

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Casella Waste Management of NY, Inc., with respect to the procurement of rubbish removal services conducted by the State University of New York – College at Plattsburgh

**Determination
of Appeal**

SF-20160139

Contract Number – C000550

August 12, 2016

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the State University of New York – College at Plattsburgh (SUNY Plattsburgh) for rubbish removal services. We have determined the grounds advanced by Casella Waste Management of NY, Inc. (Casella) are insufficient to merit the overturning of the contract award made by SUNY Plattsburgh and, therefore, we deny the Appeal. As a result, we are today approving the SUNY Plattsburgh contract with T & L Enterprises, LLC d/b/a Valley Sanitation (Valley).

BACKGROUND

Facts

SUNY Plattsburgh issued an Invitation for Bids for rubbish removal services in March 2016 (IFB). The IFB provided that “[t]he total price shall include delivery and set up of all containers listed on the attached schedules, pickup as per the schedules, landfill fees, maintenance of containers and removal of containers at the termination of the contract” (IFB, at pg. 2). The IFB stated the contract would be awarded on the basis of lowest cost.¹ The template bid sheet attached to the IFB required pricing for: (i) three categories of services (scheduled trash pickups, estimated extra pickups and estimated container rentals), (ii) an estimated annual landfill fee,

¹ The contract is primarily for services which, generally, are to be awarded on the basis of “best value” pursuant to the State Finance Law (see “Applicable Statutes,” *infra* at pg. 3). In *Transactive Corporation v. New York State Department of Social Services* (236 AD2d 48, 53 [1997]; *aff’d on other grnds*, 92 NY2d 579 [1998]), the Appellate Division, Third Department, held that, while a State agency typically may not award a contract for services solely on the basis of price, it could be permissible when such approach effectively represents a cost-benefit analysis. In addition, the New York State Procurement Council recognizes that “[f]or certain services procurements, best value can be equated to low price” (NYS Procurement Guidelines, Section IV[A]; see also Section V[B][11]). Applying the rationale in *Transactive* and consistent with the NYS Procurement Guidelines, this Office has upheld awards of service contracts based on cost alone where the services were routine in nature (such as, here, with rubbish removal) and the solicitation sufficiently defined the qualitative and efficiency requirements, so that there is little room for technical variances which will have any meaningful value to the procuring agency. (see Comptroller Bid Protest Decisions 20020035, 20080185 and 20100434; see also Comptroller Bid Protest Decision 20010084, at FN 7). Notwithstanding the fact that Casella did not raise this issue, based our review of the procurement record, we are satisfied that SUNY Plattsburgh’s award of this contract based on lowest price undertook the requisite cost-benefit analysis and, in this case, was appropriate.

which SUNY Plattsburgh provided, and (iii) a total first year cost (equal to the sum of the bid prices for the foregoing services and the supplied landfill fee).

On March 25, 2016, SUNY Plattsburgh publicly opened the two submitted bids (one from Casella and one from Valley). The amount included on Valley's bid sheet for "Total First Year Cost for Above Services and as per Specifications" was lower than the corresponding amount on Casella's bid sheet. Upon further review of Valley's bid, however, SUNY Plattsburgh determined that the annual prices bid for the scheduled trash pickups and the estimated extra pickups, calculated using the unit pricing listed by Valley, were not accurate. SUNY Plattsburgh recalculated Valley's bid resulting in Valley's total first year cost being higher than Casella's bid. Based on this information, SUNY Plattsburgh awarded the contract to Casella on March 31, 2016.

By letter dated April 5, 2016, Valley protested the award to Casella and stated that Valley had quoted unit prices in cost per ton (the IFB and the bid sheet required bidders to measure unit prices per cubic yard). Valley disputed SUNY Plattsburgh's recalculation of its bid and requested that SUNY Plattsburgh use Valley's bottom line total first year cost as the basis for determining the low bidder. On April 11, 2016, SUNY Plattsburgh upheld the protest and, relying on Valley's confirmation of its total first year cost, determined Valley was the low bidder and awarded it the contract. On April 14, 2016, Casella filed a bid protest with SUNY Plattsburgh, which was denied on April 21, 2016. Casella appealed on April 28, 2016, and SUNY Plattsburgh denied the appeal on May 5, 2016.

By letter dated May 13, 2016, Casella filed an appeal of SUNY Plattsburgh's protest decisions with this Office (Appeal). On July 12, 2016, SUNY Plattsburgh reaffirmed its position from the prior agency-level determinations, but did not file a separate answer to the Appeal. On July 12, 2016, Valley responded to the Appeal (Valley Answer).

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 contract approval responsibility prescribed by SFL § 112, 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.² 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 the OSC Protest Procedure.

