

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Bid Protest filed by Haun  
Specialty Gases, Inc. with respect to the Procurement  
for the Purchase and Delivery of Scientific,  
Specialty, Liquid and Industrial Gases conducted by  
the New York State Department of Health

**Determination  
of Bid Protest**

**SF-20140160**

July 03, 2014

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The Office of the State Comptroller has completed its review of the above-referenced procurement conducted by the New York State Department of Health (DOH) for the purchase and delivery of scientific, specialty, liquid and industrial gases at its Wadsworth Center and the protest filed with respect thereto. As outlined in further detail below, we have determined that the grounds advanced by the protestor, Haun Specialty Gases, Inc. (Haun), are without sufficient merit to overturn the contract award by DOH. We, therefore, deny the protest and are today approving the DOH contract with Airgas, Inc. (Airgas).

**BACKGROUND**

**Facts**

On October 22, 2013, DOH issued an Invitation for Bid (IFB) for a five year contract for comprehensive next-day gas delivery service at its Wadsworth Center location to include a full line of cylinder gases and gas refills required for use in a laboratory setting. Bidders were asked to provide their costs for a market basket listing of gases comprising approximately 75% of the total gases ordered annually. Bidders were also asked to submit the resumes or other like documentation demonstrating that the bidder's staff meets the requirements provided in the IFB. Bids were due on December 17, 2013. The IFB provided that a contract award would be made to the "responsible and responsive bidder who offers the lowest total cost" (IFB, pg. 8). DOH received four bids, one of which was immediately disqualified for being untimely. Of the remaining three bids, Haun's bid was determined to be the lowest cost bid, but was disqualified for failing to meet the mandatory bid specification related to the submission of staff resumes or like documentation. DOH, therefore, awarded the contract to the next lowest bidder, Airgas, the incumbent supplier. Haun was notified of the award to Airgas on March 3, 2014 and filed a bid protest with this Office dated March 12, 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.

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.<sup>1</sup> 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 the procedures for initial protests filed with this Office.

In the determination of this Protest, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by DOH with the DOH/Airgas contract;
2. The correspondence between this Office and DOH arising out of our review of the proposed DOH/Airgas contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
  - a. Haun's Protest to this Office, dated March 12, 2014, and
  - b. DOH's Answer to Haun's Protest, dated May 2, 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."<sup>2</sup> A "responsive" offerer is an "offerer meeting the minimum specifications or requirements as prescribed in a solicitation for commodities or services by a state agency."<sup>3</sup>

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(9)(c) provides that "state agencies can require clarification from offerers for purposes of assuring a full understanding of responsiveness to the solicitation requirements."

### **DISCUSSION**

In its Protest, Haun challenges the procurement conducted by DOH on two grounds: 1) DOH's rejection of its bid was arbitrary and capricious; and 2) Airgas, as the incumbent supplier, possessed an unfair competitive advantage in developing its bid. As a result, Haun argues that the contract award to Airgas should be rescinded and the contract be awarded to Haun.

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<sup>1</sup> OSC Guide to Financial Operations, Chapter XI.17.

<sup>2</sup> SFL §163(3).

<sup>3</sup> SFL §163(1)(d).

### ***The Rejection of Haun's Bid***

Section D.2.d of the IFB states that: "Resumes or other like documentation must be included with the bid which demonstrates that the Bidder's staff meets the requirements as stated in Sections C.2.a and C.2.c of this IFB" (IFB, pg. 8). Sections C.2.a and C.2.c describe specific job duties and qualifications that certain employees of the bidder must possess in certain job titles, including titles involved in the delivery of the gases. In its bid proposal, Haun included the names, phone numbers and years of experience of certain enumerated employees but did not indicate which specific employees would be fulfilling the duties associated with Section C.2.c of the IFB. Indeed, none of the identified employees were in titles that would normally be associated with the delivery functions.

Section C.2.c required that delivery personnel be properly trained and have working experience in filling cylinders with liquefied gases. Therefore, after reviewing its bid, DOH sent a letter to Haun, dated December 23, 2013, asking for clarification as to which of Haun's employees would be fulfilling those duties. By letter dated December 23, 2013, Haun notified DOH that the three employees that would be fulfilling the duties described in C.2.c were "mistakenly not included in [its] original bid submission" and provided the names and qualifications of those employees. Upon receiving this response, DOH determined that Haun's bid failed to meet the requirements of the IFB and, therefore, was nonresponsive and disqualified from further consideration.

Haun asserts that DOH's decision to disqualify its bid for failing to include resumes of its employees after allowing it the "opportunity to supplement its bid" with that information is arbitrary and capricious (Protest, pg. 3). In elaborating on this argument, Haun argues that DOH should not be permitted to request additional information from a bidder and then "summarily reject" that bid for the bidder's failure to provide the requested information with its initial bid.

