

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by
Hewlett-Packard Company with respect to the
procurement conducted by the New York State
Office of Temporary and Disability Assistance
Contract No. C009646

Determination
of Bid Protest
SF- 20040067

August 4, 2004

This Office has completed its review of the above-referenced procurement conducted by the New York State Office of Temporary and Disability Assistance ("OTDA") and the bid protest filed by Hewlett-Packard Company ("HP") with respect thereto. As outlined in detail below, we have determined that the grounds advanced by the protestor are without sufficient merit to overturn the contract award by OTDA to Currier McCabe and Associates Consulting Services ("CMA"). Accordingly, we are denying the protest filed by HP and are today approving the contract award to CMA.

Background

On March 10, 2003 OTDA issued a Request for Proposals ("RFP") to solicit proposals for the support of the Upstate Welfare Management System ("WMS")¹ and the Benefit Issuance and Control System ("BICS"),² an information system designed, developed and supported by the State and made available to county Departments of Social Services through a network of Data terminals and printers. The selected vendor was to contract with OTDA for four years to provide:

- hardware and software maintenance and support for the terminal systems for the Upstate WMS and the BICS;
- maintenance and support for other office automation hardware and software, and;
- the optional acquisition of replacement printers and other products.

¹ WMS is a complex mainframe-based application system begun in the mid-1970's and developed fully over the ensuing 25 years to what is today the primary management system for the statewide delivery of State and Federal assistance programs (RFP § 1.3.1).

² BICS is an application system that was developed in the early 1980's for the purpose of providing county social services with an automated means to issue benefits and to receive and process payment data, reports, checks and vouchers in ways that meet their own management and reporting needs. This application system consists of a suite of mainframe based WMS transactions and batch programs that select data and create reports that are deposited into distribution queues for transmission to the local social services district (RFP § 1.3.3.1).

The RFP established a method of award based on "best value to the OTDA and the State"³, in which the proposals would be evaluated based on a combination of technical merit and cost. The method of award specified the following evaluation criteria:

- Price would be awarded a maximum of 40 points, with the low price offer receiving all 40 points and the remaining offers receiving a proportional amount of 40 points;
- Technical merit would be awarded a maximum of 60 points.

The RFP broke down the allotment of points for technical merit as follows:

- 5 points for "understanding of the project and of the nature and scope of work to be performed";
 - 2 points for "preventative maintenance plan";
 - 18 points for "remedial maintenance plan";
 - 3 points for plans for "removal and disposal of all decommissioned WMS and BICS, and storage of surplus WMS and BICS equipment";
 - 20 points for "WMS and BICS support staffing";
 - 8 points for "replacement hardware supply/acquisition plan";
 - 4 points for "staffing succession plan"; and
 - A number of categories scored on a pass/fail basis.

In addition to the evaluation criteria identified in the RFP, OTDA developed, prior to the receipt of the bids, a methodology for evaluating the bids based on both technical merit and price, which further delineated the award of points in the technical categories.

In response to the RFP, two proposals were received by OTDA: one from CMA and one from HP.

On November 7, 2003 OTDA notified HP that it had selected CMA for contract award.⁴ On January 9, 2004 HP filed a formal bid protest with the agency. By letter dated February 2, 2004 OTDA formally denied HP's protest, holding that the agency did not err when it selected CMA.

By letter dated February 12, 2004 HP filed an appeal to OTDA, asking OTDA to reconsider its protest decision. By letter dated February 17, 2004 OTDA denied HP's appeal and affirmed its protest decision of February 2, 2004.

³ 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").

⁴ We note that since 1992 these services have been provided by HP and its predecessors, Compaq Computer Corporation and Digital Equipment Corporation (Compaq acquired Digital in 1998, and was in turn acquired by HP in 2002).

OTDA signed a contract with CMA and on January 15, 2004 OTDA submitted the contract to this Office for approval. By letter dated February 18, 2004 HP filed a protest with this Office, appealing the OTDA determinations.

Upon review of the procurement record, this Office determined that OTDA had failed to score one of the technical criteria⁵ and returned the contract file to OTDA for re-scoring. OTDA complied and re-scored the proposals. Because CMA still had a higher score, OTDA resubmitted the contract awarded to CMA to this Office for approval on May 27, 2004.

Procedures and Comptroller's Authority

The Comptroller is required by Section 112 of the State Finance Law ("SFL") to approve State agency procurement contracts that exceed \$15,000 in amount before such contracts become effective. The Comptroller reviewed this bid protest filed by HP as part of his review of the contract award under Section 112.

