

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Technology Innovation & Strategy, Inc. with Respect to the Procurement of Rational eDiscovery Services Conducted by the New York State Department of Law

**Determination
of Bid Protest**

SF-20160095

Contract Number – OP103799

June 2, 2016

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Law (OAG) for Rational eDiscovery Services. We have determined the grounds advanced by Technology Innovation & Strategy, Inc. (TIS) are sufficient to warrant the overturning of the contract award made by OAG and, therefore, we uphold the Protest. As a result, we will not approve the proposed OAG contract with W&K Systems, Inc. (W&K).¹

BACKGROUND

Facts

On March 2, 2016, our Office received a letter from TIS protesting OAG's proposed contract award to W&K for Rational eDiscovery Services. In the letter, TIS stated that it was a New York State small business that was interested in bidding on this procurement which had been advertised by OAG in the Contract Reporter in January. TIS complained that, despite several attempts to reach out to the OAG contact designated for this procurement opportunity, TIS's requests for information were ignored by OAG and TIS was never afforded the opportunity to submit a bid. At the time of this letter, our Office had not yet received the proposed contract from OAG for approval. Therefore, by letter dated March 8, 2016, our Office advised TIS that we would begin our review of the Protest once OAG submitted the proposed contract award and related procurement record.

On April 13, 2016, OSC received the contract for approval. Within the submission was a cover memo wherein OAG requested "approval of a one-time purchase for Rational eDiscovery implementation services" from W&K, a certified New York State Minority Owned Business. The submission also contained a copy of the Contract Reporter advertisement which stated that OAG was conducting this procurement pursuant to its discretionary purchasing authority under State Finance Law § 163(6) and, therefore, the procurement was limited to New York State small businesses, certified Minority or Women Owned Businesses (M/WBEs). The advertisement, dated January 27, 2016, implied that OAG was currently seeking a vendor to fulfill this need and that it would accept bids from M/WBEs until February 18.

¹ We note that, in this instance, the contract that was submitted for approval was in the form of a purchase order.

The procurement record contained e-mail correspondence from TIS dated February 1 and February 4 asking to be added to the mailing list for this procurement and stating its interest in participating. TIS further alleged it had made several phone calls to OAG seeking similar information and was repeatedly told that “information will be e-mailed shortly.” Also contained in the procurement record was the OAG’s Purchasing Memorandum, dated February 22, 2016, sent to “all prospective bidders” informing recipients that OAG had made a conditional award to W&K. According to TIS, this Purchasing Memorandum was the first communication that it received from OAG in response to TIS’s repeated requests for information. As part of our review of the contract, we asked the OAG whether it had responded to the communications from TIS during the procurement process. The agency stated that its only response to TIS was the Purchasing Memorandum that was sent via e-mail on February 22, 2016.

OAG did not refute this recitation of events, but informed our Office that OAG selected W&K to provide the services and later determined that the purchase would exceed \$50,000 and, therefore, would need to be advertised. OAG then posted the advertisement on January 27, 2016, but apparently, at that time, the work had already been substantially performed by W&K. OAG stated in its cover memo that it considered other alternatives, but ultimately determined W&K was best fit to perform the services. Finally, OAG asserted the view that “as W&K is an MBE, it will be within our discretion of \$200,000 [to make additional payments to W&K that exceed \$50,000].”

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.

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.² This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no protest process engaged in at the department level, 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 OAG with the OAG/W&K contract;
2. The correspondence between this Office and OAG arising out of our review of the proposed OAG/W&K contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
 - a. TIS’s Protest dated March 2, 2016.

² OSC Guide to Financial Operations, Chapter XI.17, <http://www.osc.state.ny.us/agencies/guide/MyWebHelp/>.

