

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Tailwind Associates with respect to the procurement for personal services multiple award standby agreements for IT services conducted by the New York State Office of Children and Family Services

Determination
of Bid Protest
SF-20070056

June 11, 2007

This Office has completed its review of the above-referenced procurement conducted by the New York State Office of Children and Family Services, (hereinafter "OCFS") for IT and analysis services and the bid protest filed by Tailwind Associates,¹ (hereinafter "Tailwind") with respect thereto. As outlined in further detail below, we have determined that the grounds advanced by the protestor provide a sufficient basis to overturn the procurement and the multiple awards by OCFS. As a result, we are today returning the contracts unapproved.

BACKGROUND

Facts

On August 22, 2006 OCFS issued a Request for Proposal (hereinafter "RFP") for the procurement of personal services for IT and analysis services. The RFP was intended to result in multiple award standby agreements to provide OCFS with a pool of pre-qualified contractors eligible to respond to a Task Order Award solicitation.² The offers for such services were due on October 13, 2006. The RFP provided that OCFS would make multiple awards on a best value basis on four categories of IT and analysis services: (i) Programming (maximum of 7 awards); (ii) Technical Support (maximum of 5 awards); (iii) Business Analysts/Project Management (maximum of 5 awards), and; (iv) Implementation Support (maximum of 5 awards).

The procurement record documents that OCFS published the RFP on its website and sent the solicitation to three hundred and twenty eight (328) firms (132 mail/email + 196 online bidders list). While fifty seven (57) potential offerers attended the mandatory bidders conference and forty three (43) firms issued a letter of intent to bid, only twelve (12) bids were received prior to the proposal due date.

¹ We note the bidder was actually Atec/Tailwind, LLC, a partnership between Tailwind Associates and Atec/group.

² RFP Page 36 .

Subsequently, OCFS entered into eight contracts for personal services which were submitted to this Office on February 12, 2007. Tailwinds filed its initial protest with this Office on February 21, 2007 and supplemented this filing by a submission dated March 29, 2007.

Protesting Party

The protestor, Tailwind, bid in three of the four groups of services that were the subject of the procurement: programming, business analysts and implementation support.

Procedures

Because OCFS has already entered into proposed contracts with the awardees resulting from this procurement, this Office has reviewed the issues raised in the Protest filed by Tailwind as part of the review of the multiple contract awards by OCFS.

In determination of this Protest, this Office considered:

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

Tailwind's initial protest dated February 21, 2007 (correspondence from Peter Henner, Esquire to John G. Moriarty, Director, OSC Bureau of Contracts)

Tailwind's Protest dated March 29, 2007 (correspondence from Peter Henner, Esquire to John G. Moriarty, Director, OSC Bureau of Contracts)

OCFS' Response to the protest, dated April 10, 2007

(correspondence from Norman C. Massry, Assistant Counsel, OCFS to John G. Moriarty, Director, OSC Bureau of Contracts)

Tailwind's Reply to OCFS' Response, dated April 13, 2007

(correspondence from Peter Henner, Esquire to John G. Moriarty, Director, OSC Bureau of Contracts)

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.

Section 163 of the State Finance Law requires that service contracts be awarded on the basis of best value from a responsive and responsible offerer (SFL 163(10)).

ANALYSIS OF BID PROTEST

Tailwind's Protest

Tailwind challenged the procurement conducted by OCFS on the following grounds:

- 1 There was no valid reason to require a letter of credit in the amount of \$250,000 be posted for each of the four categories of services.
 - This requirement discouraged small companies from bidding.
 - The intention of this requirement was to insulate large, favored entities from competition from smaller companies.
Only twelve (12) proposals were received even though RFP's of this nature typically receive fifty (50) proposals.
2. The review process provided numerous opportunities for impermissible subjectivity leading to points unfairly taken away from Tailwind.

OCFS could not explain why Tailwind lost points in the evaluation process for its Executive Summary and Corporate Structure. OCFS did not contact the references supplied by Tailwind, but instead relied on other references, one of which had little, if any, knowledge of Tailwind's operations.

OCFS' Response to the Protest

OCFS responded to the Protest as follows:

1. The accusations that Tailwind's proposal was victimized by harsh scoring is baseless and without merit.

OCFS' intention was to evaluate all proposals uniformly and consistently to provide all Offerors with an equal opportunity for selection.

 - The proposal submitted by Tailwind was not as financially competitive as the proposals from other vendors.
Scoring related to Tailwind's past performance with OCFS was limited to references, which was a minor component of the technical scoring.
2. The letter of credit requirement has been a standard practice in recent OCFS procurements and is not designed to exclude small vendors, but to protect the interests of the State should there be a substantial breach in the vendor's obligations.

