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STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

March 29, 2004

Allen L. Weintraub, Esq.
333 Mamaroneck Ave. #239
White Plains, NY 10605

Re: NYS Office of Children and Family
Services Commission for the Blind and
Visually Handicapped Business
Enterprise Program - IFB for Automatic
Vending Machine Service IFB #1303
SF-20030345

Dear Mr. Weintraub:

This letter is written in response to your correspondence dated December 11, 2003, on behalf of your client Answer Vending, Inc. ("Answer"), protesting the NYS Office of Children and Family Services Commission for the Blind and Visually Handicapped Business Enterprise Program's ("Commission") contract award to Mycor Services ("Mycor") for certain automatic vending machine services. As set forth in further detail below, we have determined that the grounds advanced by the protest are without sufficient merit to warrant the rejection of the contract. As a result, we hereby deny the protest and are today approving the contract award by the Commission to Mycor.

Background

On September 29, 2003, the Commission issued Invitation For Bids #1303 ("IFB") for automatic vending machine services for certain United States Internal Revenue Service locations in Holtsville, New York for a three year period. The bids for such services were due by October 23, 2003. The contract award was to be made to the responsive and responsible bidder offering the highest bid amount (IFB, Section IV). Answer, the incumbent vendor, submitted a bid of \$318,600.00 for the three year period. Mycor submitted a bid of \$335,999.88 for the three year period. On the bid opening date of October 23, 2003, the Commission made a contract award to Mycor. By letter dated November 5, 2003, Thomas Murn, President of Answer, contested to the Commission its award to Mycor for the following reasons: (i) Answer's "close proximity" to the location, as compared to Mycor's location "a minimum of 2 1/2 hours away"; (ii) Answer's increased sales due to its "advanced computer handheld software system that tracks each product individually" and its "impeccable commission payment history"; and

(iii) Answer's "demonstrated responsibility and reliability". By letter dated November 18, 2003, the Commission denied the protest, stating that in accordance with "Section IV of the IFB, the award was made to the highest responsive and responsible bidder" and since Mycor's bid was the highest bid received, the Commission would "go forward with the awarding of this contract to Mycor Services". The contract between the Commission and Mycor was submitted to this Office for review and approval on December 2, 2003. By letter dated December 11, 2003, Answer protested the Commission's award to Mycor to this Office ("Answer Protest").

In reviewing the issues raised in the Answer Protest, in addition to the correspondence between the parties regarding the protest Answer filed with the Commission, this Office also considered the following documents: Commission's December 15, 2003 response to the Answer Protest; Answer's December 18, 2003 reply to the Commission's response; Commission's correspondence dated December 22, 2003; and Answer's correspondence dated December 30, 2003.

Answer's Position

It is the position of Answer that the IFB contained an inflated and inaccurate annual vending sales figure and such figure compromised Answer's ability to bid properly. In addition, Answer asserts, upon information and belief, that Mycor would not be able to place and service the vending machines by the start dates set forth in the IFB.

Commission's Position

It is the position of the Commission that the IFB clearly articulated that the sales figure was an estimate and that in a letter accompanying the IFB noted that there would be an increase of more than 580 employees at the site, justifying an increase in the sales figure listed by the incumbent vendor (Answer). With respect to any delay in the contract start date, the Commission states that since the delays were beyond the control of the concessionaire, the Commission has authority to extend the agreement start and end dates so as to provide a full thirty-six month term of service.

Sales Figures Set Forth in the IFB

Section (3) of the IFB, entitled "Estimated Annual Sales", provides that:

The estimated annual sales for the above location, July 1, 2002 - June 30, 2003, total \$361,277. This estimate is based on sales as reported by the current vendor, and it has not been independently verified by The Commission. Each bidder is expected to visit the location to independently estimate the value of the business available . . .

Analysis

Initially, we note that we cannot agree with the suggestion by the Commission that any error in the amounts contained in the IFB could not be material. In reaching this conclusion we note the following:

- (i) while the IFB stated that the \$361,277 figure for sales during the July 1, 2002 - June 30, 2003 period was "estimated" the IFB also stated that such estimate was "based on sales as reported by the current vendor"; while the IFB suggested that each bidder visit the location to independently estimate the value of business, it is equally clear that the sales of the current vendor would be a major consideration in the preparation of a bid; and while the IFB did disclose that there would be an increase of 580 employees at one location, we are satisfied that a reasonable bidder would project an increase in sales over the actual sales figure for the base period utilizing the projected increase in the number of employees , and would then base its bid upon this higher figure.

