

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Bid Protest filed by Best  
Climate Control Corp. with respect to the  
procurement of HVAC Maintenance  
Services conducted by the State University of New  
York at Stony Brook University Hospital.

**Determination  
of Bid Protest**

**SF-20180105**

Contract Number – SNY01-C011323-3320215  
with Commercial Instrumentation Services

July 30, 2018

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The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the State University of New York at Stony Brook University Hospital (SBUH) for HVAC maintenance services (Services). We have determined the grounds advanced by Best Climate Control Corp. (Best) are sufficient to merit overturning the contract award made by SBUH and, therefore, we uphold the Protest. As a result, we are today disapproving the SBUH contract with Commercial Instrumentation Services, Inc. (Commercial).

**BACKGROUND**

**Facts**

On February 2, 2018, SBUH issued Invitation for Bids Number 17/18-2795 (IFB) seeking a vendor to provide the Services. The resulting contract was to be awarded to the qualified responsible low bidder (*see* IFB, pgs. 4, 19).<sup>1</sup>

SBUH received four bids prior to the due date of March 14, 2018. SBUH determined two bids, including the bid submitted by Best, were not responsive to the terms of the IFB. Subsequently, SBUH awarded the contract to Commercial, the lowest bidder of the remaining two bidders.

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<sup>1</sup> 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 the direction found in 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 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, 20100434 and 20160139; *see also* Comptroller Bid Protest Decision 20010084, at FN 7). Notwithstanding the fact that Best did not raise this issue, based on our review of the procurement record, we are satisfied that SBUH could have awarded a contract for the Services solely on the basis of low price and that SBUH undertook the requisite cost-benefit analysis.

On March 30, 2018, SBUH informed Best that its bid was not responsive and, as a result, disqualified from the IFB. SBUH provided Best a debriefing regarding the non-responsive determination on April 18, 2018. By letter dated April 26, 2018, SBUH informed Best that the contract had been awarded to another bidder. On May 4, 2018, Best filed a protest with this Office challenging the award to Commercial (Protest). SBUH responded to the Protest (Answer) by letter dated May 23, 2018, and, on May 29, 2018, Best filed its reply (Reply) to the Answer with this Office.

### **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 for services proposed in the instant matter, the Comptroller's approval is required so long as the value of the contract exceeds certain monetary thresholds that are negotiated by SUNY and this Office pursuant to EDL § 355(5). The value of the proposed SBUH/Commercial contract value exceeds the applicable monetary threshold and, therefore, is subject to the Comptroller's approval.

In carrying out the aforementioned responsibilities proscribed by SFL § 112, OSC has promulgated a Contract Award Protest Procedure that governs the process to be used when an interested party challenges a contract award by a State agency.<sup>2</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 24.4 of Title 2 of the Codes, Rules and Regulations of the State of New York.

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/Commercial contract;
2. the correspondence between this Office and SBUH arising out of our review of the proposed SBUH/Commercial contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
  - a. Best's Protest dated May 4, 2018,
  - b. SBUH's Answer to the Protest dated May 23, 2018, and

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<sup>2</sup> 2 NYCRR Part 24.

c. Best's Reply to the Answer dated May 29, 2018.<sup>3</sup>

### **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.<sup>4</sup> 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."<sup>5</sup> A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."<sup>6</sup> "Specification" or "requirement" is defined to include "the necessary qualifications of the offerer, the capacity and capability of the offerer to successfully carry out the proposed contract."<sup>7</sup>

### **ANALYSIS OF THE PROTEST**

#### **Protest to this Office**

In its Protest, Best challenges the procurement conducted by SBUH on the following grounds:

1. SBUH incorrectly determined the bid submitted by Best failed to meet the IFB's reference requirement and, as a result, improperly deemed Best's bid non-responsive.

#### **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. The bid submitted by Best contained only two acceptable references instead of three, as required by the IFB, and therefore SBUH appropriately determined the bid non-responsive.

#### **Best's Reply to the Answer**

In its Reply, Best argues that:

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<sup>3</sup>While SBUH and Best submitted additional correspondence to this Office, including letters dated June 5, 2018, and June 8, 2018, respectively, these submissions were outside the scope of the filings permitted as of right under 2 NYCRR Part 24. Furthermore, the additional correspondence did not raise any new issues relating to the Protest and, therefore, are not formally addressed in this Determination.