Applicable Statutes

The requirements applicable to this procurement are set forth in SFL § 163(6) which sets forth standards for purchasing under a State agency's discretionary buying thresholds. Specifically, subdivision 6 states that: "Pursuant to guidelines established by the state procurement council . . . state agencies may purchase services and commodities in an amount not exceeding fifty thousand dollars without a formal competitive process; and state agencies may purchase commodities or services from small business concerns or those certified pursuant to articles fifteen-A and seventeen-B of the executive law . . . in an amount not exceeding two hundred thousand dollars without a formal competitive process."

SFL § 6-b goes on to state that "[for] purposes of determining whether a purchase is within the discretionary thresholds established by subdivision six of this section, the . . . state agencies shall consider the reasonably expected aggregate amount of all purchases of the same commodities or services to be made within the twelve-month period commencing on the date of purchase."

Furthermore, pursuant to Economic Development Law §§ 141(3) and 143(1), a discretionary purchase that exceeds \$50,000 must be advertised in the Contract Reporter and shall be submitted for publication "in sufficient time to allow a minimum of fifteen business days between publication of such notice and the date on which a bid or proposal is due"

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, TIS challenges the procurement conducted by OAG on the following ground:

1. TIS was unfairly denied the opportunity to submit a bid.

Response to the Protest

Although OAG failed to submit an Answer to the Protest, its cover memo indicates OAG's belief that it was authorized under its discretionary buying threshold to execute the contract with W&K since that firm is a certified M/WBE and this purchase is under \$200,000.

DISCUSSION

The Rules Governing Discretionary Purchases

1. Discretionary Purchase of \$50,000 or Less

For purchases valued at \$50,000 or less, the Contract Reporter requirements do not apply and such purchases are not subject to the Comptroller's pre-approval under SFL § 112 (*see* Economic Development Law § 141[3]; SFL § 112[2]). However, even for these "pure" discretionary purchases, the New York State Procurement Council has published Discretionary

Purchasing Guidelines (Guidelines) that State agencies are required to comply with when making such purchases (*see* SFL § 163[6]).

Initially, the Guidelines provide that “[a]gencies shall consider the reasonably expected aggregate amount of all purchases of the same commodities, services or technology to be made within a twelve (12) month period commencing on the date of purchase when determining which procurement methodology to use” (*see* <http://www.ogs.ny.gov/procurecounc/pdfdoc/DiscretionaryPurchasingGuidelines.pdf>, dated May 21, 2014). It is this criteria that State agencies must use when first determining whether the value of a procurement falls within the scope of the respective discretionary buying thresholds. Moreover, the Guidelines provide that, when purchasing under a discretionary buying threshold, “[a]gencies must also comply with their internal policies and procedures governing discretionary purchases, which should include an assessment as to whether a formal competitive procurement process, or one that is less formal but still competitive, may best meet the Agency’s needs” (*Id.*).

Finally, the Guidelines state that: “For purchases up to the Discretionary Buying Threshold, each Agency must: i) ensure that the commodities, services or technology acquired meet its form, function and utility needs; ii) document and justify the selection of the vendor; iii) document and justify the reasonableness of the price; and iv) ensure that the State buys from responsible vendors” (*Id.*). Accordingly, it is clear from the Guidelines that State agencies must document its selection of a responsible vendor at a reasonable price even where the purchase is valued at \$50,000 or less.

2. Discretionary Purchase up to \$200,000

As detailed above in the “Applicable Statutes” section, State agencies are also authorized to make discretionary purchases up to \$200,000 from certain categories of vendors, including small business concerns or those certified pursuant to articles fifteen-A and seventeen-B of the executive law (certified M/WBEs and certified Service Disabled Veteran Owned Businesses), “without a formal competitive process” (SFL § 163[6]). It is this authority that OAG relies on for its contract award to W&K, a certified M/WBE.

Although discretionary purchases are not subject to the formal competitive bidding requirements set forth in SFL § 163, if a discretionary purchase is in an amount in excess of \$50,000, the law requires that the procurement opportunity be advertised in the Contract Reporter and that the resulting contract award is subject to the approval of the Comptroller (*see* Economic Development Law § 141[3]; SFL § 112[2]). In addition, as stated above, discretionary purchases must be conducted “[p]ursuant to guidelines established by the state procurement council” (SFL § 163[6]).