In determination of this protest, this Office considered the entire procurement record, communications between HP and OTDA that resulted in the OTDA determinations, and communications forwarded to this Office after the HP protest of the OTDA determinations, including: From HP, correspondence dated January 9, 2004; January 26, 2004; February 12, 2004; February 18, 2004; and February 24, 2004; and From OTDA, correspondence dated January 14, 2004, February 2, 2004; February 3, 2004 (including two attachments dated January 16, 2004 and one attachment dated January 13, 2004); and February 17, 2004 .

Protesting Party

The protestor, HP, was one of two bidders to submit a proposal in response to the RFP issued by OTDA.

Analysis of Bid Protest

Protestor's Position

HP protests the award to CMA on the following grounds:

⁵ This technical criterion (relating to "replacement hardware supply/acquisition plan") was worth one point. It was initially not scored due to fears that the Technical Evaluation Committee ("TEC") would have to see cost data to be able to score this criterion, and that cost data was not available to the TEC. Upon re-scoring, both CMA and HP were awarded the maximum score of one point, and therefore the difference between them in scoring did not change.

- HP's proposal was evaluated based upon criteria not announced in the RFP. This violated SFL §§ 163(7) and 163(9)(b).
- The RFP indicated that the offerers' plans for replacement of out-of-production components would be evaluated in only one of seven technical areas for which points were to be awarded. In fact, OTDA allotted a total of 8.75 points to plans for replacement of out-of-production components in two separate categories, constituting nearly 15% of the total technical points to be awarded. This evaluation scheme was not sufficiently disclosed by the RFP and thus OTDA provided insufficient notice of the evaluation methodology.
- HP lost technical points because "it was rather thin in the area of providing parts and components beyond OTDA's inventory and that owned by HP." However, the RFP did not state that an offerer could not rely on its own stock of parts to meet this requirement.
- OTDA evaluated resumes submitted by offerers for the four support specialist positions, with points being assigned to each in accordance with whether the resume supported the position requirements reflected in the RFP. In each case, 0.25 points were allotted to the requirement that the proposed specialist have "good communication skills and courteous manner." These traits cannot be determined based on a resume and thus should not have been included as a basis for evaluation.
- Beyond the issues raised above, HP's technical evaluation score in other categories was not justified. Even assuming that the Evaluation Instrument accurately reflected the RFP's announced evaluation scheme, HP believed that the technical scores it received in a number of areas (including "understanding project nature and scope", "WMS and BICS support staffing", "staffing succession plan", and certain training and other staffing issues) were not justified, and that a re-evaluation is warranted for this reason as well.

Agency's Response to Protest

In responding to the concerns raised by HP, OTDA asserts that:

- A procuring agency is not required to disclose to offerers either the detailed evaluation criteria or the relative importance or weight of the various individual Technical Evaluation measures. Therefore, it was not inappropriate for OTDA to utilize specific evaluation criteria that were not announced in the RFP.
- It was made clear throughout the RFP that the WMS terminal environment consisted primarily of obsolete hardware and software and explicitly stated that

“the availability of decommissioned hardware is of particular concern.” Therefore, it was justifiable to include scoring sub-criteria related to acquisition and supply of out-of-stock or obsolete hardware.

- It was appropriate for HP to lose technical points because “the proposal was rather thin in the area of providing parts and components beyond OTDA’s inventory and that owned by HP.” Even if the RFP did not state that a vendor would lose points for relying on its own stock of parts to meet this requirement, HP was made aware of this concern in the oral interviews and failed to address it.

- The RFP listed Help Desk duties and considerable phone work for both WMS and BICS software support staff. Therefore, it was a reasonable expectation that resumes submitted in response to these job descriptions would indicate whether candidates had such skills as would support performance of these duties.

- The score HP received in all technical evaluation criteria was appropriate.

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.⁶ 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.⁷

SFL §163(9)(b) requires that the solicitation “describe and disclose the general manner in which the evaluation and selection shall be conducted...” and “where appropriate... identify the relative importance and/or weight of cost and the overall technical criterion to be considered by a state agency in its determination of best value.

SFL §163(7) 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.”

⁶ SFL §163(10).
⁷ SFL §163(1)(j).

