

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by
CPS Armor Inc. with respect to the procurement
of Armored Car Services
by the New York State Department of Motor Vehicles
Contract Number C000564

Determination
of Bid Protest
SF- 20030075

August 12, 2003

This Office has completed its review of the above-referenced contract awarded by the New York State Department of Motor Vehicles ("DMV") and the bid protest filed by CPS Armor Inc. ("CPS"). As outlined in further detail below, we have determined that DMV appropriately disqualified CPS after determining that CPS was not a responsible vendor, and therefore the proposed contract will be approved with Patriot Courier Services, Inc. ("Patriot").

BACKGROUND

Facts

In April 2001, DMV commenced a procurement for armored car services. Bids were to be submitted no later than May 15, 2001. Bids were opened on May 17, 2001. On June 6, 2001, DMV notified the incumbent vendor, CPS, which had been performing such services since 1995 pursuant to Contract Number C000433, that it was not a responsible vendor and therefore could not compete for the award.

DMV's determination followed allegations that a subcontractor or assignee of CPS on C000433, Gibson Armored Service ("Gibson"), had been responsible for DMV suffering losses of funds on January 22, 1998 and May 28, 1999. DMV, as is further outlined below, held CPS responsible for the actions of Gibson. Therefore, DMV awarded the contract to Patriot.

CPS protested this determination to DMV. DMV determined that, in accordance with principles of due process, it would give CPS an opportunity to consider the details of the DMV assertions and to respond to those details, prior to issuing a final determination on this matter.

By letter dated December 19, 2001, DMV provided such details to CPS. By letter dated January 14, 2002, CPS responded to the DMV assertions. By memorandum dated January 28, 2003, DMV rendered a final determination, finding once again that CPS was not a responsible vendor.

By letter dated March 24, 2003, CPS appealed this DMV final determination to the Office of the State Comptroller ("OSC"). On May 14, 2003, DMV forwarded to OSC a contract with Patriot for our approval.¹

Because the protest pre-dated our receipt of the contract, we offered CPS the opportunity to supplement its protest with a further submission. CPS turned down our offer; informing us via telephone that it believed its March 24, 2003 submission was sufficient.

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. As a contract has already been signed by DMV, the Comptroller has reviewed the bid protest by CPS as part of his review of the contract award.

In determination of this protest, the following correspondence/submissions from the parties were considered: From CPS, correspondence dated: August 1, 2001; October 22, 2001; January 14, 2002; February 24, 2003; and March 24, 2003; from DMV, correspondence dated June 6, 2001; October 10, 2001; December 19, 2001; January 28, 2003; March 6, 2003; and March 18, 2003; the Complaint of the New York Attorney General in the action entitled State of New York v. Consolidated Payroll Services, Inc., et. al.; and the Answer of certain of the Defendants (including CPS) in the same action.

Protesting Party

The protestor, CPS, is one of six vendors who submitted a proposal in response to the Invitation for Bids (IFB), and was the incumbent vendor providing the service for DMV prior to the procurement in question.

ANALYSIS OF BID PROTEST

Protestor's position

The CPS protest is made on the following grounds:

DMV agreed to the arrangement between CPS and Gibson, whether it is a subcontract or an assignment, by renewing contracts with CPS with full knowledge of the subcontract/assignment to Gibson.

¹ Patriot was, according to DMV, the lowest responsive and responsible bidder on the procurement. It appears that DMV has been utilizing Patriot to perform the Services, without a contract approved by the Comptroller, since 2001.

- If Gibson's licensure or bonding was deficient, DMV should have notified CPS of this fact immediately and cannot assert it after alleged wrongdoing by Gibson.
- The alleged loss of funds occurred in 1998 and 1999, but DMV continued to do business with CPS until 2001, demonstrating that DMV continued after the loss to consider CPS a responsible bidder.
- DMV has done nothing to substantiate that Gibson was responsible for the loss. The litigation commenced by the Attorney General has not yet been concluded and therefore there is no authoritative decree to the effect that Gibson was responsible for the loss.

