

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Protest filed by Cape Fox Professional Services, LLC. with respect to the Procurement for the Administration of the NYS Motorcycle Safety Program conducted by the New York State Department of Motor Vehicles

**Determination
of Bid Protest**

SF20140079

Contract Number-C000791

September 15, 2014

The Office of the State Comptroller has completed its review of the above-referenced procurement conducted by the New York State Department of Motor Vehicles (DMV) for the administration of New York State's Motorcycle Safety Program. We have determined that the grounds advanced by Cape Fox Professional Services, LLC (CFPS) are insufficient to merit the overturning of the award made by DMV to the Motorcycle Safety Foundation (MSF) and, therefore, we deny the Protest. As a result, we are today approving the DMV contract with MSF.

BACKGROUND

Facts

On August 15, 2013, DMV issued a Request for Proposals (RFP) for the administration of New York State's Motorcycle Safety Program (NYSMSP). The purpose of the RFP was to enter into a five-year contract with an organization that could coordinate motorcycle rider training pursuant to New York State Vehicle and Traffic Law (VTL) § 410-a. The awardee would administer the NYSMSP, which consists of approved motorcycle rider training courses, motorcycle course instructor training, program promotion, and promotion of public awareness. The RFP provided that the bidder would be selected based upon factors including: (1) the most favorable financial advantage for the State; (2) the greatest utility to the motorcyclist; (3) the comprehensiveness of the program and effectiveness of a provider; and (4) compatibility with existing rider education programs. Bidders' proposals were due October 17, 2013. DMV received two proposals—one from CFPS and one from MSF. On November 27, 2013, DMV notified CFPS that it was tentatively awarded the contract.

On January 3, 2014, MSF filed a protest with this Office challenging the award of the contract to CFPS. Both CFPS and DMV filed answers to the protest. However, prior to the resolution of the protest and completion of this Office's review of the contract, DMV notified this Office that, for reasons other than those raised in MSF's protest, it found CFPS's proposal to be nonresponsive and was withdrawing the initial contract award and making a new award to MSF. DMV indicated that, while CFPS proposed to administer the NYSMSP through use of MSF's rider training course curriculum, it had become apparent post-award that CFPS did not, in fact, have the legal authority to utilize the curriculum for the term of the contract. By letter dated January 28, 2014, DMV notified CFPS and MSF that the initial contract award was being

rescinded and a new award was being made to MSF. This Office received a letter dated February 7, 2014 and another dated February 10, 2014 from CFPS protesting DMV's secondary award of the contract to MSF (Protest).

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 (\$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 appeals of agency protest determinations. Because there was no protest process engaged in 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 this Protest, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by DMV with the DMV/MSF contract;
2. The correspondence between this Office and DMV arising out of our review of the proposed DMV/MSF contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
 - a. CFPS's Protest to OSC, dated February 7, 2014;
 - b. CFPS's Supplemental Protest, dated February 10, 2014;
 - c. MSF's Answer to the Protests, dated February 13, 2014;
 - d. DMV's Answer to the Protests, dated April 10, 2014;
 - e. CFPS's Reply to the Answers, dated April 15, 2014;
 - f. MSF's Sur-reply to CFPS's Reply, dated May 9, 2014;
 - g. DMV's Letter Responding to OSC's June 3, 2014 Questions, dated July 1, 2014.

DISCUSSION

In the Protest, CFPS asserts that: (1) the RFP contained specifications to which only MSF could be responsive; (2) CFPS was indeed responsive to the RFP requirements and rescission of the award to CFPS was improper; and (3) renewal of CFPS' Rider Education Recognition Program (RERP) agreement with MSF is not required in order for CFPS to perform

¹ OSC Guide to Financial Operations, Chapter XI.17.

under the contract as the prime contractor. As such, CFPS asserts that the contract award to MSF should be voided.

Analysis

RFP Requirements

CFPS asserts that the RFP contained specifications to which only MSF could possibly be responsive.² In the Protest, CFPS asserts that bidders were required to submit a proposed rider training course curriculum that met a two-part requirement provided for in Section 4.1.1 of the RFP:

“The Bidder must submit its proposed rider training course curriculum. The courses must meet nationally recognized standards for motorcycle rider safety programs, *and* be comparable to the standards of the Motorcycle Safety Foundation’s motorcycle rider safety program...” (emphasis added).

