

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Bid Protest filed by McKinsey & Company, Inc. Washington D.C. with respect to the procurement of a Business Transformation Services Tier II Assignment conducted by the New York State Division of the Budget in conjunction with the New York State Department of Transportation.

**Determination  
of Bid Protest**

**SF- 20120222**

August 13, 2012

Contract Number – C000407

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This Office has completed its review of the above-referenced procurement conducted by the New York State Division of the Budget (hereinafter "DOB") and the bid protest filed by McKinsey & Company, Inc. Washington D.C. (hereinafter "McKinsey") 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 approving the DOB contract with Grant Thornton LLP (hereinafter "Grant Thornton").

## **BACKGROUND**

### **Facts**

On May 10, 2011, DOB issued a Request for Proposals for Business Transformation Consulting Services. The goal of the procurement was to make multiple awards to consulting firms that would recommend and help implement best practices for consolidating redundant government entities, identify operational improvements to increase cost effectiveness and improve service quality. After selecting proposals on the basis of "best value" (see State Finance Law § 163 [1] [j]), DOB entered into contracts with eight offerers in August 2011. Each of the eight contractors (hereinafter "the Tier I Vendor Pool") was then pre-qualified to compete for work as a consultant on an as needed basis through a Tier II Assignment Selection (minibid) process.

On April 20, 2012, DOB issued a Tier II Assignment in conjunction with the Department of Transportation (hereinafter "DOT") for business transformation services to assist DOT in restructuring its organizational framework and internal

management practices (hereinafter “the Assignment”). On May 23, 2012, DOB reissued the Assignment via e-mail with certain modifications to the Procurement Schedule and the Cost Proposal Form. All contractors in the Tier I Vendor Pool were invited to respond. Since this was a procurement for services, consistent with the requirements of Section 163 of the State Finance Law (hereinafter “SFL”), the method of award was based on a best value determination.

The Assignment required offerers to propose a two-phased approach. In Phase I, offerers were asked to develop the “initial roadmap for change” by reviewing existing operations, evaluating current DOT initiatives, and outlining recommended process changes. In Phase II, the selected consultant would actually develop a set of business processes for implementing the changes recommended in Phase I. As for the cost component, offerers were instructed on the Cost Proposal Form to propose hourly rates for each job title as well as an estimated number of hours for work to be performed in each of the three contract years. In addition, offerers were required to propose an overall not-to-exceed cost for each phase. The two not-to-exceed prices were combined to arrive at a proposed Total Project Cost. As noted, the Cost Proposal Form was designed to cover three contract years. Contract Year 1 was designated as August 2011 – August 2012; contract Year 2 was designated as August 2012 – August 2013; and contract Year 3 was designated as August 2013 – August 2014. Since this particular Tier II Assignment was not issued until May 2012, it was expected that work would not commence until at least June 2012, the last two months of Contract Year 1.

On May 29, 2012, DOB certified that it had received five bids in response to the Assignment solicitation. Two of the five firms, including McKinsey, were deemed nonresponsive by DOB because, in each instance, DOB found that the firm failed to provide a complete Cost Proposal Form. Therefore, these two proposals were rejected and not scored. DOB notified McKinsey of its determination in this regard by letter dated May 31, 2012. The proposals of the remaining three firms were evaluated and Grant Thornton’s proposal was selected as the best value. DOB then notified the unsuccessful bidders of its selection.

On June 29, 2012, this Office received a letter of protest from McKinsey (hereinafter “Protest”) challenging DOB’s decision to reject McKinsey’s proposal and requesting that this Office refrain from approving the contract award to Grant Thornton. On July 11, 2012, this Office received a letter from DOB answering the allegations of the Protest (hereinafter “Answer”). On July 16, 2012, McKinsey filed a reply to the DOB 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>1</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>2</sup> 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 engaged in at the agency level, 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 this Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DOB with the DOB/Grant Thornton contract;
2. the correspondence between this Office and DOB arising out of our review of the proposed DOB/Grant Thornton contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
  - a. McKinsey's Protest, dated June 28, 2012;
  - b. DOB's Answer, dated July 11, 2012; and
  - c. McKinsey's Reply, dated July 16, 2012.

