

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by The Answer Group with respect to the Protest Determination of the Bronx Psychiatric Center regarding the procurement of Vending Machine Services for the Bronx Psychiatric Center conducted by the New York State Office of Mental Health

**Determination
of Bid Protest**

SF20130186

August 8, 2013

Contract Number – OMH01-X000158-3650213

This Office has completed its review of the above-referenced procurement conducted by the New York State Office of Mental Health (“OMH”) and the Appeal filed by The Answer Group (“Answer Group”) of the protest decision issued by Bronx Psychiatric Center (“Bronx”) 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 OMH.

BACKGROUND

Facts

On August 1, 2012, Bronx issued an Invitation for Bid (“IFB”) for vending machine services at the Bronx Psychiatric Center. The IFB provided that the contract would be awarded to the responsible and responsive bidder offering the “lowest total bid amount” (IFB, paragraph 6; understood by the bidding community to mean the highest commission rate paid to the State, as quoted on the IFB Attachment D “Bid Quote Sheet”).¹ Four bids were received and opened on October 17, 2012 – one from Vita Vending, Inc. (Vita) with a commission rate of 53.3%, one from Answer Group offering a commission rate of 35%, and two other bids that offered less than 35%. Bronx awarded the contract to Vita as the responsive bidder that submitted the highest commission rate.

By letter dated April 12, 2013, Answer Group protested Bronx’s decision to award the contract to Vita. By letter dated April 19, 2013, Bronx denied the protest and by letter dated April 29, 2013, Answer Group appealed Bronx’s protest decision to this Office. In its Appeal, Answer Group argues that Vita offered a commission rate that was not reasonably based and far beyond industry standards. Answer Group argues that by offering such a high commission rate to the agency, Vita would not be profiting enough to be able to comply with the requirements of

¹ The IFB contained errors and inconsistencies in stating: the method of award (lowest total amount bid versus highest commission rate), and the MWBE goal (20% versus 0%). These errors did not appear to interfere with the competitive bidding process (and were not cited as arguments by the protestor). There is sufficient evidence in the record that all Bidders were clearly told the method of award, and that the Bidders understood the MWBE goal to be 0%.

the contract (such as installing cashless devices, since such devices are a significant investment). Answer Group further asserts that Bronx failed to verify Vita's ability to meet its promised commission until Answer Group filed its protest – after the initial award to Vita.

Additionally, Answer Group asserts that the evaluation of the bids should not have been based on cost/commission rate alone but rather should have been based on a best value methodology that took into consideration cost and technical merit.

Procedures and Comptroller's Authority

Under Section 112(3) of the State Finance Law ("SFL"), before any contract wherein the state agrees to give a consideration other than the payment of money becomes effective, when the reasonably estimated value of such consideration exceeds ten thousand dollars (\$10,000) in amount, it must be approved by the Comptroller.²

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.³ These procedures govern initial protests to this Office of agency contract, as well as appeals of agency protest determinations. Since this is an Appeal of Bronx's protest determination, the Appeal is governed by Section 4 of the Contract Award Protest Procedures.

In the determination of this Appeal, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by Bronx with the Bronx/Vita contract;
2. The correspondence between this Office and Bronx arising out of our review of the proposed Bronx/Vita contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
 - a. Answer Group's Protest to Bronx, dated April 12, 2013;
 - b. Bronx's Protest Determination, dated April 19, 2013; and
 - c. Answer Group's Appeal to OSC, dated April 29, 2013

DISCUSSION

Evaluation Methodology

With respect to Answer Group's assertion that the evaluation methodology utilized by Bronx should have been based on a best value methodology that took into consideration cost and technical merit, we note that Answer Group recently made this same argument in a protest appeal

² SFL §112(3).

³ State Financial System Guide to Financial Operations Chapter XI Section 17.

of a similar contract for vending machine services at a different psychiatric center. This Office addressed that argument in opinion number SF-20130162, a copy of which is attached. We believe that the analysis contained in that determination is fully applicable to this protest determination, and, therefore, for the reasons set forth in that determination, we find no merit in Answer Group's assertions in connection with this protest with respect to this issue.

