

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by PMI Document Solutions, Inc. with respect to the procurement of two high-speed roll microfilm scanners conducted by the New York State Office of Mental Health.

**Determination
of Appeal**

SF-20140446

Contract Number – C008664

November 21, 2014

The Office of the State Comptroller has completed its review of the above-referenced procurement conducted by the New York State Office of Mental Health (OMH) for two high-speed roll microfilm scanners. As outlined in further detail below, we have determined that the grounds advanced by PMI Document Solutions, Inc. (PMI) are insufficient to merit the overturning of the contract award made by OMH and, therefore, we deny the appeal. As a result, we are today approving the OMH contract with NextScan Inc. (NextScan) for two high-speed roll microfilm scanners.

BACKGROUND

Facts

On July 22, 2014, OMH issued an Invitation for Bids (IFB) seeking to purchase two high-speed roll microfilm scanners on the basis of lowest price. OMH received two bids – one from PMI and the lowest price bid from NextScan. Because NextScan's bid price was substantially lower than the bid submitted by PMI, OMH sought verification from NextScan to ensure that its scanner in fact met the mandatory specifications set forth in the IFB. OMH held a webinar with NextScan during which they discussed the product, its functions and specifications, and NextScan conducted a live demonstration of the unit. After the webinar, OMH concluded that NextScan's scanner complied with the specifications of the IFB and, as a result, awarded the contract to NextScan.

By letter dated September 11, 2014, PMI filed a bid protest with OMH challenging its award of the contract to NextScan on the basis that NextScan's bid failed to meet the mandatory specifications set out in the IFB and, therefore, OMH must have waived the requirement of certain bid specifications. Consequently, PMI also asserted that since it submitted a bid that met all of the mandatory bid specifications, its bid price was higher than it would have been if it had been given the opportunity to revise its bid accordingly. OMH issued a letter dated September 22, 2014, denying PMI's protest on the basis that NextScan's bid met the mandatory requirements of the IFB and offered the lowest price. By letter dated October 1, 2014, PMI filed an appeal of OMH's protest decision with this Office (Appeal) and by letter dated October 27, 2014, OMH responded to the Appeal.

Comptroller's Authority and Procedures

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 a Contract Award Protest Procedure that governs the process to be used when an interested party challenges a contract award by a State agency.¹ This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because this is an appeal of an agency protest decision, the Appeal is governed by section 4 of this Office's procedure for protest appeals.

In the determination of this Appeal, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by OMH with the OMH/NextScan contract;
2. The correspondence between this Office and OMH arising out of our review of the proposed OMH/NextScan contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
 - a. PMI's Appeal dated October 1, 2014; and
 - b. OMH's Answer to the Appeal dated October 27, 2014.

Applicable Statutes

The requirements applicable to this procurement are set forth in SFL Article 11 which provides that contracts for commodities shall be awarded on the basis of lowest price to a responsive and responsible offerer.² "Lowest price" is defined as "the basis for awarding contracts for commodities among responsive and responsible offerers."³ 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."⁴

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."

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

² SFL §163(10).

³ SFL §163 (1)(i).

⁴ SFL §163(1)(d).

ANALYSIS OF BID PROTEST

Appeal to this Office

In its Appeal, PMI challenges the procurement conducted by OMH on the following grounds:

1. NextScan's bid is not responsive to the IFB's mandatory specifications.
2. By awarding the contract to NextScan, OMH waived certain mandatory specifications for NextScan thereby creating an unfair procurement. If PMI had revised its bid to eliminate those same specifications, PMI's bid price would have been lower.

Response to the Appeal

In its Answer, OMH contends the Appeal should be rejected and the award upheld on the following grounds:

1. NextScan's bid meets all of the mandatory specifications and offers OMH the lowest price.
2. PMI's assertion that OMH created an unfair procurement by accepting a bid that does not meet the mandatory specifications has no factual basis.

DISCUSSION

Since this is a procurement for a commodity, it is governed by the provisions of SFL §163, which generally provide for a formal competitive process by which an award is made to a responsive and responsible bidder offering the lowest price bid. Generally, in determining a bidder's responsiveness, the procuring state agency must undertake an objective assessment as to whether the submitted bid meets the specification and requirement set forth in the solicitation issued by the procuring agency. After such assessment is made, the contract is awarded to the responsive and responsible bidder offering the lowest price (*see* SFL §163[3]).

In the Appeal, PMI argues that NextScan's bid did not meet four of the thirteen mandatory specifications set forth in Section 1 of the IFB.⁵ PMI does not, however, dispute that NextScan offered the lowest priced bid in response to the IFB. Therefore, our determination of the Appeal will turn on whether OMH properly determined that NextScan's proposal was responsive.

We separately address each of the four specifications PMI claims were not met by NextScan's bid below:

⁵ We note that the mandatory specifications contained in Section 1, Page 2 of the IFB overlap with the minimum requirements set forth on Attachment D to the IFB (Bid Quote Sheet). Since PMI's Appeal refers to the numbered specifications in Section 1, we will reference the specifications as set forth therein.

