

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of Appeal by Mid-State
Communications & Electronics Inc. with respect to
the procurement of Tower and Communications
Facility Maintenance Services conducted by the New
York State Police.

**Determination
of Appeal**

SF-20200058

Contract Number – C001913_

October 02, 2020

The Office of the State Comptroller (OSC) has reviewed the above-referenced procurement conducted by the New York State Police (NYSP) for tower and communications facility maintenance services, which is Lot 8 (Lot 8) of a multiple-lot procurement conducted by NYSP for public safety communications maintenance, equipment, solutions, services and support. We have determined the grounds advanced by Mid-State Communications & Electronics Inc. (Mid-State) are sufficient to merit overturning the contract award for Lot 8 made by NYSP and, therefore, we uphold the Appeal. As a result, we are today returning non-approved the NYSP contract for Lot 8 with Adesta LLC (Adesta). For the reasons set forth below, we are today approving the NYSP contracts for Lots 1-7 and Lots 9-12.

BACKGROUND

Facts

On May 10, 2019, NYSP issued Request for Proposal RFP - HQ2020 (RFP) seeking vendors in the public safety communications equipment and services industry to provide equipment and services throughout New York State. The RFP sought proposals for 12 individual lots (Lots) and permitted offerers to submit a proposal for one, several, or all Lots (*see* RFP, at Section 1.3). As relevant for this Determination, for Lot 8, NYSP sought a contractor to provide for “preventive maintenance, remedial maintenance/repairs, installation, alteration, and removal of NYSP communications tower, tower site, communication facility, and microwave network equipment” (RFP, at Section 4.8).

The RFP provided for contract awards to be made “by Lot, on the basis of Best Value, based on a combination of Financial Cost and a Technical Score based on the ability to cover multiple segments of NYSP’s Communications System Support needs at a competitive cost” (RFP, at Section 6). The RFP provided that each offerer’s proposal for a particular Lot would be scored on the basis of cost, worth 75% of the total score (up to a maximum of 75 points), and a technical component, worth 25% of the total score (up to a maximum of 25 points) (*Id.*).

For the cost component, the RFP required offerers to submit a cost proposal using the Bid Cost Proposal form designated for the particular Lot attached to the RFP (*see* RFP, at Section 7.2

and Attachment 2B). The cost proposal with the lowest total cost would receive the full number of available points (75) and other cost proposals with higher costs would receive proportionately lower cost scores according to a predetermined mathematical formula.¹

For the technical component, the RFP provided that additional points would be awarded to offerers submitting a “qualifying bid” for more than one Lot in the following manner: an offerer would receive (i) two points for each additional Lot if such offerer submitted proposals for multiple Lots (up to a maximum of 22 points), and (ii) three additional points if such offerer submitted proposals for more than six Lots (*see* RFP, at Section 6).² The technical score was added to the cost score and the offerer receiving the highest combined score would be awarded the contract for that particular Lot (*Id.*).

NYSP received four proposals, including Mid-State’s proposal, for Lot 8 by the proposal due date of November 27, 2019. Mid-State submitted the lowest cost proposal and Adesta’s cost proposal was the second lowest. As a result, NYSP awarded Mid-State the maximum 75.0 points for the cost component of its proposal and awarded Adesta 74.0499 points for the cost component of its proposal.

In addition to its proposal for Lot 8, Adesta submitted an unsuccessful proposal for one other Lot and NYSP awarded Adesta two points for the technical component of its proposal for Lot 8, for a total combined score of 76.0499 points. Mid-State did not submit any additional proposals and was therefore awarded 0.0 points for the technical component of its proposal, for a total combined score of 75.0 points. NYSP awarded the contract for Lot 8 to Adesta, the responsive proposer whose proposal received the highest combined score.

