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OFFICE OF THE STATE COMPTROLLER

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Gentlemen:

Re: Bid Protest of the Contract Award for Construction by the State University of New York Downstate Medical Center to Axis Construction  
Projects Nos. 07-017, 07-108, 07-019, 07-026  
OSC SF-20090091

This is in response to Touro Contracting Corporation's (hereinafter "Touro") protest dated February 2, 2009 regarding the above-referenced procurement which resulted in an award by the State University of New York Downstate Medical Center (hereinafter "SUNY Downstate") to Axis Construction, Inc. (hereinafter "Axis").

In its protest letter, Touro asserts that: (i) the specifications drafted by SUNY Downstate restricted eligibility; (ii) SUNY Downstate violated the instructions in the Invitation for Bidders (hereinafter "IFB") by allowing Axis to change its bid after the bid was opened, to materially alter the commencement of performance and delete substantial work; (iii) Axis was non-responsive because it did not submit a bid bond, and when it did, the bid bond was either backdated or substituted; (iv) by awarding to Axis, SUNY Downstate is wasting \$321,000; and (v) Touro has the requisite experience required by the specifications.

This Office has reviewed the issues raised in the protest as part of our review of the contract award made by SUNY Downstate to Axis. In our review, this Office considered: (i) the procurement record submitted by SUNY Downstate; (ii) Touro's protest dated February 2, 2009; (iii) SUNY Downstate's response to the protest dated February 17, 2009; and (iv) Touro's reply to SUNY Downstate's response dated February 20, 2009.<sup>1</sup> As detailed below, we have determined that an issue identified in the protest warrants overturning SUNY Downstate's contract award to Axis. As such, we are returning the SUNY Downstate/Axis contract unapproved.

### Background

Previously, on January 25, 2008, this Office rendered a determination that we could not approve an award by SUNY Downstate for the construction services related to Projects Nos. 07-017, 07-108, 07-019 and 07-026 based upon the fact that there were material variations between the eligibility requirements published in the New York State Contract Reporter and those listed in the IFB issued by SUNY Downstate. As a result, we concluded that if SUNY Downstate wanted to move forward with these projects, it would have to undertake a new procurement.

On June 6, 2008 SUNY Downstate issued a new IFB for the above-referenced projects. Section 7 of the IFB entitled Qualifications of Bidders included, in part, the following:

(3) A bidder must also be prepared to prove, to the satisfaction of the University, that it has successfully completed a contract of similar work in an amount of not less than 50 percent of the amount of its Total Bid;

(4) Similar work is defined by the University as work in a hospital-based, patient care environment, involving the construction of rooms to be used for interventional procedures, and where the department/unit maintains ongoing operations 24/7/365;

(5) Each bidder must be prepared to prove, to the satisfaction of the University, that it and key project personnel have minimum ten (10) years experience in constructing hospital-based interventional imaging procedure rooms, and have built such since 2003; such projects must have included Philips or similar imaging equipment. Contracted personnel must be familiar with infection control/life-safety and TJC requirements. Must provide a Bid Bond equal to a minimum of 5% of Bid.<sup>2</sup>

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<sup>1</sup> We note that Touro sent a letter to this Office December 24, 2008 objecting to the fact it had been deemed non-responsive for failure to meet the qualifications of the IFB.

<sup>2</sup> The Qualifications of Bidders were also contained in the Notice to Bidders.

Page P-1 of the Proposal included the timing for the completion of work and the liquidated damages schedule. It states:

**"The Work Proposed Herein Will Be Completed Within 180 Calendar Days, Starting 10 Calendar Days After The Contract Approval Date of the New York State Comptroller.** In the event the bidder fails to complete such work by said date or dates, or within the time to which such completion may have been extended in accordance with the Contract Documents, the bidder agrees to pay the University liquidated damages in an amount equal to the values indicate[d] in the Liquidated Damages Schedule below for each calendar day of delay in completing the work."  
(emphasis in original)

Page P-1 also includes the liquidated damages schedule. The schedule provides that for contract amounts between \$1 million and \$1,999,999 the liquidated damages are \$400 per day and for contract amounts between \$2 million and \$3,499,999 the liquidated damages are \$500 per day.

The Notice to Bidders also contained the requirement that all work on the projects be completed within 180 calendar days starting ten (10) days after the contract approval date of the New York State Comptroller.

Section 9 of the IFB, Award of Contract, stated the "award of the Contract shall be made to the bidder submitting the lowest bid who, in the opinion of the University, is qualified to perform the work involved and is responsible and reliable."

Three bids were received by the proposal deadline on September 16, 2008 from: (i) Touro in the amount of \$1,856,000; (ii) Axis in the amount of \$2,177,700; and (iii) J.G.N. Construction Corp. in the amount of \$2,490,000.

