

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by
CAT*ASI with respect to the procurement
of a Licensing Test Administrator
by the New York State Insurance Department
Contract Number C000285

Determination
of Bid Protest
SF- 20020263

November 19, 2002

This Office has completed its review of the above-referenced contract awarded by the New York State Insurance Department ("NYSID"), the Request For Proposals ("RFP"), and the bid protest filed by Assessment Systems Incorporated (now known as "CAT*ASI"). As outlined in further detail below, we have determined that the procurement was fair and was conducted in accord with the law, and therefore the proposed contract will be approved with Experior Assessments, LLC ("Experior").

BACKGROUND

Facts

On February 8, 2002, NYSID issued an RFP in order to obtain the services of a vendor to administer insurance licensing examinations, including test development, administration, and data support, along with submission of statistical reports and data storage on behalf of NYSID.

The RFP stated that the method of award would be based on "best value"¹ taking into consideration "the most beneficial combination of qualifications, services and cost"² assuming that the winning proposal met all required specifications and the winning bidder possessed all required qualifications. Technical and cost sections would be evaluated separately, allowing a maximum of 75 technical points and 25 financial points. The bidder with the highest composite score would receive the award. The RFP sets forth the technical and cost requirements that the proposal shall contain in order to demonstrate the contractor's ability to meet these requirements.

The RFP established technical criteria which included

- The bidder's ability to make the commitment of appropriate resources so as to enable it to complete the engagement within a reasonable timeframe.
- The bidder's demonstrated comprehension of the essential issues attendant to

¹ See State Finance Law §163(1)(j) (defining "best value" as the "basis for awarding all service contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers").

² The lower the cost to the applicant, the more cost points a vendor would receive.

this engagement, as stipulated in the submitted proposal.

- The bidder's demonstrated level of competence in, and understanding of, the appropriate field of expertise for which it is being engaged.
- The ability of the staff assigned to this project to make themselves available for meetings with the Department's representatives.
- The ability of staff to communicate effectively.
- The expertise of the staff available for this project.
- Time lines for completion of the project.
- Additional options.³

The RFP established cost requirements which instructed the bidders to include in their proposals:

- Fee schedule for a contract period of five (5) years, as listed in Appendix D⁴
- Specifications and discussion on any other fees relating to special services
- Details of any differential pricing, if applicable
- Details of any future price increase for any contract year where the submitted price is not fully guaranteed
- Cost or fee charges for both partial fingerprints and fingerprints of both hands
- Cost or fee charges for providing test center photo of candidates, including methods to be used
- Cost or fee charges, if any, for providing any daily testing option

In addition to the evaluation criteria identified in the RFP, NYSID developed, prior to the receipt of the bids, a methodology for evaluating the bids based on both technical merit and cost per year.

Pursuant to the RFP, two proposals were received, one from CAT*ASI, and one from Experior. NYSID determined that the Experior proposal offered the best value, and awarded a contract to Experior.

NYSID signed the contract with Experior on May 17, 2002 and then forwarded the contract to this Office. CAT*ASI then formally protested to this Office the award of the contract to Experior.

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 before such contracts become effective.⁵ As a contract has already been signed by NYSID, the Comptroller has reviewed

³ These options included a statement of how the vendor would adapt to alternative photo processing.

⁴ Appendix D is a list of required price quotes from the vendor over a five-year period, in every category that could result in costs to the license applicants.

⁵ This is a procurement contract, not a revenue contract, even though the applicants and not the State pay for the services provided. Unlike a revenue contract, the purpose of this contract is not to raise revenue but to provide a service needed

the bid protest by CAT*ASI as part of his review of the contract award.

In determination of this protest, the following correspondence/submissions from the parties were considered: From CAT*ASI, correspondence dated: July 16, 2002, August 15, 2002, August 30, 2002, and September 20, 2002; from NYSID, correspondence dated August 22, 2002 and October 29, 2002; and from Experior, correspondence dated November 7, 2002.

Protesting Party

The protestor, CAT*ASI, is one of two vendors who submitted a proposal in response to the RFP, and is the incumbent vendor providing the service for NYSID.

ANALYSIS OF BID PROTEST

Protestor's position

The CAT*ASI protest is made on the following grounds:

- NYSID did not provide CAT*ASI with a proper debriefing, thereby hindering CAT*ASI in its ability to adequately detail a protest.
- The NYSID Evaluation Committee did not properly apply the evaluation criteria established in the RFP when it developed the more specific evaluation methodology to utilize in the evaluation of the proposals. This was misleading to the vendors who submitted proposals and relied on the criteria announced in the RFP.
- The evaluation methodology used by NYSID in evaluating the proposals was not fair, objective or proper.
- The evaluation methodology developed by NYSID was not correctly applied.
- In particular, the analysis of the cost of the proposals was flawed, because the evaluation methodology did not factor in the entire cost to the applicants. In reality, the Experior proposal was more costly than the CAT*ASI proposal and, therefore, if, indeed, the technical merit of both proposals was equal, did not constitute best value.

