

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by LDV, Inc.
with respect to the procurement of a Mobile
Command Center Vehicle conducted by the
New York State Department of Financial
Services.

**Determination
of Bid Protest**

SF-20140087

May 8, 2014

The Office of the State Comptroller has completed its review of the above-referenced procurement conducted by the New York State Department of Financial Services (DFS) for a mobile command center vehicle and the protest filed with respect thereto. We have determined that the grounds advanced by the protestor, LDV, Inc. (LDV), are sufficient to warrant the overturning of the award by DFS and, therefore, uphold the protest. As a result, we will not approve the proposed DFS purchase of a mobile command center vehicle from Farber Specialty Vehicles (Farber).

BACKGROUND

Facts

In December 2013, DFS solicited quotes for a mobile command center vehicle on "eBuy," an online service of the U.S. General Services Administration (GSA). DFS requested quotes on two different vehicle models from all vendors who were able to provide the vehicle through the GSA schedule contract and received a total of eight quotes in response. DFS determined that five of the eight quotes received, including the two quotes provided by LDV, did not meet its specifications and deemed them nonresponsive. The nonresponsive quotes were eliminated from consideration. DFS reviewed the remaining three quotes and made an award to Farber. LDV was notified of the award to Farber and filed a bid protest with our Office which was received on February 10, 2014 (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. While this Office generally renders its protest determinations simultaneously with its action on a contract, we note that the proposed DFS/LDV transaction has not yet been submitted to this Officer for approval. Since DFS has advised this Office that it is prepared to submit the transaction for approval, but is holding the transaction pending resolution of the issues raised by the Protest, we are addressing the merits of the Protest at this time.

In carrying out the 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.¹ These procedures govern initial protests to this Office of agency contract awards and appeals of agency protest determinations. Since there was no protest process engaged in at the procuring agency level, the Protest is governed by this Office's procedures for initial protests filed with this Office.

In the determination of this Protest, this Office considered:

1. the documentation forwarded to this Office by DFS in connection with its Contract Reporter Exemption Request; and
2. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. The Protest filed by LDV, received by this Office on February 10, 2014, and
 - b. The Answer to the Protest filed by DFS, dated March 18, 2014.

Applicable Statutes

The requirements applicable to this procurement are set forth in SFL Article 11, which provides that commodities contracts "shall be awarded on the basis of lowest price to a responsive and responsible offerer."² A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."³

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."

SFL §163(10)(e) provides that the Office of General Services "may authorize purchases required by state agencies ... by approving the use of a contract let by any department, agency or instrumentality of the United States government and/or any department, agency, office, political subdivision or instrumentality of any state or states. A state agency purchaser shall document in the procurement record its rationale for the use of a contract let by any department, agency or instrumentality of the United States government or any department, agency, office, political subdivision or instrumentality of any other state or states. Such rationale shall include, but need not be limited to, a

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

² SFL §163(3).

³ SFL §163(1)(d).

determination of need, a consideration of the procurement method by which the contract was awarded, an analysis of alternative procurement sources including an explanation why a competitive procurement or the use of a centralized contract let by the commissioner is not in the best interest of the state, and the reasonableness of cost.”

ANALYSIS OF BID PROTEST

Protest to this Office

In its Protest, LDV challenges the procurement conducted by DFS stating that its proposal met all required specifications and, therefore, should have been considered for award.

Response to the Protest

In its Answer, DFS contends the Protest should be rejected and the award upheld since LDV’s proposal failed to meet two of the required specifications and, therefore, was properly deemed nonresponsive.

DISCUSSION

Since this is a procurement for a commodity, it is governed by the provisions of SFL §163, which generally provides for a formal competitive process. However, this contract was not awarded in accordance with the statutory competitive bidding provisions of SFL §163, but rather was awarded as a “piggyback” off of a contract let by the GSA. State agencies are authorized to “piggyback” onto federal government contracts, or contracts of other governmental entities (with the approval of the Office of General Services) pursuant to SFL §163(10)(e).⁴ When this provision is used, the remaining statutory requirements of section 163 are not implicated. However, where, as here, there are multiple vendors available under the GSA contract, we would generally require as a part of our review under SFL §112 that the agency engage in a reasonable competitive process (and, in fact, DFS did undertake a competitive process among those vendors on the GSA schedule). We would additionally require that such competitive process be fair, that the determination of a bidder’s responsiveness reflect an objective assessment of whether a bidder’s proposal meets clearly specified criteria, and that the contract be awarded to the lowest responsive and responsible bidder (see SFL §163[2] setting forth the operating principles of state procurement). We, therefore, need to determine whether DFS properly determined that LDV’s proposal was nonresponsive to the specifications.

