

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Mark Goldberg Prosthetic & Orthotic Labs, Inc. with respect to the procurement of Orthotic and Prosthetic Devices and Related Services conducted by the State University of New York at Stony Brook University Hospital

**Determination
of Bid Protest**

SF-20150281

December 1, 2015

Contract Number – C011131

The Office of the State Comptroller (Office) has reviewed the above-referenced procurement conducted by Stony Brook University Hospital (SBUH) for Orthotic and Prosthetic Devices and Related Services (Devices and Services). We have determined the grounds advanced by Mark Goldberg Prosthetic & Orthotic Labs, Inc. (Goldberg Labs) are insufficient to merit the overturning of the contract award made by SBUH and, therefore, we deny the Protest. As a result, we are today approving the SBUH contract with East Coast Orthotic & Prosthetic Corp. (East Coast) for the Devices and Services.

BACKGROUND

Facts

On June 10, 2015, SBUH issued Invitation for Bids (IFB) Number 15/16-2571 seeking a vendor to provide orthotic and prosthetic devices as well as the services of an Orthotist and Prosthetist to properly fit the devices to patients (IFB, at pg. 10). The resulting contract was to be awarded to the lowest qualified responsible bidder offering the largest percent discount off of the current Medicare Durable Medical Equipment (DME) Fee Schedule (Fee Schedule) (IFB, at pg. 11).

The deadline for submission of bids was July 8, 2015. SBUH received two responsive bids, one from Goldberg Labs offering a discount of 50 percent off of the DME Fee Schedule, and one from East Coast offering a discount of 80 percent. SBUH determined that East Coast met all the requirements in the IFB and was a responsible bidder. Therefore, SBUH awarded the contract to East Coast as the lowest qualified and responsible bidder.

On September 1, 2015, SBUH informed Goldberg Labs that the contract was awarded to East Coast. By letter dated September 11, 2015, Goldberg Labs filed a protest with this Office challenging the award to East Coast (Protest). On September 24, 2015, SBUH filed its response to the Protest with this Office (SBUH Answer) and thereafter, on October 30, 2015, submitted the contract with East Coast to this Office for review.

Comptroller's Authority and Procedures

Under State Finance Law (SFL) § 112(2), with certain limited exceptions, before any contract made for or by a state agency, which exceeds fifty thousand dollars, becomes effective it must be approved by the Comptroller. One of those exceptions applies to contracts entered into by the State University of New York (SUNY). Education Law (EDL) § 355(5) allows SUNY to procure materials, equipment and supplies, construction and construction-related services, and printing contracts without prior approval of the Comptroller. For other types of contracts, such as the contract proposed in the instant matter, the Comptroller's approval is required so long as the value of the contract exceeds a certain monetary threshold that is negotiated by SUNY and this Office pursuant to EDL § 355(5). In the instant matter, the contract's value exceeds the applicable monetary threshold and, therefore, it is subject to the Comptroller's approval.

In carrying out the contract approval responsibility prescribed by SFL § 112 and EDL § 355(5), this Office has issued a Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge 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. Since this is an initial protest of an agency's contract award, the Protest 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 SBUH with the SBUH/East Coast contract;
2. The correspondence between this Office and SBUH arising out of our review of the SBUH/East Coast contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
 - a. Goldberg Lab's Protest, dated September 11, 2015;
 - b. SBUH's Answer to the Protest, dated September 23, 2015; and
 - c. Goldberg Lab's Reply to SBUH's Answer, dated September 25, 2015.

Applicable Statutes

The requirements applicable to this procurement are set forth in SFL § 163, which provides that contracts for commodities shall be awarded on the basis of "lowest price" to a responsive and responsible offerer and contracts for services shall be awarded on the basis of "best value".² Lowest price is defined as "the basis for awarding contracts for commodities among responsive

¹ OSC Guide to Financial Operations, Chapter XI.17, at <http://www.osc.state.ny.us/agencies/guide/MyWebHelp/>.