1. Specification #8 – Use an external PC not integrated within.

Mandatory Specification #8 required that the high-speed roll microfilm scanners proposed by bidders “[u]se an external PC not integrated within.” PMI claims that NextScan’s scanner did not meet this bid specification because it has an internal PC and “will not function without this internal integrated PC.”⁶

As noted above, before making an award to NextScan, OMH undertook steps to confirm that the NextScan product met the mandatory specifications set forth in the IFB. Specifically, OMH conducted a webinar during which NextScan demonstrated its product and confirmed, among other things, that NextScan could manufacture its unit using an external PC not integrated within as required by the IFB.

In addition, upon receiving PMI’s bid protest, OMH requested that NextScan provide explicit confirmation that it could meet the challenged specifications. With respect to Mandatory Specification #8, NextScan stated that: “[o]ur standard configuration includes an external PC to receive the Image Data from the scanner and store it either locally or on a network data share. The scanner can be configured with an internal PC or externally which we have done for customers in the past. Our PC whether internal or external is provided by NextScan and provides system integrity, performance consistency, and workflow flexibility” (Letter from NextScan to OMH, dated September 16, 2014). In response to PMI’s Appeal to this Office, NextScan reiterated its position stating: “Let me be clear, we are supplying NY OMH a scanning solution with an external PC and external storage devices . . .” (Letter from NextScan to OMH, dated October 23, 2014). In an attachment to the October 23rd letter, NextScan specifically addressed how each mandatory specification, including Mandatory Specification #8, was met by the NextScan product. Finally, as part of the procurement record, OMH has provided NextScan’s quote sheet that was included as part of NextScan’s bid. This document details what NextScan proposed to provide in response to the IFB, namely, two scanning systems “with external PC,” that again confirms that the PC is an independent component from the scanner. Based on all of the foregoing, we find no reason to disagree with OMH’s finding that NextScan’s bid satisfied Mandatory Specification #8.

2. Specification #10 – Image detection includes dual leading edge, dual trailing edge, and up to (3) levels of blips.

Mandatory Specification #10 required that the high-speed roll microfilm scanners proposed by bidders have the capability to provide image detection that includes dual leading edge, dual trailing edge, and up to three levels of blips. PMI claims that NextScan’s scanner

⁶ In support of its argument that NextScan did not meet Mandatory Specification #8, PMI attached to its Appeal an e-mail between a sales representative at NextScan and an individual at another organization (that was not involved in this procurement). In the e-mail chain, the NextScan representative is asked “. . . if the PC controlling the scanner is integrated within the scanner . . .” The NextScan representative responds that “. . . there is a PC integrated into the scanner.” We note, however, that the specific circumstances surrounding the e-mail exchange were not provided and the information in the procurement record provides adequate support to the contrary.

does not meet this bid specification because it uses only single leading edge and single trailing edge image detection.

Notwithstanding the Comptroller's broad contract review authority under SFL §112, this Office generally gives significant deference to agency determinations regarding factual issues which are within the agency's technical expertise, so long as such determinations are supported by the record. With respect to Mandatory Specification #10, NextScan stated that its scanner has the ability to utilize up to twenty detection channels and up to four levels of blips. In support of its position, NextScan cited two passages of the scanner's operations manual and provided a very technical and detailed description regarding the unit's capabilities (Letter from NextScan to OMH, dated October 23, 2014). The procurement record appears to support OMH's technical determination that NextScan's bid met Mandatory Specification #10, and, therefore, we will not disturb it.

3. *Specification #12 - Full roll scanning with automatic image detection on the fly. Must have a "go to" frame function for specialized quality control.*

Mandatory Specification #12 required that the scanners proposed by bidders have the ability to conduct full roll scanning with automatic image detection on the fly and have a "go to" frame function for specialized quality control. PMI claims that the NextScan unit's imaging detection is not automatic. In its letter to OMH dated September 16, 2014 (responding to PMI's agency-level bid protest), NextScan indicated that its audit software contains a "Go To" function permitting "nearly instantaneous" positioning to any location on the roll. This point was again confirmed in the attachment to NextScan's October 23rd letter to OMH. Based on NextScan's response and the live demonstration of the scanner's capabilities provided during the webinar, OMH determined that NextScan's bid satisfied this requirement. As stated above, since the procurement record appears to support OMH's technical determination that NextScan's bid met Mandatory Specification #12, we will not disturb it.

4. *Specification #13 – Image output options must include: TIFF, JPEG, PDF, BMP, and more.*

Mandatory Specification #13 required that the scanners provide image output options including TIFF, JPEG, PDF, BMP, and more. PMI claims that NextScan does not list BMP as an output option. NextScan has responded that the software used in its scanner offers hundreds of output types, including BMP, even if BMP was not expressly listed in its brochure (Letters from NextScan to OMH, dated September 16, 2014 and October 23, 2014). NextScan has affirmatively stated that its scanners have BMP capability and there is no evidence to the contrary in the record before us. Thus, we are satisfied that OMH properly determined that NextScan's bid met this requirement.

CONCLUSION

For the reasons outlined above, we have determined that the issues raised in the Appeal are not of sufficient merit to overturn the contract award by OMH. As a result, the Appeal is denied and we are today approving the OMH/NextScan contract for two high-speed roll microfilm scanners.