

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Halmar International with respect to the procurement of Highway Reconstruction and Interchange Improvements on Route 17 conducted by the New York State Department of Transportation

**Determination
of Bid Protest**

SF-20120302

Contract Number – D2625058

November 5, 2012

This Office has completed its review of the above-referenced procurement conducted by the New York State Department of Transportation (DOT) and the bid protest filed by Halmar International (Halmar) 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 DOT to A Servidone/B Anthony Construction (Servidone). Therefore, the protest is denied and we are today approving the DOT/Servidone Contract.

BACKGROUND

Facts

On July 18, 2012, DOT placed a notice in the Contract Reporter, soliciting bids for Highway Reconstruction and Interchange Improvements on Route 17, Exit 122. Bids for the Project were due on August 23, 2012, and, on that date, the unverified bids were publicly opened, announced and published by DOT. Based on the unverified bid amounts, Halmar was declared the lowest bidder on the Project. Subsequently, however, after verifying the bids, pursuant to the requirements of Highway Law §38(3), by calculating the total cost of each bid by adding up the unit prices contained in the bids, Servidone was determined to be the lowest bidder, while Halmar was determined to be the third lowest bidder.

On August 27, 2012, Halmar sent a letter to DOT notifying them that its intended total bid cost was the total cost listed on its bid and not the amount listed on DOT's website after DOT's verification. DOT responded on August 29, 2012, notifying Halmar that after calculating the bids by adding the unit prices for each individual bid item, as required by Highway Law §38(3), it came up with an amount that was higher than the total cost listed by Halmar in its proposal, placing Halmar as the third lowest bidder on the Project. Halmar then filed a protest (the Protest) with this Office, which was received

on October 4, 2012, challenging the award made by DOT to Servidone. On October 15, 2012, DOT filed its answer to the Protest with this Office and on October 17, 2012, Servidone filed its answer to the Protest with this Office.

Procedures and Comptroller's Authority

Under Section 112(2) of the State Finance Law (SFL), before any contract made for or by a state agency, which exceeds fifty thousand dollars in amount, becomes effective it must be approved by the Comptroller.

In carrying out the SFL §112 responsibilities, 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 appeals of agency protest determinations. Because there was no Protest process at the agency level, this protest is governed by Section 3 of this Office's procedures for an initial protest to OSC.

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DOT with the proposed DOT/Servidone contract;
2. the correspondence between this Office and DOT arising out of our review of the proposed DOT/Servidone contract;
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Halmar's August 27, 2010 Letter to DOT;
 - b. DOT's August 29, 2012 Response to Halmar's Letter;
 - c. Halmar's October 4, 2012 Protest to OSC;
 - d. DOT's October 15, 2012 Answer to the Protest; and
 - e. Servidone's October 17, 2012 Answer to the Protest.

Applicable Statutes

The requirements applicable to this procurement are set forth in Highway Law §38. Specifically, Highway Law §38(3) provides that "[t]he contract for the construction or improvement of such highway or section thereof shall be awarded to the lowest responsible bidder, as will best promote the public interest." Section 38(3) further provides that the lowest bid:

shall be deemed to be that which specifically states the lowest gross sum for which the entire work will be performed, including all the items

¹ Comptroller's G-Bulletin G-232.

specified in the estimate thereof. The lowest bid shall be determined by the commissioner of transportation on the basis of the gross sum for which the entire work will be performed, arrived at by a correct computation of all the items specified in the estimate therefor at the unit prices contained in the bid.

ANALYSIS OF BID PROTEST

Halmar's Protest to this Office

Halmar challenges the procurement on the grounds that:

DOT's award of the contract to Servidone is not in the best interest of the State because had DOT waived the mathematical error made in Halmar's bid, it would result in a bid from a responsive, responsible bidder that is \$1,145,441 less than the current awardee.

DOT's Response to the Protest

DOT contends that the Protest should be rejected and the award upheld because:

Awarding the contract to Halmar would violate the clear mandate of Highway Law §38(3) and would cast doubt on the public bidding system by giving the appearance of granting a preference to a particular contractor at the expense of its competitors.

