

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Forklift
Headquarters Inc. with Respect to the Procurement
of a Forklift Concession Conducted by the New York
Convention Center Operating Corporation

**Determination
of Bid Protest**

SF-20150085

Contract Number – X000024

May 29, 2015

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York Convention Center Operating Corporation (NYCCOC) for a forklift concession. We have determined the grounds advanced by Forklift Headquarters Inc. (FLHQ) are insufficient to merit the overturning of the contract award made by NYCCOC and, therefore, we deny the protest. As a result, we are today approving the NYCCOC contract with United Rentals North America, Inc. (United Rentals) for a forklift concession.

BACKGROUND

Facts

NYCCOC operates the Jacob K. Javits Convention Center in New York City. On November 26, 2014, NYCCOC issued a Request for Proposals for fueled forklifts available for rental at the Javits Center, RFP#1949EA (RFP). Private contractors employed by event organizers rent the forklifts to assist with set-up and dismantling of events at the Javits Center. The RFP provided the proposals would be evaluated based on the terms and conditions of the rental contract with customers (cost component) worth 30% of the total score and four technical components, aggregating 70% of the total score. Three companies submitted proposals by the January 7, 2015 due date. On March 9, 2015, NYCCOC awarded the contract to United Rentals, Inc. FLHQ requested a debriefing and was initially informed that it was not NYCCOC's practice to hold a debriefing nor was it required to do so, as State Finance Law (SFL) § 163 does not apply to NYCCOC.¹ At FLHQ's insistence, NYCCOC agreed to a March 18, 2015 meeting to discuss the scoring of FLHQ's proposal. At that meeting, NYCCOC advised FLHQ its proposal received the full 30 points for the cost component and 36.2 points of the remaining 70 points for the technical component. NYCCOC did not provide FLHQ a breakdown of the scores assigned for each of the four technical components.² NYCCOC also advised FLHQ that it had evaluated the proposals and made an award on the basis of best value.

¹ SFL § 163(9)(c) requires state agencies to provide a debriefing to any unsuccessful offerer upon request. NYCCOC, however, is not a "state agency" for purposes of section 163 but, rather, is a public benefit corporation organized under the Public Authorities Law (*see* SFL § 160[9]; Public Authorities Law § 2562).

² NYCCOC stated that, at the March 18 meeting, it "explained the evaluation process and the basis on which a decision was made to award the contract to United Rentals, and answered all of the questions that Mr. Riddle raised" (NYCCOC Answer dated April 2, 2015, at pg. 1).

FLHQ filed a protest with this Office by letter dated March 30, 2015 (Protest) and NYCCOC responded to the Protest by letter dated April 2, 2015 (Answer). On April 7, 2015, FLHQ filed a reply to NYCCOC's Answer (Reply).

Comptroller's Authority and Procedures

NYCCOC was created under Section 2562 of the Public Authorities Law (PAL) as a public benefit corporation. PAL § 2564 requires NYCCOC, in connection with its operation of the convention center, to "grant concessions, all on such terms and conditions as it may determine are fair and reasonable, subject, in the case of rentals and concessions other than for exhibition purposes, to the prior approval of the state comptroller."

This Office has issued a Contract Award Protest Procedure (OSC Protest Procedure) that governs the process to be used when an interested party challenges a contract award that is subject to the Comptroller's approval.³ This procedure governs initial protests to this Office and appeals of protest determinations made by the public entity that conducted the procurement. Because NYCCOC did not have a protest procedure, this initial protest was filed with our Office, and is governed by section 3 of the OSC Protest Procedure.

In the determination of the Protest, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by NYCCOC with the NYCCOC/United Rentals, Inc. contract;
2. The correspondence between this Office and NYCCOC arising out of our review of the proposed NYCCOC/United Rentals, Inc. contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
 - a. FLHQ's protest dated March 30, 2015;
 - b. NYCCOC's answer to the protest dated April 2, 2015; and
 - c. FLHQ's reply to NYCCOC's answer dated April 7, 2015.

Applicable Statutes, Guidelines and RFP Provisions

As stated above, PAL § 2564 provides that NYCCOC concession contracts, other than for exhibition purposes, are subject to the Comptroller's approval. Public benefit corporations with a majority of board members appointed by the Governor, such as NYCCOC, are required to adopt guidelines "regarding the use, awarding, monitoring and reporting of procurement

³ OSC Guide to Financial Operations, Chapter XI.17, <http://www.osc.state.ny.us/agencies/guide/MyWebHelp/>.

contracts” (PAL § 2879[1]). Such guidelines must include requirements relating to the selection of contractors (PAL § 2879[3]).