The bid submitted by Haun, while listing certain staff that would be providing services under the contract, did not specifically identify the staff that would be providing delivery and cylinder filling services. Indeed, the individuals listed hold positions that would normally not be involved with delivery. Therefore, to determine whether Haun had satisfied the requirements of the IFB, DOH sought clarification from Haun as permitted under SFL§163(9)(c). In response to DOH's request for clarification, Haun provided DOH with the names of three employees that were not listed in its original submission. Clearly, Haun's submission of additional staff to provide delivery and cylinder filling services was not a clarification of its initial bid, but rather a supplementation of its bid to conform the bid to the specification requirements.

In this respect, we note that it is well-settled law that a municipality or state agency may waive a technical noncompliance with bid specifications (or permit a bidder to correct an omission) if the defect is a mere irregularity and it is in the best interest of the state or the municipality to do so. However, a state agency or municipality may not waive noncompliance if it is material or substantial. A variance is material or substantial when it would impair the interests 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 (2<sup>nd</sup> Dep't. 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 (4<sup>th</sup> Dep't 1978).

However, even where the variance is not material, a state agency or municipality has broad discretion to refuse to waive the variance. *See e.g., George A. Nole & Son, Inc. v. Bd. Of Education of the City School Dist. Of Norwich & Kotasek Corp.*, 129 A.D.2d 873 (3<sup>rd</sup> Dep't, 1987); *Hamlin Constr. Co. v. County of Ulster*, 301 A.D.2d 848 (3<sup>rd</sup> Dep't, 2003).

Here, we would be inclined to agree that the omission of the information concerning the delivery staff was a non-material defect that could have been waived by DOH. However, even assuming that the variance was non-material, as noted above, DOH would not generally be required to waive such non-compliance. Under the circumstances of this transaction, where the price differential was only \$1,162.06, or 0.73% of the bid price, we would not disturb DOH's determination to not exercise its discretion to waive this variance. Therefore, we accept DOH's determination to reject Haun's bid as non-responsive

### ***Incumbency***

In the Protest, Haun asserts that, as the incumbent supplier, Airgas possessed a competitive advantage over other bidders since it knew of the actual usage of gases at the Wadsworth Center. Haun asserts that many of the low volume gases consumed at the Wadsworth Center are the most expensive gases and possessing knowledge with respect to actual usage at the Wadsworth Center allowed Airgas to manipulate its bid.

First, it should be noted that Haun's bid was the lowest cost bid. Therefore, if Haun had not been found non-responsive, it would have been awarded the contract. In any event, however, bidders were provided with the estimates of the number of cylinders of each of the gases included in the market basket, and these estimates were based upon actual usage level for the prior year. Therefore, each of the bidders had the same knowledge as the incumbent with respect to such usage.

Haun's argument, however, appears to be premised on the assumption that the vendor awarded this contract will supply DOH with all gases (not just the gases included in the market basket) during the term of the contract, and that the knowledge that Airgas has with respect to the usage of these non-market basket gases gave it an advantage in establishing its prices for the market basket gases.<sup>4</sup> In this respect, we note that the IFB indicates that:

[g]ases not included in the market basket may be added over the life of the contract by mutual agreement. The contractor will propose a price for the gas to be added and [DOH] will determine price reasonableness through a market price comparison. Any gas to be added to this contract and the ultimate contract price is subject to the [DOH] contract amendment process and must be approved by the Office of the State Comptroller.<sup>5</sup>

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<sup>4</sup> Presumably, Haun is suggesting that the incumbent could lower its proposed prices for the market basket gases, based upon its ability to make up for such reduced charges through higher charges for the non-market basket gases.

<sup>5</sup> Page 4, Section C(1) of the IFB.

Thus, while the IFB language is not entirely clear, it does not in any way guarantee that the vendor awarded the contract will be supplying the non-market basket gases — rather such gases may only be added by contract amendment (subject to approval by this Office) after a price comparison.<sup>6</sup> Therefore, even if we assume that Airgas possessed an advantage as the incumbent and presumed that it would be supplying the non-market basket gases,<sup>7</sup> such advantage would not be present in this case since the bidder awarded this contract cannot make that presumption.

Therefore, here, we are satisfied that Airgas did not possess an unfair competitive advantage as the incumbent supplier.

## **CONCLUSION**

For the reasons outlined above, we find the issues raised in the Protest are not of sufficient merit to overturn the award by DOH to Airgas. As a result, the Protest is denied and we are today approving the DOH/Airgas contract.

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<sup>6</sup> Furthermore, because these non-market basket gases were not included in the calculation of price, consistent with our position that, with limited exceptions, all reasonably foreseeable costs must be factored into the calculation of cost (*see, SF20080408, SF20080185, SF20100156*) we would not approve any amendment to the contract that would add any such gas or gases to the contract, except in the limited circumstance where such gas or gases could be purchased separately without competition pursuant to the agency's discretionary purchasing authority under SFL §163(6) because the expected cost of such gas or gases is under \$50,000. Even in that circumstance, we would only approve an amendment providing for the addition of such gas or gases where DOH had established the reasonableness of the price.

<sup>7</sup> We need not determine whether there would, in fact, have been such an advantage, since, for the reasons discussed in the text, we are satisfied that any such advantage would not be present here.