

THOMAS P. DINAPOLI
STATE COMPTROLLER



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ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

December 27, 2007

Mr. Michael Slocum, President
Slocum DeAngelus & Associates
974 Albany Shaker Road
Latham, New York 12110

Dear Mr. Slocum:

Re: SF 20070265

This is in response to a letter dated June 6, 2007 from Mr. Dennis A. Scimeca, writing on behalf of your firm, Slocum DeAngelus & Associates ("Slocum") to Mr. Michael A. Lawler, Associate Commissioner of the Office of Alcoholism and Substance Abuse Services (OASAS), on which this Office was copied.

We have reviewed that letter, as well as your letter of May 14, 2007, to Mr. Lawler and your correspondence of December 6, 2007 to this Office, in connection with our review of Contract C003454 awarded by OASAS to Toski, Schaefer & Co., P.C., ("Toski"), which has been submitted to us for approval. We have also reviewed the October 25, 2007 and November 16, 2007 correspondence from Mr. Lawler to this Office.

We are treating your letter of June 6, 2007 as an appeal to the Office of the State Comptroller ("OSC") of OASAS's denial of your protest.

As you know, this contract is for the provision of professional services in connection with certain capital projects of not-for-profit providers and local government units, which will be financed through OASAS with Mental Hygiene Capital Improvement Fund tax-exempt bonds to be sold by the Dormitory Authority of the State of New York ("DASNY").

Procedures and OSC's Authority

Under Section 112(2) of the State Finance Law, before any contract made for or by a state agency which exceeds \$50,000 in amount becomes effective, it must be

approved by OSC. OSC has reviewed your protest as part of its review of the contract awarded by OASAS to Toski.

Applicable Statutes

The requirements applicable to this procurement are set forth in Article 11 of the State Finance Law, which provides that contracts for services shall be awarded on the basis of "best value" from a responsive and responsible offerer.¹ Best value is defined as "the basis for awarding contracts for services to the offerer, which optimizes quality, cost and efficiency, among responsive and responsible offerers."² A "responsive" offerer is an "offerer meeting the minimum specifications or requirements as prescribed in a solicitation for commodities or services by a state agency."³

SFL § 163(9)(b) provides that the "solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive

SFL § 163(1)(e) defines a "specification" or "requirement" as "... any description of the work to be performed, the service or products to be provided, the necessary qualifications of the offerer, the capacity and capability of the offerer to successfully carry out the proposed contract, or the process for achieving specific results and/or anticipated outcomes or any other requirement necessary to perform the work ... Specifications shall be designed to enhance competition, ensuring the commodities or services of any offerer are not given preference except where required by this article. "

Analysis of Bid Protest

The arguments advanced in your protest letters, and our conclusions thereon, are summarized as follows:

Protest Issue 1:

Your argument:

The IFB erroneously indicated that the cost of title insurance and surveys for the mortgage closings were to be included in legal fees. Since costs for these items are typically not included in legal fees, but are paid directly to the entity furnishing the title insurance or survey, there was a fundamental error in the IFB which evidenced a lack of input in its drafting on the part of agency legal counsel.

OSC Determination on Issue 1:

This issue about billing for title insurance and survey work was addressed in the answer provided to question 5 prior to bid submissions, which clarified that such costs

¹ SFL § 163(10).

² SFL § 163(1)(j).

³ SFL § 163(1)(d).

should not be included in fees for legal services. Accordingly, no bidder or prospective bidder should have been misled.⁴

Protest Issue 2:

Your argument.

The time frames for performance of legal services set forth in the answer to question 4 were not reasonable, and would have caused bidders to skew their bids based on unrealistic information.

OSC Determination on Issue 2:

OASAS made clear before bids were submitted that bids were to be based on a per project cost, not on the size of individual projects or on a time and materials basis. However, for the information of bidders, OASAS provided estimates of the anticipated number of projects per year and of the percentage of projects which would be in the New York metropolitan area. In its response to bidders' Question 4, while OASAS did provide projections of the number of hours required legal services would entail, OASAS stated that these "estimates" were "very gross based on the cooperation of all parties."

In response to OSC inquiries during the contract audit review process, OASAS advised us that the IFB was sent only to qualified professional vendors that would be anticipated to have experience with mortgage closings. Thus, bidders would have been expected to have knowledge of the steps necessarily involved in completing the contract requirements, and could therefore formulate their bids taking into account the projected time that would be involved. We note also OASAS's representations to us that it is standard practice for fees for legal services for projects of this type to be determined based on a per project cost and that, in general, the closing documents to be prepared and the other legal services to be performed in order to complete a closing do not materially vary based upon the size of the project.