Agency's response to protest

The NYSID response to the protest is as follows:

- NYSID provided a full and fair debriefing.
- NYSID properly applied the evaluation criteria established in the RFP, both in

by the State. Additionally, it should be noted that the application fee is paid only to the vendor and no part of it accrues to the State.

developing the specific evaluation methodology to be utilized in the evaluation of the proposals, and in the actual application of such methodology.

- The evaluation methodology used by NYSID in evaluating the proposals were fair, and the “weighting” of cost and technical points was objectively based on statistics gleaned from the prior history of this program.
- The Experior proposal was less expensive than the CAT*ASI proposal. Therefore, even though both proposals were scored virtually equally in terms of technical merit, the Experior proposal represented the best value.⁶

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.⁷ 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.⁸

The SFL also requires that “[w]here the basis for award is the best value offer, the state agency shall document, in the procurement record and in advance of the 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.”⁹

SFL section 161 establishes a “State procurement council,” which is empowered to “...establish... guidelines concerning state procurement...”¹⁰ Pursuant to this authority, the council has established “Procurement Guidelines.” Section 7(VI)(2) of the Procurement Guidelines states that after the agency makes the award, “[d]ebriefings... should be offered....”

DISCUSSION

The questions presented on this protest are

- (1) Was an adequate debriefing provided to CAT*ASI?
- (2) Did NYSID properly apply the evaluation criteria established in the RFP

⁶ CAT*ASI’s in its cost proposal included alternative fees for photographs. In a footnote CAT*ASI stated, “No charge if taken with exam, otherwise fee applies for photo only.” Experior did not include a separate charge for photos in any circumstance. Since the cost evaluation methodology did not provide for alternative fees and since NYSID determined that CAT*ASI’s proposal was unclear regarding which of the two fees was to be applied, NYSID, in calculating the total cost of the CAT*ASI proposal, applied the higher fee in all cases, and, therefore multiplied the higher fee by 25,523, the number of annual test sessions. Ultimately, this higher fee resulted in CAT*ASI’s proposal being more expensive.

⁷ SFL §163(10).

⁸ *Id.* §163(1)(j).

⁹ *Id.* §163(7).

¹⁰ *Id.* §161(2)(d).

when it developed the more specific evaluation methodology and was the methodology established prior to the submission of the proposals?

(3) Was the evaluation methodology used by NYSID in evaluating the proposals fairly and objectively developed? Was such methodology correctly applied?

(4) Was the actual cost of both proposals properly determined?

The Debriefing

A debriefing is not expressly required under the SFL. However, as stated above, Section 7 (VI)(2) of the Procurement Guidelines advises that a debriefing should be offered. Therefore, in general we would be disinclined to approve a contract where a debriefing has been requested, unless and until the requested debriefing has been provided. Accordingly, we will determine whether an adequate debriefing was provided to CAT*ASI.

A telephone debriefing was conducted on August 9, 2002. CAT*ASI asserts that NYSID did not provide specific information necessary to provide an adequate debriefing. NYSID disagrees. However, in response to CAT*ASI's assertion of an inadequate debriefing, NYSID wrote a letter to this office dated August 22, 2002, with a copy to CAT*ASI, which provided information and answers to the questions and alleged inadequacies asserted by CAT*ASI. In particular, NYSID explained:

The selection criteria were comprised of the overall proposal including the extent to which the bidder met the functional description as defined in section 1-A of the RFP, the relevant experience and qualifications of the bidder and personnel to be assigned to the project, and the ability of the bidder to meet deadlines.

- References were not contacted¹¹
- The scores in the technical evaluation were equal and therefore the award, which was a combination of the technical and financial determinations, was essentially resolved by the cost proposals.
- To determine an annual cost, the cost in each category was multiplied by the actual number of tests that were taken last year for that category or NYSID's best estimate of the number of occurrences that would occur annually.
- Some categories listed in the Fee Schedule were, as part of the development of the evaluation methodology, determined to be insignificant prior to the receipt of any bids based on the number of occurrences the prior year and therefore did not become part of the evaluation.¹² These categories were:
 - Reinstatement/reschedule fee: late cancellation/ missed appointment (both electronic and paper and pencil sessions)
 - Fee to accept credit card as payment
 - Fee for providing copies of sample practice tests
 - Fee to provide duplicate or replacement score reports
 - Fee to hand score answer sheets to verify computer produced score

¹¹ We note that the RFP required that references be provided but neither the evaluation criteria listed in the RFP, nor the evaluation methodology established prior to the receipt of bids, stated that the result of the references would be scored.

