

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Casella Waste Management of NY Inc., DBA Vet's Disposal, with respect to the procurement for solid waste/garbage removal and recycling services conducted by the State University of New York College at Oneonta
Contract Number C990098

Determination
of Bid Protest
SF-20070029

April 20, 2007

This Office has completed its review of the above-referenced procurement conducted by the State University of New York College at Oneonta (hereinafter "SUCO") and the bid protest filed by Casella Waste Management of NY Inc., doing business as Vet's Disposal, (hereinafter "Vet's") with respect thereto. As outlined in further detail below, we have determined that the grounds advanced by the protestor do not provide a sufficient basis to overturn the procurement and the contract award by SUCO to Greene-Del Sanitation and Recycling Inc. (hereinafter "Greene-Del"). As a result, we are today approving the contract.

BACKGROUND

Facts

October 5, 2006 SUCO issued an invitation for bid (hereinafter "IFB") for the College's solid waste/garbage removal and recycling services. SUCO also mailed the IFB to Greene-Del, Vet's and Burt Adams Disposal.¹

The cover letter accompanying the IFB stated that "a pre-bid site visit is mandatory" and the "pre-bid meeting is scheduled for October 20, 2006."² In addition, the front sheet of the IFB provides that "**When submitting a proposal you must:** ... Have attended the pre-bid site visit on October 20, 2006." (emphasis in original). A third reference to the pre-bid site visit is found in paragraph 20 of the IFB which states: "A pre-bid site visit is mandatory. Bidders must attend the meeting to be held on October 20, 2006, at the Office of Dale Couse, Head Janitor, in the Human Ecology Building, Room 103B."

¹ We note Burt Adams Disposal did not submit a bid in response to the IFB.

² Based on the procurement record, it is clear to this office that the "pre-bid site visit" and "pre-bid meeting" are one in the same.

The IFB's stated method of award provides that: (i) "Award will be made to the lowest responsive and responsible bidder for the total amount quoted for the years that this contract will be in effect."³

Vet's was the only attendee at the pre-bid site visit which took place on October 20, 2006. Greene-Del attended a pre-bid site visit on October 25, 2006.⁴

Two bids were submitted in response to the IFB before the scheduled bid opening on November 6, 2006: one from Vet's and the other from Greene-Del. The bid submitted by Greene-Del was the low bid received and, subsequently, SUCO signed a contract with Greene-Del for the solid waste/garbage removal and recycling services. On December 18, 2006, the SUCO/Greene-Del contract was received by this Office.

By correspondence dated January 26, 2007, Vet's filed a Protest of the contract award to Greene-Del with this Office.

Protesting Party

The protestor, Vet's, is one of the bidders on the procurement. We also note that Vet's is the incumbent vendor providing the solid waste/garbage removal and recycling services to SUCO.⁵

Procedures

Because SUCO has already entered into a proposed contract with Greene-Del resulting from this procurement, the Comptroller has reviewed the issues raised in the Protest filed by Vet's as part of the review of the contract award to Greene-Del.

In determination of this Protest, this Office considered:

- (i) the documentation contained in the procurement record forwarded to this Office by SUCO with the SUCO/Greene-Del contract;
- (ii) the correspondence and communications between this Office and SUCO arising out of our review of the proposed SUCO /Greene-Del contract; and
- (iii) the following correspondence/submissions from the parties (including the attachments thereto)⁶

³ The IFB further states that "The award will be made on the GRAND TOTAL for years one through three."

⁴ The source of this information is the letter of Ellen Lacy Messina, Associate Counsel, the State University of New York dated February 16, 2007 that was considered as a part of our review.

⁵ Vet's is the assignee of the successful bidder, Spohn's Disposal Services, under SUCO's previous procurement for these services. Vet's acquired, through purchase, all of the assets of Spohn's Disposal Service on April 1, 2006.

⁶ Greene-Del did not submit any correspondence with respect to the protest.

Vet's Protest dated January 26, 2007 (correspondence from Elizabeth Dailey McManus of The West Firm LLC to William Hughes, Manager, IFB Team OSC)
SUCO'S Response to Protest, dated February 16, 2007 (correspondence from Ellen Lacy Messina, State University of New York, Office of Counsel, to OSC Bureau of Contracts)
Vet's Reply to SUCO's Response, dated February 26, 2007 (correspondence from Elizabeth Dailey McManus of The West Firm LLC to John G. Moriarty, Director, Bureau of Contracts OSC)

Comptroller's Authority Applicable Statutes

The Comptroller is, generally, required by section 112(2) of the State Finance Law to approve all State contracts which exceed \$50,000 in amount before such contracts become effective. However, under the authority of section 355(5) of the Education Law, a higher threshold with respect to Comptroller approval of contracts let by the State University has been established, and the present threshold for SUCO contracts is \$150,000. The proposed contract between SUCO/Greene-Del exceeds this monetary threshold.