We are satisfied that neither the IFB nor OASAS's responses to bidders' questions should have caused responsible bidders to skew their bids based on unrealistic information relating to the legal services component of bids.⁵

⁴ Your protest letters contend that the IFB and the responses to prospective bidders' questions should have been reviewed by OASAS Counsel's Office prior to issuance. However, while generally such a practice may be desirable, there is no requirement that this be done. For the other reasons discussed in this letter, we have concluded that the arguments you have advanced with respect to the legal services aspect of this procurement do not form a basis to overturn the agency's decision on this award.

⁵ You contend that disparities in the bids create an inference that in formulating their bids, bidders must have significantly underestimated the amount of time required for completion of the required services, resulting in unrealistically low cost proposals. We note in this regard that it is well established that competitive bidding laws were not enacted for the benefit of bidders. Rather, the intended beneficiaries of the competitive bidding statutes are the taxpayers, and challenges to any agency's actions in conducting procurements must be weighed with sole reference to the public interest. (See Transactive Corporation v. New York State Department of Social Services, 236 A.D. 2d 48, aff'd on other grnds, 92 N.Y. 2d 579 (1998)).

Protest Issue 3:

Your argument:

The IFB was inconsistent in terms of defining whether providers would be preparing Project Cost Worksheets and general ledger history reports, or whether the vendor would be preparing these documents and thus would need to factor that obligation into its bid. In addition, the estimates provided in the IFB and in the responses to bidders' questions with respect to the time periods involved for cost certification services were understated, resulting in likely confusion on the part of bidders in preparing their bids.

OSC Determination on Issue 3:

In our view, the wording of IFB Section 2, Scope of Work, made it clear that the initial preparation of the Project Costs Worksheet and the general ledger history reports would be the responsibility of the providers, not the responsibility of the vendor.

The Scope of Work provisions of the IFB define the tasks to be completed by the vendor in connection with project cost certifications. Such tasks included, among others, *obtaining completed* Project Costs Worksheets, and *obtaining* general ledger history reports detailing all the sources and uses of funds on the Project Cost Worksheet. The IFB, by its terms, did not require the vendor to *prepare* these documents.

As in the case of hours estimated for legal services as described above, in its response to Question 4 (which also included estimates for cost certification services), the agency noted that the estimates were "very gross based on the cooperation of all parties." Again, OASAS advised us that the IFB was sent only to qualified professional vendors that would be anticipated to have experience with mortgage closings. If an experienced bidder regarded these estimates as understated, that factor should have been taken into account in preparing its bid.

With respect to your assertion that the IFB provided at subsection 2.1 that the cost certification was to be completed within 30-120 days after final payment for the project cost has been made by the provider, and that that time frame is unrealistic, we note that such subsection of the IFB actually stated a period of 90-120 days for this task, and went on to note that this time frame (and others discussed in that subsection) "may fluctuate depending on issues such as the cooperation of the provider, the nature of legal issues, timeliness of survey updates, etc." Therefore, bidders were on notice that the agency did not consider these time frames to be anything other than estimates.

We conclude that your arguments on this protest issue are without merit

Protest Issue 4:

Your argument:

The vendor that was awarded this contract will likely submit change orders during the term of the contract, increasing the contract cost, because the scope and time constraints of the IFB were grossly understated.

OSC Determination on Issue 4:

Since the contract provides for a fixed fee per project, without escalation during the contract term, OSC would not approve an increase in the contract amount and, therefore, your concern is unfounded. OASAS has confirmed to OSC that the vendor selected for award is fully aware of the contract terms and is prepared to perform the contract on that basis. In the event the agency is dissatisfied with the vendor's services, it would have the option of terminating the contract, and re-bidding. Therefore, there is no realistic prospect that the result you have forecast will actually come to pass.

Protest Issue 5:

Your argument:

OASAS may have been required to conduct this procurement through a Request for Proposals (RFP) process, rather than by an IFB.

OSC Determination on Issue 5:

OASAS has advised OSC that the term "RFP" was used in earlier communications regarding this procurement in the generalized sense of conveying that a competitive selection process would be employed. An IFB process was ultimately selected. Specifically, the evaluation methodology adopted by OASAS provided first for a pass/fail review of each proposal to determine whether it met all mandatory requirements as defined in the IFB, with no points assigned on the basis of that analysis. Bids submitted which passed that analysis were then reviewed on the basis of cost, with contract award to be made to the bidder proposing the lowest cost.

