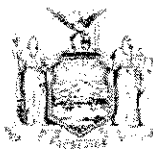


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January 25, 2008

Mr. Stephen Roger Bosin
Attorney At Law
70 Grand Avenue
River Edge, NJ 07661

Dear Mr. Bosin:

**Re: Protest of Contract Award for Construction by
SUNY Downstate Medical Center to Axis
Construction – OSC File No. SF-20070351**

This is in reply to your correspondence dated October 19, 2007, in which your client, Touro Contracting Corporation ("Touro"), protests the award of a construction contract by State University of New York Downstate Medical Center ("SUNY") to Axis Construction, Inc. ("Axis").

In the protest, Touro alleges that the agency improperly rejected Touro's bid for lack of work experience, and that had such work experience been properly evaluated, Touro, as low bidder, should have been awarded the contract. SUNY responded that Touro failed to provide sufficient information for evaluation of its work experience. Touro's work experience was not in the area of construction of imaging suites required by the advertisement, and as such, SUNY believed Touro to be non-responsive to the solicitation issued by SUNY. However, we need not address the issues raised by the protest since for reasons outlined in further detail below, we are returning the SUNY/Axis contract unapproved with the direction that SUNY undertake a new procurement for the necessary services.

On July 2, 2007, the New York State Contract Reporter advertised a submission by SUNY for construction and maintenance relating to the replacement/renovation of a digital imaging suite at the Downstate Medical Center. The advertisement listed a number of eligibility requirements for bidders. The advertisement stated, among other things, that the selected bidder must have: a minimum ten (10) years experience in constructing hospital based image processing rooms; expertise in electronic project management; current successful projects that included Phillips or similar imaging equipment. However, the IFB issued by SUNY did not include these same eligibility requirements (see IFB, Section 7 "Qualifications of Bidders"). The requirements

in the advertisement published in the Contract Reporter were much more restrictive than those contained in the IFB; rather the IFB required only that a bidder must have completed a single contract for similar work with a value at least 50 percent of the value of this contract.

Section 142 of the Economic Development Law sets forth the information that must be included in the Contract Reporter advertisement, including "a description of any eligibility or qualification requirement or preference." The publication requirements of the Economic Development Law are intended to give bidders a reasonable opportunity to learn about proposed contract opportunities for which they may be eligible. As a result, an agency cannot waive material requirements contained in the advertisement and likewise cannot provide in the IFB materially less stringent requirements than those contained in the advertisement.

Here, the IFB issued by SUNY is the final and definitive statement of the minimum requirements. However, in this case, a potential bidder that had completed a similar project, but did not have ten (10) years experience in constructing hospital based image processing rooms, which read the Contract Reporter advertisement would have reasonably concluded that it was not qualified to bid on the project and would not have requested the actual bid specifications.

Therefore, we have concluded that we can not approve any award made under the procurement undertaken by SUNY, and if SUNY determines that such work must still be completed, it must re-procure these services.

Sincerely,


John G. Moriarty
Assistant Comptroller
Division of Contracts and Expenditures

emm

cc: Kevin O'Mara
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