Furthermore, we are satisfied that Answer, as the incumbent would be placed at a disadvantage to the extent that the IFB contained inaccurate sales figures. In reaching this conclusion, we note that it is obvious that the other bidders would have been placed at a disadvantage if the sales figures in the IFB had understated the actual sales figure, since Answer could have submitted a higher bid based upon knowledge only it as the incumbent, had. Similarly, Answer, as the incumbent, would be placed at a disadvantage through the inclusion in the IFB of a sales figure that overstated the actual sales. Specifically, in such situation, the other bidders could structure their bids based upon the inaccurately high figures (and presumably could disavow their bid or void their contact when the error was discovered); whereas Answer, as the incumbent, would reasonably have to base its bid upon the actual (lower) sales figures since it might be deemed to have knowledge of the inaccurate figure (and would therefore have a difficult time disavowing its bid or attempting to void its contact based upon the inaccurate figure).

Based upon our review of the protest, we would be compelled to uphold the protest to the extent that we were satisfied that: (i) the IFB overstated the actual sales figure; (ii) Answer took reasonable steps to advise the Commission of the error; and (iii) the overstatement of the sales had a direct and material effect on the outcome of the competitive bidding process. For the reasons outlined below: (i) we are satisfied that the IFB overstated the actual sales figures; (ii) we believe there is a material issue of

fact concerning what actions Answer took to advise the Commission of the error, but need not resolve this issue since; (iii) we are satisfied that the overstatement in the IFB did not materially effect the outcome of the competitive bidding process since it appears clear that Mycor would have been the high bidder even if the IFB had contained the correct sales figures.

Accuracy of Sales figure in IFB

Based on our review of the record, it appears that the \$361,277 figure contained in the IFB is not the sales reported by the vendor for the location during the designated one year period, rather, the sales as reported by the vendor were \$346,599.20 (\$14,677.80 less than the annual sales figure set forth in the IFB).¹ We note that the \$14,677 discrepancy represents approximately 4.2% of the sales for the one year period.

Reasonableness of Actions by Answer

While Answer did not list the incorrect annual sales figure contained in the IFB as a ground for its protest to the Commission on November 5, 2003, Answer asserts that it contacted the Commission by telephone soon after the release of the IFB regarding the

¹ It appears that the basis for the discrepancy between the sales figure set forth in the IFB and the sales figures reported by the incumbent vendor (Answer) is attributable to a miscommunication between Answer and the Commission. The miscommunication is evidenced by a series of faxes sent by Answer (the incumbent vendor) to the Commission concerning sales during the one year period, as well as e-mails between these parties (see the December 2, 2003 e-mail from John Hickey, Answer, to Sylvia Wendell, Commission, and associated faxes, attached to Answer's December 11, 2003 submittal). The first fax, dated August 19, 2003, appears to provide sales figures for: (i) certain machines under the location designation "IRS 1040 Waverly Ave, Holtsville, NY" and (ii) certain machines under the location designation "IRS #2 5000 Corporate Pk Dr, Holtsville, NY". A second fax, dated, September 12, 2003, appears to provide the annual sales figure for certain machines under the location designation "1 Corporate Drive, Holtsville, NY". The sales figure set forth in the IFB is the combined totals of the figures contained in the first and second faxes. The documents contained in the record appear to show that the sales figure with respect to the machines listed in the second fax, under the location designation "1 Corporate Drive, Holtsville, NY" were also contained in the first fax. Therefore, when the Commission combined the totals contained in the two faxes, the sales figures of certain machines were counted twice. As a result, the annual sales figure set forth in the IFB was overstated by \$14,677.80.

incorrect sales figures contained in the IFB.² The Commission contends, however, that the first verbal contact with the Commission concerning the sales figure set forth in the IFB occurred on October 20, 2003 (just three days before the bids were due). In addition to the dispute as to the timing of the initial contact between the parties concerning the annual sales figure contained in the IFB, the parties do not agree as to the sum and substance of such contact. While both parties agree that, in its pre-bid contact with the Commission, Answer questioned the annual sales figure set forth in the IFB, there is a dispute as to whether Answer explained to the Commission the basis for its assertion that the annual sales figure set forth in the IFB was inaccurate.

The Commission contends that while, in the October 20, 2003 telephone call, Answer did provide what it claimed was the correct sales figure, when asked, Answer could not provide any basis for disputing the dollar amount listed in the IFB. According to the Commission, at such time while Mr. Murn "expressed concern that the figure contained in the IFB was incorrect . . . Mr. Murn was unable to state why or in what manner the figure was wrong" (Commission's response dated December 22, 2003, also see November 26, 2003 e-mail from Sylvia Wendell, Commission, to Tom Murn, Answer, attached to Answer's December 18, 2003 submittal). After this contact, the Commission contends that it re-checked its figures and did not identify any errors in its computations and, therefore, continued to believe the annual sales figure set forth in the IFB was accurate. The Commission further contends that Answer did not get back to the Commission before the bid closed with any rationale for its allegation that the sales figure set forth in the IFB was inaccurate. Answer, on the other hand, asserts that it contacted the Commission by telephone on September 29, 2003 and advised the Commission that the sales figure set forth in the IFB was incorrect and again contacted the Commission by telephone on October 20, 2003 and explained why the figure in the IFB was inaccurate.

