

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Amazing Deals, LLC, with respect to the procurement of retail concessions at Robert Moses and Jones Beach State Parks conducted by the New York State Office of Parks, Recreation and Historic Preservation.

**Determination
of Bid Protest**

SF-20200069

Contract Number – X001372

July 8, 2020

The Office of the State Comptroller (OSC or this Office) has reviewed the above-referenced procurement conducted by the New York State Office of Parks, Recreation and Historic Preservation (Parks) for retail concessions at Robert Moses and Jones Beach State Parks. We have determined the grounds advanced by Amazing Deals, LLC (Amazing), are insufficient to merit overturning the contract award made by Parks and, therefore, we deny the Protest. As a result, we are today approving the Parks concession license agreement (License) with J&B Restaurant Partners Top Flight Foods LLC (J&B) for retail concessions.

BACKGROUND

Facts

On November 15, 2019, Parks issued Request for Proposals X001372 (RFP) for retail concessions at Jones Beach State Park in Wantagh, New York and Robert Moses State Park in Babylon, New York (*see* RFP, at pg. 1). The RFP provided that the resulting License would be awarded “to the respondent that achieves the highest score best demonstrating relevant experience and expertise; best responds to this RFP; offers the best value to New York State; and will serve the public interest” (RFP, at pg. 11). Parks received six proposals by the due date of January 8, 2020.¹

Parks reviewed the proposals for completeness and compliance with mandatory requirements of the RFP and invited all proposers to make an oral presentation to Parks’ Review Panel to assist in its evaluation and scoring of proposals (*see* RFP, at pg. 10). Proposals were scored on a 100-point scoring system, with the technical score worth a maximum of 75 points per evaluator and the financial score worth a maximum of 25 points per evaluator (*see* RFP, at pgs. 11-12).² The Review Panel, consisting of five evaluators, scored technical proposals on the criteria set forth in the RFP and were permitted to adjust such scores following oral presentations (*see* RFP, at pg. 11).

¹ NYC Deals LLC submitted a proposal but withdrew its proposal prior to award. As a result, Parks scored the five proposals submitted by the due date.

² The RFP required proposers to propose a minimum License Fee of 8% of gross receipts payable monthly (*see* RFP, at pg. 12).

Parks' Concessions Management Bureau reviewed the financial proposals and the financial proposal offering the highest return to the State was awarded the maximum 25 points per evaluator with other proposals receiving a relative proportionate score (*see* RFP, at pgs. 12-13). The financial score was added to the total technical score for each evaluator, and individual combined evaluator scores were added together to produce a total combined score for each proposal (*see* RFP, at pg. 13). By letter dated February 7, 2020, Parks awarded the License to J&B, the proposer receiving the highest total combined score.

Amazing requested a debriefing which was provided by Parks on February 14, 2020. Amazing filed a protest with OSC by letter dated February 21, 2020 (Protest) and Parks filed an answer to the Protest by letter dated May 26, 2020 (Answer).³

Comptroller's Authority and Procedures

Under State Finance Law (SFL) § 112(3), before any revenue contract made for or by a state agency which exceeds twenty-five thousand dollars becomes effective, it must be approved by the Comptroller.

In carrying out this contract approval responsibility, 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 there was no protest process engaged in at the department level, the Protest is governed by section 24.4 of the OSC Protest Procedure.

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by Parks with the Parks/J&B License;
2. the correspondence between this Office and Parks arising out of our review of the proposed Parks/J&B License; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Amazing's Protest dated February 21, 2020; and
 - b. Parks' Answer dated May 26, 2020.

Applicable Statutes

³ Amazing filed a protest with Parks on February 19, 2020, and, before Parks responded to Amazing's protest, Amazing filed a substantially identical protest with this Office on February 21, 2020. Parks, in a letter dated February 26, 2020, stated it would respond to the protest Amazing filed with Parks "through the formal bid protest proceeding before OSC only." Thus, we are treating Amazing's protest as an initial protest to this Office.

⁴ 2 NYCRR Part 24.

This procurement is not subject to the competitive bidding requirements of State Finance Law § 163, as this is not an expenditure contract involving the purchase of goods or services but, rather, is a revenue contract, i.e. a contract which generates revenue for the State. However, in fulfilling this Office's statutory duty under SFL §112, we generally require that revenue contracts be let pursuant to a reasonable competitive process. We will proceed to analyze the issues raised in the Protest under these non-statutory standards.