Mid-State requested a debriefing on April 9, 2020, which NYSP provided by telephone conference on April 17, 2020. By letter dated April 17, 2020, Mid-State filed a protest with NYSP challenging NYSP’s award. NYSP denied Mid-State’s protest by letter dated April 23, 2020. Mid-State appealed NYSP’s denial by letter dated April 30, 2020 and NYSP denied Mid-State’s appeal by letter dated May 15, 2020. Mid-State filed an appeal with this Office (Appeal) by letter dated May 20, 2020. On August 7, 2020, NYSP reaffirmed its position from the prior agency-level determinations, but did not file a separate answer 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 that exceeds \$50,000 dollars becomes effective, it must be approved by the Comptroller.

¹ The RFP did not set forth the mathematical formula used by NYSP to award points to the cost proposals other than the cost proposal offering the lowest total cost.

² The RFP does not explain what makes a bid “qualifying.” The Collins English Dictionary defines “qualifying,” when used in connection with a contest or competition, as “played in order to decide which person or team will progress to the final stages; preliminary.” Therefore, we interpret qualifying bid to mean one which is responsive to the minimum requirements of the RFP.

In carrying out this contract approval responsibility, OSC has promulgated the 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.³ 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 the OSC Protest Procedure.

In the determination of the Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by NYSP with the NYSP/Adesta contract;
2. the correspondence between this Office and NYSP arising out of our review of the proposed NYSP/Adesta contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Mid-State's protest to NYSP, dated April 17, 2020;
 - b. NYSP's protest determination, dated April 23, 2020 (NYSP Protest Determination);
 - c. Mid-State's appeal to NYSP, dated April 30, 2020;
 - d. NYSP's appeal determination, dated May 15, 2020 (NYSP Appeal Determination); and
 - e. Mid-State's Appeal to OSC, dated May 20, 2020.

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.⁴ 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."⁵ A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."⁶

SFL § 163(7) requires the contracting agency to 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 the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted."

³ 2 NYCRR Part 24.

⁴ SFL § 163(10).

⁵ SFL § 163(1)(j).

⁶ SFL § 163(1)(d).

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, Mid-State challenges the procurement conducted by NYSP, as it relates to the contract award for Lot 8, on the following grounds:

1. NYSP did not make a best value award as required by the RFP and SFL § 163, as the procurement's technical criteria bore no reasonable relationship to the optimization of quality, cost, and efficiency among responsive and responsible offerers.
2. The technical criteria of the RFP effectively steered awards away from MWBE and small business enterprises in disregard of the State Finance Law's definition of "best value" which may include quantitative factors for such businesses.⁷
3. NYSP's evaluation criteria ran afoul of the requirements of Article 15-A of the Executive Law and Parts 140-145 of Title 5 of the NYCRR in that the criteria effectively minimized the likelihood of participation by MWBEs, by, among other things, encouraging bundled contract bids, with no corresponding benefit to NYSP, relating to cost or otherwise.
4. The debriefing provided by NYSP did not satisfy the requirements of the State Finance Law.

NYSP's Response to the Appeal

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

1. The RFP provided a limited incentive for vendors to attempt to satisfy multiple Lots, which is a clearly established objective fully aligned with the definition of "best value" set forth in SFL § 163(1)(j). Furthermore, the specific methodology that was included in the RFP and applied in the scoring of the bids, ties to a tangible public benefit, is rational in its basis and was applied as described in the RFP.
2. The granting of technical points to vendors who bid on multiple Lots, regardless of their MWBE status, does not disadvantage MWBE vendors. Furthermore, the MWBE goals are for subcontractors, not prime vendors like Mid-State, and therefore even if MWBE goals had been assigned to Lot 8, it would not have affected the outcome of the award for Lot 8.
3. The encouragement of bundled contract bids does not discriminate against MWBEs as 12 independent contracts were awarded pursuant to the RFP, and potential vendors were indiscriminately provided the opportunity to bid on all twelve Lots.

DISCUSSION

Best Value Award

⁷ Mid-State states it is a New York State certified women-owned business (WBE) enterprise and small business enterprise (SBE) (*see* Appeal, at pg. 4). Consistent with the terminology used in the Appeal, for purposes of this Determination, we refer to MWBEs (New York State certified minority- and women-owned business enterprises).

