

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by
Environmental Consultants LLC with respect to
the procurement of Wastewater Treatment
Services by the Office of Children & Family Services
Contract Numbers C022797 and D070983

Determination
of Bid Protest
SF- 20020035

May 2, 2002

This Office has completed its review of the above-referenced contracts awarded by the Office of Children & Family Services ("OCFS"), the Request For Bids ("RFBs"), and the bid protest filed by Environmental Consultants LLC ("EC"). 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 Severn Trent Environmental Services, Inc. ("STES") and the proposed contract with Valley River, Inc. ("Valley River").

BACKGROUND
Facts

On June 4, 2001, OCFS issued an RFB soliciting bids for wastewater treatment plant operation and maintenance at the following eight facilities:

- Brace Residential Facility
- Cass Residential Facility
- Goshen Residential Facility
- Great Valley Residential Facility
- Harlem Valley Residential Facility
- Highland Residential Facility
- MacCormick Residential Facility
- Red Hook Residential Facility

The RFB listed specifications for each facility operation and maintenance which included the following required activities by the winning bidder. These specifications had to be addressed in the bids. Bids that did not meet all of these specifications were disqualified.¹

¹ The RFB stated, "all bidders shall submit a detailed proposal outlining the following criteria. Only bidders demonstrating compliance with these required criteria will be considered for award. Therefore this proposal must mirror the following mandatory criteria:"

The required specifications were:

- Serve as “Operator of Record” and “Authorized Agent” and provide all necessary daily and emergency operations including the following items on this list.
- Provide a Chief Operator a minimum of 3 days per week, for a minimum of 2 hours of operation each and every day.
- Provide an Operator a minimum of 2 hours per day each and every day, except for those days that the Chief Operator is present.
- Provide all normal and emergency operational, process control and adjustments, as necessary.
Provide all sampling, refrigeration and transport, as necessary.
Provide all laboratory testing, sampling equipment, lab supplies, and all coordination and reporting thereof.
- Perform all normal, routine and preventative maintenance and record keeping/logs of all work.
- Develop and submit all Discharge Monthly Reports to the Department of Environmental Conservation (“DEC”) and others as needed on a timely basis.
Attend all DEC inspections.
- Provide copies of all inspection reports to the Facility Director and (another OCFS employee).
- Provide an annual report at the end of the calendar year and at the end of the contract term.
- Observe facility rules and security.
- Submit bi-weekly copies of all work logs, work orders (repair), and process control and progress of the plant.
- Submit monthly copies of Discharge Monthly Reports.

Additionally, the RFB notified the bidders that the successful bidder would be required, during the contract term, to accomplish the following. The bids did not need to address the following to be deemed responsive, however.²

- Perform an initial review and evaluation of each facility’s State Pollutant Discharge Elimination System (“SPDES”) permit, its Waste Water Treatment Plant (“WWTP”) process, the characteristics of each plant’s inflows and outflows, and all equipment and controls of the plant.
Include in the evaluation a description of each aspect of the plant’s process and the equipment present and a prescribed preventative maintenance schedule for each.

The RFB also required all bidders to include a listing of their recent work experience along with a list of references for such work, a completed “Bidder Responsibility

² The “mandatory” language recited in fn. 1 also appeared before this section. However, OCFS did not intend these items to be addressed in the bids and, in fact, the bidders did not address such matters in their bids. In fact, in this section of the RFB the language commenced with the words “The Contractor shall...” The intent of this seems to be consistent with the result – that the bidders need not address these matters in their bids but rather were put on notice that if they won the award(s) they would have to comply with these criteria. In future RFBs, OCFS may want to clarify this.

Questionnaire", and the bidder's most recent audited financial statements.

The RFB stated that the method of award would be lowest price per year on each facility,³ assuming that the winning bidder's bid met all required specifications and the winning bidder possessed all required qualifications. There was a potential for eight awards, i.e., one award for each facility to each of eight separate vendors.⁴

None of the facilities involved is located on a body of water which is part of the New York City Watershed. OCFS has not been a defendant in any lawsuit regarding discharges of effluent from any of these facilities into environmentally sensitive bodies of water.

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

Pursuant to the RFB, seven sets of bids were received, one set from STES, and six sets from other vendors. Three bidders were deemed non-responsive or non-responsible due to their failure to submit a required questionnaire, financial information and/or statement of experience/references. Valley River was the low bidder on Red Hook. STES was the low bidder on the other seven facilities.

OCFS signed one contract for seven facilities with STES based on its submitting the low bid prices on such facilities and one contract with Valley River based on its submitting the low bid price on the Red Hook facility, and forwarded this Office the contracts for approval. The contracts were received in this Office on October 10 and October 12, 2001. EC then formally protested to this Office the award of the contracts.

