

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by A.T.
Kearney, Inc. with respect to the procurement of
Strategic Sourcing Services conducted by the
New York State Division of Budget

**Determination
of Bid Protest**

SF-20100351

Contract Number – C000398

November 9, 2010

This Office has completed its review of the above-referenced procurement conducted by the New York State Division of Budget (hereinafter "DOB") and the bid protest filed by A.T. Kearney, Inc. (hereinafter "A.T. Kearney") 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 DOB. We, therefore, hereby deny the protest and are today approving the DOB contract with Accenture.

BACKGROUND

Facts

On March 19, 2010, DOB issued a Request for Proposals for Strategic Sourcing Services (hereinafter "RFP"). The purpose of the procurement was to support an effort to transform New York State's procurement function from a decentralized approach into a strategically-focused one that seeks to aggressively drive down the total cost of ownership of goods and services. The ultimate goal of the procurement is to save the State hundreds of millions of dollars and improve process efficiency and staff productivity through strategic sourcing.

Since this is a procurement for services, consistent with the requirements of Section 163 of the State Finance Law (hereinafter "SFL"), DOB selected best value as the basis for the award of the contract and provided for minimum specifications and requirements in the RFP. The RFP asked bidders to propose an analysis identifying appropriate categories for strategic sourcing and spend management in New York State Agencies to be completed within six months of starting work (hereinafter "Phase I"), and an implementation phase (hereinafter "Phase II") anticipated to last up to four years. As indicated in the RFP, the technical proposal was made up of five parts and was worth seventy-five percent (75%) of the total score and the cost proposal was made up of two parts and worth twenty-five percent (25%) of the total score.

Proposals were received by the April 30, 2010 due date. After reviewing the proposals, DOB selected Accenture's proposal as the best value proposal and notified the

unsuccessful bidders of such selection. On August 27, 2010, this Office received a letter of protest from A.T. Kearney (hereinafter "Protest") challenging the DOB award of the contract to Accenture. On September 8, 2010, this Office received a letter from DOB answering the allegations of the Protest (hereinafter "DOB Answer"). On September 22, 2010, A.T. Kearney filed a reply to the DOB Answer (hereinafter "Reply") and on October 1, 2010, DOB submitted a sur-reply.

Procedures and Comptroller's Authority

Under Section 112(2) of the SFL, generally, 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.

In carrying out the aforementioned responsibilities prescribed 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.¹ These procedures govern initial protests to this Office of agency contract awards and contract awards made by this Office and appeals of agency protest determinations. Because there was no protest process at the agency, the Protest is governed by this Office's procedures for Initial Protests Filed with the Office of the State Comptroller (Section 3 of the OSC Contract Award Protest Procedures).

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DOB with the DOB/Accenture contract;
2. the correspondence between this Office and DOB arising out of our review of the proposed DOB/Accenture contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Extension Request from Frank G. Hoare, Esq. on behalf of A.T. Kearney dated August 13, 2010;
 - b. A.T. Kearney's Protest, dated August 27, 2010;
 - c. DOB's Answer, dated September 8, 2010;
 - d. A.T. Kearney's Reply, dated September 22, 2010 ; and
 - e. DOB's Sur-Reply, dated October 1, 2010.

Applicable Statutes

The requirements applicable to this procurement are set forth in SFL Article 11 which provides that contracts for services shall be awarded on the basis of "best value" to a

¹ Comptroller's G-Bulletin G-232.

responsive and responsible offerer.² Best value is defined as “the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers.”³ A “responsive” offerer is an “offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency.”⁴

SFL §163(7) provides that “[w]here the basis for award is the best value offer, the state agency shall document, in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria, which whenever possible, shall be quantifiable, and the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted.”

SFL §163(9)(a) provides that “[t]he commissioner or a state agency shall select a formal competitive procurement process ... [which] shall include ... a reasonable process for ensuring a competitive field.”

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 §160(5) provides that “costs” as used in Article 11 “shall be quantifiable and may include, without limitation, the price of the given good or service being purchased; the administrative, training, storage, maintenance or other overhead associated with a given good or service; the value of warranties, delivery schedules, financing costs and foregone opportunity costs associated with a given good or service; and the life span and associated life cycle costs of the given good or service being purchased. Life cycle costs may include, but shall not be limited to, costs or savings associated with construction, energy use, maintenance, operation, and salvage or disposal.”