### **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 responsive and responsible offerer.<sup>3</sup> 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."<sup>4</sup> A "responsive"

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<sup>1</sup> SFL §112(2).

<sup>2</sup> Comptroller's G-Bulletin G-232.

<sup>3</sup> SFL §163(10).

<sup>4</sup> SFL §163(1)(j).

offerer is an “offerer meeting the minimum specifications or requirements as prescribed in a solicitation for commodities or services by a state agency.”<sup>5</sup>

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)(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.”

## **ANALYSIS OF BID PROTEST**

### **Protest to this Office**

In the Protest, McKinsey challenges the procurement conducted by DOB on the following grounds:

1. McKinsey completed the Cost Proposal Form in a manner that was consistent with the contract performance schedule identified in the Assignment.
2. Since McKinsey offered a firm fixed price, any hourly rate omissions on its Cost Proposal Form were not material.
3. The omissions on McKinsey’s Cost Proposal Form were minor clerical errors and DOB should have allowed McKinsey to clarify and/or correct them.
4. DOB improperly rejected McKinsey’s proposal as nonresponsive.

### **Response to the Protest**

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

1. The Assignment did not establish a contract performance schedule that would have allowed McKinsey to interpret the bid requirements with respect to cost in the manner advanced by McKinsey.
2. McKinsey’s proposed firm fixed price did not render the omissions on the Cost Proposal Form non-material.

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<sup>5</sup> SFL §163(1)(d).

3. McKinsey's error was substantial in that it submitted an incomplete Cost Proposal, omitting key information specifically required by the Assignment. Therefore, a correction would have been impermissible.
4. The arguments advanced by McKinsey do not warrant overturning DOB's determination to reject McKinsey's Proposal as nonresponsive.

## DISCUSSION

### Contract Performance Schedule

McKinsey contends that it reasonably interpreted the Assignment as requiring rates only for those years in which work would actually be performed. Specifically, McKinsey asserts that the Assignment indicated that no Phase I work would be performed in Year 3, and no Phase II work would be performed in Year 1. McKinsey proposed a timeline based on this perception and, accordingly, did not provide Phase I hourly rates for Year 3 or Phase II hourly rates for Year 1 on its Cost Proposal Form. Instead McKinsey inserted "n/a" where such rates would have otherwise been placed.

As noted by DOB, the Assignment did not contain an express project schedule that called for Phase I to be conducted only in Years 1 and 2 and Phase II to be conducted only in Years 2 and 3. Indeed, the Assignment stated that the project was expected to be completed "in two potentially overlapping Phases," and provided generally that Phase I was "expected to take one-three months" and Phase II was "expected to take 12-15 months" (Assignment, at pg. 4). McKinsey argues that since the project was expected to commence in June 2012 (in the last two months of Year 1), the only reasonable interpretation was to conclude that no Phase I work would be performed in Year 3 and no Phase II work would be performed in Year 1. While this supposition may have been reasonable for Phase I (which was only expected to last one – three months), the same assumption for Phase II is not supported. At the time that the Assignment was issued and McKinsey was completing its proposal (May 2012), it was entirely possible that Phase I would have been completed and Phase II work would have begun before the end of Year 1 in August 2012. In addition, the Assignment left open the possibility of two fully concurrent phases, both commencing in Year 1.

Moreover, the Assignment expressly stated that "Proposals with fee formats different than the format indicated in Attachment 5 – Cost Proposal Form may not be considered for evaluation. **Failure to submit all information as specified may result in the bid being considered non-responsive**" (Assignment, at pg. 5, emphasis in original). The Assignment also made clear that "**Rates must be provided for all titles and contract years ... Do not leave blanks or enter a zero dollar amount for any rate**" (Assignment, at pg. 13, Attachment 5,

emphasis in original). These instructions were explicit and clear. Therefore, we disagree with McKinsey that the manner in which it submitted its Cost Proposal Form was reasonable and consistent with the terms of the Assignment. Rather, it appears that McKinsey based its Cost Proposal Form on McKinsey's own project timeline, not the requirements set forth in the Assignment.