Discussion

I. Utilization of Evaluation Criteria Not Announced in the RFP

As stated above, SFL § 163(9)(b) requires that in a “best value” procurement, the solicitation must identify the relative importance and/or weight of cost factors to technical factors. This does not require that the RFP provide any detail concerning the weight ascribed to specific areas of the technical evaluation – although we generally encourage agencies to do so. Rather, SFL § 163(7) requires that the state agency document in the procurement record before the initial receipt of offers the determination of the evaluation criteria and the process to be used in determination of best value and the manner in which the evaluation process and selection the is to be conducted. These specific evaluation criteria may not contradict the RFP, but they may be more detailed than the more general requirements stated in the RFP.

OTDA met the requirements of the law when it 1) identified in the RFP the relative importance and weight of cost factors to technical factors (the RFP stated that 60 points would be allotted to technical factors and 40 points would be allotted to cost)⁸; and 2) developed the specific evaluation criteria to be utilized, prior to the initial receipt of offers. We see no evidence that these criteria in any way contradicted the more general requirements stated in the RFP (see discussion below).

II. The Evaluation of Plans for Replacement of Out-Of-Production Components

HP claims insufficient notice in the RFP that so many technical points would be allotted to the offerers’ plans for replacing out-of-production components, and, in fact, asserts that the RFP limited such scoring to one evaluation category. However, the RFP did not contain any language limiting the scoring of this item to one particular evaluation category. In fact the RFP did not specifically address the scoring of this item, but generally provided notice to potential offerers of the following:

- **“WMS Terminal Hardware Support” –**

A limited stock of used hardware is maintained by OTDA in its Albany office. The selected offerer may, in its discretion, utilize these available replacement parts or units from this stock. . . . When the needed used hardware is not available in this stock, the offerer is required to provide other replacement parts at no additional cost to the State. The offerer will be responsible for acquiring all needed

⁸ By breaking down the various elements of technical factors to be considered, the RFP went beyond the requirements of the law.

parts and components beyond those in the OTDA's inventory and must provide satisfactory proof of its ability to do so. The supply and source and available count of all parts and whole product for out-of-production items must be identified and include in offerer's response. The selected offerer may use decommissioned hardware as it becomes available to defray its cost of replacement parts. . . (RFP §2.3.2).

The availability of decommissioned hardware is of particular concern with regard to the terminal servers, network servers and concentrators where the availability of functionality may be in doubt. Offerers are required to specifically address within their technical proposals a feasible approach for ensuring the continued availability of these terminal servers and concentrators (RFP §2.3.4).

With regard to the scoring of the technical proposals, the evaluation instrument prepared by OTDA prior to the initial receipt of offers provided for a total of 8.75 points based upon each proposal's plan for replacement of out-of production components, in 2 categories. Specifically, 6.75 points were allocated to this area under the category "replacement hardware supply/acquisition plan", and 2 points were allocated under the category "remedial maintenance plan". For the reasons discussed below, we are satisfied that this evaluation instrument was not inconsistent with the RFP and that the RFP provided adequate notice to potential proposers.

The RFP expressly advised offerers that, in addition to the 8 points being awarded for a "replacement hardware supply/acquisition plan"⁹, 18 points would be awarded for a "remedial maintenance plan". Since remedial maintenance is described in the RFP as "the repair and replacement of any defective components that have been determined to be unserviceable . . . (RFP §2.5), we are satisfied that a bidder could not reasonably assume that the only points which would be allocated to replacement plans for out-of-production components were in the area of "replacement hardware supply/acquisition plan".

In light of the above, we believe the RFP did not expressly, or implicitly, limit the scoring of replacement plans for out-of-production components to one of the seven technical areas for which points were to be awarded. Further, the

⁹ Of the 8 points under this category, only 6.75 points were related to out-of-production components. The remaining 1.25 points related to a description of the qualification process that the vendor will use to determine functional equivalents for replacement devices (primarily new hardware). We note that HP questions whether the RFP placed proposers on notice of the need to address this area. We are satisfied that it did, but further note that, in any event, HP received the full 1.25 points in this sub-category.

language of the RFP more than adequately placed the offerers on notice that points could be awarded for replacement plans for out-of-production components in more than one evaluation category and, as a result, the technical scoring of HP's proposal was not inconsistent with the RFP.