ANALYSIS OF BID PROTEST

Protest to this Office

In its Protest, A.T. Keamey challenges the procurement conducted by DOB on the following grounds:

1. The State allotted too much weight to the cost of Phase I in its cost evaluation.
2. The Phase II cost evaluation does not reflect the actual cost of Phase II. The State's assigned weights to the hourly rates proposed by bidders on a labor profile that the State arbitrary developed, has no basis in actual usage.

² SFL §163(10).

³ SFL §163(1)(j).

⁴ SFL §163(1)(d).

3. The State should have filtered "unqualified" bidders out of the process before evaluating cost.
4. The Evaluation Panel disparately evaluated the accelerated Phase I timelines proposed by Accenture and A.T. Kearney
5. The Evaluation Panel confused the cost savings estimate of Accenture with the cost savings guarantee of A.T. Kearney.
6. The Evaluation Panel should have made scoring reductions based on Accenture's apparent lack of team integration during the oral presentation.
7. The State should have exercised its reserved right to request best and final offers. The Failure to request best and final offers resulted in a selection which was clearly not the best value.

Response to the Protest

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

1. The amount of work to be conducted in Phase II is wholly dependent on the State's decision on what spending categories are pursued after the completion of Phase I. Since Phase I will be fully undertaken, it is reasonable to allot a higher weight to Phase I than Phase II.
2. The work and staff to be undertaken in Phase II is completely dependent on the outcome of Phase I, and therefore cannot be estimated at this point. As a result, the evaluation of Phase II cost was rate-based rather than evaluated based on actual cost or an estimate of staff hours. In Phase II, hourly rates were weighed based upon a reasonable estimate of a contractor's utilization of labor positions based on DOB's general knowledge of representative consultant staffing distributions. The estimated usage of titles in Phase II is further validated by analyzing the title usage in Phase I proposed by the bidders under this procurement. The methodology used to calculate Phase II cost represented a quantifiable, rational and fair basis to compare cost proposals.
3. All responsive bidders underwent a cost evaluation. These responsive bidders were found to have some capacity to provide the services required and were evaluated in accordance with the pre-defined evaluation methodology.
4. Evaluation Panelist comments reflect the strengths and weaknesses in a given proposal and are not a comprehensive list of every attribute of a panelist's numerical score.
5. Bidders were asked to state "a hard dollar savings target for this project that the firm believes is reasonable and achievable within (2) years of its commencement," and "the portion of its total fees for the project that will be retained." The hard dollar saving targets proposed by the bidders in this category (\$318 million by Accenture and \$100 million by A.T. Kearney) were accurately evaluated by the Evaluation Panel. The RFP requested a two-year savings target and A.T. Kearney did not state that its figure was an annual value.
6. Evaluation Panelists did not identify anything in Accenture's presentation that changed their impression of the strength of the firm's proposed solution and therefore did not make any adjustment to their technical scores.

7. Reserving a right in an RFP does not obligate a party to exercise that right. The RFP asked bidders to submit the firm's lowest discounted governmental rates. Doing so eliminated the need for Best and Final Offers.

DISCUSSION

Cost Evaluation Methodology

The 25 points allocated to cost were awarded using a methodology that was conducted in two parts, calculation of Phase I costs and calculation of Phase II costs. In Phase I bidders were asked for a fixed price to conduct an analysis identifying appropriate categories for strategic sourcing and spend management in New York State Agencies. The lowest cost bidder for Phase I would receive 15 of the 25 cost points. Phase II, asked for hourly rates for each bidder team. The bidder team was comprised of job positions from a labor profile developed by DOB. An estimated number of performance hours was multiplied against the hourly rate for each job position and added up to come up with a composite cost for Phase II. The lowest Phase II cost proposal was awarded the remaining 10 cost score points. The points awarded for Phase I and Phase II were combined to come up with a total cost score for each bidder. The total cost score was then normalized to award 25 points to the proposal receiving the highest combined cost score, and proportionately lower amounts to the remaining proposals. Accordingly, the cost of Phase I was weighted at 60% and the cost of Phase II at 40%.

A.T. Kearney argues that the cost evaluation methodology was flawed because: (i) it overemphasized the cost of Phase I; and (ii) the calculation of Phase II cost does not accurately reflect actual cost. Since both arguments involve the same issues, they will be addressed together below.