### **Waiver of Deviation/Clarification**

McKinsey argues that, since it proposed to perform the work at a "firm fixed price," the failure to include certain hourly rates had no effect on McKinsey's overall price or DOB's ability to properly evaluate McKinsey's proposal.<sup>6</sup> Therefore, McKinsey contends that DOB should have waived the deviation and either: (a) scored McKinsey's Cost Proposal as submitted, or (b) corrected the error through a clarification with McKinsey. DOB counters that McKinsey's error was substantial and that a correction after the proposal deadline would have been impermissible.

#### **a. DOB's Ability to Waive the Deviation**

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. However, a state agency may waive a non-material deviation where it is in the best interest of the State to do so. L. J. Coppola, Inc. v. Park Mechanical Corp., 131 A.D.2d 641, 516 N.Y.S.2d 722 (2d Dep't 1987); Landtek Group Inc. v. City of Long Beach, 2007 N.Y. Misc. LEXIS 7387 (Sup. Ct. Nassau Co. 2007).

A variance is material when it would impair the interests of the procuring state agency, place one 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. Sirignano, 31 Misc2d 1027, 220 N.Y.S.2d 939 (1961).

Under DOB's evaluation methodology, the cost scores for responsive offerers were based solely on their not-to-exceed Total Project Cost which, here, was

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<sup>6</sup> McKinsey's Administrative Proposal contained a narrative attached to its Consultant Disclosure Form A which explained its belief that a fixed price model, rather than an hourly based approach, would provide the best value to the State.

provided by McKinsey.<sup>7</sup> The proposed hourly rates for each job title were not scored. Thus, one could argue that since McKinsey did provide the relevant not-to-exceed amounts on its Cost Proposal Form, its Proposal could have been scored in the same manner as the other responsive offerers. DOB argues, however, that the missing hourly rates were necessary information for two reasons: (1) to clarify what hourly rate applied in the event that Phase II work began in Year 1; and (2) to confirm, as required by the Assignment, that the rates used for Tier II projects were less than or equal to the competitively established Tier I hourly rates.

Even if we were to assume that the deviation in this case was not material, an agency's decision of whether or not to waive a non-material deviation is discretionary. L. J. Coppola, Inc. v. Park Mechanical Corp., *supra*; Landtek Group Inc. v. City of Long Beach, *supra*. Here, a review of the procurement record reveals that McKinsey's proposed Total Project Cost exceeded the proposed Total Project Costs of the three firms considered, by a substantial amount. In fact, the difference in proposed costs was so great that even if McKinsey's Proposal received the highest available technical score, in light of the difference in cost, it is apparent that McKinsey would not have been selected for award. Accordingly, since the McKinsey Proposal was not susceptible of award, we need not decide whether or not the deviation in question was material. Therefore, we have no basis to disturb DOB's decision not to waive the deviation in McKinsey's Proposal.

#### b. Clarification

Next, McKinsey contends that in the event that DOB determined that the rates in question were required, DOB should have allowed McKinsey to correct the error through a clarification.

The State Finance Law provides agencies with the ability to seek clarifications from offerers, and DOB reserved the right to seek clarifications in the Assignment (see State Finance Law § 163 [9] [c]). As with the waiver of non-material deviation, an agency's decision as to whether to seek a clarification is discretionary. In this instance, for the same reasons set forth above concerning the Total Project Cost proposed by McKinsey, we see no reason to disturb DOB's decision not to seek a clarification.

### **Responsiveness of McKinsey's Proposal**

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<sup>7</sup> According to McKinsey's Reply papers, its proposed fixed price was the amount listed on its Consultant Disclosure Form A, which is consistent with the amount listed as the not-to-exceed Total Project Cost offered on McKinsey's Cost Proposal Form.

Since it is clear from the procurement record that the Cost Proposal Form as submitted by McKinsey did not contain the information that was requested in the Assignment, DOB properly rejected the Proposal as non-responsive.

## **CONCLUSION**

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