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

In the determination of the Appeal, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by SUNY Plattsburgh with the Valley contract;
2. The correspondence between this Office and SUNY Plattsburgh arising out of our review of the proposed Valley contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
 - a. Valley's protest to SUNY Plattsburgh dated April 5, 2016 (Valley Protest);
 - b. SUNY Plattsburgh's determination of Valley's protest dated April 11, 2016;
 - c. Casella's protest to SUNY Plattsburgh dated April 14, 2016 (Casella Protest to SUNY);
 - d. SUNY Plattsburgh's protest determination dated April 21, 2016 (SUNY Protest Determination);
 - e. Casella's appeal of SUNY Plattsburgh's protest determination dated April 28, 2016;
 - f. SUNY Plattsburgh's appeal determination dated May 5, 2016 (SUNY Appeal Determination);
 - g. Casella's Appeal dated May 13, 2016; and
 - h. Valley's Answer dated July 12, 2016.

Applicable Statutes

The requirements applicable to this procurement are set forth in SFL Article 11 which provides that contracts for services shall be awarded on the basis of "best value" to a responsive and responsible offerer.³ Best value is defined as "the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers."⁴ A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."⁵

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."

³ SFL § 163(10).

⁴ SFL § 163(1)(j).

⁵ SFL § 163(1)(d).

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, Casella challenges the procurement conducted by SUNY Plattsburgh on the following grounds:

1. The IFB clearly instructed bidders to quote prices using cost per cubic yard. Since Valley did not adhere to that requirement, Valley's bid was non-responsive and should be rejected.
2. Due to Valley's error-filled bid submission, Casella was, in fact, the low bidder and should be awarded the contract.

Agency Response to the Appeal

In its answer, SUNY Plattsburgh reaffirmed its position stated in the SUNY Protest Determination and the SUNY Appeal Determination; to wit, on the following grounds:

1. Based on the statement made by Valley confirming the total annual cost and after review of Valley's bid sheet, SUNY Plattsburgh determined that Valley is the low bidder.
2. Although there may have been confusion with the bid sheet, Valley has demonstrated that it will perform the contract at a lower cost.

Winning Bidder Response to the Appeal

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

1. The landfill charges fees by the ton and Valley used that same metric to present its unit price for extra pickups. Regardless of the underlying component prices, Valley offered the lowest total cost per year and thus was properly awarded the contract.

DISCUSSION

Responsiveness of Valley's Bid

The bid sheet consists of three main categories of rubbish removal services (regularly scheduled pickups, extra pickups and container rentals) and an estimated annual landfill fee, which was supplied by SUNY Plattsburgh. The bid sheet requires each bidder to add the proposed annual price for each service item and the landfill fee to arrive at a total first year cost. Casella asserts Valley's bid contained numerous errors (*see* Appeal). In essence, Casella's allegation is that Valley's bid did not comply with the IFB specifications, was therefore non-responsive and should

have been rejected. Our review of the procurement record identified errors in the regularly scheduled pickups and extra pickups sections of Valley's bid sheet. We address each section below.

1. Regularly Scheduled Pickups

Both Casella and Valley submitted a price per cubic yard for regularly scheduled trash removal during peak and off-peak times. However, Valley made a computational error when it multiplied its quoted price per cubic yard by the estimated volume. In this case, the resulting error in the annual price for this category of services derives from a miscalculation rather than noncompliance with the specifications. Furthermore, Valley's total first year price for the regularly scheduled pickups remains lower than Casella's total price for that category of services after correctly calculating the annual bid prices for peak and off-peak regular pickups using Valley's price per cubic yard.

2. Extra Pickups

In the next section of the bid sheet, "Estimated number of Extra Pickups in Cubic," bidders proposed unit prices for five categories of potential extra pickups (not regularly scheduled) and used those prices to calculate an annual bid price for each category. Although Valley inserted a unit price and corresponding annual bid price for each item, the estimated volume of trash multiplied by the unit price did not equal the annual bid price. Further, it appeared that the error was not computational in nature, since Valley offered a unit price of \$0 for one item and still supplied an annual bid price. Valley explained that it offered a unit price based on weight, rather than by cubic yard (*see* Valley Protest, at pg. 1). Valley asserts the bid sheet for this section was confusing so it "simply calculated [these extra pickup] fees per ton (the way that the landfill actually charges them) in arriving at our bottom-line number" (Valley Answer).

Casella challenges Valley's assertion that it was confused as to the unit measure required by the IFB for this section. Casella states it sought to clarify "what figures were to be placed in the section" at a pre bid meeting held on March 14, 2016, where both bidders were present, and that SUNY Plattsburgh replied "a price per cubic yard" (Casella Protest to SUNY, at pg. 2). Valley responds the mere fact that Casella questioned the specification indicates there was confusion about which unit of measure to bid (*see* Valley Answer).