ANALYSIS OF BID PROTEST

Vet's Protest

Vet's challenged the procurement conducted by SUCO and the award to Greene-Del on the following grounds:

1. "Concerns regarding the integrity of the process ... which create an overall appearance of favoritism towards Greene-Del to the detriment of Vet's."

Vet's was led to believe that it was the sole bidder for the proposal. "Had Vet's been aware of or advised that a competitor was participating in the process ... Vet's would have bid accordingly."

The cover letter accompanying the IFB, as well as the front sheet and paragraph 20 of the IFB stated that a pre-bid site visit is mandatory and the pre-bid meeting is scheduled for October 20, 2006.

Vet's attended the pre-bid site visit on October 20, 2006 and no other bidder attended this pre-bid site visit.

- 2 The award was not made on a best value basis and therefore is invalid

The SUCO contract is one for services and, therefore, must pursuant to SFL § 163 be awarded on a best value standard.

The IFB used a lowest price standard, which applies to contracts for commodities.

3. Vet's questions whether Greene-Del is responsible.

Greene-Del only employs two people.

UCC filings identify Greene-Del's recent loans for a large volume of equipment.

- College equipment was used to unload Greene-Del's containers at SUCO.
- Mr. Couse, Head Janitor, authorized and supervised the unloading and storage of Greene-Del's containers two weeks prior to the commencement of the new contract.

SUCO's Response to the Protest

SUCO responded to the Protest as follows:

In the interest of competition, the College allowed Mrs. Compton of Greene-Del to come to a pre-bid site visit at another time, set as October 25, 2006. Although meeting separately, both vendors received the same information-which was merely the location for the dumpsters. There was no information provided by the site-visit conductor, Dale Couse that "could influence a price decision."

State Finance Law section 163 does allow for an IFB, when award will be based on price alone, for the purchase of services and technologies. In this case, best value can be interpreted to mean the offer at the lowest price which meets the specifications among responsible offerers.

The college conducted a Vendor Responsibility review and found Greene-Del to be responsible.

The fork-lift used to unload the containers belongs to Greene-Del and no College equipment or personnel were used in this task.

Vet's Reply to SUCO Response:

SUCO failed to comply with the requirements of its own IFB by granting Greene-Del a private, after the fact, pre-bid meeting, affording Greene-Del a benefit not afforded to Vet's.

Greene-Del was surely aware that it was in a competitive process, Vet's was not, which unquestionably did influence the price decisions of each bidder.

SUNY failed to establish the award of the contract to the lowest bidder constituted proper application of the applicable best value standard.

DISCUSSION

The resolution of this Protest, and our review of the contract award by SUCO to Greene-Del, requires that we address the following issues:

- (i) Whether providing Greene-Del with the opportunity to attend a pre-bid site visit on a date other than the date listed in the IFB was a material variance from the requirements of the IFB?
- (ii) Whether an award of the contract for the solid waste/garbage removal and recycling services can be made on the basis of price alone?
- (iii) Whether Greene-Del is a responsible vendor?

I. Providing Greene-Del with the opportunity to attend a pre-bid site visit on a date other than the date listed in the IFB was not a material variance from the requirements of the IFB.

Preliminarily, we note that all of the information provided at the site visit was detailed in the bid specifications and nothing stated altered the required services. The visit was for the benefit of the bidders, providing them with an opportunity to view the location of the dumpsters, the size of the campus and gauge the services required to satisfy the contract.

The objective of State procurement is to facilitate each state agency's mission while protecting the interests of the State and its taxpayers and promoting fairness in contracting with the business community (SFL §163(2)). To this end, procuring entities are generally not permitted to materially deviate from the requirements set forth in its solicitation.

A variance is material or substantial when it would impair the interests of the procuring agency, place the successful bidder in a position of unfair economic advantage, or place other bidders or potential bidders at a competitive disadvantage. Cataract Disposal, Inc. v. Town of Newfane, 53 N.Y.2d 266, 440 N.Y.S.2d 913 (1981); Fischbach & Moore v. NYC Transit Authority, 79 A.D.2d 14, 435 N.Y.S.2d 984 (2nd Dept. 1981); Application of Glen Truck Sales & Service, Inc. v. Sirigano, 31 Misc2d 1027, 220 N.Y.2d 939 (1961).