SUNY Downstate sent letters, dated September 17, 2008, to each of the three bidders requesting additional information as outlined in Sections 7 and 8 of the IFB, including:

A description of the company's work experience to prove to SUNY Downstate Medical Center that it has the qualifications to do this project by having completed projects of this type—as described in the above-referenced Section 7 and the eligibility requirements contained in the advertisements.

By letter dated November 28, 2008, SUNY Downstate informed Touro of its determination that Touro's work experience did not meet the required qualifications and thus its proposal was non-responsive. On December 2, 2008,

SUNY Downstate notified Axis of its intent to award Axis the contract. The SUNY Downstate/Axis contract was received by this Office for review on May 12, 2009.

### Authority

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. However, under the authority of section 355(5) of the Education Law, a higher threshold with respect to Comptroller approval of contracts let by the State University of New York has been established, and the threshold for SUNY Downstate contracts is currently \$75,000.00 for construction. Because the value of this proposed contract exceeds \$75,000.00, it is subject to this Office's review.

### Analysis

#### I. Work Completion/Variance from Requirement

As referenced above, the IFB required that "[a]ll work on this contract is to be completed within 180 calendar days after the contract approval date of the New York State Comptroller." In its proposal, Axis included a page of proposal qualifications, one of which modified its timing schedule for the completion of work by stating "[t]he total schedule duration is one hundred eighty (180) calendar days from start of construction to completion and turnover. Start of construction will be based on the lead times for the submittal, approval, order and delivery of equipment, materials, etc."

Preliminarily, we note that SUNY asserts that Axis did not change its bid, but rather simply provided a clarification to a boilerplate list of qualifications. We do not agree. Subsequent to the bid opening, SUNY met with Axis and on October 29, 2008, Axis sent a clarification letter to SUNY Downstate confirming that its "proposal . . . includes all items of scope as per drawings and specifications for the Interventional Imaging Interim Equipment Replacement Project." It is not at all clear that this letter would operate to alter the exception that Axis had taken to the completion schedule. However, even if it were to be viewed as doing so, such an alternation would clearly, in our view, constitute a change or amendment to Axis' proposal. Such a change is impermissible to correct a material deviation from the bid specifications. See Sinram-Marnis Oil Co. v. City of New York, 74 N.Y.2d 13 (1989), *quoting* LeCesse Bros. Cont. Inc. v. Town Board, 62 A.D.2d 28 (4<sup>th</sup> Dept. 1978); Tony's Barge v. Town Board, 310 A.D.2d 234 (2<sup>nd</sup> Dept. 1994). Therefore, we must determine whether the "qualification", which Axis made with respect to the completion date, was a material variation from the specifications.

A variance is material if it would impair the interests of the procuring 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 (1981); Fischbach & Moore v NYC Transit Authority, 79 A.D.2d 14 (2<sup>nd</sup> Dept. 1981); Application of Glen Truck Sales & Service, Inc. v. Sirigano, 31 Misc.2d 1027 (1961).

In this case, we find that Axis' qualification as to the completion time provided it with an advantage not enjoyed by any other bidder and disadvantaged potential bidders.<sup>3</sup> First, by changing the date and providing for additional lead time, Axis could reasonably assure itself that it could comply with the 180-day timeframe and likely avoid the liquidated damages of \$500 per day, thus not having to factor such liquidated damages into its bid price. Other bidders however, did not have such an advantage and may have factored the potential for liquidated damages into its bid price. Additionally, the required timeframe for the completion of the project may have dissuaded other bidders from submitting a proposal due to their current scheduling, where Axis, by this qualification, could control this date. Lastly, we believe by qualifying its proposal, Axis gained a competitive advantage over other bidders in that it could choose to accept or reject the project where, as here, SUNY Downstate did not concede to its timeframe for work completion. See Le Cesse Bros, *supra*. Since we have found that the timing of the project was material, SUNY Downstate could not permit Axis the opportunity to withdraw this qualification to its bid, and therefore the bid was materially non-responsive.

Although, in light of our determination above, the other issues raised in the protest are moot, since SUNY Downstate may re-bid these projects, we provide the following guidance with respect to the other issues raised in the protest.

## II. Qualifications of Bidders

The two central purposes of New York's competitive bidding statutes are: (i) protection of the public fisc by obtaining the best work at the lowest possible price; and (ii) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts. Acme Bus Corp. v. Board of Educ. of Roosevelt Union Free School, 91 N.Y.2d 51, 54-55 (1997). And, although an agency may not draw specifications that ensure a contract award to a particular bidder (Gerzof v. Sweeney, 16 N.Y.2d 206, 211 (1965)), it may require specifications that set forth "experience and qualifications that must be met for an entity to be an eligible bidder. E.W. Tompkins Co. Inc. v. State University of New York, 61 A.D.3d 1248, 877 NYS2d 743 (3<sup>rd</sup> Dept. 2009).