Agency's response to protest

The DMV response to the protest is as follows:

- CPS violated the Contract, when it "assigned" its Contract or "sub-contracted" services under the Contract to Gibson, without the express written permission of DMV.
- CPS is responsible for the conduct of Gibson. Gibson's actions or inactions resulted in the loss of \$240,906.66.
- CPS subcontracted with or assigned its contract to Gibson, a company which apparently posted a fraudulent bond and which was not licensed by the NYS Department of State as an armored car service at the time of the loss.

Applicable Statutes and Guidelines

The requirements of competitive procurements are set forth in SFL Section 163, which provides that contracts for services shall be awarded on the basis of "best value" from a responsive and responsible offerer.² The requirements for prior approval by the State of the assignment or subletting of a contract are set forth in SFL Section 138, quoted below.

DISCUSSION

The questions presented on this protest are:

- (1) Did CPS violate the Contract and SFL Section 138 by

² SFL §163(10). "Best value" is usually determined by weighing a combination of cost and technical factors following the issuance of a Request For Proposals ("RFP"). However, where, as here, the technical criteria can be so exactly specified that there is no meaningful technical difference among bidders, best value can be equated with price alone and the services may be procured using an Invitation For Bids ("IFB"), with the award being made to the least expensive responsive and responsible bidder. That is why we refer herein to "bidder" instead of "offerer."

assigning/sub-letting its contract to Gibson without necessary approvals? If so, does this violation rise to the level of non-responsibility?

- (2) Is CPS responsible for the actions of Gibson which allegedly resulted in a loss by DMV of \$240,906.66, and if so, do Gibson's actions justify a finding that CPS is non-responsible?

Assignment/Sub-letting of Contract from CPS to Gibson

SFL Section 138 states, in relevant part, as follows

A clause shall be inserted in all... contracts hereinafter made or awarded by the state... prohibiting any contractor, to whom any contract shall be let, granted or awarded... from assigning, transferring, conveying, sub-letting or otherwise disposing of the same, or of his right, title or interest therein, or his power to execute such contract to any other person, company or corporation, without the previous consent in writing of the department or official awarding the same.

The statute continues, stating that if such assignment, sub-letting, etc. occurs without the previous written consent of the department, the department shall revoke/annul the contract; the state shall be relieved from any liability under the contract; and the assignee/sub-lettee shall lose all moneys earned under the contract (except for wages payable to employees).

The contract between DMV and CPS included the "non-assignment clause" required by the above section of law.

DMV refers to the arrangement between CPS and Gibson as an "assignment." Our records indicate otherwise. CPS has remained the payee of the contract. The State has no relationship with Gibson. The arrangement appears to be a subcontract.

However, in light of the language of the statute and the contract, it may not matter whether the arrangement between CPS and Gibson is an assignment or a subcontract. Case law has consistently interpreted the term "sub-letting," as used in Section 138 (and in the nearly identical language of General Municipal Law Section 109), to mean "subcontracting" of the entire contract or a substantial portion thereof, so that the primary contractor does not perform it.³ Therefore, to determine whether the statutory language and contractual "non-assignment clause" apply, we would need to ascertain whether CPS subcontracted a "substantial portion" of its contract

³ See Ocorr & Rugg Co. v. City of Little Falls, 77 A.D. 592 (4th Dept, 1902), aff'd 178 N.Y. 622; Lane Construction Corporation v. Winona Construction Corporation, 49 A.D. 2d 142 (3rd Dept, 1975).

with DMV to Gibson

Gibson performed the services required of CPS, at least on the "routes" involved in this dispute. It does not appear that CPS retained any portion of the required services on such routes for itself. CPS, in its Answer to the Attorney General's Complaint, admits that it "subcontracted part or all of the duties and obligations of the Contract to Gibson." CPS also admits that it "did not obtain written consent from" DMV prior to this subcontract. Therefore, it is reasonable to conclude that the statutory and contractual non-assignment language does apply in this case.

