

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Bid Protest filed by Avery  
Dennison Corporation with respect to the  
procurement of Materials for Reflective License  
Plates conducted by the New York State  
Department of Correctional Services

**Determination  
of Bid Protest**

**SF-20090364**

Contract Number – PA06152

October 23, 2009

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This Office has completed its review of the above-referenced procurement conducted by the New York State Department of Correctional Services (hereinafter "DOCS") and the bid protest filed by Avery Dennison Corporation (hereinafter "Avery") with respect thereto. As outlined in further detail below, we have determined that the grounds advanced by the protestor are without sufficient merit to overturn the contract award by DOCS. We therefore hereby deny the protest and are today approving the DOCS contract with 3M Company (hereinafter "3M").

**BACKGROUND**

**Facts**

DOCS initially released an Invitation for Bids (hereinafter "Initial IFB") to procure license plate materials for reflective license plates that will be produced by Corcraft. The materials sought by this procurement are to be used for new license plates that are scheduled to be issued beginning in April of 2010. There were two bids submitted in response to the Initial IFB, one by 3M and the other by Avery.

The specifications of the Initial IFB required that the successful bidder install and make operational three digitally-controlled application and registry lines by August 15, 2009, regardless of when the resulting contract was approved (hereinafter "Initial Implementation Specification").<sup>1</sup> Neither bidder appears to have taken a specific exception in its bid to the Initial Implementation Specification; however, Avery did propose an alternative timeframe in its bid.

The Initial IFB also included the following specification (hereinafter "Temperature Resistance Specification"):

After baking the applied roller coat paste/ink in accordance with license plate manufacturing process requirements, the specular gloss shall not be less than 70 when measured on

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<sup>1</sup> It is not clear what timeframe the successful vendor would have had to install and make operational the required equipment since this Office had not approved the contract.



a 60 [degree] glossmeter in accordance with ASTM D523-08. Subsequent immersion of the test sample in 90 octane (mid-grade) gasoline for a period of 3 hours shall result in a loss of gloss of no more than 10 points when the sample is tested a minimum of 2 hours after immersion. Initial IFB at page 5 "SPECULAR GLOSS".

After testing by an independent entity, DOCS determined that 3M was capable of meeting such specification. Avery, however, acknowledged that it was not capable of meeting the Temperature Resistance Specification and took exception to this specification in its bid.

Ultimately, DOCS determined that Avery was the low bidder, and apparently initially determined that Avery was responsive, and thereafter subsequently submitted a contract with Avery to this Office for approval. 3M filed a protest with this Office in part challenging the responsiveness of Avery's bid based on Avery's non-compliance with the Temperature Resistance Specification. After an initial review of the procurement record by this Office, this Office advised DOCS that OSC required additional justification to support the waiver of the Temperature Resistance Specification before this Office could approve the contract.

Subsequently, DOCS determined that the Temperature Resistance Specification was no longer necessary and the best course of action was to reject all bids received in response to the Initial IFB and issue a new Invitation for Bids (hereinafter "IFB") without the Temperature Resistance Specification. DOCS notified Avery and 3M of its decision and reissued the IFB on August 20, 2009.

The IFB was reissued without the Temperature Resistance Specification, but with a change to the implementation specification which now required that equipment be installed and operational thirty days from this Office's approval of the contract (hereinafter "Implementation Specification"). In response to the IFB, again, DOCS received two bids, one from Avery and the other from 3M. In this instance, 3M's bid was lower than Avery's and, therefore, DOCS awarded the contract to 3M.

On September 2, 2009, this Office received a letter of intent to protest the DOCS contract award to 3M from the attorney representing Avery. On September 14, 2009, this Office received Avery's letter of protest challenging the award of the contract to 3M (hereinafter "Protest"). On September 25, 2009, this Office received the DOCS letter responding to the allegations in the Protest (hereinafter "DOCS Answer"). On September 30, 2009, this Office received the 3M letter responding to the allegations in the Protest (hereinafter "3M Answer"). On October 2, 2009, this Office received Avery's reply to 3M's Answer (hereinafter "Reply").



### **Procedures and Comptroller's Authority**

Under Section 112(2) 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.<sup>2</sup> 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.<sup>3</sup> These procedures govern initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no Protest process engaged in at the department level, the Protest is governed by this Office's procedures for initial protests filed with this Office (Section 3 of the Procedures).

