



STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

August 2, 2006

Mr. Robert Bergen, Esq.  
Holland & Knight, LLP  
195 Broadway, 24<sup>th</sup> Floor  
New York, NY 10007-3189

Dear Mr. Bergen:

Re: SF-20060095 – Staubach Bid Protest/OGS  
Procurement for Tenant Representative  
Services

This is in response to your letters dated April 28, 2006 and June 30, 2006, submitted on behalf of your client the Staubach Company of New York LLC, ("Staubach"), protesting the contract award by the Office of General Services ("OGS") to United Systems Integrators ("USI") for Tenant Representative Services.<sup>1</sup>

Your protest, in effect, asserted that this procurement was defective for four reasons, specifically that:

- (i) OGS improperly required that bidders propose a single statewide commission rate, which rates were the basis for the cost evaluation;

The winning bidder, USI, does not have either the depth or breadth of experience that Staubach has, and therefore, in light of the significant weight given in the OGS evaluation criteria to "quality and experience," a fair evaluation of this category should have resulted in Staubach being determined to provide best value;

OGS incorrectly calculated Staubach's estimated cost to the State, resulting in incorrect cost scoring; and,

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<sup>1</sup> Staubach was an unsuccessful bidder under the procurement.

- (iv) The cost evaluation methodology, which was based upon the maximum commission rate proposed by the bidders, was defective in light of industry practices.

At the outset, we note that, as outlined in my letter to Franklin Hecht dated June 6, 2006 (a copy of which was forwarded to you), we previously indicated that your allegations listed above as (i), (ii) and (iii) would not justify our upholding of the protest and rejecting the contract award. This conclusion is based on the following:

- (i) OGS's determination to let a statewide contract and to require a single maximum commission rate for the entire State for these services was not unreasonable - and this agency will not in this case overturn such determination;

Best value determinations are not made solely on the basis of the technical scores of the bidder. Best value determinations also include a cost component. In this case, Staubach's technical score for experience was significantly higher than USI's, and in fact, Staubach's total technical score was superior to USI. However, because Staubach's cost proposal was higher than that of USI, Staubach's total score, including the cost component fell short of USI's overall score, and thus USI's proposal was determined to be the best value for the State;

As required by Section 163(7) of the State Finance Law, OGS developed, prior to receipt of bids, a formula for projecting the commissions that would be earned by each vendor who submitted a proposal as well as a calculation for assigning cost evaluation points based upon the results. OGS applied this formula to each of the proposed maximum commission rates per lease year, and utilized the projected commission earnings in evaluating the cost proposals. We are satisfied that the estimated cost calculated for Staubach, based upon its submitted maximum commission rates, was correct, and that no mathematical error occurred.

However, as indicated in my letter of June 6, we did request that OGS provide additional information regarding the allegations listed in (iv) above. With respect to this issue you alleged that a tenant's rent already includes a calculation for the landlord's listing agent's commission, and the listing agent and the tenant representative share in that commission. As such, you assert that the tenant would pay the "same amount of commission regardless of the involvement of a tenant representative." Based upon these assertions, you argue that the evaluation methodology with respect to costs, based upon the maximum proposed commissions, was defective.

On June 14, 2006, Mr. Hecht responded to my letter, and on June 19, 2006, we forwarded a copy of his response to you. On June 30, 2006 you provided us with your rebuttal to this letter. We have considered all of the forgoing (and the procurement record), and for the reasons outlined below have concluded that your assertion listed in (iv) above does not warrant withholding our approval of this contract.

The RFP required that the bidder propose the maximum commission rate statewide that would be accepted in a transaction. The bidder was informed that, unless otherwise agreed to by the State, it would be required to notify the landlord in writing that should the State enter into a

lease any commission calculated into the lease payments would be limited to the maximum proposed commission rate. In the event that a listing agent was involved, the listing agent and the tenant representative would split the commission rate. In addition, the RFP advised that the potential tenant representative commissions resulting from such a commission split might vary from minimal to substantial.<sup>2</sup>

In light of the fact that the commission rate that was bid would, absent consent from the State, be the maximum commission rate included in the lease payments, it is clear that an evaluation of commission rates was not meaningless and would affect the costs to the State through the lease payments. Whether or not there is a listing agent, a higher commission rate would result in higher lease payments charged to the State. Through the language of the RFP, the State limited the commission that it can be charged through lease payments and if a potential landlord was not willing to agree to the limited commission rate, the State would look elsewhere for available space. As a result, the lower the proposed maximum commission, the lower the likely overall cost of the contract will be to the state. Accordingly, it was appropriate for OGS to review the maximum commission rates as part of the scoring of the cost proposals.

In light of the foregoing, and our review of the procurement record,<sup>3</sup> we have concluded that the issues raised in your protest to this Office are not sufficient to overturn OGS's contract award to USI. Therefore, we are denying your protest with respect to this bid, and are approving the contract award to USI.

Sincerely,



John G. Moriarty  
Director, Bureau of Contracts

emm

cc: Peter B. Hennessy  
Franklin Hecht

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<sup>2</sup> Although your client alleged that it was informally told by an OGS representative that another bidder had "specifically indicated" a flaw in the commission structure, and that the RFP was not altered, no formal objections, questions, or requests for clarification, concerning the commission structure were filed with OGS in writing by any bidder, including Staubach, prior to the bid opening.

<sup>3</sup> The procurement record included the RFP issued by OGS, your correspondence, the correspondence from Peter Hennessy of Staubach, dated March 1, 2006, the responses from OGS, dated March 2, 2006 and June 14, 2006.