Part of this Office’s review of discretionary purchases that are in excess of \$50,000 is to ensure that the purchase complies with the requirements set forth in the Guidelines. While a formal competitive process is not required, it is still incumbent upon the purchasing agency, as detailed in the Guidelines, to ensure that the informal process used is fair and as open as possible. Since the advertisement of discretionary purchases above \$50,000 is required by law, our Office also reviews the timeliness and accuracy of the advertisement. In addition, we expect agencies to elicit

multiple quotes. While the selection of a vendor and the reasonableness of price can be justified using other methods, if less than three quotes are received on a properly advertised discretionary purchase, we require that the contracting agency document how it determined that the cost is reasonable. OSC's review is consistent with the Guidelines provided by the Procurement Council (see http://www.ogs.ny.gov/procurecounc/pdfdoc/Discretionary_PurchasingGuidelines.pdf, dated May 21, 2014).

Furthermore, ensuring accurate and timely publication of the procurement opportunity and requiring informal competition in the form of multiple quotes furthers the well-established public policy behind the letting of public contracts. More specifically:

“[T]he law and public policy mandate that bidders be treated equally and fairly in their pursuit of public work. That requirement, however, is not grounded in a concern for the welfare of the bidder, but rather in the firm belief that fairness in the bidding process is inextricably connected with the objective of obtaining the best quality work at the lowest possible price Hence, our courts have consistently held that the provisions of the statutes and ordinances of this State requiring competitive bidding in the letting of public contracts evince a strong public policy of fostering honest competition in order to obtain the best work or supplies at the lowest possible price. In addition, the obvious purpose of such statutes is to guard against favoritism, improvidence, extravagance, fraud and corruption.”

Fischbach & Moore, Inc. v New York City Transit Authority, 79 AD2d 14, 18-19 (2d Dept 1981 [internal citations and quotations omitted]).

In the instant matter, in response to our audit questions, OAG has stated that it placed the advertisement in the Contract Reporter *after* an award had been made to W&K and W&K had already performed a substantial amount of the work. Then, once the advertisement was placed and OAG received interest from TIS, the record reveals (and OAG does not dispute) that OAG failed to respond to TIS's inquiries about bidding on the project. In fact, the advertisement itself, which stated that bids would be received until February 18, as well as the Purchasing Memorandum issued by OAG on February 22, appear to be meaningless as no bids were accepted by OAG and, in fact, the work had been substantially completed.

As explained by OAG, the late advertisement occurred because the agency initially thought the purchase would be less than \$50,000, thus without the need for a Contract Reporter advertisement. OAG averred that it considered other options before making the award to W&K in October 2015 and determined at that time that W&K offered a reasonable price for the services. OAG also asserted in its cover memo that since W&K is a certified M/WBE, it was still permissible to make the award to W&K even where the purchase ended up exceeding \$50,000. We disagree. The initial misestimate by OAG does not negate the need to comply with the applicable legal requirements once OAG realized that the purchase would exceed the \$50,000 threshold. We believe the proper course of action at that time would have been to contact our Bureau of Contracts and seek an exemption from the advertising requirement.

Although the Legislature has afforded State agencies with greater flexibility in making purchases under \$200,000 from M/WBEs, among other categories of vendors, that flexibility is not without limits. In this instance, we believe that OAG failed to comply with the legal requirements for a discretionary purchase and, furthermore, improperly advertised a procurement opportunity when, in fact, there was no such opportunity to be had. As such, we will not approve the OAG contract with W&K.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Protest are of sufficient merit to overturn the contract award by OAG. As a result, the Protest is upheld and we will not be approving the proposed OAG contract with W&K contract for Rational eDiscovery Services.