

THOMAS P. DINAPOLI
STATE COMPTROLLER



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STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

April 13, 2009

Mr. Andrew Rolfe
Arcola Sales & Services Corp.
51 Kero Road
Carlstadt, NJ 07072

Dear Mr. Rolfe:

Re: Contract PC64222
OGS Contract with W.N.Y. Bus Parts, Inc.

This letter is in response to your letter dated January 14, 2009, appealing the Office of General Services' (hereinafter "OGS") decision rejecting your protest of the contract award to W.N.Y. Bus Parts, Inc., doing business as Gorman Enterprises (hereinafter "WNY") for Type VI buses procured by OGS. As outlined in further detail below, we have determined that the grounds advanced in the protest are without sufficient merit to overturn the contract award by OGS. We therefore hereby deny the protest and are today approving the OGS contract with WNY.

OGS issued an invitation for bids (hereinafter "IFB") for six types of buses. The award of the Type VI bus is the only award that appears to be at issue in this matter. The IFB provided that separate awards would be made for each type of bus based upon the lowest GRAND TOTAL BID PRICE for that type of bus. The bidders were provided with a pre-printed pricing sheet on which the bidders were required to provide their bids. The pricing sheet required that the bidders insert a base price for the type of bus for which the bid was being submitted, as well as prices for various options, including air-conditioning. The bidders were then required to multiply their base price and their price for each option by specified quantities to arrive at the extended total price for the type of bus and each option. The bidders were then required to add together the extended total price for the base bus and each option to arrive at the GRAND TOTAL BID PRICE for that type of bus.

Among the options listed in the specifications contained in the IFB for the Type VI bus, for which bidders were required to provide prices, were two types of optional air-conditioning. The first air-conditioning option was for traditionally installed air-conditioning (hereinafter "Option 4") and the second option was for roof mounted air-conditioning (hereinafter "Option 4A"). The pricing sheet reflected an estimated quantity of forty (40) buses for Option 4 and forty (40) buses for Option 4A. WNY bid a price for Option 4 of four thousand nine hundred ninety-seven dollars (\$4,997) and a price for

Option 4A of two hundred forty-eight dollars (\$248).¹ With respect to the pricing of Option 4A on the pre-printed form, WNY inserted the handwritten language "Must Use Option 4 and 4A".

WNY correctly extended its unit price of two hundred forty-eight dollars (\$248) by multiplying such amount by forty (40) for an extended total price of nine thousand nine hundred twenty dollars (\$9,920) for Option 4A. WNY then correctly added together its extended total price of nine thousand nine hundred twenty dollars (\$9,920) for Option 4A with its extended total prices for the base bus and each option to arrive at its proposed GRAND TOTAL BID PRICE of six million three hundred twenty thousand fifty-two dollars and eighty cents (\$6,320,052.80), which was the lowest GRAND TOTAL BID PRICE of all the bids for the Type VI bus.

After reviewing the submitted bids for all six bus types, OGS selected a winner for each bus type, in accordance with the terms of the IFB. The contract for Type VI buses was conditionally awarded to WNY, and the unsuccessful bidders were notified of the same. Subsequently, a bid protest was filed by Arcola Sales and Services Corp. (hereinafter "Arcola"). In its protest to OGS, Arcola alleged that it was abundantly clear that the two hundred forty-eight dollar price listed in WNY's bid was an incremental cost and required OGS to add the cost for Option 4 and Option 4A to ascertain the actual cost of Option 4A ($\$248 + \$4,997 = \$5,225$), and that if this had been done, Arcola would have been the low bidder. Arcola also contended that to permit WNY "to retroactively claim otherwise would be permitting [WNY] to modify [its] bid." Arcola cites Appendix B paragraph 24a, "Unit Pricing", which states in relevant part that "[i]n the event of a discrepancy between the unit price and the extension, the unit price shall govern unless, in the sole judgment of the Commissioner, such unit pricing is obviously erroneous," as support for its contention that OGS must recast the cost for Option 4A to make it consistent with other bids.

In response, OGS cited its "long standing practice ... to require low bidders to remove extraneous terms and conditions submitted with their bid, and failure to do so, results in a determination of non-responsiveness." OGS denied the protest on the grounds that under its authority to request clarifications/revisions from bidders, OGS "requested and received a withdrawal of all extraneous terms, conditions and clarifications submitted with the bid."²

¹ All other bidders pricing for Option 4A was higher than their respective Option 4 pricing.