<sup>4</sup> SFL § 163(10).

<sup>5</sup> SFL § 163(1)(j).

<sup>6</sup> SFL § 163(1)(d).

<sup>7</sup> SFL § 163(1)(e).

1. Best's use of SBUH as a reference complied with the requirements of the IFB. Furthermore, even though not required by the IFB, Best provided two additional references, each of which satisfied the reference requirement.

## **DISCUSSION**

### **Responsiveness of Best's Bid**

Best alleges SBUH improperly found Best to be non-responsive despite the fact that it "clearly satisfied the references requirement in the IFB" (*see* Protest, at pg. 3). SBUH asserts that since Best did not provide three acceptable references as required by the IFB, SBUH appropriately determined Best was non-responsive (*see* Answer, at pg. 2).

#### **1. References Requirement**

The IFB required that bidders "submit client references for minimum of three (3) current healthcare institutions they are servicing of which one (1) must be from a Hospital of similar size and scope of SBUH" (*see* IFB, at pg. 19). The bid submitted by Best contained five references. SBUH acknowledged two of the five references submitted by Best were acceptable (*see* Answer, at pg. 1). Thus, the only outstanding issue is whether Best submitted a third acceptable reference.

#### **2. Use of SBUH as a Reference**

Best stated it has performed HVAC maintenance services for SBUH for 13 years and, therefore, named SBUH as a reference (*see* Protest, at pg. 2). SBUH, however, "determined not to consider itself as a reference, since it might provide an advantage to a vendor that had been able to work with SBUH to the disadvantage to a vendor that had not had this opportunity" (Answer, at pg. 2).

Best avers the IFB does not prohibit use of SBUH as a reference (*see* Protest, at pgs. 2-3, Reply, at pg. 1). Best further alleges SBUH arbitrarily decided to exclude itself as a reference "only after it opened the bids and saw that [Best] was the low bidder" and that, by removing itself as a potential reference, SBUH disadvantages both current and prior vendors by depriving them of a reference that would have otherwise satisfied the IFB requirements (*see* Reply, at pg. 2).

The applicable IFB requirement does not expressly preclude the use of SBUH as a reference (*see* IFB, at pg. 19) and our review of the procurement record confirms SBUH made the decision to not consider itself as an acceptable reference after the bid due date. The procurement record further indicates SBUH provided Best and the other bidder that used SBUH as a reference an opportunity to submit an alternate reference (*see* Protest, Exhibit F). While SBUH reserved "the right to make all decisions regarding this IFB, including, without limitation, the right to decide whether a response does or does not comply with the requirements set forth [in the IFB]" (IFB, at pg. 7), we must now address whether this particular change to the reference requirement of the IFB was a permissible change.

It is generally understood that a procuring entity may waive technical non-compliance with bid specifications or requirements if the defect is a mere irregularity and it is in the best interest of the procuring agency to do so (see OSC Bid Protest Determination SF20100328; *Le Cesse Bros. Contracting, Inc. v. Town Board of the Town of Williamson*, 62 AD2d 28 [1978]). However, the procuring entity may not waive a material or substantial requirement, and a proposal would have to satisfy each and every material specification to be considered responsive (*Id.*). A variance is material if it would impair the interests of the contracting public entity, place the successful bidder in a position of unfair economic advantage or place other bidders or potential bidders at a competitive disadvantage (see *Cataract Disposal, Inc. v. Town of Newfane*, 53 N.Y.2d 266 [1981]; *Fischbach & Moore v. NYC Transit Authority*, 79 A.D.2d 14 [2<sup>nd</sup> Dept. 1981]; *Glen Truck Sales & Service, Inc. v. Sirignano*, 31 Misc.2d 1027 [Sup Ct Westchester County, 1961]).

In this case, while SBUH did not waive a bid specification, SBUH's determination to alter the specification of the IFB related to the submission of references must be held to the same materiality standard. If SBUH's change to such specification would impair the interests of SBUH, provide Commercial with an unfair advantage, or place other bidders or potential bidders at a disadvantage, it is not permissible.