Even if such language were applicable, DMV might have waived at least some of its ability to enforce it. The same line of cases cited above regarding subcontracting also state that where the State or municipality knows about a subcontract, and allows the subcontractor to proceed to provide goods and services, it has waived objection under the law to the payment of the subcontractor that could otherwise be asserted based on the arrangement not receiving prior approval.⁴

While CPS admits to subcontracting "some or all" of its obligations without DMV's consent, it further argues that DMV agreed to the arrangement between CPS and Gibson by renewing contracts with CPS with full knowledge of the subcontract to Gibson. DMV does not deny that it knew about the Gibson involvement as a subcontractor (see, e.g., DMV's correspondence of December 19, 2001 which affirmatively admits that DMV knew of the arrangement between CPS and Gibson since 1996).

Therefore, in accord with case law, DMV could not now assert CPS's violation of the statute and of the non-assignment clause in the Contract as legal authority to refuse payment to CPS and/or Gibson. That does not mean that both the contract and the statute may not have been violated. Nor does it mean that DMV cannot assert such alleged violations in determining the responsibility of CPS.

We do not approve of CPS utilizing the services of an un-approved subcontractor. However, we do not believe CPS's failure to obtain DMV's prior approval where such conduct was mitigated by the fact that DMV knew that Gibson was the subcontractor and did not object, by itself justifies a finding of non-responsibility. As stated below, however, CPS is liable for its choice of Gibson as a subcontractor, and may have a heightened liability because CPS did not seek the prior approval of the State.

⁴ The Court in Qcorr stated, "A party may not, with full knowledge of all the facts, have the benefit of work done and materials furnished by a subcontractor without objection, and then urge as an excuse for not paying for the same that the sub-contract was not consented to by him." 77 A.D. at 608. See also A. & J. Buyers, Inc. v. People, 54 Misc 2d 995, aff'd 30 A.D. 2d 775 (4th Dept, 1968), rev'd on other grounds 25 N.Y. 2d 265.

CPS's Responsibility for Gibson's Actions

DMV alleges that Gibson is responsible for the loss of \$240,906.66. This matter is being litigated. CPS denies the State's allegations that Gibson was responsible for the loss.

Ultimate liability for such loss is currently in litigation. ⁵ We need not determine whether Gibson is responsible for the loss, in light of the following:

- The Contract makes it clear that CPS is responsible for all performance under the Contract. CPS assumes all risks of liability and must provide adequate insurance against losses.
- CPS chose Gibson as a subcontractor without prior approval of the State. The State had no opportunity in a formal approval process to determine Gibson's credentials.
- DMV asserts, in addition to the claim of misappropriation of funds, that Gibson did not have the required license and posted a fraudulent insurance bond. Rather than denying these assertions, CPS merely responds (in its correspondence dated February 24, 2003) that it "requested all of the required documents from Gibson" and that "if the documents were fraudulent, DMV had the obligation of notifying our client."

Thus, it is undisputed that Gibson was not fully licensed or insured. CPS as the prime contractor is responsible for assuring that it, and its subcontractor, are in full compliance with all contractual requirements, especially those designed to protect the State. Even in the absence of any actual loss resulting from such deficiencies, CPS's use of a subcontractor without the required license and bonding put the State in peril and in our judgment, justifies DMV's finding of non-responsibility. This is particularly true where, as here, CPS did not obtain the consent of the State to the assignment.

⁵ The fact that such issue is in litigation would not preclude the Comptroller from concurring in DMV's finding of non-responsibility based upon Gibson's responsibility for the loss, if the Comptroller was satisfied that the record justified such finding. We need not make such determination, however, since as noted in the text, we believe that CPS use of an unlicensed and un-bonded subcontractor to perform a substantive portion of its contract with DMV would justify DMV finding CPS non-responsible even if there had been no loss.

CONCLUSION

We find that DMV had justification for disqualifying CPS after determining that CPS was a non-responsible vendor. The record herein supports DMV's determination that CPS was not responsible in its selection and monitoring of its subcontractor, Gibson. Pursuant to SFL Section 163, the State cannot do business with a non-responsible vendor. Therefore, the protest is denied and the Comptroller's Bureau of Contracts will approve the contract with Patriot.