Vita's High Commission Rate

Answer Group asserts that Vita cannot meet the commission rate it bid. However, for the reasons outlined below, we find no merit in this assertion.

Bronx reached out to Vita to verify that it would be able to fulfill the terms of the contract even with such a high commission rate being offered to Bronx. Vita provided Bronx with a breakdown of the cost at which it purchases the products in the vending machines and the cost at which it sells those products. There is a large discrepancy between the purchase and sale price for most of these products, clearly indicating a profit margin for Vita. Vita also asserted that as the nine-year incumbent on this contract, most of the machines at Bronx are already paid for and therefore, their cost of doing business there is low. Vita contends that it is strategic in the selection of products it sells in order to compensate for the high commission rate. Based on these facts, Bronx was satisfied that Vita will be able to fulfill the terms of the contract even at a higher than average commission rate and this Office finds no reason to question Vita's capability to do so. Answer Group has not submitted sufficient evidence to rebut this. Furthermore, the fact that Bronx confirmed Vita's ability to fulfill this contractual requirement after making the preliminary award is not dispositive; Bronx is satisfied that Vita has the ability and, as Bronx notes, Vita is contractually required to perform.

CONCLUSION

For the reasons outlined above, we find that the issues raised in the Appeal are not of sufficient merit to overturn the protest determination of Bronx. As a result, the Appeal is denied and we are today approving the Bronx/Vita contract.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by The Answer Group with respect to the Protest Determination of Pilgrim Psychiatric Center regarding the procurement of Vending Machine Services for the Pilgrim Psychiatric Center and Sagamore CPC conducted by the New York State Office of Mental Health

**Determination
of Bid Protests**

SF20130162

July 30, 2013

Contract Number – X000214

This Office has completed its review of the above-referenced procurement conducted by the New York State Office of Mental Health (“OMH”) and the Appeal filed by The Answer Group (“Answer Group”) of the protest decision issued by Pilgrim Psychiatric Center (“Pilgrim”) with respect thereto. As outlined in further detail below, we have determined that the ground advanced by the Protestor is without sufficient merit to overturn the contract award by OMH. We, therefore, hereby deny the Appeal and are today approving the OMH contract with Magnum Vending Enterprises, LLC (“Magnum”).

BACKGROUND

Facts

On January 30, 2013, Pilgrim issued an Invitation for Bid (“IFB”) for vending machine services at the Pilgrim Psychiatric Center and Sagamore CPC. The IFB provided that the contract would be awarded to the responsive bidder offering the highest commission rate (IFB at pg. 2). Two bids were received and opened on March 5, 2013 – one from Answer Group offering a commission rate of 30.5% and one from Magnum with a commission rate of 36%. Pilgrim awarded the contract to Magnum as the responsive bidder that submitted the highest commission rate.

By letter dated March 29, 2013, Answer Group protested Pilgrim’s decision to award the contract to Magnum. By letter dated April 8, 2013, Pilgrim denied the protest and by letter dated April 17, 2013, Answer Group appealed Pilgrim’s protest decision to this Office. In its Appeal, Answer Group argues that the evaluation of the bids should not have been based on cost/commission rate alone but rather should have been based on a best value methodology that took into consideration cost and technical merit. As such, Answer Group asserts that Pilgrim should re-evaluate the bids utilizing a best value methodology.

Procedures and Comptroller's Authority

Under Section 112(3) of the State Finance Law ("SFL"), before any contract wherein the state agrees to give a consideration other than the payment of money, when the reasonably estimated value of such consideration exceeds ten thousand dollars (\$10,000) in amount, becomes effective it must be approved by the Comptroller.¹

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.² 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. Since this is an Appeal of Pilgrim's protest determination, the Appeal is governed by Section 4 of the Contract Award Protest Procedures.

In the determination of this Appeal, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by Pilgrim with the Pilgrim/Magnum contract;
2. The correspondence between this Office and Pilgrim arising out of our review of the proposed Pilgrim/Magnum contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
 - a. Answer Group's Protest to Pilgrim, dated March 29, 2013;
 - b. Pilgrim's Protest Determination, dated April 8, 2013;
 - c. Answer Group's Appeal to OSC, dated April 17, 2013; and
 - d. Magnum's Response to the Appeal, dated May 9, 2013.

