

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Bid Protest filed by VDL Enterprises, Inc. with respect to the procurement of Job Skills and Adult Education Basics Program Delivery and Curriculum Development conducted by the New York State Governor's Office of Employee Relations and the NYS & CSEA Partnership for Education and Training

Contract Numbers – C16003-C160024

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**Determination  
of Bid Protest**

**SF-20160255**

January 9, 2017

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Governor's Office of Employee Relations and the NYS & CSEA Partnership for Education and Training (collectively GOER) for Job Skills and Adult Education Basics Program Delivery and Curriculum Development (Education Services). We have determined the grounds advanced by VDL Enterprises, Inc. (VDL) are insufficient to merit the overturning of the contract award made by GOER and, therefore, we deny the Protest. As a result, we are today approving the DOH contracts for the Education Services awarded under this procurement.

**BACKGROUND**

**Facts**

GOER issued a Request for Proposals for Education Services on March 10, 2016 (the RFP). The purpose of the procurement is to contract with consultants who can provide classroom instruction and webinars in the areas of Job Skills and Adult Education Basics (AEB) to State agencies and employees who are represented by the Civil Service Employees Association, Inc. (CSEA) (RFP, at pg. 5). The RFP required, among other things, that offerors provide four references with whom the bidder has provided similar services or provided similar activities within the past three to five years that could attest to the bidder's qualifications (RFP, at pgs. 38-39).

Offerors were permitted to submit proposals in any or all of 14 categories of courses. Ultimately, 21 awards were made for the Education Services. Although VDL submitted a proposal, GOER found it to be nonresponsive and declined to consider VDL for an award. By email correspondence on September 12, 2016, GOER explained the reason VDL was not selected for an award; namely, it failed to meet the mandatory reference requirements of the RFP. By letter dated September 23, 2016, VDL formally protested GOER's determination to our Office. GOER answered the protest by letter dated November 14, 2016.

## **Comptroller's Authority and Procedures**

Under State Finance Law (SFL) § 112(2), with certain 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 proscribed 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 (OSC Protest Procedure).<sup>1</sup> 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.<sup>2</sup>

In the determination of the Protest, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by GOER;
2. The correspondence between this Office and GOER arising out of our review of the proposed contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
  - a. VDL Protest dated September 23, 2016; and
  - b. GOER's Answer dated November 14, 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 offeror.<sup>3</sup> Best value is defined as "the basis for awarding contracts for services to the offeror which optimizes quality, cost and efficiency, among responsive and responsible offerors."<sup>4</sup> A "responsive" offeror is an "offeror meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."<sup>5</sup>

SFL § 163(7) provides that "[w]here the basis for award is the best value offer, the state agency shall document, in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria, which whenever possible, shall be quantifiable, and

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

<sup>2</sup> While VDL states in the Protest that it is appealing the GOER determination, since the RFP did not provide for a protest procedure at the agency level, VDL's protest to this Office is an initial protest.

<sup>3</sup> SFL § 163(10).

<sup>4</sup> SFL § 163(1)(j).

<sup>5</sup> SFL § 163(1)(d).

the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted.”

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.”

## **ANALYSIS OF THE PROTEST**

### **Protest to this Office**

In its Protest VDL challenges the procurement conducted by GOER on the following grounds:

1. GOER erred in disqualifying VDL because GOER failed to contact one of the four references VDL provided.

### **Response to the Protest**

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

1. All four references provided by VDL were contacted and interviewed. Only one of the four provided a satisfactory reference. The reference in question was contacted by GOER on May 4, 2016.

## **DISCUSSION**

A procurement for services such as the one at issue is governed by SFL § 163, which generally provides for a formal competitive process by which an award is made to a responsive and responsible bidder on the basis of “best value.”<sup>6</sup> A “responsive” bidder is defined as one whose proposal meets the minimum requirements as prescribed in a solicitation for commodities or services by a state agency.<sup>7</sup> In the RFP, GOER included a “mandatory requirement” that offerors “must pass two (2) reference checks in order for their bids to be further reviewed and rated.”<sup>8</sup> A “mandatory” requirement is defined in the RFP as one which if not fulfilled, will cause the bid to be rejected as nonresponsive.<sup>9</sup>

With regard to references, the RFP provided as follows:

**Bidders must provide four (4) references** with whom the bidder has provided similar services or performed similar activities within the past three to five years and who can attest to the bidder’s qualifications, by listing the organization name,

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<sup>6</sup> SFL § 163 (4)(d).