SBUH's change to the reference specification after bid submission clearly could have disadvantaged any bidder relying on using SBUH as a reference to satisfy the IFB requirement. In this case, two of the four bidders submitted bids using SBUH as a reference. While Commercial was able to substitute another reference, Best, to the extent SBUH determined its remaining references were unacceptable, was placed at a disadvantage. Accordingly, SBUH's change to the reference requirement was not permissible. Therefore, SBUH's finding that the bid submitted by Best was non-responsive based on Best's use of SBUH as a reference cannot stand.<sup>8</sup>

Finally, we note that subsequent to SBUH finding the bid submitted by Best to be non-responsive (apparently at the debriefing), SBUH advised Best that SBUH would have given Best "a negative reference, so recusing itself had, in fact, potentially aided [Best] (see Answer, at pg. 2). Best states that it has performed HVAC maintenance services for SBUH for over 13 years and has never had any complaints about its work (see Protest, at pg. 2). While we find the timing of SBUH's disclosure as to its dissatisfaction with the work performed by Best to be curious, we need not resolve this issue in light of our findings below with regard to the additional references submitted by Best.

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<sup>8</sup> Furthermore, we are not persuaded by SBUH's rationale for this post-submission change to the reference specification. SBUH states that considering itself as a reference might advantage a vendor that previously worked for SBUH to the disadvantage to a vendor that had not had this opportunity. In our view, using SBUH as a reference does not necessarily advantage or disadvantage a bidder, but rather permits a bidder with prior experience with SBUH to use such experience to satisfy the reference requirement. In such a case, SBUH must still ascertain whether it would provide the bidder a positive reference.



### 3. Additional References provided by Best

As previously stated, SBUH accepted two of the references submitted by Best, and, in addition to the SBUH reference (which SBUH would not consider), Best submitted two further references (Additional Reference 1 and Additional Reference 2, respectively). SBUH stated it had difficulty verifying that Best had provided services for these additional references (*see* Answer, at pg. 1).

#### Additional Reference 1 <sup>9</sup>

At SBUH's request, Best provided further documentation for Additional Reference 1, consisting of a purchase order from Additional Reference 1 to the prime contractor and an underlying purchase order from the prime contractor to Best which was acting as a subcontractor (*see* Protest, Exhibit G). SBUH determined this reference was not acceptable since "[Best] had performed installation work, not maintenance services, which is what the IFB required" (*see* Answer, at pg. 2).<sup>10</sup>

In response to SBUH's contention, Best claims its "scope of work for [Additional Reference 1] actually did include maintaining and servicing HVAC equipment" (Reply, at pg. 3). In support, Best refers to its purchase order with the prime contractor which lists "HVAC service requirements" as work Best would be performing (*Id.*).

As previously noted, the IFB requires that a bidder provide client references for current health care institutions that the bidder is "servicing" (*see* IFB, at pg. 19). While we agree that the work performed for the reference should relate to the scope of work required by the IFB, the language of the IFB does not limit such work solely to maintenance. Furthermore, the scope of work set forth in the IFB contemplates services other than maintenance, such as "repair, retrofit, replacement and installation" (*see* IFB, at pg. 14; *see also* IFB, pg. 13).

For these reasons, we find Additional Reference 1 satisfied the terms of the IFB and SBUH's rejection of Additional Reference 1 was improper.

### 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 SBUH. As a result, the Protest is upheld and we are today disapproving the proposed SBUH contract with Commercial for the Services.

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<sup>9</sup> Best did not provide SBUH with any additional information concerning Additional Reference 2. However, as discussed in this Determination, Additional Reference 1 satisfied the IFB reference requirement, making further references unnecessary.

<sup>10</sup> In its Answer, SBUH states "[n]otwithstanding the receipt of this reference [attached to the Answer], which indicated that [Best] had performed installation work, it still did not resolve SBUH's inability to verify that [Best] had performed work for [the reference]" (Answer, at pg. 2). In light of the documentation provided by Best, it is unclear why SBUH continued to question whether Best provided services to Additional Reference 1. In our view, the procurement record contains sufficient evidence to confirm Best performed work for Additional Reference 1 (*see e.g.*, Answer, Exhibit C, an email from the construction manager of Additional Reference 1 to SBUH stating that Best had performed installation work for the entity).