DISCUSSION

In the Appeal, Answer Group asserts that the evaluation methodology utilized by Pilgrim was flawed because it was based solely on the evaluation of price, specifically on commission rate alone. Answer Group argues that other factors relating to technical merit should have been considered and a best value evaluation conducted. Answer Group argues that Pilgrim should have required bidders to submit information evidencing that the vending technology used would provide transparent and accurate revenue tracking and reporting documentation because vending technology varies greatly among contractors. Answer Group further argues that without the proper software in place to ensure accountability, the State does not have the ability to verify that it is receiving the actual commission contracted for. Additionally, Answer Group argues that bidders should have been required to provide information confirming that the technology it

¹ SFL §112(3).

² State Financial System Guide to Financial Operations Chapter XI Section 17.

would be using is in fact compatible with current MDB and DEX standards as required by the IFB.

While Pilgrim did not submit an answer to this Office responding to the Appeal filed by Answer Group, Pilgrim did respond to the allegations contained in the initial protest filed by Answer Group. The initial protest contains virtually the same arguments raised by Answer Group in its Appeal. In its response to the initial protest, Pilgrim contends that the IFB clearly indicated the technical requirements to be met by a bidder in order to be a responsive bidder and, therefore, awarding on the basis of cost/commission rate as the only factor to be evaluated was appropriate.

The winning bidder, Magnum, did submit an answer to the Appeal. In its answer, Magnum asserts that its machines satisfy the specifications set forth in the bid specifications. Magnum further asserts that:

All vending machines have tamper proof, technological components that ensure vending accountability. Although advances in technology seem impressive on paper, there is 100% no fact to support that they “add additional accountability”. Certainly bells and whistles make a nice appearance but they are definitely no more accurate than simple Math.

Analysis

Preliminary, we note that since the contract before us is a revenue contract, rather than a purchase contract (i.e. a contract where the State is paying for goods or services), it is the position of this Office that the letting of such a contract is not subject to the procedural requirements of SFL §163.³ However, in carrying out the Comptroller’s statutory role of approving State contracts, this Office requires that revenue contracts (where the reasonably estimated value of the consideration given by the State exceeds \$10,000) be awarded after a fair, reasonable and impartial competitive process. This Office is satisfied that the process utilized by Pilgrim was a fair, reasonable and impartial competitive process, and, therefore, we will not overturn the award to the high bidder Magnum.

Furthermore, for the reasons outlined below, we are satisfied that, even if the provisions of SFL §163 were applicable to this procurement, and the procurement was considered a contract for services (that are required to be awarded on the basis of best value), Pilgrim would have been justified in awarding this contract solely on the basis of the price/commission rate.

The IFB issued by Pilgrim clearly set forth the technical requirements that a bidder had to satisfy to be considered “responsive” and clearly stated that the contract award would be made to the responsive bidder offering the highest commission rate. The leading case interpreting the

³ See, e.g. *Allen Group v. Adduci*, 123 A.D.2d 91 (3d Dept. 1987), SF 20120274 and SF 20020062. As noted in SF-20120274, however, there is an earlier decision by the Court of Appeals, in *Signacon Controls v. Mulroy*, 32 N.Y.2d 410 (1973), where the Court seemed to suggest that contracts by municipalities that will result in purchases by members of the general public could be considered purchase contracts subject to General Municipal Law §103, the bidding statute applicable to municipalities.

provisions of SFL §163 with respect to best value awards is Transactive Corporation v. New York State Department of Social Services, 236 A.D.2d 48 (1997); aff'd on other grnds, 92 N.Y.2d 579 (1998). In Transactive, the Appellate Division, Third Department, reviewed a procurement of a complex electronic benefit transfer system. The procuring agency awarded the contract using a competitive range methodology whereby the cost proposals of all responsive proposers were first evaluated and scored and technical scores only considered for those proposers offering a cost proposal that fell within 10% of the lowest cost proposal. Since no other responsive proposer submitted a cost proposal that fell within 10% of that of the lowest cost proposal, the award was ultimately made without considering the technical scores. One of the grounds asserted in the challenge of the award was that this methodology did not constitute a best value award as required by SFL §163. The Appellate Division rejected this argument as well as the other arguments made by the challenger and upheld the contract award.⁴ With respect to the method of award of a service contract, the Court stated:

In awarding a contract for services, a State agency **generally** cannot rely solely on price as the determinative factor but must engage in a cost-benefit analysis since State Finance Law § 163(10) provides that such a contract must be awarded on the basis of best value...⁵ (emphasis supplied).