CFPS argues that this two-part requirement is impossible to meet because MSF does not publish educational standards to which other providers may compare their programs when developing curricula. As a result, CFPS argues that the only curriculum that could possibly meet this RFP requirement would be the MSF curriculum itself. CFPS further argues that if bidders were only required to meet the first part of the requirement and propose a curriculum that meets nationally recognized standards, such requirement would indeed be possible to meet.

During this Office’s review of the procurement record as well as the Protest, questions arose that required additional information from DMV. Therefore, on June 3, 2014, this Office sent a letter to DMV containing our questions. One of the questions specifically pertained to DMV’s requirements for rider training course curricula set forth in the RFP which, at first blush, appeared to be inconsistent with the requirements that are established by VTL § 410-a(1), which provides:

“... Approved rider training courses shall meet nationally recognized standards for motorcycle rider training courses, *or* standards for motorcycle rider safety programs which are approved by the department [of motor vehicles] and are comparable to the standards of the motorcycle safety foundation’s motorcycle rider safety program...” (emphasis added).

As noted above, in Section 4.1.1 of the RFP (and as cited in CFPS’s Protest), the standard is stated as a two-part requirement with an “and” between both requirements. However, in Section 3.5.1 of the RFP, the standard mirrors the language of VTL § 410-a(1) with an “or” between both requirements. In our June 3, 2014 letter, we asked DMV to clarify the apparent inconsistency. DMV responded by letter dated July 1, 2014, stating that “... the inconsistency ... reflects the fact that the statute provides DMV the authority to approve standards for motorcycle rider training courses, and DMV considers the approved standard to be courses which both meet nationally recognized standards for motorcycle rider safety programs *and* are

² Page 1 of CFPS’s Protest dated February 7, 2014.

comparable to the standards of [MSF's] motorcycle rider safety program." See also 15 NYCRR § 3.7(a)(5)(iii) (wherein DMV provides for a waiver of the motorcycle road test if a person holds a valid New York driver's license and "has successfully completed a motorcycle rider training course with standards comparable to the Motorcycle Safety Foundation's [MSF] motorcycle rider safety program.").

DMV, in its Answer to the Protest, also clarified that the RFP does not mandate the use of the MSF curricula. Rather, DMV would accept any curriculum that DMV has evaluated and approved as comparable to the MSF standards, which itself is nationally recognized. DMV goes on to state that, in evaluating such alternative curriculum as comparable to MSF, it does not rely on national or MSF standards, but follows DMV's own established criteria which DMV claims are widely known and based upon accepted industry standards. Since VTL § 410-a(1) appears to give DMV the authority to approve the standards for motorcycle rider training courses, we do not view DMV's requirement in Section 4.1.1 of the RFP to be inconsistent with the statute. Furthermore, since the RFP made clear that DMV would accept any alternative curriculum that it deemed to be comparable to the MSF curriculum, we do not consider the requirement in Section 4.1.1 to be unduly restrictive.