NYCCOC’s Procurement Contracts Guidelines (NYCCOC Guidelines), approved by the Authority’s Board on November 21, 2013, set forth the requirements applicable to this procurement. NYCCOC Guidelines require proposals in response to a Request for Proposals to be “evaluated on the basis of best value, taking into consideration a variety of criteria including qualifications, proposed methodology, management capability and cost” (Section 303[f] of NYCCOC Guidelines).

Section 4 of the RFP provided “[p]roposals will be evaluated according to the percentage weight assigned to each section of the proposal” and set forth the evaluation criteria:

- Terms and Conditions of Rental Contract with Customers (Cost) (30%)
- Company Qualifications and Experience (15%)
- Quality of Proposed Gasoline Powered Fleet (20%)
- Fleet Management Solutions (25%)
- Implementation of New Contract (10%).

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, FLHQ challenges the procurement conducted by NYCCOC on the following grounds:

1. NYCCOC did not evaluate FLHQ’s proposal using the evaluation criteria specified in the RFP, nor did the RFP provide for evaluation of proposals on a best value basis.
2. NYCCOC applied the technical evaluation criteria unfairly among the offerors resulting in a low overall technical score for FLHQ.

Response to the Protest

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

1. NYCCOC scored the proposals in accordance with the methodology set forth in the RFP by separately scoring each evaluation criterion and assigning to each score the relative weight for that criterion.
2. NYCCOC evaluators appropriately evaluated and scored the proposals.

Reply to the Answer

In its Reply, FLHQ reiterates the arguments raised in its Protest and raises an additional challenge to NYCCOC's procurement:

1. Correspondence from a private contractor to a NYCCOC officer demonstrates a potential conflict of interest affecting the integrity of the procurement because the contractor has a national contract with United Rentals, Inc.

DISCUSSION

Evaluation of Proposals

FLHQ claims NYCCOC evaluated FLHQ's proposal "on a 30% for pricing and 70% for all other criteria" basis which differs from the evaluation methodology described in the RFP (*see* Protest, at pg. 1). Additionally, FLHQ argues the RFP does not indicate NYCCOC will award the contract on the basis of best value.

Section 4 of the RFP sets forth the evaluation criteria and the relative weight allocated to each: 30% for cost and an aggregate of 70% for the remaining four technical criteria. Each of these four criterion was assigned an individual weight (*see* "Applicable Statutes, Guidelines and RFP Provisions," above and RFP, at pgs. 4-5) and, according to NYCCOC, each criterion "was separately evaluated and scored by each of the five evaluators...and those results were averaged and totaled to reach a final score" (Answer, at pgs. 1-2). Our own independent review of the procurement record confirms NYCCOC's assertion that all the proposals were evaluated in the manner set forth in the RFP.

As stated above, the NYCCOC Guidelines generally require NYCCOC to select a contractor based on a best value determination when soliciting services through the use of a Request for Proposals (NYCCOC Guidelines, Section 303[f]). While FLHQ asserts that the RFP did not use the words "best value," we note that the NYCCOC Guidelines are available on the NYCCOC's website and are readily available to the public. More importantly, the RFP sufficiently detailed the criteria NYCCOC would use to evaluate the proposals, which amounted to a best value determination (a consideration of variety of criteria including qualifications, proposed methodology, management capability and cost). Since the evaluation methodology was formulated consistent with the NYCCOC Guidelines, and was conducted in the manner set forth in the RFP, we find no reason to overturn the award because the RFP did not specifically mention a "best value" basis for award.

NYCCOC's Application of the Evaluation Criteria to the Proposals

With respect to the scoring of the four technical criteria worth an aggregate of 70 points, FLHQ argues it should have received at least 65 points. We separately discuss each of the criterion below.

1. Company Qualifications and Experience (15 points). The first criterion is intended to evaluate “the capability of the company to finance, support and maintain a fleet of forklifts of similar size and usage” (RFP, Section 4[B], at pg. 4). FLHQ argues that, as the incumbent for the past 15 years, it should have received full points (*see* Protest, at pg. 2). NYCCOC countered that “[t]he purpose of rebidding a contract is to give other companies the opportunity to demonstrate that they are better qualified than the incumbent” (Answer, at pg. 2). The mere fact that a company has been providing services to the procuring entity does not guarantee that company an advantage under a subsequent procurement. We find NYCCOC’s decision to award fewer points to FLHQ on this criterion is supported by the record and, therefore, we will not disturb it.