<sup>7</sup> SFL § 163 (1)(d).

<sup>8</sup> RFP, at pgs. 38-39, 43, 44.

<sup>9</sup> RFP, at pg. 15.

address, contact person, email address and telephone number . . . It is recommended that you confirm contact information for the references and inform them that failure to timely respond [to the reference inquiry] may cause your proposal to be eliminated from consideration . . . **It is a mandatory requirement that bidders must pass two (2) reference checks in order for their bids to be further reviewed and rated.** Bids will be rejected as non-responsive if references are not provided. **Mandatory Requirement** (RFP, at 38-39, emphasis in original).

In the Protest, VDL acknowledges that one of its listed references declined to provide a reference and another reference was no longer at the listed agency. VDL contends that a third reference – whom GOER states failed to provide a professional reference for VDL – was not contacted by GOER and if the reference had been contacted would have indicated the professional (as well as personal) nature of the individual’s relationship with VDL (Protest, at pg. 1).

In its Answer, GOER asserts that all references provided by VDL were contacted on May 3<sup>rd</sup> or 4<sup>th</sup>, 2016 and provided the Reference Check Forms used to record the information obtained from the references, and telephone records for the GOER – Labor Management Employee Assistance Program for those days (GOER Answer, at pg. 1; Attachments). The information provided indicates:

- (1) The first reference was contacted by telephone on May 4, 2016 by GOER, and the response of that individual was that VDL had not performed any services over the last 10 years. The individual declined to provide a reference;
- (2) The second reference was contacted by telephone on the same day and provided a satisfactory reference;
- (3) The third reference – the one being specifically contested by VDL in this Protest – was contacted by telephone on the same day. The reference stated that her relationship with the principal of VDL was personal and that no professional services had been rendered to her by VDL. She declined to provide a professional reference; and
- (4) The fourth reference was contacted on the same day. The person who was reached stated that the business had changed names and that the individual VDL listed no longer worked there. No reference was provided.

The RFP identified the reference checks as a “mandatory requirement.” Furthermore, the RFP cautioned bidders as to the consequence of not satisfying this mandatory requirement and recommended that the bidder confirm contact information for the references provided and inform them that a failure to timely respond would eliminate the bidder’s proposal from further review.<sup>10</sup>

It is settled that a procuring State agency may waive “a technical noncompliance” with bid specifications, but may not waive the specification if it is deemed material (*Varsity Transit, Inc. v Board of Education*, 130 AD2d 581 [2d Dept 1987]; *Le Cesse Bros. Contracting, Inc. v Town Board of Williamson*, 62 AD2d 28, 32 [4th Dept 1978]; *Hunderford & Terry, Inc. v Suffolk County*

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<sup>10</sup> RFP, at pgs. 38, 45.

*Water Auth.*, 12 AD3d 675, 676 [2d Dept 2004]; SF-20140323; SF-20060062; SF-20010182). The express language of the RFP clearly stated the mandatory nature of the reference check requirement, and that the failure to satisfy this requirement would eliminate the proposal from further consideration. Accordingly, it is clear that a proposal failing to meet the reference check requirement was not responsive to the RFP.

The procurement record before this Office, including the Reference Check Forms and the itemized telephone billing records from May 4<sup>th</sup>, provide sufficient evidence that each of the references provided by VDL were in fact contacted by GOER. Thus, based on our review of the procurement record, only one of the four references identified in VDL's proposal provided a satisfactory reference. Accordingly, GOER properly found that the proposal submitted by VDL was non-responsive to the RFP.

## **CONCLUSION**

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the contract awards by GOER. As a result, the Protest is denied and, we are today approving the DOH contracts for the Education Services awarded under this procurement.