Mid-State asserts the criteria used by NYSP to evaluate the technical component of its proposal for Lot 8 has no reasonable or rational basis towards achieving NYSP's stated objective of minimizing the number of vendors ultimately servicing equipment across all of the Lots (*see* Appeal, at pg. 12). Specifically, Mid-State contends that "awarding 'Technical' points to a bidder for its proposal on one particular lot based on its mere submission of bids for additional lots, without consideration as to whether those additional bids were, for example, the low bids on any such lots – and without any regard for the content, substance, cost, or success of such bids – bears absolutely no relationship to the goal of minimizing the number of vendors ultimately awarded contracts," nor does it "contribute to 'the ultimate goal of determining which proposal presents the best value to the State,' as is the point of utilizing a Technical component in the evaluation" (Appeal, at pgs. 12-13). Further, Mid-State asserts that "[w]hile this criteria may incentivize additional bids, it plainly does not incentivize additional bids 'at a competitive cost,' nor, more importantly, does it award additional points based on submitting multiple bids 'at a competitive cost,'" and therefore fails to provide NYSP with best value (Appeal, at pg. 13).⁸

NYSP asserts the methodology set forth in the RFP used to score the technical component of a proposal "was not arbitrary, as it was designed to solicit responses from bidders providing services and solutions across multiple classes of public-safety communications technologies" so as to "reduce the number of vendors servicing systems and equipment and [those] necessary to respond to and remedy outages" in order to minimize down-time (NYSP Protest Determination, at pg. 1). To achieve this objective, NYSP contends that awarding additional points to offerers submitting proposals for multiple lots "provided a limited incentive for [offerers] to attempt to satisfy multiple lots" (NYSP Protest Determination, at pg. 2). NYSP further asserts that the methodology used to score the technical component "ties to a tangible public benefit, is rational in its basis and was applied in the manner described in the RFP" (*Id.*). As a result, NYSP states "[t]his clearly established objective [is] fully aligned with the definition of 'best value' set forth in State Finance Law" (NYSP Appeal Determination, at pg. 1).

As stated above, SFL § 163(10) requires that service contracts be awarded on the basis of best value. SFL § 163(1)(j) defines best value as "the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers. Such basis shall reflect, wherever possible, objective and quantifiable analysis." Finally, SFL § 163(7) requires the contracting agency to 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 the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted."

This Office has consistently required that a state agency, making an award under SFL § 163 on the basis of best value, use a cost evaluation methodology bearing "a reasonable

⁸ In response to Mid-State's contention that NYSP should only award points when an offerer submits the lowest cost proposal for another Lot, NYSP asserts that this methodology "is not allowed, as it would have resulted in the financial component being considered twice" (NYSP Appeal Determination, at pg. 1). We find this assertion without merit since evaluating the technical component of the particular Lot in question and awarding points for a successful proposal for another Lot does not involve reconsideration of the cost component of that other Lot since each cost component evaluation for a Lot is being determined independently. Moreover, had NYSP considered the merit of each offerer's proposal on additional Lots, the cost score of each offerer's proposal on the particular Lot being evaluated would have remained unchanged.

relationship to the anticipated costs that will be incurred under the terms of the resulting contract” (OSC Bid Protest Determination SF-20080408, at pg. 9; *see also* OSC Bid Protest Determination SF-20100156, at pg. 6 [finding that the State agency’s cost scoring methodology was flawed since it “did not necessarily award the greatest number of points to the bidder whose proposal was likely to provide the lowest cost to the State”]; OSC Bid Protest Determination SF-20150153, at pg. 11 [“To make a true ‘best value’ determination, SFL § 163 implicitly requires that the cost evaluation methodology have a reasonable relationship to the anticipated *actual* costs to be incurred by the State under the terms of the contract”])).