The Court noted, however, that the agency issued an RFP with extensive technical requirements and established criteria for the evaluation of both the technical and cost proposals. The Court found that the use of a competitive range was permissible since the agency had engaged in the requisite cost-benefit analysis, stating that:

such procedure embodies a cost-benefit analysis as it reflects a determination that where a price proposed by a responsive and responsible bidder is lower than a price offered by another bidder by a stated percentage, any increase in value embodied in the higher price will be offset by the cost savings of the lower priced proposal.⁶

Accordingly, what is required by SFL §163 is that an agency undertake a cost-benefit analysis in determining best value. This Office, in applying the rationale in Transactive, and consistent with the Procurement Guidelines issued by the New York State Procurement Council,⁷ has concluded that there are certain circumstances where cost alone may be used as the basis for an award on a best value basis. Specifically, in prior protest determinations, this Office has indicated that an award based solely upon cost in a best value procurement can be justified only where quality and efficiency requirements are sufficiently defined by the agency in the specifications to assure that, quality and efficiency variations between responsive and

⁴ The procurement under review in that case had been the subject of a bid protest to this Office, and we had rejected the protest and approved the contract (SF-19960095). The court decision thus ratified the determination of this Office.

⁵ Transactive 236 A.D.2d 48, 53.

⁶ Transactive 236 A.D.2d 48, 53-54.

⁷ The Procurement Guidelines provide that “[f]or certain service and technology procurements, however, best value can be equated to low price.” (Section V-B).

responsible offerers are not reasonably expected to have any significant financial, health or safety consequences to the State.⁸

Here, we are satisfied that there is little potential for meaningful variations between responsive bidders. The provision of vending machine services requested under the RFP is a fairly routine activity. In its May 9, 2013 letter, Magnum confirmed that all of its “vending machines have tamper proof, technological components that ensure vending accountability.” Furthermore, as noted, Pilgrim did impose, in Appendix D, technical requirements it deemed necessary for the performance of this contract that bidders were required to meet. Specifically, Appendix D of the bid solicitation issued by Pilgrim provided that:

All machines installed must have a cash accountability system installed for accurate reading of all transaction which will enable the CONTRACTOR to accurately determine monthly revenue payments. . . . All equipment must be compatible with current MDB and DEX standards and should be able to support the installation of cashless debit card devices that meet these standards. . . . All vending machines are to be equipped with sealed registers. Any exceptions to metered machines must be approved by the facility.

This Office finds the above technical requirements are sufficient to ensure that a proper accounting of revenue is made and that the State will receive the commissions it is entitled to receive under the winning bidder’s proposal and the contract. Therefore, we are satisfied that even if this procurement were deemed a contract for services subject to the best value requirements of SFL §163, the agency properly equated price to best value.

Pilgrim determined that Magnum met the above technical requirements and offered the highest commission rate. Accordingly, Pilgrim properly awarded the contract to Magnum.

CONCLUSION

For the reasons outlined above, we find that the issues raised in the Appeal are not of sufficient merit to overturn the protest determination of Pilgrim. As a result, the Appeal is denied and we are today approving the Pilgrim/Magnum contract.

⁸ SF-20020035. In another protest (SF-20010084), however, we concluded that it was not appropriate to award the contract solely on the basis of cost because, in that case, quality and efficiency requirements had not been fully defined in the specifications. In that case since the procurement was for the complex operation of the Bedford Hills wastewater treatment plant, a Hudson River tributary which feeds the Croton Reservoir System in Westchester County and, therefore, quality and efficiency could potentially have dire financial, health, and safety consequences to the People of the State of New York, it was clear that the award of the contract on the basis of cost alone did not reflect the cost-benefit analysis required by SFL §163.