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 contracts have already been signed by OCFS, the Comptroller has reviewed this bid protest as part of his review of the contract awards.

In determination of this protest, the following correspondence/submissions from the

³ The term of the engagements, according to the RFB, is one year with the option to renew for two additional one-year periods.

⁴ Vendors were not required to bid on all eight facilities. Rather, they could, if they had wished, bid on only one facility or on more than one but less than eight facilities.

parties were considered: From EC, correspondence dated: September 17, 2001, November 6, 2001, November 21, 2001, and April 9, 2002; From STES, correspondence dated November 9, 2001, November 16, 2001, and April 18, 2002; and from OCFS, correspondence dated November 19, 2001.

Protesting Party

The protestor, EC, is the subcontractor to the incumbent vendor providing the service at the OCFS Harlem Valley Residential Facility.

ANALYSIS OF BID PROTEST

Protestor's position

The EC protest is made on the following grounds

The evaluation methodology utilized by OCFS in the RFB 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.

Agency's response to protest

The OCFS response to the protest is as follows:

- OCFS adequately set forth detailed performance standards in the RFB. Under these circumstances, an award based upon low price is in compliance with the Procurement Council Guidelines.

The procurement of wastewater treatment plant operation and maintenance services does not require prevailing wage rate compliance.

Winning bidder's response to protest⁵

The STES response to the protest is as follows

- The selection criteria utilized by OCFS 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 RFB sets specific performance standards and clearly outlines the scope of services.

Even if STES 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 Guidelines⁶. 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."

⁵ Valley River did not seek to participate in this proceeding.

⁶ These Guidelines do not have the force and effect of law, but are, rather, meant to assist agencies in conducting procurements.

DISCUSSION

The questions presented on this protest are:

- (1) Was the STES bid so unrealistically low as to guarantee non-performance, thereby amounting to a non-responsible bid?
- (2) Was the scoring methodology utilized by OCFS consistent with the law?

The STES low bid

EC argues that the STES bids were so unrealistically low (especially in regard to the Harlem Valley Residential Facility) that it all but guarantees non-performance of the services required by the contract. Its analysis suggests that STES cannot possibly profit at the bid prices, and may not be able to pay prevailing wage. Therefore, EC contends that we should consider such bids 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 evidence that the company will not be able to perform the services required. A vendor could, arguably, establish a price which is likely to result in a loss on one job to build its reputation in the state and win other jobs in the future. We know of no reason that an entity as large as STES, which appears to have world-wide operations and substantial resources, would fail to perform required services just because STES offered a bid which negates or cuts its profit margin. EC has submitted no evidence which would refute this.⁷

This Office has consistently held that prevailing wage need not be bid, although it must be eventually paid (See, e.g., SF#19970051, dated December 15, 1997; SF#19980016, dated March 24, 1998). In cases like the one before us, where a bare allegation is made that a vendor will not pay prevailing wage, we need no further proof from the vendor that it will pay what the law requires. In cases where there is more than a bare allegation, e.g., proof of prior violations of the prevailing wage law, then the procuring agency must gather further information. In this case, even though there is no more than a bare allegation, OCFS has communicated to this Office that it contacted STES and that STES submitted a statement indicating that prevailing wage would be paid to any staff engaging in activities covered by the Prevailing Wage Law. We are satisfied, under these circumstances, that the procurement record provides a reasonable basis for OCFS to conclude that STES could perform the services in question at the rate bid in its proposal without violating the provisions of the Prevailing Wage Law.

The evaluation methodology

"In awarding a contract for services, a State agency generally cannot rely solely on

⁷ We make no judgment whether it is possible for STES to make a profit based on its bid prices.

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 Procurement Guidelines (cited above) do permit, in limited circumstances, the award of service contracts on the basis of price, they permit such an approach only where qualitative and efficiency requirements have been sufficiently defined in the specifications, so that there is little room for technical variances between proposals which will have any meaningful 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 analysis⁸.

In a prior wastewater treatment services procurement at Bedford Hills Correctional Facility (SF#20010084, dated March 30, 2001), we determined, based upon the Transactive determination, that a State agency violated the law by establishing, in its RFP, a system for evaluating the bids based solely on price. That determination was based upon the facts of that procurement and reflects our conclusion that in that case lowest price did not constitute best value. The OCFS procurement, however, varies significantly from the Bedford Hills procurement. While in both procurements the specification requirements would permit a relatively wide variation in the quality of services provided, in the Bedford Hills transaction we were convinced that such variations could, and likely would, significantly impact on the value of the services to the facility and the State; whereas in this case we are satisfied that such variations will have little or no impact on the value of the services to the facilities or the State.⁹ Specifically:

- It appears that the OCFS wastewater treatment plants are relatively small and their operation is not as complex as the Bedford Hills plant.¹⁰ Therefore, they do not require the same (higher) level of technical proficiency required at the Bedford Hills plant.¹¹

⁸ We are satisfied that the Procurement Guidelines are consistent with the holding in Transactive. Indeed, in Transactive, the award, which was upheld by the court, was, in fact, made in accordance with the award criteria, on the basis of cost alone, without factoring in the evaluation of the technical merits of the proposals, since no other responsive proposal was within the “competitive range” (i.e. 10% of the low bid).