The technical evaluation methodology should similarly have a reasonable relationship to the technical, or non-cost, benefits desired by the agency. NYSP stated the methodology of awarding points solely for the submission of proposals for more than one Lot is rationally related to attaining the consolidation of services, thereby minimizing resource down-time (*see* NYSP Protest Determination, at pg. 2). Generally, this Office accords deference to an agency in matters within that agency’s expertise, such as the criteria to be evaluated to achieve its desired objective. Here, Mid-State’s cost proposal was the undisputed low bid for Lot 8. However, in accordance with the technical evaluation methodology, NYSP awarded the Lot 8 contract to Adesta as the result of a single, unsuccessful proposal submitted by Adesta for Lot 12. In essence, Adesta was awarded Lot 8 for submitting two bids that were the highest cost, and absent the additional points for the technical component, would have been unsuccessful. Thus, in this instance, applying NYSP’s methodology resulted in a higher cost to NYSP and the State. In our view, awarding additional points to an offerer with respect to one Lot simply because that offerer submits a proposal on another Lot, no matter how high-cost that other proposal might be, bears no reasonable relationship to the application of best value, i.e., the optimization of quality, cost and efficiency. Moreover, as confirmed by the award which resulted from this methodology in regard to Lot 8, this evaluation methodology neither achieves NYSP’s stated objective nor promotes best value, since the procurement resulted in the same number of vendors providing services as if the contracts had been awarded on the basis of cost alone and the award resulted in higher costs to the State.

For these reasons, the technical evaluation methodology used by NYSP failed to achieve best value.

MWBE Vendors

Mid-State alleges that NYSP’s technical evaluation criteria “steered contract awards away from MWBE and Small Business Enterprises,” despite the fact that “best value,” as defined by SFL § 163(1)(j), allows the use of quantitative factors for such offerers (*see* Appeal, at pgs. 17-18). Mid-State contends NYSP’s determination that the number of potentially qualified MWBEs and SBEs were insufficient to warrant inclusion of quantitative factors for the Lots (other than Lot 3), combined with NYSP’s award of additional points based on the number of Lots for which proposals were submitted, further disadvantaged MWBEs and SBEs who lacked the capacity to bid on more than one Lot (*see* Appeal, at pg. 18). Mid-State also alleges that the technical evaluation criteria ran afoul of New York State Executive Law Article 15-A and Parts 140-145 of Title 5 of the NYCRR “in that the criteria effectively minimized the likelihood of

participation by Minority and Women-Owned businesses by, among other things, encouraging bundled contract bids” (Appeal, at pgs. 1-2, 20).

NYSP asserts awarding technical points to offerers submitting proposals for multiple Lots, regardless of MWBE status, does not disadvantage MWBE vendors (*see* NYSP Protest Determination, at pg. 2). In support, NYSP claims that even if MWBE participation goals had been established for Lot 8, such goals would have required a successful offerer to make good faith efforts to achieve participation of MWBEs as subcontractors, not prime vendors, and thus would not have impacted the contract award for Lot 8 (*see* NYSP Appeal Determination, at pg. 2). Finally, in response to Mid-State’s claim that the technical evaluation methodology encouraged bundled contact bids, NYSP states the RFP “will result in the award of twelve *independent* contracts” and “potential vendors were indiscriminately provided the opportunity to bid on all 12 Lots,” regardless of MWBE status (*Id.*).

SFL § 163(1)(j) provides that best value methodology “may also identify a quantitative factor for offerers that are small businesses, certified minority- or women-owned business enterprises...or service-disabled veteran-owned business enterprises...to be used in evaluation of offers for awarding of contracts for services” (emphasis added). Executive Law Article 15-A was enacted to promote “maximum feasible participation in the performance of state contracts” by certified MWBEs and state agencies are required to make a good faith effort to meet designated participation goals (*see* Executive Law 313[1], [2]; 5 NYCRR § 141.7).