In the determination of this Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DOCS with the DOCS/3M contract;
2. the correspondence between this Office and DOCS arising out of our review of the proposed DOCS/3M contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
  - a. Protest letter from Brian J. Lucey, Esq., dated September 14, 2009, filed on behalf of Avery;
  - b. DOCS' September 25, 2009 Answer to the Protest;
  - c. 3M's September 30, 2009 Answer to the Protest; and
  - d. Avery's October 2, 2009 Reply to 3M's Answer.

### **Applicable Statutes**

The requirements applicable to this procurement are set forth in SFL Article 11 which provides that "commodities shall be awarded on the basis of lowest price to a responsive and responsible offerer."<sup>4</sup> "Lowest price" is defined as "the basis for awarding contracts for commodities among responsive and responsible offerers."<sup>5</sup> A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."<sup>6</sup>

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<sup>2</sup> SFL §112(2).

<sup>3</sup> Comptroller's G-Bulletin G-232.

<sup>4</sup> SFL §163(10).

<sup>5</sup> SFL §163(1)(i).

<sup>6</sup> SFL §163(1)(d).

SFL §163(9)(a) provides that "[t]he commissioner or a state agency shall select a formal competitive procurement process .... The process shall include, but is not limited to, ... a description of the required specifications governing performance and related factors; a reasonable process for ensuring a competitive field; a fair and equal opportunity for offerers to submit responsive offers; and a balanced and fair method of award."

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 and shall describe and disclose the general manner in which the evaluation and selection shall be conducted."

SFL §163(9)(d) provides that "[a]ll offers may be rejected. Where provided in the solicitation, separable portions of offers may be rejected."

## **ANALYSIS OF BID PROTEST**

### **Avery's Protest to this Office**

In its Protest, Avery challenges the procurement conducted by DOCS on the following grounds:

1. the specification requiring the successful vendor to install equipment within 30 days of the contract award "inappropriately" skewed the outcome in favor of 3M by
  - a. making it "extraordinarily difficult for a vendor other than 3M to comply with the specification" (Protest at 4); and
  - b. providing 3M with a cost advantage as the incumbent. Protest at 3.
2. DOCS decision to re-bid the contract was "erroneous" because after DOCS "correctly determined that the gas immersion specification inappropriately restricted competition", DOCS should have "removed the specification and moved forward with the award to Avery." Protest at 5.
3. DOCS denied Avery due process when DOCS failed to provide Avery with an opportunity to respond to the allegations asserting that its initial bid was non-responsive. Protest at 6.

### **DOCS Response to the Protest**

In the Answer, DOCS contends the Protest should be rejected and the award upheld on the following grounds:

1. In order to ensure Corcraft could meet the timeframe for the Governor's Initiative to reissue license plates by April 1, 2010, it was necessary to place



the time restrictions imposed by the Initial IFB and IFB on the successful bidder. DOCS Answer at 2.

2. After confirmation that only one bidder could meet the Temperature Resistance Specification, and a discussion with this Office, DOCS determined that it would reject all bids, "revise the Specular Gloss requirement to a more reasonable test method and re-bid the contract." DOCS Answer at 3.
3. Avery clearly stated in the bid proposal that they could not meet the Specular Gloss requirement, and that there was no reason to allow Avery to rebut the results of an independent certified laboratory test." DOCS Answer at 3.

### **3M's Response to the Protest**

In the Answer, 3M contends the Protest should be rejected and the award upheld on the following grounds:

1. 3M acted properly and did not request that DOCS use any restrictive provisions in the IFB. 3M Answer at 1-2.
2. DOCS properly rejected all bids received in response to the Initial IFB and reissued the procurement. 3M submitted its bid based on the terms contained in the original IFB and its bidding strategy and fiscal calculations were based upon the terms contained in that original IFB. As a result, it would have been unfair to 3M to waive Avery's non-compliant bid, and, therefore, rebidding was the only option, if the Initial IFB was unduly restrictive. 3M Answer at 2-3. Avery fails to provide any evidence in its Protest to support its allegation that DOCS should not have rejected and rebid. 3M Answer at 3-4.

### **DISCUSSION**

This Office has reviewed the papers submitted in relation to the Protest, as well as the corresponding procurement record, and, for the reasons set forth herein, finds no basis to upset the contract award by DOCS. As such, this Office is rejecting the Protest and approving the contract between DOCS and 3M today. We now address the issues raised in the Protest *in seriatim*.<sup>7</sup>

<sup>7</sup> In accordance with this Office's bid protest procedures, protesters are expected to provide specific factual and/or legal basis for their protest. It is asserted in the Protest that "3M's belated favorable pricing reflects nothing more than an intent to exercise predatory pricing rather than adherence to the underlying fairness required by New York's competitive procurement process." Protest at 3. However, nowhere in the Protest is any documentation or support for this assertion provided. As such, in accordance with our procedures, we could have summarily rejected this assertion. However, we nonetheless reviewed the procurement record to determine if there were any other reason such a price change could have occurred. Upon our review of the procurement record, it appears clear that there are other possible reasons that such a price change could occur, such as the removal of the Temperature Resistance Specification. We therefore, find no merit to this assertion.