2. Quality of Proposed Gasoline Powered Fleet (20 points). The second criterion required that the proposal set forth a description of the forklifts proposed to meet the contract requirements (*see* RFP, Section 4[C], at pg. 5). FLHQ proposed to deliver 16 new forklifts, refurbish existing equipment and continue replacing equipment over a five-year period on a rolling basis, or as reasonably requested by NYCCOC, effectively resulting in all new equipment within the contract term (*see* Reply, at pg. 2). United Rentals offered to deliver new forklifts and NYCCOC awarded United Rentals more points for this criterion. FLHQ claims United Rentals cannot deliver the new equipment on the contract start date and, thus, mislead the evaluators (*see* Protest, at pg. 2). FLHQ further states United Rentals will be forced to substitute existing equipment until the new units are ready and, therefore, United Rentals did not meet the RFP requirements because it failed to submit a description of that equipment with the proposal (*see* Protest, at pg. 2). NYCCOC rejected FLHQ’s claim as speculation, instead relying on United Rentals’ representations that the new forklifts will be delivered within 90-120 days of ordering (*see* Answer, at pg. 2). Even if the new equipment is not available on the contract start date, NYCCOC does not view the short-term use of existing equipment in anticipation of the new forklifts as diminishing the quality of United Rentals’ proposal (*see* Answer, at pg. 2). Additionally, NYCCOC believes “deducting points based on the possibility of a delayed implementation for which [United Rentals] would in no way be at fault would be inappropriate” (Answer, at pg. 2). FLHQ strongly insists that a delivery delay is inevitable which NYCCOC evaluators should have considered when scoring United Rentals’ proposal (*see* Reply, at pg. 3).

NYCCOC’s technical evaluation team concluded that United Rentals’ proposed fleet of new forklifts warranted a higher technical score than FLHQ’s offer, and determined United Rentals’ estimated delivery time was acceptable. While United Rentals did not submit specifications on existing equipment that might be used for an interim period, this stopgap measure was not envisioned at the time proposals were submitted and we agree with NYCCOC that, if necessary, this solution would not significantly diminish the quality of United Rentals’ proposal. We find NYCCOC assigned points in a reasonable manner based on the content of the proposals; thus, we will not disturb NYCCOC’s determination on this criterion.

3. Fleet Management Solution (25 points). The third criterion required bidders to describe the solution it proposes to manage the forklift needs at the Javits Center, as well as the maintenance of the equipment itself (*see* RFP, Section 4[D], at pg. 5). In essence, FLHQ argues its software solution is better than United Rentals’ system (*see* Protest, at pg. 2, and Reply, at pg. 3). NYCCOC awarded FLHQ fewer points because FLHQ had not used the solution it proposed

and “had no demonstrated experience in using, whereas United Rentals proposal involved the extension of a program they are currently utilizing” (Answer, at pg. 2). Here again, we believe the evaluation of the system used to manage the fleet is properly within NYCCOC’s expertise and NYCCOC’s scoring of this criterion is supported by the procurement record. We, therefore, defer to NYCCOC’s allocation of points for this criterion.

4. Implementation of New Contract (10 points). The final criterion required that the proposal contain a “detailed description of Transition Plan for implementation of new contract to ensure minimal business disruption” (RFP, Section 4[E], at pg. 5). FLHQ asserts that “[a]s incumbent there would be no disruption at all and any new procedures would simply [be] incorporated smoothly into the new contract period ...” (Protest, at pg. 2). NYCCOC maintains FLHQ did not address how it planned to implement the new requirements under this contract, such as a requirement that the concessionaire supply the forklifts with fuel during the rental periods (*see* Answer, at pg. 3). After reviewing the procurement record, we find no reason to upset NYCCOC’s scoring.

Potential Conflict of Interest

FLHQ claims a potential conflict of interest threatens the integrity of NYCCOC’s procurement process. FLHQ’s Reply includes a copy of an email sent by a private contractor frequently assisting with events at the Javits Center, to NYCCOC’s Chief Executive Officer (*see* Reply, Exhibit 2). In the email, the contractor’s Director of Operations expressed dissatisfaction with FLHQ’s supply of forklifts and indicated he might contact United Rentals, that company’s current national vendor, to obtain the necessary equipment for an event. The email also acknowledged NYCCOC was soliciting bids for a new concession contract.⁴ FLHQ submitted a second email from the same private contractor in which the company again referenced its national contract with United Rentals (*see* Reply, Exhibit 3).

We disagree with FLHQ that this correspondence, on its face, evidences a private contractor’s attempt to influence the outcome of NYCCOC’s procurement. Nothing in the procurement record indicates that the private contractor’s comments, or any other action of the contractor, played any role in NYCCOC’s procurement process. Therefore, we find no support for FLHQ’s assertion.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the contract award by NYCCOC. As a result, the Protest is denied and we are today approving the NYCCOC/United Rental, Inc. contract for the forklift concession.

⁴ NYCCOC advised us that the solicitation referred to in the email was withdrawn and subsequently replaced by the RFP.