² SFL § 163(3)(a)(ii),(4)(d).

and responsible offerers.”³ Best value is defined as the “the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers.”⁴ For purposes of SFL § 163, “responsible” means the financial ability, legal capacity, integrity, and past performance of a business entity⁵ and “responsive” means a bidder meeting the minimum specifications or requirements as prescribed in a solicitation.⁶

SFL § 163(9)(f) provides that “[p]rior to making an award of a contract, each state agency shall make a determination of responsibility of the proposed contractor ...”

ANALYSIS OF THE PROTEST

Protest to this Office

In the Protest, Goldberg Labs challenges the procurement conducted by SBUH on the following grounds:

1. SBUH did not comply with the requirements of SFL § 163(1)(h) since it failed to provide the material and substantial reasons for making a “single source” award.
2. The award should not have been on the basis of low price.
3. SBUH’s decision to award an exclusive contract to East Coast does not have a rational basis: more specifically, SBUH failed to consider factors would be in the best interest of the State, such as the opinion of Hospital physicians and the physical location of the bidders’ offices.

SBUH’s Response to the Protest

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

1. SBUH did not award the contract as a “single source” and thus was not subject to the requirements of SFL § 163(1)(h).
2. The low cost method of award was properly established and followed by SBUH.
3. SBUH investigated East Coast’s responsibility by verifying the information contained on East Coast’s Vendor Responsibility Questionnaire with Hospital physicians and reviewing its references. SBUH determined that East Coast was a responsible bidder, and the location of bidders’ offices was not relevant to the evaluation since the contract is for on-site inpatient services.

³ SFL § 163(1)(i).

⁴ SFL § 163(1)(j).

⁵ SFL § 163(1)(c).

⁶ SFL § 163(1)(d).

Goldberg Lab's Reply to the Answer

In its Reply, Goldberg reiterates the arguments raised in the Protest and further asserts:

1. SFL § 163 does not distinguish between single source contracts and single award contracts.

DISCUSSION

I. Single Source vs. Competitive Single Contract Awards

In the Protest, Goldberg Labs challenges SBUH's decision to make a single contract award for the Devices and Services contract as compared to the multiple contract awards made in prior procurements for the same devices and services. Goldberg Labs refers to this method as a "single source" award and asserts that SBUH did not comply with the requirements set forth in SFL § 163(1)(h), which requires the agency to document the material and substantial reasons for awarding the contract to one particular vendor when two or more offerers are available to supply the required commodities or services (Protest, at pg. 4). In the Answer, SBUH states that this procurement was not subject to the requirements of SFL § 163(1)(h) because SBUH conducted a competitive procurement and did not make a single source award (Answer, at pg. 2). In its Reply, Goldberg Labs asserts that SFL § 163 does not distinguish between single contract awards and single source awards (Reply, at pg. 2).

Initially, we note that SFL § 163 clearly distinguishes between a competitively bid single contract award and the noncompetitive award of a contract to a "single source." More specifically, SFL § 163(1)(h) defines "single source" as:

a procurement in which although two or more offerers can supply the required commodities or services, the commissioner or state agency, upon written findings setting forth the material and substantial reasons therefor, may award a contract ... to one offerer over the other. The commissioner or state agency shall document in the procurement record the circumstances leading to the selection of the vendor, including the alternatives considered, the rationale for selecting the specific vendor and the basis upon which it determined the cost was reasonable.

SFL § 163(10)(b)(i) goes on to provide that:

Single or sole source procurements for services or commodities ... may be made *without a formal competitive process* and shall only be made under unusual circumstances ... (emphasis added).

The New York State Procurement Guidelines (Guidelines) further distinguish between competitive and noncompetitive contract awards, and defines a competitively bid contract as one "awarded pursuant to an IFB or RFP" and a single source contract as a procurement "in which, although there are two or more potential offerers, the agency has determined that it is in the best interest of the State to procure from a particular vendor" (Guidelines, at pgs. 8-9).