We note that the procurement record before this Office does not provide this Office with a basis to conclusively determine the factual dispute between the parties concerning the timing or nature of the pre-bid contact between the Commission and Answer regarding the annual sales figure set forth in the IFB. However, for the reasons set forth below, we do not believe that the resolution of this factual dispute is necessary to the resolution of the protest.

² We note that the first written documentation relative to the accuracy of the sales figure contained in the IFB is not until December 2, 2003 - almost six weeks after the bid opening (see December 2, 2003 e-mail from John Hickey, Answer, to Sylvia Wendell, Commission, attached to Answer's December 11, 2003 submittal).

Impact of Inaccurate Sales Figure

Even if we accept that Answer acted promptly and reasonably to communicate to the Commission that the sales figures in the IFB were inaccurate and that the Commission failed to adequately respond to such information, we are not satisfied that the inaccurate sales figure materially affected the outcome of the bid process. We note that Mycor's bid of \$335,999.88 was 31% of the sales figure set forth in the IFB. If Mycor had submitted the same percentage bid on the actual sales figure, its bid would have been \$322,349.03, a bid still higher than Answer's bid of \$318,600.⁴ As a result, in our view, even if Mycor bid on the actual sales figure (rather than the sales figure set forth in the IFB), the result would not have been different — the proposal submitted by Mycor would have been the proposal from the bidder offering the highest bid amount.⁵

Mycor's Ability to Perform Timely

Finally, we will address Answer's contention that Mycor was not able to provide services on the start date set forth in the IFB. Section III (1)(C) of the IFB provides that "In the event that delays beyond the control of the successful bidder prevent the installation of equipment at the location on the start date of the contractual agreement, the Commission may, at its discretion, extend the end date of the agreement a number of days equal to the number of days between the start date of the agreement and the date of installation of the equipment so as to provide the Concessionaire at least a thirty-six (36) month term of service."⁶ The initial delay with regard to the start date

⁴ Alternatively, we note that Answer's bid of \$318,600, which was calculated on the basis of the actual sales figure of \$346,599 (or \$1,039,707 over three years), represented a bid of 30.6% of the sales over the three year term. If Answer had submitted the same percentage bid on the "inaccurate" sales figure of \$361,277 set forth in the IFB (or \$1,083,831 over three years) its bid would have been \$331,652 — still less than Mycor's winning bid of \$335,999.88. Therefore, in this scenario also, Mycor would have been the successful bidder.

⁵ In reaching this conclusion we note that in order to postulate a scenario under which Mycor would not have been the high bidder, one would have to assume that Mycor's bid of \$335,999.88, which was approximately 31% of the incorrect sales figure of \$1,083,831, was composed of two elements, a bid of less than Answer's bid of 30.6% (or \$318,600) on the first \$1,039,797 of sales, and a bid of over 41% on the remaining sales of \$44,031. Such a scenario is clearly unrealistic, and this conclusion is supported by the fact that Answer itself has indicated that the normal range on this type of bid is 25% to 33%.

⁶ In addition, the IFB expressly provided that the Commission could "change any of the schedule dates stated herein" (IFB Section IV).

appears to relate to "delays in providing security clearances to Mycor truck drivers" (e-mail from Sylvia Wendell, Commission, to John Murn, Answer, dated December 5, 2003). Since such a delay is beyond the control of Mycor, the Commission has authority to adjust the start and end dates of the agreement.

Conclusion

For the reasons outlined above, we are satisfied that the inaccurate sales figure contained in the IFB did not materially effect the outcome of the competitive bidding process since even if the correct figure had been set forth in the IFB, Mycor would still have been the successful bidder.⁷ As a result, we are denying Answer's protest and this Office is today approving the contract between the Commission and Mycor.

Very truly yours,



Tom Sanzillo

First Deputy Comptroller

cc: Toni G. Koweek
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⁷ We do note that, to the extent that Mycor, the successful bidder, based its bid on the incorrect sales figure set forth in the IFB, Mycor may have been placed at a disadvantage since it might not be able to generate the sales it contemplated when it made its bid. Therefore, at the request of this Office, the Commission advised Mycor that the sales figure set forth in the IFB was inaccurate and provided Mycor with the opportunity to withdraw its bid. By letter dated January 13, 2004, Mycor advised this Office that it had been "informed that the estimated sales figure provided in the IFB for Bid #1303 is probably too high" and, nevertheless, "Mycor is still interested in providing services and stands by its original bid of \$335,999.88."