¹² This is discussed in greater detail in Fn. 18, *infra*.

- reports
 - Fee to test for NYS licenses at out-of-state test locations
 - Fee for special arrangements (disabilities, English as second language)
- If there was more than one way of accomplishing a service that did not have a specified method, it was up to the bidder to specify which method it was proposing and whether it best meets the technical and cost requirements in the awarding of a bid.

The level of detail provided in this debriefing cannot, in our opinion, be said to violate the Procurement Guidelines.¹³

Conflicts Between The RFP And The Evaluation Methodology

As previously noted the RFP established both technical criteria and cost requirements, the details of which are stated above (*supra*, pp. 1 and 2). In addition, as required by SFL §163 (7), and as outlined below, NYSID established the specific evaluation methodology, including technical factors and cost factors and the manner for combining cost and technical factors prior to the initial receipt of the bids.

Technical Factors

The evaluation methodology used to score the technical proposals contained five categories¹⁴ which evaluated the following:

- The overall view of proposal¹⁵
- The extent to which bidders meet the functional description as defined in section 1-A of the RFP¹⁶
- The proposal's clarity, explicitness, completeness, and reasonableness
- The relevant experience and qualifications of the bidder and personnel to be assigned to the project including the bidders financial stability and integrity as well as their ability to successfully complete projects of similar scope and

13 CAT*ASI also asked NYSID for a copy of the Experior proposal. NYSID refused. Litigation ensued. The New York County Supreme Court agreed with CAT*ASI that the proposal could not be shielded from such a request solely on the basis that the contract had yet to be approved. However, it is not yet clear whether 1) the Attorney General will appeal the decision on behalf of NYSID, or 2) NYSID can make the case that all or part of the Experior proposal is proprietary or contains trade secrets. In any event, the failure to provide a copy of Experior's proposal would not violate the Procurement Guidelines – since those guidelines specifically state that the debriefing need only relate to the offerer's own proposal. CAT*ASI very recently contacted this Office and requested that this bid protest determination be delayed until CAT*ASI receives the Experior proposal. We cannot agree to such delay, in light of the fairly extensive exchange of information that has already occurred among the parties and the careful audit of the entire procurement record that has been conducted by this Office.

14 Categories 4 and 5 are the same.

15 As set out in Section 7.1 of the RFP.

16 Section 1-A of the RFP details the contractor's responsibilities.

Cost Factors

The RFP established specific cost requirements, listed in Appendix D, the details of which are stated above (*supra*, p. 2.) The evaluation methodology utilized the same Appendix D cost requirements, with the exceptions listed above (*supra*, p.5).¹⁸

Combined Scoring Methodology

Technical factors were allotted 75 points and cost factors allotted 25 points and the award would be made to the proposal receiving the highest combined points.

We see no conflict between the RFP and the specific evaluation methodology.

Fairness Of The Evaluation Methodology

This Office has fully audited the procurement record herein and has found that the evaluation methodology was correctly applied to the proposals. However, CAT*ASI claims that the evaluation methodology was unfair, as not truly representing the actual cost to applicants, nor the actual technical merit of the proposals. NYSID disagrees.

Under the Procurement Stewardship Act, the procuring agency is responsible for the development of the evaluation methodology. NYSID has offered a satisfactory explanation, that the evaluation categories (both cost and technical) and the "weighting"¹⁹ of such categories, were objectively developed, based upon statistics reflecting prior testing usage.

CAT*ASI has offered no evidence that would overcome NYSID's position, in light of NYSID's expertise and familiarity with its own statistics. Therefore, we cannot say that the evaluation methodology was unfair in its development or application.

17 As set out in section 2 of the RFP.

18 We note that some of the cost categories originally listed in the RFP were not considered during evaluation. Rather, prior to the receipt of the bids, NYSID made a determination that these categories had an insignificant number of occurrences in the previous year and, therefore, scoring them would not be relevant to the determination of "best value." We would prefer, in the future, that NYSID score all categories listed in the RFP. Here, however, we note that even if these categories had been scored, the result would not have changed because in each category that was omitted CAT*ASI had an equal or higher proposed cost than Experior.

19 NYSID prefers to refer to this as development of a multiple to apply to various proposal elements recorded on a matrix.

Cost of CAT*ASI proposal versus cost of Experior proposal

CAT*ASI asserts that, even if the evaluation methodology was not in material conflict with the RFP and was correctly applied, it ignored elements of cost that were necessary to determine the actual cost to the license applicants, and that Experior's proposal was actually more costly than CAT*ASI's proposal. If true, because Experior and CAT*ASI were virtually tied on technical merit, then the proposal of CAT*ASI and not Experior would be the best value.