(i) Weights of Phase I and Phase II

A.T. Kearney argues that the cost of Phase I was given too much weight in the cost evaluation methodology and should not have been worth 60% of total cost, leaving only 40% of total cost for Phase II. In response, DOB argues that the cost evaluation methodology gave appropriate weight to the two cost components based on the most reasonable cost assessment that could be made with the information currently available. DOB argues that in light of the fact that Phase I efforts will be fully exhausted and the services provided in Phase II will be wholly dependent on carrying out and completing Phase I, it is reasonable to give Phase I more weight. Furthermore, DOB argues that the cost scoring methodology awarded the greatest number of points to the bidder whose proposal was likely to provide the lowest cost to the State.

(ii) Calculation of Phase II Cost

A.T. Kearney argues that the calculation of Phase II cost does not accurately reflect actual cost because it was calculated based on an arbitrary composite of hourly rates submitted for a labor profile developed by DOB. Due to the indefiniteness of Phase II,

DOB did not request actual cost or an estimated number of staff hours for Phase II in the RFP, rather the estimated cost of Phase II was rate-based. DOB weighed hourly rates by an estimate of a contractor's division of labor across different job titles in Phase II. The estimates were based on DOB's general knowledge of representative consultant staffing distributions. DOB estimated that 60% of the effort in Phase II would be services provided by Senior Procurement Analysts and Procurement Analysts and 40% of the services would be provided by general project oversight employees and managers. DOB states that estimates correlate with the usage of the corresponding titles in Phase I.

(iii) Analysis

This Office has, on a number of occasions in prior bid protests, held that a state agency, in making an award under SFL §163 on the basis of best value, must, in the evaluation and scoring of cost, evaluate all fees or other elements that will impact on cost unless the impact of such fee or element on cost: (i) will be substantially identical for all providers; (ii) are difficult or impossible to estimate and, therefore, are speculative; or (iii) are unlikely to occur.⁵

Furthermore, as stated in SF 20200156, it is our opinion that a state agency, in evaluating cost must generally not only consider all expected costs, but must weigh such costs in a manner reasonably designed to predict actual costs under the contract. Therefore, in this case, we would normally require that DOB document that the 60/40 split between the weights for the Phase I and Phase II costs was reasonable.⁶ Here, however, it is not necessary to undertake such an analysis, since, as outlined below, even if different weights were assigned to Phase I and Phase II, there would not be any change in the outcome of the procurement. As a result, even if we assume that the weights were not appropriate, any error would be harmless error.

Our conclusion that any hypothetical error would be harmless error is based upon the following. There were a total of ten bidders whose cost scores were evaluated, yet only three bidders made it to the final round. Accenture received the maximum number of 75 technical points, while A.T. Kearney received 71.41 technical points and Global eProcure received 52 technical points. Since A.T. Kearney's cost proposal was significantly more expensive than Accenture's cost proposal for both Phase I and Phase II, no matter what weight was given to Phase I and Phase II, Accenture would still receive a higher cost score and a higher total score than A.T. Kearney, and, therefore, would necessarily have a higher total score. We recognize that there were eight other bidders for this contract. However, we have likewise verified that regardless of the weight

⁵ SF20080408, 20090447

⁶ Presumably, this would require that DOB document either that (i) it reasonably expects that the costs for Phase I will be 60% of the total cost; or (ii) the 60% weight is appropriate because of uncertainty as to whether Phase II will be undertaken and/or uncertainty as to the scope of Phase II.

afforded Phase I and Phase II in the cost evaluation, Accenture would still have outscored the other eight bidders.⁷

Filtering Out "Unqualified" Bidders

A.T. Kearney argues that DOB should have filtered "unqualified"⁸ bidders out of the evaluation of cost because the results were skewed by extremely low prices offered by two bidders with very low technical scores. The cost evaluation methodology awarded the maximum of 25 points for cost to the bidder receiving the highest combined cost scores and a proportion of the 25 points to every other bidder based on the ratio of their combined cost score to the combined cost score of the proposal receiving the highest combined cost score. Here, the firm receiving the highest combined cost score (and therefore receiving the full 25 points for cost) received a very low technical score and was, consistent with the evaluation methodology, eliminated from the competition before oral presentations and rescoring. This Office agrees that in procurements where bidders are eliminated before a final award is made, bidders who do not meet pre-defined requirements to move forward should be eliminated before the evaluation of cost. However, even though we encourage the practice of setting minimum standards to move forward in the evaluation process, agencies are not required to do so. More importantly, however, as noted by DOB, and confirmed by our calculations, it appears that if DOB had filtered out "unqualified" bidders (presumably the bidders not advancing to the oral presentations) in the evaluation of cost, the gap between the scores of Accenture and A.T. Kearney would have widened.