DISCUSSION

This raises the following issues:

- (i) Whether all proposals were scored fairly, uniformly and consistently with the established evaluation procedures, and;
- (ii) Whether there is a reasonable business justification for requiring a vendor to post a letter of credit in the amount of \$250,000 for each of the services.

The evaluation and scoring of the proposals was inherently flawed.

We note at the outset that the proposals in this type of procurement are difficult to score due to the fact that, for the most part, the proposals have little technical variance. That is why it is absolutely essential that the evaluation and scoring of such proposals be fair and uniform and consistent with the evaluation procedures established prior to the receipt of offers.

Based upon our review of the evaluation of the references conducted by OCFS, we have identified two serious problems: (i) all references were not scored by the same individual or team of individuals; and (ii) the evaluations were not conducted in accordance with the evaluation procedures established prior to receipt of offers.

Use of different evaluators

One of the operating principles of the Procurement Stewardship Act enunciated in section 163(2) of the State Finance Law is that state procurements be evaluated using a "fair and balanced method". Consistent with this operating principle, this Office expects that agencies will have the same individual (or group of individuals) conduct and score all the reference checks.³ Otherwise, the scoring of the reference checks may be distorted based on the individual biases of the particular evaluators conducting the reference checks or because one may tend to score higher generally than another evaluator.

Unfortunately, the evaluation of the references by OCFS did not conform to this standard. Rather, OCFS utilized a procedure which utilized multiple evaluators for the references, but provided that each individual reference to be scored was contacted only by a single member of the reference evaluation team, and only that person scored the proposer with respect to that reference. This approach created an inherently unfair and unbalanced scoring methodology, since it

³ Alternatively, the actual reference checks can be conducted by different individuals who utilize a set script and simply record the responses provided by the reference. Copies of the responses are then provided to the person or team which is going to score the references, and the scores are based upon such record.

resulted in individuals, with apparently very different scoring philosophies, scoring different references - creating the very real possibility that the outcome of this procurement was determined by which evaluator scored one or more of a particular proposer's references.

Failure to comply with evaluation methodology

Section 163(7) of the State Finance Law requires that agencies establish the evaluation methodology, which will be utilized to determine best value, prior to the initial receipt of offers. While this section does not expressly require that the evaluation methodology, so established, be followed, it is clear that this is implicitly required by such provision. In evaluating the references, however, OCFS deviated from this requirement in two respects.

First, OCFS did not contact the number of references established in the technical evaluation methodology. The RFP required that the Offeror include in its proposal a description of its experience providing IT resources for each category being submitted and also that the Offeror identify at least three (3) project references.⁴ While this requirement was somewhat ambiguous as to whether a proposer who was proposing for more than one category was required to provide only a total of three references, or at least three references per category, in practice it was interpreted by all proposers as requiring that they identify at least three references per category (although, in some cases, a reference might be utilized for more than one category). The evaluation methodology established by OCFS provided that "three Offeror references will be contacted." Again, this was ambiguous, and could be interpreted to mean that it would evaluate a total of three, or three per category.⁵ However, OCFS did neither, and did not uniformly evaluate only three references in total or three references per category, but rather, utilized different standards, as to number of references scored, for different proposers. This is not only unfair, but also in violation of the implicit requirements of section 163(7).

Second, OCFS contacted and scored individuals that were not listed as references. An agency can certainly contact persons or entities not listed by a proposer, provided that the persons or entities contacted have relevant information concerning the proposers. However, if an agency is going to do so, it must so provide in its evaluation methodology, and must do so on a consistent basis with respect to each proposer. In this case, the methodology established by OCFS provided that "three Offeror references will be contacted." While this language is somewhat vague, we believe that the most reasonable interpretation is that the entities contacted will be entities listed as references by the proposer. Assuming this is the proper reading of the evaluation instrument, OCFS did not comply. Furthermore, even if the term "reference" were interpreted in a broader

⁴ RFP page 28, response to contractor qualifications requirements number 1.4.

⁵ If OCFS had consistently applied either standard, we could accept their interpretation of this ambiguity.

fashion to include any prior entity for whom the proposer has provided services, OCFS would be required to do so on a consistent basis. It did not do so. Rather, in some cases only entities listed by the proposer were contacted, whereas in other cases, including that of Tailwinds, entities not listed by the proposer were contacted. This is not only inconsistent with any plausible reading of the evaluation instrument, but also fundamentally unfair – since it can reasonably be assumed that entities listed as references will be more likely to give a favorable opinion of the proposer.

