¹⁰ The agreement, dated

⁸ The Pegasus excuse that these rosters were acceptable in the past and that complaints regarding them were not made until recently is irrelevant. The rosters were inaccurate.

⁹ We note, however, that we are impressed by the careful and rather voluminous documentation provided first to Pegasus, and then to us, by UB. Indeed, while some materials have been submitted going back a number of years, most of the deficiencies noted have been from January 15, 2001 forward. (Pegasus seems to believe that UB's case is weakened somehow by there being fewer complaints in previous years. From our perspective, UB's case is strengthened. Recent performance is more relevant to a contractor's responsibility than long past performance.) While Pegasus can attack many of the individual reports and logs, overall it appears that UB had substantial problems with the performance of Pegasus during this period, most of which have not been challenged by Pegasus. And as stated above, a contractor receiving such deficiency reports should be spending at least the bid amount of time on the job in an attempt to correct the problems. Pegasus chose not to do so.

¹⁰ The Comptroller was also a party to the litigation, named as a defendant by Pegasus because this Office issued a bid-protest decision upholding UB's rejection of a prior Pegasus bid on the grounds of non-responsiveness

February 6, 2001, stated:

In confirmation of our understanding reached by telephone, petitioner in the above-entitled matter will discontinue the pending Article 78 proceeding with prejudice and State University of New York will vacate its July 24, 2000, determination that petitioner is not a "responsible bidder" for purposes of the State Finance Law's services contract provisions and deem it never to have been issued. In addition, contract number A-050 for cleaning services at the University of Buffalo will be terminated and will be re-let in the very near future and Pegasus will be permitted to submit a bid, if it chooses to do so, upon the re-letting.

Pegasus also correctly notes that the procurement at issue resulted, at least in part, from the re-letting referred to in the settlement agreement. Pegasus asserts that by finding it non-responsible, UB has violated that settlement agreement and that "such conduct would support a motion to vacate the stipulation of discontinuance so that the prior proceeding could be reinstated." Regarding this bid protest proceeding, Pegasus asserts that "[t]he Comptroller should not countenance such a deceptive practice."

UB asserts that "the basis of (the prior non-responsibility determination)... was that Pegasus had filed an altered document to OSC as part of its bid protest and false sworn statement by (a Pegasus principal) to that effect as well. The basis for the most recent determination of irresponsibility, dated July 27, 2001 is entirely different: the fact that Pegasus failed to perform its contracts properly... The settlement hardly inoculated Pegasus from future findings of irresponsibility; it only removed the prior one related to the altered document. It is also important to remember that, with regard to the work rosters, this breach of the contracts occurred in the main during the 1st half of 2001 – a year after the first irresponsibility determination and even after the settlement date."

State Finance Law, Section 163, requires that a vendor's responsibility be determined each and every time a contract is awarded by a State agency. A State agency could not, via a settlement agreement, waive a requirement of the State Finance Law. Therefore, we must view the settlement agreement in the context of such law.

UB asserts that withdrawing its prior finding of non-responsibility does not "inoculate" Pegasus from future determinations regarding responsibility based upon other behavior.¹¹ Further, UB asserts that it is not relying upon the same non-

(SF-0000052). In such decision, this Office never made a determination regarding UB's finding that Pegasus was non-responsible, stating that we did not have evidence which would enable us to make a determination regarding alleged alteration of documents or fabrication of evidence.

¹¹ It is unclear whether UB is agreeing that the intent of the settlement was to memorialize its acceptance that the

responsible conduct as in the prior responsibility determination.

UB's recollection is correct. This Office is intimately familiar with the prior finding of non-responsibility. The finding was not based upon poor performance. It was limited to allegations of the alteration of documents during a prior bid protest proceeding pending before this Office.

Because this responsibility determination was based upon behavior separate and apart from the previous behavior covered by the settlement agreement, we see no deception by UB. We also note that UB is correct in stating that some of the Pegasus behavior that led to the determination of non-responsibility occurred subsequent to the signing of the agreement.

Finally, we conclude that UB's actions did not violate the provision of the agreement that stated, "Pegasus will be permitted to submit a bid, if it chooses to do so, upon the re-letting." Pegasus was not barred from submitting a bid.¹² It did submit a bid. Upon consideration of the bid and the bidder, Pegasus was found non-responsible.

UB's Motivations in Rejecting Pegasus

The Pegasus attorney asserts the following:

My client has now been advised by a state employee that there has been a preconceived plan carried out by, among others, (two employees) of UB, to have Pegasus removed as a contractor at UB; that up until September, 2000 UB's records reflect that Pegasus was sought so that one contractor could be brought on campus to provide service to all campus buildings; and that (the two UB employees) did not want Pegasus to be that one contractor. My client has also been advised that inspectors were directed to find as many deficiencies as possible in Pegasus' work. If these allegations are true, it would explain the treatment that Pegasus has received. It would also describe an intentional attempt to circumvent state bidding laws. The allegations are such

alleged misconduct did not occur, or, if it did occur that it did not constitute sufficient grounds to render Pegasus non-responsible. We note that the settlement could just as plausibly be read as simply vacating the existing determination and requiring UB to make a new determination with respect to such issues in connection with any future procurement. We need not resolve this, however, since as discussed in the text we agree with UB's position that the present determination is based upon different conduct.

¹² Indeed, under New York law, it could not have been debarred (i.e., precluded from submitting a bid), as debarment is limited to violators of Prevailing Wage laws.

as would warrant a full investigation of the practices and procedures regarding procurement of cleaning services on the UB campuses, and on behalf of my client, we ask that the Comptroller's office conduct such an investigation, as to which Pegasus will fully cooperate.

UB's attorney responds as follows:

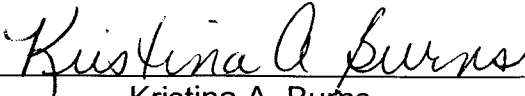
Pegasus engages in innuendo and baseless *ad hominem* accusations... [W]e are once again forced to respond to Pegasus's continuing and tiring claims of "mistreatment," racial discrimination, "subtle bias," and, now in (Pegasus's attorney's) latest letter, UB's "motivat[ion] by something other than an attempt to secure competent janitorial services for its buildings."

The UB attorney then recites a lengthy internal process that was conducted at the university to address the Pegasus claims of bias, all of which were completed prior to this bid protest proceeding. He concludes that "UB is motivated by only compliance with existing contracts that, if fully implemented, would give the University excellent service in the custodial service area, and properly match payment with service."

While we take the Pegasus allegations very seriously, we note that Pegasus has submitted no evidence to this Office in support of those allegations. A mere allegation of wrongdoing, absent any proof, will not result in our rejecting a contract. On the record before us, we find no evidence that UB actions were based on any ground other than Pegasus's performance.

CONCLUSION

Although the Pegasus offer was responsive to the RFP, UB has demonstrated that Pegasus was not a responsible offerer on this procurement. We conclude that the previous settlement agreement does not prevent UB from making this responsibility determination. The record before us yields no evidence that UB was improperly motivated in making its determination. Therefore, the protest is dismissed and the contract with One Source is approved.


Kristina A. Burns