### A. Thirty Day Specification & Overhead Costs

The Protest asserts that the installation and operation specification inappropriately skewed the procurement in favor of 3M. This argument is without merit.<sup>8</sup>

#### Overhead Costs:

Avery first argues that it will have the overhead cost of installing "new" equipment, whereas 3M will not.<sup>9</sup> This argument presupposes that 3M will have no need to remove some or all of the currently installed machinery and replace it with new machinery. This Office can find no evidence to support or refute this supposition.

Even assuming, however, that 3M can utilize its existing equipment, and that this may be an advantage for the incumbent, is not necessarily contrary to law. "The central purposes of New York's competitive bidding statutes are '(1) protection of the public fisc by obtaining the best work at the lowest possible price; and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts' (*Matter of New York State Ch., Inc., Associated Gen. Contrs. v New York State Thruway Auth.*, 88 NY2d 56, 68)." *Transactive Corp. v New York State Dep't of Soc. Servs.* 236 AD2d 48, 52 (1997, 3<sup>rd</sup> Dep't), *app gr* 91 NY2d 811, and *app gr* 91 NY2d 812; *see also Acme Bus v Board of Education*, 91 NY2d 51; *Signacon Controls v Mulroy*, 32 NYS2d 410; *Jered v NYCTA*, 22 NY2d 187; *LeCesse v Town Board of the Town of Williamson*, 62 AD2d 28, *aff'd* 46 NY2d 960. It has also been stated that bidding statutes are enacted for the benefit of the taxpayers and not for the benefit or enrichment of the bidders, and should be construed and administered so as to accomplish that purpose fairly and reasonably with sole reference to the public interest. *Acme, supra*; *Jered, supra*; *Spencer, White & Prentis v Southwest Sewer Dist.*, 103 AD2d 802, 477 NYS2d 681, *app dsmd* 63 NY2d 607, 482 NYS2d 1024. Specifications are not contrary to law merely because they tend to favor one bidder over another - rather more must be shown to render the specifications invalid. *Gerzof v. Sweeney*, 16 N.Y.2d 206, 264 N.Y.S2d 376 (1965); *Associated Gen. Contrs. v New York State Thruway Auth.*, 88 NY2d 56, 68. While it is possible that 3M (or any other incumbent) might receive a benefit from being the incumbent and, therefore, already having equipment on site, to the extent that this is the case, an equal or greater benefit would inure to the state in the form of a presumably lower cost. As a result, any incidental

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<sup>8</sup> We note that DOCS submitted a proposed contract to this Office for approval between DOCS and Avery after the Initial IFB, which belies the suggestion that DOCS had a preference for 3M.

<sup>9</sup> Avery appears to assert that the specifications required that non-incumbents install "new" equipment - whereas the incumbent could utilize existing equipment. We can find no such distinction in the specifications. Presumably, to the extent that Avery had idle used equipment (or could acquire used equipment) that otherwise met the specifications, this would have satisfied the specifications.



advantage to the incumbent from this specification is consistent with the core purposes of the bidding statutes, and therefore the specification is reasonable and appropriate.<sup>10</sup>

Compliance with Timeframe:

Avery also contends that the 30 Day Implementation Specification makes it "extraordinarily difficult for a vendor other than 3M to comply with the specification." Again we note that Avery's contention that 3M has an advantage over other bidders because the equipment is installed presupposes that 3M will have no need to remove some or all of the currently installed machinery. This Office can find no evidence to support or refute this assertion.

As previously stated, specifications are not contrary to law merely because they tend to favor one bidder over another. *Gerzof v. Sweeney*, 16 N.Y.2d 206, 264 N.Y.S2d 376 (1965); *Associated Gen. Contrs. v New York State Thruway Auth.*, 88 NY2d 56, 68. In *Gerzof* and *Associated Gen. Contrs.*, however, the Court of Appeals indicated that specifications that eliminate competition or exclude a class of would-be bidders (or make it impossible for such bidders to submit a competitive bid) must be both rationally related to the purposes of the bidding statutes and essential to the public interest. In upholding the challenge to the contract award under such specifications in *Gerzof*, the Court of Appeals stated "[s]uch a scheme or plan is illegal in the absence of a clear showing that it is essential to the public interest." *Gerzof* at 381; See also *J. I. Company v. Town of Vienna*, 105 A.D.2d 1077 (4<sup>th</sup> Dep't, 1984).