Servidone's Response to the Protest

Servidone contends that the Protest should be rejected and the award upheld because:

- Highway Law §38(3) provides that the lowest bid is to be determined by the gross sum arrived at by a correct computation of all contract pay items specified in the proposal. Halmar's proposal set forth an incorrect total and when such pay items were correctly added, Halmar's bid was the third lowest. The variation between the total amount bid by Halmar and the correct amount after computation of pay items is material and may not be excused. Doing so would throw the entire public bidding process into turmoil.

DISCUSSION

The bid proposal Halmar submitted contained a total cost of \$67,267,812.29, which was the lowest cost proposal submitted. At first glance, DOT deemed Halmar the lowest cost proposer. However, upon calculating prices submitted for each unit item in the bid, DOT determined that the correct computation of the total of all of the line items in Halmar's bid was, in fact \$68,667,812.29. Therefore, Halmar was not the lowest bidder, but, was the third lowest bidder on the Project. Upon DOT's publication of the verified bids, Halmar notified DOT that the correct bid amount is the lower total cost of \$67,267,812.29 contained at the end of its bid. In the Protest, Halmar asserts that a mathematical calculation error resulting from a transcription mistake by a Halmar representative occurred at the time of the bid submission. With respect to Bid Line #0242 Item 564.0501, Structural Steel, Type 1, Halmar maintains that the bid was

mistakenly reduced by \$200,000 rather than reduced to \$200,000. Halmar asserts that the total cost amount contained in the bid is its intended bid amount which is \$1,145,441 lower than the cost submitted by Servidone.

Halmar asserts in the Protest that the mathematical error contained in its bid is a minor informality that DOT has the broad discretion to waive and that waiving such informality would have been in the best interest of the State. For the reasons set forth below, we find that DOT acted properly in determining that Halmar was not the lowest responsible bidder.

Highway Law §38(3) specifically requires that DOT determine the lowest bid on the basis of the gross sum for which the entire work will be performed, arrived at by a correct computation of all the items specified in the estimate therefor at the unit prices contained in the bid. As such, DOT was required by law to award the proposed contract to the bidder presenting the lowest bid after correctly computing the sum of the unit prices for the specific items contained in its bid. When DOT added up the unit prices proposed by Halmar in its bid for all of the items contained in the bid, it correctly determined that Halmar's total bid was \$68,667,812.29, rather than the amount reflected on Halmar's bid sheet. Consistent with Highway Law §38(3), DOT treated this correct computation of the line items as Halmar's actual bid and correctly placed Halmar as the third lowest bidder in the procurement and did not award the contract to Halmar. We find that DOT was required to do precisely what it did in this case, and if DOT had not done so it would have been in violation of Highway Law §38(3).

Further, even if Highway Law §38(3) did not contain such a requirement for the calculation of bids, it is doubtful that DOT would, under common law principles, have had the authority to waive Halmar's defect. It is well-settled 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 municipality or state to do so. However, a municipality or state agency may not waive noncompliance if it is material or substantial. A defect is material or substantial when it would impair the interest 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 (2nd 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 (4th Dep't 1978).

Here, the asserted defect in Halmar's bid was not obvious. Based upon the facts of this case, DOT, when confronted with the clearly erroneous bid, could not have known whether: (i) as Halmar asserts, Halmar's total bid of \$67,267,812.29 was its intended bid and that the error was simply the inclusion of an incorrect line item; or, (ii) Halmar's total bid of \$67,267,812.29 was the result of a mathematical error in the addition of the line items, with the result that Halmar's intended bid was \$68,667,812.29, making Halmar the third lowest bidder. DOT's only recourse would have been to seek

clarification from Halmar. Such a “clarification” from Halmar, after the public opening of bids, would have afforded Halmar a significant and unfair advantage over the other bidders, since it would know which answer would result in its receiving the contract award. Therefore, it is doubtful that DOT could, even in the absence of Highway Law §38(3), have waived Halmar’s “defect.”

Conclusion

For the reasons outlined above, we find that the arguments raised in the Protest are not sufficient to overturn the award by DOT to Servidone. Therefore, we deny the Protest and are today approving the DOT/Servidone Contract.