In W.F.M. Contracting Co. v. Gotbaum, 197 A.D.2d 475, (1st Dep't 1993), the Appellate Division, First Department held that an agency could modify the requirements of an IFB and waive a low bidder's attendance at a pre-bid meeting. In reaching its decision, the court cited the Cataract Disposal case, thus implicitly finding that in that case the standard enunciated by the court in Cataract Disposal was satisfied. Here, SUCO did not waive the requirement in its entirety, but simply modified the requirement by permitting an alternate date. Thus, permitting a bidder to attend a site visit on an alternate date does not, per se, constitute an impermissible waiver or material variance from the bid requirements.⁷

⁷ It could be argued that the present situation is distinguishable from the situation presented in the W.F.M. Contracting Co. case because, in the present situation, only one bidder attended the scheduled site visit, and, therefore, the interests of the agency might arguably have been compromised here because one of the two bidders did not realize that there would be competition for the contract and may not have offered as

In sum, we are satisfied that the modification of the pre-bid site visit requirement permitting Greene-Del to attend a site visit on the 25th is not material.⁸

II. Awarding the contract on the basis of price alone

Vet's asserts that by awarding the contract on the basis of price alone, SUCO did not make an award on the basis of best value as required by law.

Section 163 of the SFL, provides that contracts awarded for services be made to the "responsive and responsible Offeror whose Proposal offers the **best value . . .**" (emphasis supplied).

SFL Section 163(1)(j) defines best value as "the basis for awarding contracts for services to the offeror which optimizes quality, cost and efficiency, among responsive and responsible offerors. ." The leading case interpreting these requirements is Transactive Corporation v. New York State Department of Social Services, 236 A.D.2d 48, 53 (1997); *aff'd* on other grnds, 92 N.Y.2d 579 (1998). In that case, the Appellate Division, Third Department reviewed a procurement of a complex electronic benefit transfer system. The procuring agency awarded the contract using a competitive range methodology whereby the cost proposals of all responsive proposers were first evaluated and scored and the technical scores would only be considered for those proposers with a cost within 10% of the lowest cost proposer. Since no other responsive proposer had a cost within 10% of that of the lowest cost proposer, the award was ultimately made without considering the technical scores. One of the grounds asserted in the challenge

low a price as it would otherwise have offered; whereas in the situation considered by the Appellate Division in the W.F.M. Contracting Co. case, the record from the Supreme Court indicates that there were a total of 5 bidders, including the bidder whose attendance at the site visit was waived. Even assuming, however, that such facts might, in certain cases, justify a distinction from the W.F.M. Contracting Co. case, they do not in this case. While Vet's asserts that it would have bid a lower price if it had known that there was another bidder, it also has questioned how Greene-Del could perform at the price it bid, thereby tacitly admitting that it could not have met the price offered by Greene-Del. Specifically, in its response dated February 26th Vet's states that "[t]he real question is how Greene-Del will be able to satisfy the terms of the contract for a significantly lesser sum in light of [projected fuel costs, annual Consumer Price Index increases, and anticipated disposal (i.e. tipping) fee increases], which are *near absolutes* in determining the bid for this contract." (emphasis added) Thus, in this case, it is highly unlikely that SUCO could have obtained a lower price for this contract, if it had not modified the requirement to permit Greene-Del to attend on an alternate date. To the contrary, if anything, the College realized the significantly lower price offered by Greene-Del by modifying the requirement, and thereby permitting Greene-Del to participate.

⁸ In reaching this conclusion, we also considered whether this modification could have harmed any potential bidders who, like Green-Del were unable to attend the scheduled site visit on the 20th. In this case, it is clear it did not. There was only one other firm, Burt Adams Disposal, which requested the IFB, which was the place where the site visit requirement was disclosed. The procurement record discloses, however, that Burt Adams Disposal has indicated that it failed to bid because at the time it had enough local business and was not able to take on an additional contract of this size, but that it might consider bidding in the future.

to the award was that this methodology did not constitute a best value award as required by section 163. The Appellate Division rejected this argument as well as the other arguments made by the challenger and upheld the contract award.⁹ With respect to the issue concerning the method of award, the court stated:

[i]n awarding a contract for services, a State agency **generally** cannot rely solely on price as the determinative factor but must engage in a cost-benefit analysis since State Finance Law § 163(10) provides that such a contract must...be awarded on the basis of best value..."¹⁰ (emphasis added).

