

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by
Northeast Associates in Rehabilitation, LLC with
respect to the procurement of Core Rehabilitation
Services conducted by the New York State
Education Department.

**Determination
of Appeal**

SF-20180218

Contract Number – C013536

October 17, 2018

The Office of the State Comptroller (OSC) has reviewed the above-referenced procurement conducted by the New York State Education Department (NYSED) for Core Rehabilitation Services to be provided through NYSED's Office of Adult Career and Continuing Education Services – Vocational Rehabilitation (ACCES-VR). We have determined the grounds advanced by Northeast Associates in Rehabilitation, LLC (Northeast) are insufficient to merit overturning NYSED's decision to reject Northeast's grant application for job placement services (one of the types of services being procured by NYSED, as further described below) and, therefore, we deny the Appeal.¹

BACKGROUND

Facts

NYSED issued Request for Proposal #GC18-004 (RFP) on August 15, 2017, seeking proposals from community rehabilitation programs and other service providers for the provision of Core Rehabilitation Services (Rehabilitation Services) to individuals with disabilities throughout New York State. The Rehabilitation Services include assessment, employment preparation, job placement, supported employment, assistive technology, pre-employment transition, driver rehabilitation and related adjunct services (*see* RFP, at pg. 1).

The RFP required that eligible applicants submit an Application/Basic Information Form (Attachment 1 to the RFP) and the applicants' proposal for the specific services being applied for (Attachments 1-A-1-H of the RFP) (*see* RFP, at pg. 5). An applicant's Basic Information Form must receive a pass rating to be eligible to provide services (*see* RFP, at pg. 54).² The proposals submitted by Applicants who passed the Basic Information Form review, would then be

¹ Northeast did receive grant awards for assessment and employment preparation services.

² The various services being procured pursuant to the RFP were grouped into the following service categories: Entry Services (Attachment 1-A); Assessment Services (Attachment 1-B); Employment Preparation (Attachment 1-C); Job Placement Services (Attachment 1-D); Supported Employment Services (Attachment 1-E); Assistive/Rehabilitation Technology Services (Attachment 1-F); Driver Rehabilitation Services (Attachment 1-G); and Adjunct Services (Attachment 1-H).

reviewed and scored (on a pass/fail basis) for the specific services being applied for (*Id.*). Only those proposals receiving a pass rating for a particular service category would be considered for contract award (*see* RFP, at pg. 54).

Northeast submitted proposals for various service categories by the October 25, 2017 submission deadline, but failed to include Attachment 1-D, the attachment used to apply for job placement services.³ NYSED determined Northeast's proposal for job placement services failed and eliminated its proposal from further consideration.

By letter dated June 27, 2018, Northeast was advised of tentative award for services which received a pass rating, but was also deemed non-responsive and did not receive an award for job placement services as Attachment 1-D was not included in Northeast's submission. Northeast requested a debriefing and, by letter dated August 3, 2018, NYSED advised Northeast that its proposal for all services in the job placement services category did not receive a pass rating. By letter dated August 9, 2018, Northeast protested NYSED's decision to eliminate its proposal for job placement services from consideration. NYSED denied the protest in a letter dated August 20, 2018. Northeast then filed an appeal (Appeal) of NYSED's determination with this Office via email dated September 7, 2018. NYSED did not file any response to the Appeal.

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, OSC has promulgated 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.⁴ 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 24.5 of Title 2 of the Codes, Rules and Regulations of the State of New York.

In the determination of the Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by NYSED with respect to the grant awards;
2. the correspondence between this Office and NYSED arising out of our review of the grant awards; and

³ Job placement services are those "employment-related services necessary to obtain, retain, or advance in competitive, integrated employment (*see* RFP, at pg. 27).

⁴ 2 NYCRR Part 24.

3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Northeast's protest (Agency Protest) to NYSED dated August 9, 2018;
 - b. NYSED's protest determination (Agency Protest Determination) dated August 20, 2018; and
 - c. Northeast's Appeal dated September 7, 2018.

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, Northeast challenges NYSED's decision to eliminate Northeast's proposal for job placement services from consideration on the following grounds:

1. Northeast clearly intended to apply for the job placement services covered by Attachment 1-D, which Northeast inadvertently failed to submit with its proposal, and therefore NYSED should have given Northeast the opportunity to submit the missing attachment.

DISCUSSION

Northeast's Proposal for Job Placement Services

Northeast claims it was clear from Northeast's application and other documents submitted with its proposal that Northeast intended to apply for job placement services even though it failed to include Attachment 1-D (*see* Appeal; Agency Protest). Northeast further asserts it was not aware that Attachment 1-D had not been submitted with its proposal until NYSED so notified Northeast in the debriefing summary and NYSED should accept the completed Attachment 1-D submitted with Northeast's Agency Protest (*see* Appeal; Agency Protest). NYSED responds that Northeast's proposal for job placement services that did not include Attachment 1-D failed to comply with the express terms of the RFP (*see* Agency Protest Determination, at pg. 1).

The RFP required each applicant to submit, as part of its proposal, the appropriate CRS Service Form, which forms were attached to the RFP as Attachments 1-A through 1-H (*see* RFP, at pg. 52). Each form contains specific requirements related to the corresponding service or services and "[f]ailure to meet any of those...requirements will disqualify the applicant for that case service" (RFP, at pgs. 53-54). The RFP provided that "NYSED will deem the vendor to be 'non-responsive' if required forms are not submitted" (*see* RFP, at pgs. 2, 5 and 52). The RFP further stated "only vendors that submit the appropriate CRS Service Forms (Attachments 1-A through 1-H)...will be eligible for an award for the service(s) applied for" (*Id.*). Finally, the RFP expressly provided "[v]endor submissions of any of the...forms will not be accepted after the [proposal] due date" (*see* RFP, at pgs. 2 and 52).

Notwithstanding the language in the RFP, Northeast is requesting that NYSED accept the post-bid submission of required documentation initially missing from its proposal for job placement services (*see* Appeal; Agency Protest). Furthermore, Northeast contends “[w]hile we recognize that strictly following the RFP process is essential to maintaining its integrity, we know from our past experiences and those of others that some leeway can be allowed, and believe [our] circumstances justify an exception to the process” (*see* Agency Protest).

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).

In this case, Northeast acknowledges it failed to submit a key document (Attachment 1-D) with its proposal for job placement services (*see* Appeal). As set forth above, the RFP was clear that submission of the applicable CRS Service Form was a material and essential element of an applicant’s proposal. Since the submission of Attachment 1-D was a material requirement of the RFP, NYSED was unable to waive this requirement. Moreover, our review of the procurement record shows that NYSED consistently found incomplete proposals, like Northeast’s proposal for job placement services, to be non-responsive and eliminated them from consideration for award.⁵ Thus, NYSED correctly determined Northeast’s proposal for job placement services was not responsive to the RFP.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the determination of NYSED to not consider Northeast’s proposal for job placement services. As a result, the Appeal is denied.

⁵ Forty-four other submitting agencies failed for some or all of the services applied for and five of those agencies similarly failed to submit the service form for job placement services (Attachment 1-D).