III. HP's Provision of Parts and Components Beyond OTDA's Inventory and That Owned By HP

OTDA does not challenge HP's assertion that the RFP did not require that parts be provided beyond OTDA's inventory and that of the offerers. Nor does HP challenge OTDA's assertion that the importance of this matter was raised in the oral interviews. Regardless of these assertions, the RFP did make it clear (and HP admits) that the offerers needed to provide a plan for obtaining parts and components beyond OTDA's inventory (see above-quoted sections of the RFP).

HP's proposal was not deemed unresponsive to the RFP because it relied on OTDA's inventory and that owned by HP. Rather, it did not receive a perfect score; instead it received .75 points out of a possible 2 points in this sub-category. It does not seem unreasonable or irrational to us that a state agency would, in determining the basis for a perfect score, assign more points to a vendor that could rely on a variety of brands of parts and components, and assign somewhat less to a vendor that relies on only its own brand. Therefore, we cannot say that the points that were deducted from HP in this circumstance were inappropriate.

IV. OTDA's Scoring of the Resumes Submitted by HP

HP asserts that OTDA inappropriately evaluated resumes to determine whether they met the requirement that the proposed specialist have "good communication skills and courteous manner." OTDA asserts that the RFP properly placed the offerers on notice that the job engagement included considerable phone work for both WMS and BICS software support staff, creating a reasonable expectation that resumes submitted in response to these job descriptions would indicate whether candidates had such skills as would support performance of these duties.

The RFP (in §5.3.3.1.4, which was part of "Proposal Preparation Instructions") stated "[o]fferor will be evaluated on completeness of resume submission and applicability of experience identified in resumes, including any experience supporting OTDA's WMS and BICS systems." While it is a close call, we agree that OTDA could properly use resumes to determine the existence of "communication skills" and that past experience, documented on a resume, could evidence the existence of such skills.

In this case, however, the Evaluation Instrument provided for scoring based on whether the communications skills were "good" and provided in a "courteous

manner". It is difficult to imagine how "good" skills and "courteous manner" could be determined from a resume, as opposed to a reference check or a live interview. This appears to be a flaw in the Evaluation Instrument.

However, in our opinion, it is not a material flaw which would justify our rejection of the contract. In looking at the procurement record, we determine that the points lost by HP in this category (compared to the maximum points available) were irrelevant to the outcome of this procurement. Contrary to HP's assertion, it lost points in this category not in regard to the evaluation of four resumes but only in regard to the evaluation of one resume (OTDA evaluated only the highest-scoring resume). As a result, the total points which HP lost in the evaluation on this category were only .17. Since this was less than the difference between the ultimate total scoring of the CMA proposal and the HP proposal, the use of this questionable evaluation criterion did not affect the outcome of the procurement. Therefore, we do not believe that this flaw is material or warrants our rejection of the contract.

V. HP's Other Technical Evaluation Scores

HP argues that the scores it received in several areas were not justified and that a reevaluation is warranted. In addition to the grounds we highlighted above, HP believed that the technical scores it received for "understanding project nature and scope", "WMS and BICS support staffing", "staffing succession plan", and certain training and other staffing issues were not justified.

While recognizing that this Office is not required to defer to agency determinations of fact (see, Konski v Levitt, 69 AD2d 940 (3rd dept, 1979), aff'd 49 NY2d 850, cert den 449 US 840), as a matter of policy we generally give deference to agency factual determinations which are reasonably supported by the record, particularly with respect to matters within the expertise of the agency. This is especially true with respect to the scoring of technical proposals in areas where the procuring agency has expertise. Our review of OTDA's scoring of the above-stated categories convinces us that such scoring is reasonably supported by the procurement record and is best left within the expertise of the procuring agency. The record before this Office does not provide a basis for us to disturb the agency's scoring.

Additionally, as stated above, HP's proposal was not disqualified due to being non-responsive in any of the categories that form the basis for its complaints. Rather, its proposal received less than the maximum number of technical points. From our experience, few, if any, technical proposals ever receive the maximum

number of points in every category. Indeed, in this very close competition, CMA lost only slightly fewer technical points than HP. Unlike cost evaluation (where the lowest priced proposal often receives the maximum allowable points¹⁰), maximum technical points are frequently reserved for an "ideal" technical solution.

Conclusion

Based on the foregoing, this Office has determined that the procurement conducted by OTDA was conducted in a reasonable manner and in a manner consistent with the requirements of State law. Accordingly, we hereby deny the protest filed by HP and are today approving the contract award to CMA.

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¹⁰ This is a cost scoring technique that we endorse, but is not the only such technique that is available.