Accordingly, unlike most contracts awarded by state agencies, single source contracts are not awarded pursuant to a competitive procurement. Rather, single source contracts are awarded on a noncompetitive basis where the procuring agency has documented the material and substantial reasons not to undertake a competitive procurement. As provided in the Guidelines, one example would be “where an agency needs maintenance for a particular piece of equipment, and that maintenance must be provided by a particular vendor to maintain the warranty” (Guidelines, at pg. 9). Where a state agency seeks to make a noncompetitive single source award, the agency is required to document its justification in the procurement record subject to the approval of the Comptroller if the contract value meets the respective threshold amount. Here, however, it is clear that SBUH conducted a competitive procurement and did not award the contract as a single source award. As such, SBUH was not subject to the requirements of SFL § 163(1)(h).

II. Low Price Basis for Award

Goldberg Labs also states that SBUH should have considered factors other than price in making its award, suggesting that the award should have been made on the basis of “best value,” rather than low price (Protest, at pg. 4; *see* SFL § 163[4]). Generally, pursuant to SFL § 163(3) and (4), respectively, contracts for commodities are awarded solely on the basis of lowest price while contracts for services are awarded on the basis of best value. A best value award considers both cost and the technical quality of a bidder’s proposal (*see* SFL § 163[1][j]).

At the outset, we note that an agency can award a contract for services solely on the basis of price where the agency can document that any qualitative differences between responsive and responsible offers will not substantially affect the value to the State (*see* SF20100434). In response to audit questions posed by this Office, SBUH acknowledged that this procurement contemplates both a service and a commodity but contends that the selected method of award, based on the largest discount off of the Fee Schedule established by the Federal Government, is appropriate. Specifically, SBUH notes that the prices on the established Fee Schedule include the anticipated cost of both the medical device itself as well as the fitting service. While this fact alone is not determinative, we believe it does support the view that a qualified bidder could perform the requisite fitting services. Furthermore, under the IFB, all of the technical requirements for bidders were set forth as mandatory minimum qualifications: employ certified practitioners, be properly accredited, and comply with all HIPAA requirements (IFB, at pgs. 10-11). Since all bidders were required to meet these basic technical requirements, SBUH determined that any qualitative differences between responsive offers would not substantially affect the value provided to SBUH. As such, we find no reason to upset SBUH’s determination that price, based on a discount of an established Fee Schedule that built in the price of the medical devices as well as the related services, was the proper basis for award.

III. Exclusive Contract Award to East Coast

In the Protest, Goldberg Labs also argues that the exclusive award of the Devices and Services contract lacks a rational basis. Specifically, Goldberg Labs asserts that SBUH should have consulted with physicians at SBUH as to their preference prior to making the award (Protest, at pgs. 4-5). In response, SBUH asserts that, in the course of its vendor responsibility review of

East Coast, SBUH did consult with Hospital physicians who confirmed the references provided by East Coast (SBUH Answer, at pg. 2). We disagree that further involvement of staff physicians was required prior to SBUH's low price contract award to East Coast.

Finally, Goldberg Labs asserts that the award made by SBUH is improper because it failed to consider the physical office locations of the bidders as part of the evaluation. Goldberg Labs notes that its site is located within minutes of SBUH, while East Coast's closest location is at least 30 to 45 minutes away (Protest, at pg. 5). In its Answer, SBUH states that the IFB did not require that a bidder be within a specified distance from the hospital because the contract requires the winning bidder to provide *on-site*, inpatient services (SBUH Answer, at pg. 2).

The "Scope and Requirements" section of the IFB clearly provides that "[s]ervices must be available twenty-four (24) hours a day seven (7) days per week including holidays" and requires that the selected bidder "[m]ust be able to respond to all urgent situations within one hour" In addition, this section sets forth various time frames for delivery of the various devices (e.g., delivery of non-custom orthotic or prosthetic devices within two (2) hours of a physician or nurse's order; must turn around custom orthotic or prosthetic devices within (8) hours of physician's order). Accordingly, we find no reason to question SBUH's decision not to include a distance requirement in the IFB with regard to the physical location of a bidder's office.

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 SBUH. As a result, the Protest is denied and we are today approving the SBUH/East Coast contract for Orthotic and Prosthetic Devices and Related Services.