Touro asserts, in part, that it is the lowest qualified bidder and, as such, should be awarded the contract. In support of its position, Touro points to its successful completion of similar construction work performed at SUNY Downstate over the last decade as evidence that it should not have been deemed non-responsive to the specifications of the IFB as the work to be

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<sup>3</sup> In light of our finding with respect to the completion time, we need not reach a conclusion as to whether Axis was allowed to impermissibly modify its bid to include the low voltage cabling after excluding such work in its initial proposal.

performed "is no different than other construction work that Touro had previously performed for SUNY."

In response to this issue, SUNY Downstate acknowledged its satisfaction with Touro's prior work. However, despite this satisfaction, SUNY stated the prior work "revealed that Touro had no experience constructing rooms to be used for interventional imaging procedures." The procurement record documents that SUNY Downstate's justification for the similar work requirement was that the rooms being constructed will house sophisticated imaging equipment where patient interventions take place, some requiring medical standards equivalent to those pertinent to surgical suites.

Generally, bid specifications will be upheld by the courts if such specifications represent a rational attempt by the governmental entity to obtain the best work at the lowest possible price and also operate to prevent fraud, favoritism and corruption in the letting of public contracts. See, Matter of New York State Chapter, Inc., Associated General Contractors of America v New York State Thruway Authority, 88 NY 2d 56, 68 (1996); and E.W. Tompkins Co. Inc. v State University of New York, 61 A.D.3d 1248 (3<sup>rd</sup> Dept. 2009).<sup>4</sup> While this Office in its review of contracts is not required to uphold an agency's determination if it has a rational basis, we generally give significant deference to agency determinations regarding factual issues which are within the agency's expertise. Here, we have no basis to question SUNY Downstate's determination that experience constructing interventional imaging rooms is necessary.<sup>5</sup>

We are not, however, convinced that the specific requirement that a bidder prove "that it and key project personnel have minimum ten (10) years experience in constructing hospital based interventional imaging procedure rooms, and must have built such since 2003...." is justifiable. Pursuant to this language, a bidder who has constructed one such room ten years ago and one four years ago (and meets the other qualifications) would be qualified to bid on this project, but a company that specializes in the construction of hospital based imaging rooms and has completed twenty or more such projects but has only been in business for six years would not meet the qualification. The validity of such a requirement would be questionable. See Matter of Construction Contractors Assn. v. Board of Trustees, 192 A.D.2d 265 (2<sup>nd</sup> Dept. 1993). If SUNY Downstate intends to make an award to J.G.N. Construction Corp. (which would be the lowest responsive bidder assuming that it met this requirement), or if SUNY wishes to utilize a similar requirement on a re-bid, we would require SUNY Downstate to

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4 At least one court, however, has suggested caution where particularized experience is required, particularly where the requirement would operate to exclude firms with key personnel who have such experience. See Matter of Construction Contractors Assn. v. Board of Trustees, 192 A.D.2d 265, 268 (2<sup>nd</sup> Dept. 1993)

5 Additionally, Touro contends that the new specifications are a "change" in the eligibility requirements to exclude Touro from bidding. We note that they are substantially similar to the eligibility requirements contained in the Contract Reporter notice for the prior procurement. In any event, the relevant issue is whether such requirement, even if not contained in the specifications for the prior procurement, is appropriate and in the public interest.

address this issue, especially in light of the fact that there appears to have been at most two bidders who met this requirement.

### III. Bid Bond

As stated above, it is within an agency's discretion to waive minor variations from bid requirements if the variation is non-material. Cataract Disposal Inc, Supra at 272. We agree with SUNY Downstate that the issues raised by the protest with respect to the deficiencies in the bid bond submitted by Axis are non-material. Furthermore, SUNY Downstate's handling of this issue was consistent with its procurement procedures 7554 for construction contracting. This procedure specifically addresses the failure to submit a bid bond with a proposal wherein it provides that: "[p]roposals that contain minor irregularities, such as those submitted without a proper Bid Security . . . , shall be considered informal." As such, it was within SUNY Downstate's discretion to accept or reject the non-material deviation in Axis' proposal with respect to the bid bond. See Nowack v. County of Suffolk, 233 N.Y.2d 627 (1962).

### Conclusion

In light of the foregoing, because Axis's proposal contained material deviations from specifications of the IFB with respect to completion of the project, we are returning the SUNY Downstate/Axis contract unapproved.

Sincerely,



Charlotte E. Breear  
Director, Bureau of Contracts

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