Therefore, to the extent that the 30-day requirement made it impossible or extraordinarily difficult for any bidder other than 3M to submit a responsive bid, we would require that DOCS establish that such 30-day requirement is essential to the public interest. See SF 20090020.<sup>11</sup> While Avery asserts that the thirty-day specification makes it "extraordinarily difficult for a vendor other than 3M to comply with the specification", it offers no evidence to support this assertion.<sup>12</sup> Absent some documentation or explanation as to how or why Avery could have submitted a more competitive proposal in the absence of the 30-day implementation requirement, we have no basis to assume this is the case, and, therefore, we find no basis to hold that the 30-day requirement, by itself prevented Avery from making a competitive bid. We

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<sup>10</sup> We would note that, contrary to Avery's assertion, DOCS could not at this time, require the incumbent to sell its existing equipment to any successor vendor since the current contract with 3M does not contain such a requirement. While it might be advantageous if the existing contract contained such a clause, it does not.

<sup>11</sup> In SF 20090020 we upheld a protest challenging brand name "or equal" specifications for golf carts that effectively precluded competition. Our determination was based in part on our finding that the agency had not established that one of the two asserted unique features of the brand name product were essential to the public interest.

<sup>12</sup> It is clear that this 30-day requirement did not operate to exclude any bidder, since it is our understanding that Avery and 3M are the only bidders who can supply this product – and they both bid.



therefore need not consider whether this requirement was essential to the public interest.

### **B. Rejection of Bids and Re-bidding**

The second contention in the Protest is that DOCS erroneously rejected all bids and reissued the IFB. Protest at 5. Subsequent to the issuance of the Initial IFB, DOCS determined that the Temperature Resistance Specification was restrictive (We note that Avery appears to concur with DOCS determination, see Protest at 5). Accordingly, DOCS properly exercised its right, pursuant to SFL §163(9)(d), to reject all bids and reissue the solicitation inviting bids from the entire vendor community for the license plate materials for reflective license plates via a new IFB that did not include the restrictive specification.

It is well-settled law that a municipality or state agency may waive a technical noncompliance with bid specifications if the defect is a mere irregularity and it is in the best interest of the state or the municipality to do so. However, a state agency or municipality may not waive noncompliance if it is material or substantial. A variance is material or substantial when 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, 440 N.Y.S.2d 913 (1981); *Fischbach & Moore v. NYC Transit Authority*, 79 A.D.2d 14, 435 N.Y.S.2d 984 (2<sup>nd</sup> Dept. 1981); *Application of Glen Truck Sales & Service, Inc. v. Sirigano*, 31 Misc2d 1027, 220 N.Y.2d 939 (1961); *Le Cesse Bros. Contr. v. Town Bd. Of Town of Williamson*, 62 A.D.2d 28 (4<sup>th</sup> Dep't 1978).

Here, we believe the variance was material. First, it is a reasonable presumption that a bidder would base its bid price on the specific specifications of the IFB. 3M's statement that 3M's "bidding strategy and fiscal calculations were based on the particularized requirements set forth in that IFB" is consistent with such a presumption as well. Presumably the Temperature Resistance Specification was a harder standard to meet, or Avery and DOCS would not have agreed that the specification was restrictive. It is logical to conclude that 3M's price for the Temperature Resistance Specification compliant materials was higher than it otherwise would have been. The fact that 3M submitted a lower bid when the Temperature Resistance Specification was removed would seem to support this position. Therefore, we believe that Avery's initial bid was materially non-responsive, and DOCS would have had no legal authority to accept Avery's initial bid.<sup>13</sup>

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<sup>13</sup> Additionally, we note that even where a variance is not material, a state agency or municipality has broad discretion to refuse to waive the variance. See e.g., *Donno Co., Inc. v. Bd. Of Trustees of the Village of Kings Point*, 496 N.Y.S.2d 264 (2<sup>nd</sup> Dep't, 1985); *Varsity Transit, Inc. v. Bd. Of Ed of the City of New York*, 515 N.Y.S.2d 520 (2<sup>nd</sup> Dep't, 1987); *Willeys Point Contracting Corp. v. Town Bd of Town of Oyster Bay*, 529 N.Y.S.2d 592 (2<sup>nd</sup> Dep't, 1988); *Gottfried Baking Co., Inc. v. Allen*, 257 N.Y.S.2d 833 (Sup. Ct. Albany Cty, 1964).