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, Amazing challenges the procurement conducted by Parks on the following grounds:

1. Amazing's financial proposal received the highest financial score and, as a result, would provide a higher return to the State than J&B.
2. Amazing received the maximum points available for the financial score yet received unjustified low scores for several other evaluation categories. These low scores appear to be intended to ensure Amazing would not be awarded the contract and reflect impermissible bias or favoritism toward J&B, the incumbent contractor.
3. Parks failed to comply with New York State law with respect to Minority and Women-Owned Business Enterprise (MWBE) goals in connection with this procurement.⁵

Parks' Response to the Protest

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

1. Amazing did not submit a proposal and thus, is not an interested party and does not have grounds to challenge the contract award resulting from the RFP.
2. The RFP provided that proposals would be scored on a best value basis, using a combined technical and financial score. While Amazing's proposal did receive the highest financial score, the total combined score was not the highest total score.
3. Parks' evaluation methodology is fair and balanced and evaluators scored proposals against criteria established in the RFP and, as a result, such scores are not the result of bias or subjectivity.
4. The contract resulting from the RFP is not a "state contract" within the definition and meaning of Article 15-A of the Executive Law, establishing the MWBE program for State agencies, and is not subject to any MWBE requirements.

⁵ Amazing also asserts Parks failed to timely comply with Freedom of Information Law (FOIL) requests relating to matters of the historical relationship between Parks and J&B. Consistent with the long standing policy of this Office enunciated in prior bid protest determinations, issues related to a procuring agency's action or inaction on a FOIL request does not impact our review of the contract award and are not considered as part of our review of a bid protest.

DISCUSSION

A. Status of Amazing Deals, LLC as an Interested Party

Parks asserts that Amazing is not an “interested party” under the OSC Protest Procedure because Amazing “was not a proposer in response to the RFP or a participant in the procurement,” and therefore has no grounds to challenge the award of the License to J&B (*see* Answer, at pgs. 2-3). In support of its assertion, Parks claims Amazing Deals, Inc., not Amazing Deals, LLC, submitted the proposal (*see* Answer, at pg. 2).⁶

The OSC Protest Procedure defines an “interest party” as “a participant in the procurement process, and those who can establish that their participation in the procurement process was foreclosed by the actions of public contracting entity and suffered harm as a result of the manner in which the procurement was conducted.”⁷ When determining whether an entity is an “interested party” under the OSC Protest Procedure, this Office is not bound by the same standard a court uses to determine “standing” for purposes of a judicial challenge (*see* OSC Bid Protest Determination SF-20190191, at pg. 4, citing OSC Bid Protest Determination SF-20140300, at pg. 5). Rather “[t]o determine whether a party qualifies as an ‘interested party,’ we examine a number of factors on a case-by-case basis and assess whether the party has a significant involvement in the procurement and a demonstrable potential harm as a result of the manner in which the procurement was conducted” (OSC Bid Protest Determination SF-20140300, at pg. 6).

The procurement record evidences confusion as to the particular entity that submitted the proposal in question. While the proposal was submitted by and for Amazing Deals, Inc., the information provided on the proposal forms was completed in the name of Amazing Deals, LLC. In addition, the financial proposal form references Amazing Deals, LLC. In light of this discrepancy, Parks sought clarification from Mr. Mahmood as to his role with Amazing Deals, Inc. and Amazing Deals, LLC, and the identity of the actual proposing entity. Mr. Mahmood provided an organizational chart to Parks and explained that he owns and controls both entities. By email dated January 15, 2020, Mr. Mahmood stated that the proposal was submitted by Amazing Deals, Inc. and that “LLC is simply an error and should be replaced with INC. (We do own rights to both INC and LLC names under Amazing Deals, this should explain any errors made.)”

After some initial confusion as to which of Mr. Mahmood’s Amazing Deals entities submitted the proposal in response to the RFP, Mr. Mahmood clarified that Amazing Deals, Inc. was the proposing entity. However, our review of the procurement record shows Parks was aware that one of Mr. Mahmood’s Amazing Deals entities had significant involvement in the procurement and suffered a demonstrable potential harm as a result of the manner in which Parks conducted the procurement. In addition, notwithstanding Parks’ position that Amazing Deals, LLC was not the proposing entity, Parks, in a letter dated February 7, 2020, thanked Amazing

⁶ NYC Deals LLC and Amazing Deals, Inc. submitted separate proposals, both of which were signed by Asad Mahmood; however, Mr. Mahmood signed the proposal submitted by Amazing Deals, Inc., on behalf of Amazing Deals, LLC. Mr. Mahmood withdrew the proposal submitted by NYC Deals LLC prior to award.