The IFB and the bid sheet for this section specify cost is to be measured by the cubic yard. The bid sheet for this particular section, unlike the previous section, does not contain the descriptive "per cu.yd." after the blank where a bidder inserts the unit price. Indeed, the original bid sheet did not require a bidder to provide a unit price. On March 14, 2016, SUNY Plattsburgh amended this section of the bid sheet to add an estimated volume of trash and space for a bidder to insert a unit price (e.g., 1200 cy @ _____).

SUNY Plattsburgh acknowledges "there was confusion as to the figures appearing on the [Valley] Bid Sheet under [that] section" (SUNY Protest Determination). All parties recognize the price-per-ton Valley bid for this section did not comply with the IFB specifications. Nevertheless, SUNY Plattsburgh concluded that Valley's total cost per year was "the material figure on which

[SUNY Plattsburgh] will rely” (*Id.*). Since SUNY Plattsburgh chose to waive Valley’s deviation from the IFB’s specifications, as well as the mathematical errors described above in awarding the contract, the balance of this determination focuses on SUNY Plattsburgh’s authority to waive such noncompliance.

SUNY Plattsburgh’s Ability to Waive Noncompliance

While a municipality or state agency can reject bids that do not precisely comply with bid specifications, a municipality or state agency may “waive a technical noncompliance with bid specifications if the defect is a mere irregularity and it is in the best interest of the municipality [or state] to do so” (*Hungerford & Terry, Inc. v. Suffolk County Water Auth.*, 12 AD3d 675, 676 [2nd Dept. 2004]; *see also Le Cesse Bros. Contr. v. Town Bd. Of Town of Williamson*, 62 AD2d 28 [4th Dept. 1978]). Conversely, a municipality or state agency may not waive a material or substantial variance from the bid specifications since doing so “would impair the interests of the contracting public authority or place some of the bidders at a competitive disadvantage” (*Hungerford*, at 676). Furthermore, a bidder may not later provide essential information missing from its bid at the time of submission (*see Le Cesse*, at 32).

Here, we are inclined to view the variances in Valley’s Bid Sheet as non-material and thus waivable by SUNY Plattsburgh. First, with respect to the mathematical errors in the first section of the IFB, correction of these figures does not allow Valley to change the price bid per cubic yard or provide any additional information on its bid sheet. Therefore, such correction does not grant an unfair advantage to Valley and, in our opinion, represents harmless error. Accordingly, we find Valley’s mathematical error to be nonmaterial and uphold SUNY Plattsburgh’s discretionary decision to waive it.

Turning to the variance in the next section (i.e., Valley’s bid in price per ton), the IFB advised bidders that “[f]ailure to submit the cost for additional [extra] pickups will result in the bid being rejected” (IFB, at pg. 2). Clearly, SUNY Plattsburgh deemed this requirement material and non-waivable and, although there were errors with Valley’s submissions, both Casella and Valley complied with this specification. The error with Valley’s bid related to the per unit price, but had no impact on the total annual price submitted for each category of extra pickups. As previously noted, the per-unit price was not part of the original bid sheet issued with the IFB and, considering only the annual bid prices were used to arrive at the “total first year cost” which was the basis for contract award..

Additionally, in response to OSC audit questions, SUNY Plattsburgh demonstrated it could calculate a price per cubic yard for each item described in the extra pickup section using Valley’s actual bid and disregarding the erroneous prices per ton.⁶ Thus, again, no changes or additions would be necessary for SUNY Plattsburgh to determine Valley’s intended bid price for the extra pickups. Valley confirmed its intent to stand by its total first year cost, which equaled the sum of the individual annual prices listed on the bid sheet (*see Valley Answer*). As a result, SUNY Plattsburgh found it was in its best interest to waive noncompliance to “ensure that the college

⁶ Valley did not explain how it arrived at the annual price bid for each item; however, we believe this is of no consequence since Valley has agreed to honor those prices, thereby enabling SUNY Plattsburgh to calculate unit prices for these items.

receives the best value at the lowest price in order to protect the taxpayers and the tuition payers of the State of New York and SUNY Plattsburgh” (SUNY Appeal Determination). We are satisfied that SUNY Plattsburgh had reasonable grounds to waive the defect in Valley’s bid and therefore will not upset SUNY Plattsburgh’s award of the contract to Valley.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the contract award by SUNY Plattsburgh. As a result, the Appeal is denied and we are today approving the SUNY Plattsburgh contract with Valley for rubbish removal services.