Furthermore, even if it could be argued that Avery's deviation was not material, DOCS has broad authority to reject and re-bid – provided it had a reasonable basis to do so. See *Patrick R. Brereton & Associates, Inc. v. Regan*, 94 A.D.2d 886; see also *Matter of Lovisa Constr. Co. v. New York State Dept. of Transp.*, 78 AD2d 159, 160; *Matter of Kayfield Constr. Corp. v. Morris*, 15 AD2d 373, 379; *Matter of Zara Contr. Co. v. Cohen*, *supra*; *Matter of Bielec Wrecking & Lbr. Co. of Syracuse v. McMorran*, 21 AD2d 949. Here, it would certainly have been reasonable for DOCS to re-bid in the anticipation that the less strict specifications would produce a lower price. Indeed, we note that under the reissued IFB, without the Temperature Resistance Specification, DOCS received a significantly better price from both vendors.<sup>14</sup>

### C. Due Process

The third contention in the Protest is that DOCS failed to provide Avery with due process. While Avery cites a number of cases, including *Matter of LaCorte Electrical Construction and Maintenance, Inc. v. County of Rensselaer*, 152 Misc.2d 70 (Rensselaer Supreme Court, 1991); see also *Matter of Schiavone Constr. Co. v. Larocca*, 117 AD2d 440, lv denied 68 NY2d 610; *R.W. Granger & Sons v. State Facilities Dev. Corp.*, 207 A.D.2d 596, to support this assertion, all of these cases involved situations where a governmental agency had found a vendor to be not responsible. None involved an agency determination that a vendor was non-responsive. Furthermore, while the courts in these cases did find a liberty interest that required due process protection, such findings were based not on the loss of the contract, but rather on the fact that "the stigma attached to branding a contractor as "nonresponsible" due to a "lack of integrity" implicates a liberty interest when the result of such a decision affects the contractor's ability to carry on its business." *Schiavone Constr. Co. v. Larocca*, 117 A.D.2d 440; see also *Old Dominion Dairy Prods. v. Secretary of Defense*, 631 F.2d 953, 963; cf. *ATL, Inc. v. United States*, 736 F.2d 677. Indeed, courts have held that vendors do not obtain a vested interest in a contract simply because it submitted the lowest bid. See *Matter of Kayfield Constr. Corp. v. Morris*, 15 A.D.2d 373, 378; see also *Bortle v. Tofany*, 42 A.D.2d 1007.

Therefore, we do not believe that Avery had any constitutional right to due process prior to a finding that it was non-responsive. Nonetheless, we agree that agencies should as a best practice advise bidders, particularly low bidders, who have been found non-responsive of such determination and the basis therefore, and should consider any assertion from the bidder that it is responsive, before making a final

<sup>14</sup> 3M's Initial IFB bid price was .82 per square foot and the bid price under the IFB was .649 per square foot. Avery's Initial IFB bid price was .788 per square foot and the bid price under the IFB was .718 per square foot. There appear to be no substantive changes between the Initial IFB and the IFB other than the implementation specification and the Temperature Resistance Specification.



determination and sending a contract to this Office for approval.<sup>15</sup> Here, however, Avery acknowledged in its bid that Avery's proposed materials failed to meet the Temperature Resistance Specification. Avery, therefore, had already conceded its bid's non-responsiveness.<sup>16</sup>

## CONCLUSION

We find that the issues raised in the protest are not of sufficient merit to overturn the award by DOCS to 3M and, therefore, the protest is denied and we are today approving the DOCS/3M contract.

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110 STATE STREET  
ALBANY, NY 12236

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<sup>15</sup> Indeed, where a bidder believes it has improperly been found non-responsive, it may file a protest with this Office asserting such fact, and this Office will not act on the contract until it has completed its review of the protesters' assertions and will not approve the contract where it is satisfied that the protester was improperly found non-responsive. Therefore, while not constitutionally required, bidders found non-responsive are afforded due process through their ability to assert a protest to this Office prior to the contract becoming effective and binding on the State. In this case, however, as noted previously, we have determined that Avery was not only not responsive, it was materially non-responsive.

<sup>16</sup> Further, the independent test results that were received and reviewed by this Office, as part of its pre-audit review of the proposed contract, document that 3M was compliant with the Temperature Resistance Specification.