Evaluation of Timelines Proposed

A.T. Kearney argues that they were unfairly evaluated in that their proposal did not receive additional points for shortening the performance period for conducting a spend analysis from six months, as requested in the RFP, to three months. In this regard A.T. Kearney asserts that panel evaluators noted the acceleration of performance time by Accenture but not for A.T. Kearney.

In its answer, DOB states that "[a]fter a review of and a discussion with the Panel regarding scoring in this category, the Division has determined that the notations related to the Phase I time frame are not a reflection of any disproportionate credit to Accenture. The evaluator's notations on score sheets for Accenture are the result of the firm's substantial attention drawn to this component of its proposal." We have no basis to question this assertion by DOB, and have no basis to question the scores given by the evaluators.

⁷ Regardless of the weight allocated between Phase I and Phase II in the cost evaluation, Accenture would have outscored the other bidders and won the procurement because Accenture's technical score was so significantly higher than the technical scores of those other bidders that it would not have been possible for those other bidders to have made up the difference through the cost evaluation (particularly since, overall, Accenture's cost proposal was the second lowest).

⁸ Presumably, A.T. Kearney considers bidders with very low technical scores to be "unqualified" bidders.

Evaluation of Savings Guarantee

In the Protest, A.T. Kearney argues that the scoring of the "Savings Methodology and Guaranty" portion of the technical evaluation was flawed because Accenture submitted a cost saving estimate rather than a savings guarantee, while A.T. Kearney submitted a savings guarantee. A.T. Kearney argues that had they proposed a savings estimate as they claim Accenture did, it would have been higher than the savings estimate submitted by Accenture. A.T. Kearney also appears to assert that its savings proposal of \$100 Million was an annual figure, and therefore that it should have been evaluated on a figure of \$200 Million over two years.

DOB in its answer notes that Bidders were to state "a hard dollar savings target for this project that the firm believes is reasonable and achievable within two (2) years of its commencement," and the portion of its fees for the project that will be retained (RFP, Page 14). DOB further asserts that both Accenture and A.T. Kearney submitted the required information and that the proposals were accurately evaluated consistent with the evaluation methodology. Finally, DOB asserts that A.T. Kearney did not state that their \$100 Million figure was an annual amount.

Based upon our review, we have no basis to question these assertions by DOB and therefore will not question the scores of the evaluation panel. Furthermore, this section was a small component of a category in the technical evaluation where the entire category was worth only a total of 10 points (out of the total of 75 points for technical), and, therefore, any changes to how the scoring for this one question was conducted would not materially change the overall scores of Accenture or A.T. Kearney and would not alter Accenture's status as the highest ranked proposal.

Scoring Reductions Based on Evaluation Panel Notes

Pursuant to the RFP, all finalist offerers would be invited to present their technical approach in an oral presentation to the Technical Evaluation Team. Based on the performance of the oral presentation, the evaluators would have the opportunity to adjust the bidder's technical score. A.T. Kearney points out that notes taken by 3 of the 5 evaluation panelists indicate that Accenture's team was not highly integrated at their oral presentation; and based on these notes, A.T. Kearney argues that Accenture's technical score should have been reduced.

Frequently, evaluators make general comments throughout presentation by the bidders. These comments represent general perceptions and do not necessarily result in an adjustment of the bidder's score. Presumably, none of the comments made by the evaluators reflected anything that changed their overall impression of the strength of Accenture's proposal, or anything that would warrant a change in the score of the proposal. We have no reason to question these judgments, and, therefore, are satisfied that a reduction of Accenture's score was not necessary based on these comments.

Requesting Best and Final Offers

A.T. Kearney's final argument is that DOB failed to select a bidder based on best value because it did not exercise its reserved right to ask for best and final offers. The RFP did not state that best and final offers would be requested, but rather that the right to request such offers was reserved.

As DOB stated in its answer, an agency is not required to exercise reserved rights. The RFP requested the lowest government rates offered by the bidders and at that point, each bidder should have submitted their lowest rates, without relying on a possibility that a best and final offer could be requested. Therefore, we disagree with A.T. Kearney's argument that best and final offers should have been requested, and are satisfied that DOB selected the proposal providing the best value.

Conclusion

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