

THOMAS P. DINAPOLI
STATE COMPTROLLER



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STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

March 13, 2009

Wayne Margulies
President
Waymar Advertising, Inc.
555 Kinderkamack Road
Oradell, NJ 07649-1517

Denise Straudt
Director of Business Services
Netzer Administrative Building, Room 220
State University College
108 Ravine Parkway
Oneonta, NY 13820

Susan Ganley
Account Executive
Graystone Group Advertising
2710 North Avenue, Suite 200
Bridgeport, CT 06604

Re: Employment Recruitment Advertising Services
Request for Proposal #T990140
SF20080473

Dear Mr. Margulies and Mses. Straudt and Ganley:

This is in response to Waymar Advertising, Inc.'s ("Waymar") protest letter dated October 6, 2008 regarding the above-referenced procurement which resulted in an award by the State University of New York, College at Oneonta ("SUNY Oneonta") to Graystone Group Advertising ("Graystone"). In its protest letter, Waymar asserts that: (i) Graystone's bid is non-responsive to the Request for Proposal ("RFP") because it failed to include a one-column classified ad as required by the RFP's submission requirements; and (ii) Waymar should have been awarded the contract since its prices were 25% lower than the prices submitted by Graystone.

This Office has reviewed the issues raised in the Waymar protest, as part of our review of the contract award made by SUNY Oneonta to Graystone. As part of this review, this Office considered: (i) the procurement record submitted to this Office by SUNY Oneonta with the SUNY Oneonta/Graystone contract; (ii) the issues cited in Waymar's protest letter; and (iii) the correspondence between this Office and SUNY Oneonta arising out of our review of the proposed Oneonta/Graystone contract. As detailed below, we have determined that the issues raised in the protest are not of sufficient merit to overturn the award by SUNY Oneonta to Graystone.

Background

The RFP issued by SUNY Oneonta provided that the contract would be awarded to bidder with the highest score based on an evaluation of: (i) cost – 40 points; (ii) proven ability to provide services – 25 points; (iii) experience and qualifications – 25 points; and (iv) marketing strategy and value added services – 10 points. (RFP Section VII).

Section III of the RFP, Contractor Qualifications, requested that bidders “[p]lease provide a sample ad layout in a 2 x 6 inch classified ad and a one-column classified ad, using the attached ad text to demonstrate the creative ability of your company.” However, Section X of the RFP, Submission Instructions, (listing seven (7) items that were required to be submitted with bid responses) required a bidder to provide a “[s]ample layout using text attached as Attachment 1.” In its bid, Graystone submitted four (4) 2 x 6 sample ad layouts but did not submit a one-column ad. SUNY Oneonta determined that Graystone's failure to include the one-column ad layout in its submission was the result of an “oversight error” by SUNY Oneonta in writing the RFP, and therefore waived this omission.

Analysis

The primary issue presented by this protest is whether SUNY Oneonta's decision to waive the one-column ad requirement described in Section III of the RFP was a material variance from the terms of the RFP.

Section 163(2) of the State Finance Law provides that 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. To this end, procuring State agencies are generally not permitted to materially deviate from the requirements set forth in its solicitation.

It is well established that a variance is material or substantial when it would impair the interests of the procuring State 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).

First, we find that no bidder or potential bidder was disadvantaged by the waiver of the requirement. Based upon the services being procured, it is apparent on the procurement record that the inclusion of the one-column sample ad layout did not cause any qualified bidder to refrain from submitting a proposal. Any potential bidder who is capable of providing a 2 x 6 sample ad layout is also capable, likely via a desktop software application, to shrink the 2 x 6 ad into the one-column ad. For this same reason we additionally perceive no disadvantage to any of the bidders who did provide the one-column ad.¹

Further, we do not find that SUNY Oneonta's interests were impaired in any manner. The RFP Review Committee determined that two ad layouts were not needed for the Committee's evaluation of the vendor's capability to provide the required advertising services. All bids contained a 2 x 6 classified ad that allowed the Committee to evaluate whether a bidder possessed the capability to produce a quality ad. Therefore, the Committee determined that the submission of a one-column ad was not necessary for the evaluation process, and would not alter the evaluation and selection process.

Based upon the nature of the services required under the RFP, SUNY Oneonta's analysis of the effect, or lack thereof, that the one-column ad requirement had on competition and the evaluation and selection process, we are satisfied that this requirement was not a material part of the RFP. Therefore, SUNY Oneonta's decision to waive the one-column ad layout was consistent with applicable legal requirements.²

¹ This is consistent with SUNY Oneonta's RFP review committee's reasoning that any advertising company that could meet the qualifications established in the RFP would be capable of creating advertising layouts in various ways as advertising companies must be flexible to meet the needs of their customers.

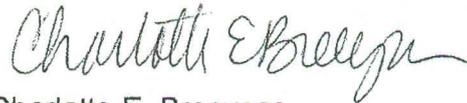
² For purposes of our analysis, it is irrelevant whether the omission by Graystone was the result of an ambiguity created by SUNY Oneonta, or a simple oversight by Graystone, since we are satisfied that the omission being waived was not material, and therefore could properly be waived even if it was solely the result of an oversight by the bidder.

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We will now address Waymar's assertion that it should have received the award since the cost it submitted was less than that of Graystone. The contract in question is a contract for services, specifically advertising services.³ Therefore, pursuant to section 163(4) of the State Finance Law, the contract was required to be awarded on the basis of best value, which generally requires consideration of both cost and technical merit.⁴ Consistent with this requirement, the RFP properly provided that the award was to be made to the bidder receiving the highest score based on an evaluation of cost (weighted at 40% of the scoring) and technical merit (weighted at 60% of the scoring), not to the vendor submitting the lowest cost.

In light of the foregoing, the protest filed by Waymar is denied.

Sincerely,



Charlotte E. Breeyear
Director, Bureau of Contracts

CEB:mea

³ While the contract does also provide for some printing, the printing is incidental to the advertising services and the total character of the contract (see Citiwide News v. New York City Transit Authority, 62 NY2d 464 [1984]) is clearly one for services.

⁴ While there are limited circumstances where best value can be equated to lowest price (see, e.g. SF-20020035 and SF-20070029), those circumstances are not present in this case, and therefore this contract could only be awarded through a process that considered both cost and technical merit.