Furthermore, despite the fact that reference checks only accounted for five points in the scoring of the technical evaluations, given the closeness of the final scores, these serious flaws in the evaluation process with respect to references create the very real possibility that such flaws affected the final results.⁶

In summary, we find the evaluation of the references was seriously flawed and inconsistent with the evaluation methodology and these flaws are sufficient, by themselves, to justify our upholding the protest.

II. OCFS has not provided any reasonable business justification for the requirement of a \$250,000 letter of credit for each service.

Although our determination of Point 1 compels us to uphold the protest and reject the contracts, we will address the other substantive issue raised in the protest regarding the reasonable business justification for the requirement of a \$250,000 letter of credit.

Despite the claim of OCFS that the letter of credit requirement has been a standard practice in its recent procurements, OCFS has not provided this Office with a business justification for a \$250,000 letter of credit requirement in a procurement for these type of IT services.⁷ In addition, we have reviewed recent procurements by other State agencies for similar services and have found no letter of credit requirements in those solicitations.

In reviewing the appropriateness of the letter of credit for this procurement we must examine the benefit to the procuring agency expected to be derived from this requirement, (i.e., the potential for breach or default by the contractor and resulting damages which the agency is protecting against); balanced against any negative effects of such requirement – particularly increases in the cost to the State and any significant reductions in the field of competition.

The RFP and OCFS' answers to questions submitted by potential proposers concerning the letter of credit requirement provide little more than general statements concerning the need for and practical application of this requirement.

⁶ We note that Tailwind failed to qualify in the programming services group by 1.76 points and Maximus Inc. failed to qualify in the technical support service group by .11 points.

⁷ Initially, the letter of credit was set in the amount of \$500,000.

The only justification for the letter of credit that OCFS provided is the general statement that the letter of credit is to "protect the interest of the State should there be a substantial breach". When asked to "detail" the understanding of what would be considered a breach, OCFS only generally answered by stating a breach would be a "failure to perform obligations as required in the Task order issued under the RFP."⁸ And, finally, in response to the question "could you provide a concrete example of a situation that would result in OCFS using the [standby letter of credit]," OCFS responded "No".

Thus, it does not appear that OCFS had any clearly articulated justification for imposing this requirement in connection with these types of services or any clear purpose that would provide specific benefits to the State. Furthermore, we are not aware of any procurement for the type of services being procured by OCFS, wherein the procuring state agency imposed such a requirement. Additionally, based upon our experience, in light of the nature of the services provided for under this contract and the consequences of a breach or default by the selected proposers, we are not aware of any significant benefit to the State from imposing this requirement.⁹

Furthermore, because a bidder was required to provide a letter from a financial institution stating that the institution will issue a standby letter of credit,¹⁰ it appears that this requirement may have had a significant impact on the number of proposers responding to the RFP. The apparent concern by proposers with respect to the letter of credit requirement is evidenced by the numerous questions OCFS received from potential vendors regarding this requirement (See RFP Questions and Answers Document, Nos. 1, 16, 17, 18, 20 and 64). Additionally, based upon prior procurements reviewed by this Office, we would expect that in a procurement of this size for these types of services the procuring agency would receive a number of bids in excess of the number received by OCFS in this case. Finally, this requirement will likely result in increased costs to the State since any winning proposer will be required to obtain and pay for such letters of credit, which cost presumably will be passed on to the State.

In summary with respect to this issue: (i) OCFS has not articulated any clear benefit to the State from the letter of credit requirement with respect to the services covered by this procurement; (ii) we are not aware of any significant

⁸ Questions and Answers No. 1.

⁹ While this Office has approved some service contracts which required letters of credit, these were situations where both OSC and the agency were able to perceive concrete benefits to the State from such requirement. In this case, due to the fact that the services are generally provided by individuals working under the direction of OCFS, it appears that the likelihood of substantial damages resulting from a breach or default is low.

¹⁰ RFP page 9.

benefit to the State from this requirement; (iii) the requirement will result in increased costs to the State; and (iv) the requirement appears to have reduced competition in this case. Under such circumstances, even absent the defects in the evaluation methodology discussed above, we could not approve awards based upon this procurement, or upon a future procurement which incorporates such requirement, unless the agency could document that there is a significant benefit to the State from requiring such letters of credit.¹¹

Conclusion

For the reasons outlined above, we have determined that the procurement conducted by OCFS is inherently flawed, and, are today returning the contracts unapproved.

¹¹ Specifically, the agency would have to demonstrate that there is a real possibility of significant damages flowing from a default or breach which the letters of credit would allow the state to collect, and that the resulting benefit to the state outweighs the increased costs and reduced competition which likely result from such requirement.