Even assuming, however, that the bid specifications are favorable to MSF, such an advantage is not necessarily contrary to law if, in fact, it furthers the public interest and is not unduly restrictive. "The central purposes of New York's competitive bidding statutes are '(1) protection of the public fisc by obtaining the best work at the lowest possible price; and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts' (*Matter of New York State Ch., Inc., Associated Gen. Contrs. v New York State Thruway Auth.*, 88 NY2d 56, 68)." *Transactive Corp. v New York State Dep't of Soc. Servs.* 236 AD2d 48, 52 (1997, 3rd Dep't), *app gr* 91 NY2d 811, and *app gr* 91 NY2d 812; see also *Acme Bus v Board of Education*, 91 NY2d 51; *Signacon Controls v Mulroy*, 32 NYS2d 410; *Jered v NYCTA*, 22 NY2d 187; *LeCesse v Town Board of the Town of Williamson*, 62 AD2d 28, *aff'd* 46 NY2d 960. It has also been held that bidding statutes are enacted for the benefit of the taxpayers and not for the benefit or enrichment of the bidders, and should be construed and administered so as to accomplish that purpose fairly and reasonably with sole reference to the public interest. *Acme*, *supra*; *Jered*, *supra*; *Spencer, White & Prentiss v Southwest Sewer Dist.*, 103 AD2d 802, 477 NYS2d 681, *app dsmd* 63 NY2d 607, 482 NYS2d 1024. It is well-established that specifications are not contrary to law merely because they tend to favor one bidder over another, but rather more must be shown to render the specifications invalid. *Gerzof v. Sweeney*, 16 N.Y.2d 206, 264 N.Y.S2d 376 (1965); *Associated Gen. Contrs. v. New York State Thruway Auth.*, 88NY2d 56, 68. While, here, MSF may receive a benefit by possessing a curriculum for motorcycle rider training courses that already expressly meets the requirements of the RFP, the specification does not limit bidders to utilizing only that curriculum. Moreover, DMV has determined that such a specification provides benefits to the State in the form of receiving services that are of a higher technical quality. Therefore, we find that the specification is not contrary to VTL § 410-a(1), or the purposes of the competitive bidding statutes.

Responsiveness of CFPS's Proposal

In the Protest, CFPS argues that its bid proposal was, in fact, responsive to the requirements set forth in the RFP and that rescission of the original award to CFPS was improper. CFPS also argues that DMV "ex-post facto" materially changed the RFP requirements.

As discussed above, bidders were required to propose a curriculum for rider training courses consistent with VTL § 410-a(1) and the requirements of the RFP. CFPS originally proposed that it would be utilizing the MSF curricula for administering the NYSMSP pursuant to CFPS's RERP agreement with MSF. However, subsequent to awarding the contract, but prior to approval of the contract by this Office, DMV discovered that CFPS did not, in fact, have the legal authority to utilize the MSF curriculum for the term of the proposed contract. DMV acknowledges that CFPS did propose alternative curricula - an "On-Street Experience" course and a "Total Control" course. However, DMV found that these alternatives did not meet the standards of VTL § 410-a(1) or the requirements of the RFP.

In this Office's June 3, 2014 letter, we asked DMV to elaborate on why the alternatives proposed by CFPS did not meet either the nationally recognized standards for motorcycle rider training courses, or a standard comparable to the MSF curriculum as required by VTL § 410-a. While not directly addressing the applicability of VLT § 410-a, DMV explained that the RFP required bidders to propose "basic" rider training curricula for beginner riders in order to meet the requirements of the RFP.³ Basic rider courses do not include operation of motorcycles on public roadways and are provided to teach students the basics of operating a motorcycle off of the public roadway. Both alternative curricula proposed by CFPS involve on-street training and a more experienced rider course. As a result, DMV determined that the alternative curricula proposed by does not meet the requirements of the RFP. Since, as discussed above, we find that DMV's more stringent requirement is allowable under the statute, we find that DMV's determination that CFPS's proposal was nonresponsive and the resulting rescission of the CFPS's contract award was appropriate.

Requirement of the RERP Agreement

CFPS argues that they do not need their own RERP agreement in order to administer the MSF curriculum because they would not actually be providing the training, but rather its subcontractors would provide such training. CFPS further asserts that all of its proposed subcontractors in New York have RERP agreements to administer the MSF curriculum and therefore, it could still satisfy the RFP requirements.

In its Answer to the Protest and in its response to our June 3, 2014 letter, DMV listed numerous provisions of the RFP where the Administrator of the NYSMSP would be required to have their own RERP agreement in order to fulfill certain tasks. We defer to DMV's expertise in this area regarding the necessity of the Administrator having its own RERP agreement in order to fulfill the requirements of the resulting contract and do not find it unreasonable that DMV would

³ Section 4.1.1(7) of the RFP.

require CFPS to have the legal authority to use the MSF curriculum that CFPS's proposal relies on.

CONCLUSION

For the reasons outlined above, we have determined that the issues raised in the Protest are not of sufficient merit to overturn the contract award by DMV to MSF. As a result, the Protest is denied and we are today approving the DMV/MSF contract.