Since this was a procurement for services, in accordance with State Finance Law Section 163(4)(d), whether the process were characterized as an IFB or an RFP, the resulting contract was required to have been awarded on the basis of "best value", as that term is defined in State Finance Law Section 163(1)(j). Your argument that an RFP rather than an IFB process should have been used in this case requires an analysis of whether the procurement was conducted in such a manner as to arrive at a contract award to the bidder offering the best value.

The standard to be applied in determining whether this evaluation methodology is adequate to arrive at the statutorily-mandated "best value" has been articulated in case law. In Transactive Corporation v. New York State Department of Social Services⁶, the Appellate Division, Third Department, held as follows:

⁶ 236 A.D. 2d 48 (1997), aff'd on other grounds, 92 N.Y. 2d 579 (1998). In Transactive the court upheld an award based upon cost alone under a "competitive range" methodology whereby technical scores were not considered because no responsive proposal provided for a cost within 10% of the low cost proposal. In

In 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, a method that optimizes quality, cost and efficiency among responsive and responsible bidders. (236 A.D.2d at 53).

Under limited circumstances, consistent with the decision of the Appellate Division in Transactive, Section IV(E) of the New York State Procurement Council Procurement Guidelines countenances the award of service contracts on the basis of price alone, but only if "quality" and "efficiency" requirements have been fully defined in the contract specifications. In such an event, it may be concluded that there is little room for technical variances between bids which will have any value to the procuring agency and that, therefore, evaluation of bids on the basis of cost alone is appropriate.

This Office has previously considered in other bid protests the standards to be applied in situations (such as this one) where the technical specifications require only professional competence, in order to determine whether it is proper to utilize an evaluation methodology in which technical responses are not scored, and the award is made solely on the basis of price. .

In OSC opinion SF20010084, a bid protest involving the Bedford Hills Correctional Facility, we stated:

[w]e do not believe that technical specifications which essentially require minimal professional competence satisfy the requirements of the Procurement Guidelines or section 163 [of the State Finance Law], except where the services being procured are of such a routine nature that a minimally qualified vendor could perform them as adequately as a highly qualified vendor.

The basic question which we must resolve in this protest is whether the services which must be performed under the contract are so routine that a minimally qualified vendor could perform them as adequately as a highly qualified vendor, without impacting on the value of the benefit received under the contract, e.g., by creating a potential problem for the State agency, the State of New York, and the People of the State of New York. [Footnote deleted]. If, indeed, the services required can be performed without a wide variation in the quality of the services provided and the frequency of problems which may be encountered, then no violation of State law or guidelines would occur if the procuring agency carefully specifies those services but only scores the price. If, on the other hand, the performance of these services are not routine; if, instead, there could be a wide variation in the quality of the services provided and in the frequency of problems

essence, the court was satisfied in that case that the competitive range methodology embodied a cost-benefit analysis, in that it reflected 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." (236 A.D. 2d at 53-54).

December 27, 2007

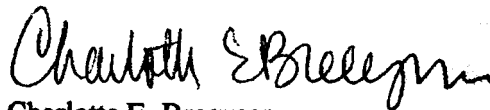
encountered, then technical qualifications of the vendors and the technical merit of their proposals should have been scored.⁷

Based upon a review of the procurement record and the correspondence noted above, we have concluded that, in preparing the IFB, OASAS properly determined that the services being procured were of such a routine nature that a vendor possessing the qualifications outlined in the specifications could perform such services as adequately as a highly qualified vendor, without impacting on the value of the benefit received under the contract.

Conclusion:

We have concluded that your arguments do not provide a sufficient basis for us to disapprove the award of this contract to the bidder selected by OASAS for award. Accordingly, your protest is denied and the proposed contract with Toski, Schaefer & Co. will be approved by the OSC Bureau of Contracts.

Sincerely,



Charlotte E. Breear
Director, Bureau of Contracts

cc: Mr. Michael A. Lawler
Associate Commissioner
Division of Fiscal Administration
Office of Alcoholism and Substance Abuse Services
1450 Western Avenue
Albany, New York 12203-3526

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555 International Drive
Williamsville, New York 14221

⁷ On the other hand, in OSC opinion SF20020035, a bid protest involving the Office of Children and Family Services, we concluded, based upon the facts of that case, that an evaluation methodology based solely on price, which gave no weight to technical merit (except on a pass/fail basis), satisfied the requirements of the State Finance Law. The different result in this case was based upon factual differences between the two situations.