The RFP did not include a quantitative factor (awarding points based on an offerer’s status as an MWBE or SBE). The quantitative factor for SBEs and MWBEs in SFL§163(1)(j) is permissive, not mandatory, for best value procurements and thus, there is no basis to disturb NYSP’s determination not to include a quantitative factor in its RFP. The RFP did set forth goals for MWBE participation for Lot 3, requiring the successful offerer for Lot 3 to document good faith efforts to provide meaningful participation by MWBEs as subcontractors and suppliers (*see* RFP, at Section 8). While Lot 8 did not contain MWBE participation goals, the presence or absence of MWBE participation goals, or a particular offerer’s ability to meet such goals, was not part of the evaluation criteria used to score the technical proposal (*see* RFP, at Section 6[B]). Instead, the goals requiring participation by MWBEs as subcontractors and suppliers applied to the successful offerer following award; therefore, the MWBE participations goals, or the lack thereof, for a particular Lot had no bearing on the award. Moreover, in light of the determination set forth above that NYSP’s technical evaluation methodology failed to achieve a best value award for Lot 8, Mid-State’s remaining assertions questioning the validity of the technical evaluation methodology, based on potential disadvantages to MWBE or SBE offerers from awarding additional points for submitting proposals for multiple Lots are moot.

The Debriefing

Mid-State asserts NYSP failed to provide Mid-State with the qualitative and quantitative analysis used by NYSP to score the cost proposals during its debriefing as required by the State Finance Law (*see* Appeal, at pg. 21). Specifically, Mid-State claims NYSP failed to provide the formula used to convert the cost proposal to a “points” score (*Id.*).

SFL § 163(9)(c)(iv) sets forth the minimum information that must be provided in a debriefing: “(A) the reasons that the proposal, bid or offer submitted by the unsuccessful offerer was not selected for award; (B) the qualitative and quantitative analysis employed by the agency in assessing the relative merits of the proposals, bids or offers; (C) the application of the selection criteria to the unsuccessful offerer’s proposal; and (D) when the debriefing is held after the final award, the reasons for the selection of the winning proposal, bid or offer. The debriefing shall also provide, to the extent practicable, general advice and guidance to the unsuccessful offerer concerning potential ways that their future proposals, bids or offers could be more responsive.”

Guidance from the New York State Procurement Council directs agencies conducting debriefings to provide “at a minimum, the strengths and weaknesses of a vendor’s bid/proposal and...information as to the relative ranking of that bidder’s bid/proposal in each of the major evaluation categories as provided for in a bid solicitation document” (NYS Procurement Bulletin Debriefing Guidelines effective January 30, 2019). This information is consistent with the goal of a debriefing: to make the procurement process more transparent and assist vendors in becoming more viable competitors in State procurements (*Id.*).

The procurement record submitted to this Office shows that NYSP provided the cost and technical scores for each proposer for Lot 8 in response to Mid-State’s debriefing request. Furthermore, NYSP provided the formula used to convert the cost proposal to a points score, prior to submitting the contract to this Office (*see* NYSP Appeal Determination, at pg. 2). While NYSP provided only a portion of the qualitative and quantitative information requested by Mid-State at the debriefing, in our view, the debriefing provided to Mid-State was sufficient to satisfy the applicable statutory standard.

The Remaining Lots

This Office has long recognized the notion of excusable harmless error in the procurement process, involving both scoring errors and flawed evaluation methodology (*see* OSC Bid Protest Determinations SF-20070368, SF-20080185, SF-20090314, SF-20090447, SF-20100130, SF-20100338, SF-20140222, SF-20150080 and SF-20160248). That is, while there may have been an error/ flaw in the procurement process, the correction of the error/ flaw would not have affected the outcome (i.e., the award) and, therefore, the error/ flaw is harmless.

In this instance, our review of the procurement record reveals that while NYSP received multiple proposals for seven of 12 Lots awarded pursuant to the RFP, only Lot 8 was awarded to an offerer other than the low bidder. We therefore conclude that, although as determined above, the technical evaluation methodology failed to achieve best value for the Lot 8 contract award, any errors related to awarding technical points to proposals on other Lots would not have changed the outcome of the contract awards for those Lots.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are of sufficient merit to overturn the contract award for Lot 8 by NYSP. As a result, the Appeal is

upheld and we will not be approving the proposed NYSP contact with Adesta for Lot 8, tower and communications facility maintenance services.