DFS determined that LDV’s proposal failed to meet two specifications: (1) a “Second right side entrance door” and (2) “Exterior Graphics” (DFS Specifications for Mobile Command Vehicle: Model #2). In relation to the first specification, LDV’s proposal

⁴ We note incidentally that DFS has not submitted the proposed piggyback award to the Office of General Services for approval as required by SFL §163(10)(e). Since we are not approving the contract award to Farber, this lack of compliance is immaterial. However, prior to making a new award off the GSA contract (either based on this procurement or a new procurement), DFS must obtain the approval of the Office of General Services.

provided two doors on the right side of the vehicle: one door to the cab of the vehicle and another door into the body of the vehicle. It is DFS' position that the "Second right side entrance door" specification required a second door into the body of the vehicle (in addition to a door to the cab). DFS asserts that "[w]e presume all vehicles of this nature have a right (curb) side door to the cab of the vehicle and did not find it necessary to specify that such a door was needed." DFS also states that "we find it incredible that [LDV] would not understand that the specification for a 'second right side entrance door' referred to a second door into the body of the vehicle, not a passenger side door into the cab of the vehicle."

In our view, however, the specification is, at best, ambiguous, and could reasonably have been read by LDV (and other bidders) as being satisfied by a door into the cab and a door into the body of the vehicle. Indeed, it is our understanding that out of the eight quotes received by DFS, five failed to provide this second entry door into the body of the vehicle, were found nonresponsive and, as a result, were disqualified from consideration. This suggests that, even to those in the business of creating these specialty vehicles, the specification did not clearly advise bidders that the second door had to be into the body of the vehicle. In addition, our review of the Questions and Answers document associated with this procurement reveals that, in the first five questions (out of a total of only nine), bidders requested further details on the specifications and/or diagrams of the vehicle that DFS required. DFS failed to provide any substantive response to these questions; and instead only directed bidders back to the existing specifications that were posted on the GSA website (which, as noted above, were at best ambiguous). This further leads our Office to conclude that the specifications were not sufficiently clear to the bidders. Therefore, we are not satisfied that DFS could properly find LDV (or other bidders) nonresponsive based upon its failure to provide a third curb-side door.

With respect to the specification that simply required "Exterior graphics," LDV indicated that it would provide "Custom computer-generated non-reflective vinyl graphics per customer specifications...." However, LDV's proposal also noted that the "Graphics package does not include production of custom shields and/or seals" (LDV Specifications and Pricing, at 5.02). Due to this caveat, DFS found LDV's proposal nonresponsive. It is DFS's position that in light of the language of LDV's proposal, "its bid would consist only of lettering and that having a shield or seal (such as the seal of a governmental agency such as DFS) was either unavailable or available only for an additional compensation."

Initially, we note that the specification language was very general in nature and, in our view, does not require that the bidder provide design services. We agree with LDV that the caveat language cited by DFS seems to simply indicate that "the graphic design of any elements is not included (i.e., artwork must be provided, but we will print and apply all graphics)" (Protest, at pg. 1). Therefore, we do not read LDV's proposal as being nonresponsive to this requirement. Further, to the extent that DFS perceived some ambiguity in the LDV proposal, we believe DFS should have sought clarification on this aspect of the proposal, particularly in light of the fact that LDV's bid was lower than the

quote provided by Farber. If DFS had sought clarification, the explanation provided by LDV should have satisfied DFS that LDV was responsive to this requirement.

Based on the ambiguity in the first specification at issue, and the fact that we perceive LDV as being responsive on the second specification (particularly with DFS' ability to clarify), we conclude that DFS did not have a valid basis to find LDV nonresponsive. Thus, we cannot approve the purchase order contract awarded to Farber. This leaves DFS with the option of either undertaking a new procurement using clearer specifications, or under certain circumstances, making a new award under this procurement.

CONCLUSION

For the reasons outlined above, we conclude that the issues raised in the Protest are sufficient to warrant the overturning of the award by DFS to Farber. Therefore, we are upholding the Protest and directing that DFS take further action consistent with this determination.