² OGS cites Appendix B paragraph 31 CLARIFICATIONS/REVISIONS as its authority to request clarifications/revisions from the bidders. Paragraph 31 provides, in relevant part, that "[p]rior to award, the Commissioner reserves the right to seek clarification, request Bid revisions, or to request any information deemed to be eligible for Contract award."

Paragraph 31 is modeled on the language of section 163(9)(c) of the State Finance Law, which clearly permits an agency to seek clarifications under certain circumstances. However, as noted below, it is also clear that a bidder generally may not materially alter its bid, and, as a result, we do not believe that this provision authorizes a bidder to materially change its bid through a "clarification". However, since, as discussed below, we conclude that the extraneous language inserted by WNY was irrelevant and of no legal force or effect, and WNY was bound to its unit price bid of \$248 for Item 4A, it follows that OGS' action did not, in this case, permit WNY to materially alter its bid.

After being notified that OGS was rejecting its bid protest and upholding its original award decision, Arcola filed an appeal of the protest decision with OGS in accordance with the protest procedure set forth in the IFB. Arcola's appeal reiterated its position and added that the clarification/revision sought and received by OGS was tantamount to allowing an individual bidder to change its bid price after the opening of the sealed bids. OGS' decision on the appeal simply stated that it had determined that the Arcola appeal was without merit.

Subsequently, Arcola filed a protest appeal (hereinafter "Appeal") with this Office. Under §112 of the State Finance Law (hereinafter "SFL"), before any contract made for or by a state agency, which exceeds fifty thousand dollars (\$50,000) in amount, becomes effective it must be approved by the Comptroller.³ Because OGS had already entered into a proposed contract with WNY resulting from this procurement, the Comptroller has reviewed the Appeal filed by Arcola as part of his review of the contract award to WNY. As part of our review, we have reviewed the procurement record along with the Appeal, and all communications filed by the parties thereto.

In carrying out the aforementioned responsibilities proscribed by SFL §112, this Office has issued Contract Award Protest Procedures that govern the process to be used when an interested party challenges a contract award by a State agency.⁴ These procedures govern initial protests to this Office of agency contract awards, appeals of agency protest determinations, as well as protests of contract awards made by this Office.

Arcola asserts that the language incorporated in WNY's bid requires that either WNY be found non-responsive or OGS recast the WNY bid to make it consistent with the other bids. Arcola correctly states that if WNY's bid is recast, Arcola becomes the low bidder. Arcola further argues that WNY's agreement to honor the incremental price and to disregard the incorporated language, would constitute a change in price after bid submissions, which is "improper and cannot be permitted."

Preliminarily, we note that we agree with Arcola that generally a bidder cannot be allowed to alter its bid, after the submission of bids.⁵ However, as outlined below, it is our view WNY did not alter its bid and, therefore, OGS properly awarded the contract for Item VI buses since:

- (i) Appendix B paragraph 24a, "Unit Pricing" did **not** require that OGS adjust the GRAND TOTAL BID PRICE submitted by WNY;
- (ii) WNY was legally bound to all of the unit prices quoted in its bid, including the unit price of \$248 for Option 4A; and
- (iii) the amount listed by WNY as its GRAND TOTAL BID PRICE of \$6,320,052.80 was the lowest bid received for this Item.

3 SFL §112(2).

4 Comptroller's G-Bulletin G-232.

5 A state agency can, however, after it has determined the lowest responsible bidder, negotiate a reduction in price from such lowest responsible bidder.

Clearly, a bid is a binding offer to make a contract. In this case, the "bids" were the unit prices quoted for the base model and the various options. The notation made by WNY on the pre-printed pricing sheet did not alter the unit prices entered by WNY on its bid sheet, and therefore was of no consequence under the terms of Appendix B.