The court noted, however, that the agency had issued an RFP with extensive technical requirements, and had established criteria for the evaluation of both the technical and cost proposals. The court found that the procuring agency subjected the proposals to technical and financial evaluations and the use of a competitive range was permissible because

"such a procedure embodies a cost-benefit analysis as it reflects a determination that where a price proposed by a responsive and responsible bidder is lower than a price offered by another bidder by a stated percentage, any increase in value embodied in the higher price will be offset by the cost savings of the lower priced proposal" had engaged in the requisite cost-benefit analysis.¹¹

Accordingly, what is required by section 163 is that an agency undertake a cost benefit analysis in determining best value. OSC, in applying the rationale in Transactive and consistent with the Procurement Guidelines issued by the New York State Procurement Council,¹² has concluded that there are certain circumstances where cost alone may be used as the basis for an award on a best value basis. Specifically, in a prior protest this Office upheld an award based solely upon cost because quality and efficiency requirements had been sufficiently defined by the agency in the specifications, and quality and efficiency variations between responsive and responsible offerers were not reasonably expected to have significant financial, health or safety consequences to the

⁹ The procurement under review in that case had been the subject of a bid protest to this Office, and we had rejected the protest and approved the contract. The court decision thus ratified the determination of this Office.

¹⁰ Transactive 236 A.D.2d 48, 53.

¹¹ Transactive 236 A.D.2d 48, 53-54.

¹² The Procurement Guidelines, state there are "occasions when it makes sense to boil down a best value award for services to a lowest price determination" (Section IV-9). The Procurement Guidelines explain that the IFB methodology, which is the method used where cost is the only consideration:

"is appropriate for those situations where the needed . . . services and/or technology can be translated into exact specifications **and the award can be made on the basis of lowest price, or best value**, when the best value determination can be made on price alone, among responsive and responsible offerers . . . **In the case of services**, an IFB may be used to acquire services and technology when the agency determines that price is the principal award criteria" (Section VI-1, emphasis in original).

People of the State of New York.¹³ Thus, we are satisfied that an agency can award a contract for services solely on the basis of lowest price, but only where it can be documented that any qualitative differences between responsive and responsible offers will not substantially affect the value provided to the state.

Applying these standards to the procurement conducted by SUCO for solid waste/garbage removal and recycling services, we are satisfied that quality and efficiency requirements had been sufficiently defined in the specifications contained in the IFB and quality and efficiency variations between responsive and responsible offerers were not reasonably expected to have significant financial, health or safety consequences to the People of the State of New York. Therefore, we are also satisfied that in the award of a contract for these services, that the agency could equate lowest cost to best value.

III. Responsibility of Greene-Del

In its protest, Vet's questioned the ability of Greene-Del to perform the required services, specifically referencing the fact that Greene-Del has only two employees and may lack the necessary equipment and financial resources for a contract of this magnitude.

State procurement laws, including section 163 of the State Finance Law, require that state agencies award contracts to responsible contractors. Therefore, once an agency has determined that a contractor should be awarded a contract, the agency must affirmatively determine whether the contractor is responsible before it can award and execute the contract with such vendor.¹⁴ Factors affecting a contractor's responsibility include, among other things, the contractor's assets, liabilities, equipment, personnel resources and expertise, and availability in consideration of other business commitments. SUCO conducted a responsibility review of Greene-Del. This responsibility review included reference checks, a Dun & Bradstreet review and a face to face meeting with the president of the firm. After this review, SUCO determined that Greene-Del was a responsible vendor. In addition, we are advised by SUCO that Greene-Del, which has been performing these services on an interim basis pending the resolution of this protest, has been performing the contract satisfactorily for over three months. There is nothing in the procurement record before this Office which would cause us to question SUCO's determination.

¹³ SF-20020035. In another protest (SF-20010084), however, we concluded that it was not appropriate to award the contract solely on the basis of cost because, in that case, quality and efficiency requirements had not been fully defined in the specifications. In that case since the procurement was for the complex operation of the Bedford Hills wastewater treatment plant, a Hudson River tributary which feeds the Croton Reservoir System in Westchester County and, therefore, quality and efficiency were of dire financial, health, and safety consequences to the People of the State of New York, it was clear that the award of the contract on the basis of cost alone did not reflect the cost-benefit analysis required by section 163.

¹⁴ See OSC Bulletin no. G-221, Vendor Responsibility: Standards, Procedures, and Documentation Requirements.

CONCLUSION

Based upon the foregoing, this office has determined that by providing Greene-Del with an alternative pre-bid site visit date the College did not materially deviate from the requirements of the IFB by impairing the interests of the procuring agency or the bidding public. Accordingly, we are denying the protest and today approving the SUCO/Greene-Del contract for solid waste/garbage removal and recycling services.

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