

THOMAS P. DINAPOLI
STATE COMPTROLLER



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ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
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ALBANY, NEW YORK 12236

January 23, 2013

Mr. Rocco Garro
Birnie Bus Company
248 Otis Street
Rome, NY 13441

Re: Contract C161189 for Offender
Transportation SF - 20120394

Dear Mr. Garro:

I am writing in response to your letter protesting the decision by the Department of Corrections and Community Supervision ("DOCCS") to award the above referenced contract to First Transit, Inc. ("First Transit"). While you attempted to send your protest letter ("Protest") to this Office in August, we did not receive a copy of the Protest until September 20, 2012.

In the Protest, you challenge DOCCS' disqualification of your bid for non-responsiveness, and maintain that the bid submitted by your organization was, in fact, responsive to the specifications set out in DOCCS' Request for Proposal ("RFP"). You assert that you are the lowest responsive bidder and therefore should be awarded the contract, or in the alternative, the award to First Transit should be vacated and a new bid process commenced.

Based on the record before us, DOCCS issued an RFP for Offender Transportation on November 29, 2011. The DOCCS received two bids: one from First Transit and one from Birnie Bus Company ("Birnie Bus"). By letter dated March 29, 2012, DOCCS notified Birnie Bus that its bid was determined nonresponsive. The DOCCS therefore awarded the contract to the only remaining bidder, First Transit, whose bid it deemed responsive to the bid specifications.

In its March 29, 2012, letter DOCCS listed the following nine instances where it found the proposal submitted by Birnie Bus to be nonresponsive to the requirements of the RFP specifications. Specifically, DOCCS determined that the Birnie Bus proposal:

1. Did not furnish a description of its phase-in plan for the time period between April 1, 2012 and October 29, 2012.

2. Did not supply a description of its company policy and practices governing drug and alcohol testing for company drivers.
3. Failed to furnish certain information pertaining to where the coaches and mini-coaches will be located.
4. Contained a response to a request for information concerning maintenance quality and staffing that was "unresponsive".
5. Failed to furnish certain information pertaining to the description of vehicles in its current fleet.
6. Did not provide a sample and description of forms used to maintain its records;
7. Failed to include a record of receipt for Addendum 5.
8. Attempted to negotiate an adjustment to its cost in relation to the price of diesel fuel.
9. Failed to provide three references for customers with whom it has had similar type leasing agreements, instead providing references for customers with which it held non-similar contracts.

In the Protest you provided documentation with respect to all of these findings, except for Finding # 4, which, you asserted, refuted DOCCS determination of non-responsiveness. However, with respect to Finding # 4, your Protest did not address DOCCS' determination in any way. While, upon request by this Office, you provided a response dated December 12, 2012, with respect to Finding # 4, this response did not assert that the required information had been submitted with the proposal. Rather, your letter of December 12 contained information with respect to the RFP requirements that had not been contained in the original proposal.

In reviewing the Protest, as well as the responses provided by DOCCS and First Transit, and the procurement record submitted by DOCCS, it is not clear whether Birnie Bus' proposal was non-responsive in all nine instances cited by DOCCS.¹ We need not address whether DOCCS' determinations with respect to Findings # 1 – 3 and 5 – 9 were correct, since, as outlined below, it is clear that with respect to Finding # 4, the Birnie Bus proposal was non-responsive to the bid specifications.

Section VI, D.1 of the RFP requires that the bidder:

Provide a description of the number of technicians at each site where maintenance services are provided. This description should include the number of technicians assigned per shift and how they are scheduled. Additionally, describe the certification program, the certificates the technicians hold, and

¹ For example, with regard to Finding #2, the RFP required that the bidder provide a description of its policy and practices governing drug and alcohol testing for company drivers. DOCCS states that the Birnie Bus proposal did not respond to this requirement. Birnie Bus, however, claims to have included with its proposal the Company's "Anti-Drug and Alcohol Misuse Prevention Policy" and did in fact provide a copy of such policy with the Protest. This instance clearly raises a question of fact which this Office need not resolve in light of our findings with regard to Finding #4. In addition, several of the findings made by DOCCS could be viewed as matters related to the adequacy of Birnie Bus' proposal rather than "responsiveness" (see Findings #1 and #5).

how the certification and training relates to the Contractor's proposed fleet of vehicles. A description of the parts inventory shall be included.

Based upon our review of the Procurement Record, it is clear that the proposal submitted by Birnie Bus did not provide information on how many technicians worked at each maintenance site, the number of technicians assigned per shift, the certifications held by any of the technicians, a description of its certification program and how the certifications and trainings related to its fleet of vehicles, or a description of the company's parts inventory. While this information was provided in response to a subsequent request from this Office, this information was not contained in Birnie Bus' original bid proposal. Therefore, DOCCS correctly found the proposal submitted by Birnie Bus nonresponsive.²

Based on the foregoing, this Office is denying the Protest.

Sincerely,



Charlotte E. Breeyear
Director, Bureau of Contracts

CEB/ac

cc: A. Annucci - DOCCS
S. Nichols - First Transit

² Where a proposal is not responsive to a requirement of the RFP, an agency must reject the proposal –except where the deviation is not material. *Le Cesse Bros. Contracting, Inc. v. Town Board of the Town of Williamson*, 62 AD2d 28, affd 46 NY2d 960 (1979). Where the deviation is not material, the agency can still reject the proposal, but has the legal authority to waive the defect or allow the bidder to correct the deviation. *In re C.K. Rehner, Inc.*, 106 AD2d 268 (1st Dep't. 1984). We do not address at this time whether DOCCS' could waive the deviation by Birnie by allowing Birnie to provide the information not contained in its original response.