⁹ In our prior opinion (SF#20010084), referred to above, we stated, “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.” Perhaps that language was overly broad. Indeed, it is true that large and complex wastewater treatment facilities (like the one at Bedford Hills, at issue in the prior opinion) do require a significant level of technical proficiency. Smaller, less complex wastewater treatment facilities (like the ones at issue herein) require less technical proficiency and any variations in the technical abilities of responsive offerers may be of little or no significance or value to the facilities.

¹⁰ The Bedford Hills plant processes up to 500,000 gallons of wastewater per day. In contrast, the OCFS plants at issue herein process from up to 9,000 gallons of wastewater per day (at the smallest capacity plant -- MacCormick) to up to 74,000 gallons of wastewater per day (at the largest capacity plant -- Harlem Valley, whose SPDES permit allows discharge up to 1.2 million gallons per day, but only processes 74,000 gallons per day).

¹¹ As is stated below (see fn. 12), the fact that the Bedford Hills plant discharges effluent into the New York City

- The OCFS facilities are not on bodies of water that feed the New York City Watershed. In contrast, the Bedford Hills facility was located on the Broad Brook, a Hudson River tributary which feeds the Croton Reservoir System, which is a part of the New York City Watershed, and is therefore subject to new regulations that will make plant operation substantially more complex and costly to maintain as of May 1, 2002.¹²

OCFS has not been a defendant in any lawsuit regarding discharges of effluent from any of these facilities into environmentally sensitive bodies of water.¹³ In contrast, the construction and operation of the Bedford Hills facility was found by the Department of Environmental Conservation to have violated the facility's SPDES permit (resulting in a 1990 consent agreement to bring the plant into compliance), and was the subject of a federal lawsuit that resulted in a 1992 settlement agreement. Future violations which may occur at Bedford Hills could be costly to the State and, potentially, could result in dire consequences for the 9 million residents of New York City who rely on unfiltered drinking water from the Watershed.

Based upon the foregoing, we are satisfied that this situation is substantially different from that presented in connection with the Bedford Hills procurement and that OCFS validly determined this is a case where "it makes sense to boil down a best value award for services to a lowest price determination." We believe the contracting agency reasonably concluded that price is the only criterion for making the decision among responsive and responsible offerers, that quality and efficiency requirements have been sufficiently defined in the specifications, and that quality and efficiency variations between responsive and responsible offerers are not reasonably expected to have significant

watershed, which is the source of unfiltered drinking water for the residents of New York City, results in requirements that make its operation much more complex than the OCFS facilities. Additionally, STES brings to the attention of this Office information indicating that 1) unlike the Grade 4-A operator license required for Bedford Hills, the OCFS facilities are not required to possess more than a Grade 2-A license, and that 2) Bedford Hills must be staffed a minimum of 14 hours per day, as opposed to the 2 hour per day staffing requirement at the OCFS facilities.

12 This in no way diminishes the importance of protecting other state waterways and wetlands, which are not part of the New York City Watershed. However, the New York City Watershed is subject to substantially more stringent requirements under the law. 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, etc. These improvements are generally referred to as "tertiary" treatment with microfiltration or equivalent technology.

13 EC brings to the attention of this Office information indicating that 1) the NYS Department of Environmental Conservation has been critical of Harlem Valley plant operations, and 2) there was one incident of intentional discharge from what appears to be a tanker truck into a wetland. These occurrences are far different from what resulted in the heightened scrutiny under which the Bedford Hills plant operates, and the financial and other jeopardy which could attach to the NYS Department of Correctional Services if other serious mishaps occur at Bedford Hills.

financial, health or safety consequences for these projects. Accordingly, we believe it is clear that the award of this contract on the basis of the lowest price that met specifications among responsible offerers did not violate State Finance Law, Section 163.

CONCLUSION

We find that the STES bid was not so unrealistically low as to deem it non-responsible, and that the evaluation methodology employed by OCFS was in accord with the State Finance Law. Therefore, the protest is denied and the contracts with STES and Valley River will be approved by the Comptroller's Bureau of Contracts.

*OFFICE OF THE STATE COMPTROLLER
110 STATE STREET
ALBANY, NEW YORK 12236*