In particular, CAT*ASI has obtained a copy of a document entitled "New York State Insurance Department Licensing Information Bulletin For Licensing Examinations October, 2002 and Later " "Published by Experior" (the "Bulletin"). The Bulletin was apparently intended as a registration form for candidates who wish to take the licensing examinations. It lists the examinations for which candidates may register, and the fees to be charged by Experior for such examinations.

CAT*ASI, in analyzing this Bulletin, and comparing the fees listed thereon to the fees it charges, asserts that Experior's proposal is more costly. In particular, CAT*ASI asserts that:

- Pursuant to the Bulletin, Experior charges an additional \$5.00 fee for non-electronic walk-in registrations as well as telephone or facsimile registrations, whereas CAT*ASI imposes an extra fee only for walk-in registrations. CAT*ASI states that it fears that NYSID inappropriately factored in to the CAT*ASI cost evaluation an extra fee for registrations by telephone or facsimile, even though CAT*ASI does not charge such fee.
- Experior does not charge for only a single test when candidates take certain tests in tandem. In contrast, CAT*ASI asserts that it (CAT*ASI) does, in fact, charge for only a single test in such circumstances.
- Experior does not intend to fingerprint candidates, and that if fingerprinting was not required then its costs should not have been evaluated.

Based upon our review of the assertions of CAT*ASI concerning the Bulletin²⁰, the responses of NYSID and Experior, and our review of the procurement record and the contract, we find the following:

- Costs for non-electronic registrations (walk-in, telephone and facsimile registration) were grouped together on the cost bid sheet. NYSID, upon reviewing the bids, fully accounted for such costs in the evaluation. CAT*ASI's assertion, after the fact, that it charges only for walk-in registrations but nothing for telephone or facsimile registrations, was not contained in CAT*ASI's bid. Additionally, even if we accept

²⁰ We note that NYSID states that this Bulletin "is not the draft document that Experior has submitted to the Department for approval as part of the contract negotiations and we have never seen the document in that form before." For the sake of this discussion, however, we will assume that the Bulletin does, in fact, correctly reflect the intended policy and practice of Experior.

that CAT*ASI intended the additional fee to apply only to walk-in registrations, this would not change the result of the procurement evaluation – since Experior still would have the lower cost proposal, and therefore the best value proposal.²¹

The RFP was not entirely clear as to the treatment of tests taken in tandem, although the existing practice has apparently been to impose only a single charge in those cases where NYSID permits the test to be taken in tandem. Experior has indicated that its practice, like that of CAT*ASI, is, and will be, to impose only a single charge where the state licensing agency determines that two tests may be taken in tandem and an applicant, in fact, chooses to take such test in tandem. Neither of the bidders' proposals is inconsistent with this practice. Therefore, NYSID's scoring of the cost proposals in this respect was proper.

- The RFP did not specify that fingerprinting would be required, although it did require the bidders to identify the costs for fingerprinting. Both CAT*ASI and Experior indicated in their proposals that they will provide and charge for any required fingerprinting. Thus, both bidders are bound by their proposals to provide such service, if required by NYSID. Experior stated in its response that, if NYSID requires fingerprinting, Experior will provide it at a cost equal to or less than the fee it bid. Additionally, if fingerprinting had not been scored, the outcome of the procurement would remain the same because our audit indicates that the price charged for fingerprinting by CAT*ASI is lower than the price charged by Experior. Therefore, including this cost in the evaluation served to raise the score of CAT*ASI, and deleting it from the evaluation would lower a revised score of CAT*ASI and raise the revised score of Experior.

Therefore, nothing asserted by CAT*ASI regarding the Bulletin and its contents would persuade us that Experior's ultimate performance of the contract would contradict its proposal or should require a downward scoring of its proposal. Nor has CAT*ASI offered any other evidence that would challenge the propriety of NYSID's cost evaluation methodology or its application. As with technical scoring discussed above, NYSID has offered a satisfactory explanation that the cost evaluation categories were objectively

²¹ The evaluation methodology provided for the additional fee for walk-in, telephone and facsimile registrations to be multiplied by 1100 (the estimated combined total of all non-electronic registrations). The 1100 number was not broken down between walk-in, telephone and facsimile registrations. However, even if we assume that the entire number of the 1100 figure relates to walk-in registrations (the most favorable assumption for CAT*ASI) and therefore totally eliminate this charge for CAT*ASI, Experior would still have the lower total cost.

developed, based upon statistics reflecting prior testing usage.

CONCLUSION

We find that the procurement process followed by NYSID was fair and in accord with the law. Therefore, the protest is denied and the contract with Experior will be approved by the Comptroller's Bureau of Contracts.

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