Appendix B paragraph 24a, "**Unit Pricing**", states in relevant part that "[i]n the event of a discrepancy between the unit price and the extension, the unit price shall govern unless, in the sole judgment of the Commissioner, such unit pricing is obviously erroneous." In this case WNY's listed unit price for Option 4A was two hundred forty-eight dollars (\$248) and WNY correctly extended this unit price in accordance with Appendix B to arrive at the extended total price for this option, and then correctly extended the extended total prices for the base bus and the various options to arrive at its GRAND TOTAL BID PRICE of \$6,320,052.80. As a result, in our view, OGS was neither required, nor indeed authorized, to recalculate WNY's GRAND TOTAL BID PRICE.⁶

Consistent with the foregoing, WNY's bid for Option 4A was two hundred forty-eight dollars (\$248), and consistent with basic contract principles, WNY was in our opinion, bound to its bid price for Option 4A.⁷ Furthermore, we note that even if one were to presume that WNY made a unilateral mistake in its bid, in this case, it is our opinion that such mistake would not, as a matter of law, have excused WNY from being bound to its bid.

Under common law, once bids have been opened, a bid containing a unilateral mistake made by the winning bidder may be rescinded where the mistake is known to the other party to the transaction and (1) the bid mistake is of such consequence that enforcement would be unconscionable, (2) the mistake is material, (3) the mistake occurred despite the exercise of ordinary care by the bidder and (4) it is possible to place the other party in *status quo*. *Balaban-Gordon Company, Inc., Respondent, v. Brighton Sewer District No. 2 et al.*, 41 A.D.2d 246 (4th Dep't 1973) citing 13 Williston, *Contracts* [3d ed.], § 1573; Ann. 52 ALR 2d 793-794). Additionally, the Third Department has held that "[a] bid could be withdrawn if the contractor, by clear and convincing proof established that a verifiable error occurred which resulted in the bid being substantially below what was necessary and that the contractor would suffer substantial loss if directed to perform the contract at the price set forth in the bid." *Matter of T.P.K. Construction Corp., Respondent, v. James C. O'Shea, as Commissioner of the Office of General Services of the State of New York*, 69 A.D.2d 316 (1979 3rd Dep't).

⁶ If WNY had extended its prices in a manner that was inconsistent with the two hundred forty eight dollar (\$248) listed unit price, such extensions would have been disregarded.

⁷ Because this Office viewed the issue of whether WNY was bound to the price of two hundred forty-eight dollars (\$248) for Option 4A as dispositive, this Office solicited opinions from Arcola, WNY and OGS. WNY implied that it was bound to the unit price it bid for Option 4A when WNY stated that "the handwritten note had no bearing on the numeric entries or the final bid number of \$6,320,052.80." Arcola subsequently took the position that WNY was not bound to its bid, as the WNY bid's handwritten note made the bid non-responsive. OGS stated in its letter dated March 16, 2009 that OGS believes that "WNY was bound to the bid price of \$248 for Option 4A."

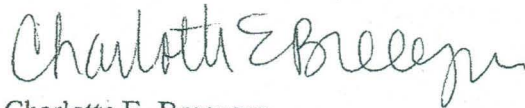
Mr. Andrew Rolfe
April 13, 2009
Page 5

Here, WNY's GRAND TOTAL BID PRICE of \$6,320,052.80, including the \$248 unit price for Option 4A is only approximately \$15,000 less than the GRAND TOTAL BID PRICE of Arcola. As a result, we do not believe the enforcement of WNY's bid would have been unconscionable, and, therefore, in our opinion, WNY was bound to its bid, including its bid of \$248 for Option 4A.

Since WNY was legally bound to all of the unit prices quoted in its bid, including the unit price of \$248 for Option 4A, it necessarily follows that it was not afforded the opportunity to amend its bid when it confirmed its bid to OGS. The amount listed by WNY as its GRAND TOTAL BID PRICE of six million three hundred twenty thousand fifty-two dollars and eighty cents (\$6,320,052.80) was correctly computed and was the lowest bid received for the Item VI bus.

Therefore, in summary, we are satisfied that: (i) WNY's GRAND TOTAL BID PRICE of \$6,320,052.80 was the low bid on Item VI buses; (ii) OGS was not required (or indeed authorized) by Appendix B paragraph 24a to recalculate the amount of this bid; and (iii) WNY was not afforded the opportunity to amend its bid, since it was legally bound to its GRAND TOTAL BID PRICE of \$6,320,052.80. In light of the foregoing, we find that the issues raised in the protest are not of sufficient merit to overturn the award by OGS to WNY. Therefore, the protest is denied and we are today approving the OGS/WNY contract.

Sincerely,



Charlotte E. Breeyear
Director, Bureau of Contracts

CEB:mea

cc: John K. Dalton, Esq.
Mr. William Gorman
Mr. Jerry J. Gerard