⁷ 2 NYCRR section 24.2(e).

Deals, LLC for submitting a proposal in response to the RFP and notified Amazing Deals, LLC that it had not been awarded the License. Finally, Parks prepared a debriefing agenda in the name of Amazing Deals, LLC and attached “Exhibit B1- X001372 Amazing Deals LLC Evaluation Results.” Thus, in light of the apparently ongoing confusion as to the identity of the proposing entity, we will address the issues raised in the Protest.

B. Best Value Determination

Amazing asserts its financial proposal received the highest financial score and awarding the License to J&B “will produce significantly lower revenue to the State of New York” (Protest, at pg. 1). Parks avers that the RFP provided for proposals to be scored on a best value basis, using a combined technical and financial score, and, while Amazing received the highest financial score, its total combined score was not the highest total score (*see Answer*, at pgs. 3-4).

The RFP advised that the resulting License would be awarded “to the respondent that achieves the highest score best demonstrating relevant experience and expertise; best responds to this RFP; offers the best value to New York State; and will serve the public interest” (RFP, at pg. 11). Thus, the RFP clearly indicates that return to the State would not be the sole consideration for award, but rather the award would be made on a “best value” basis after assessing the proposals’ technical and financial merit. Indeed, the RFP identifies objective, measurable technical criteria by which the proposals would be evaluated and the available points associated with each category of criteria (Category A: Background and Experience – 30 points; Category B: Response to the RFP – 45 points, *see RFP*, at pgs. 11-12). Finally, the RFP clearly states that the “respondent submitting the proposal with the highest aggregate point score for all three categories will be selected for award” (RFP, at pg. 13). While Amazing did receive the highest financial score, this was not the sole factor in determining the award of the License.

C. Evaluation of Amazing’s Technical Proposal

Amazing asserts that its technical proposal received low scores from certain evaluators in some criteria which “appear to be intended to ensure that Amazing Deals would not be selected which also appears to have been a result of bias or favoritism toward the incumbent contractor” (Protest, at pg. 2). Further, Amazing claims the discrepancy in scoring between one of the five evaluators and the other evaluators “is so great as to call into question the entire scoring and selection process” (Protest, at pg. 2). As support, Amazing cites certain criteria where Amazing alleges its technical proposal received unjustified low scores (*Id.*). Parks counters that its evaluation methodology is fair and balanced (*see Answer*, at pg. 4). Parks maintains its five-person panel evaluated proposals against the criteria set forth in the RFP using a standardized score sheet and that the scores given to Amazing’s technical proposal are not the result of bias or subjectivity (*see Answer*, at pg. 6).

The RFP set forth detailed evaluation criteria for the technical proposal in two main categories: Background & Experience and Response to the Proposal (*see RFP*, at pgs. 11-12). The RFP also provided the total number of points allocable to each main category and a breakdown of the points for each subcategory (*Id.*). The score sheet used by the evaluators contained the same criteria set forth in the RFP. After reviewing a technical proposal, each

evaluator completed a score sheet, assigning a preliminary point award and providing written comments for each criterion within a category. After oral presentation, evaluators were given the opportunity to adjust the point awards and provide further comments.

We recognize that evaluators bring their own subjective views to the evaluation process and may interpret information in proposals differently. However, this Office will generally not disturb a rationally reached determination of a duly constituted evaluation committee (*see* OSC Bid Protest Determination SF-20160188, at pg. 8). “Only when scoring is clearly and demonstratively unreasonable will we overturn the actions of an evaluator or an evaluation committee” (*Id.*, citing OSC Bid Protest Determination SF0898058, at pg. 7). Thus, so long as the scoring is supported by the procurement record, and is consistent with the instructions, we will generally not disturb the evaluators’ allocation of points. Our review did not reveal any contradictions between an evaluator’s written comments and the score assigned by such evaluator to Amazing’s technical proposal. We are satisfied evaluators scored Amazing’s technical proposal in a manner consistent with the RFP and score sheet.

We now turn to Amazing’s assertion that the low scores given to its technical proposal, particularly from one evaluator, reflect bias and favoritism. At the outset, we find no such evidence in the procurement record. Moreover, this Office has long recognized the notion of excusable harmless error in the procurement process (*see* OSC Bid Protest Determinations SF-20070368, SF-20080185, SF-20080412, SF-20090314; SF-20090447, SF-20100130, SF-20100338, SF-20110203, SF-20140222, SF-20150080, SF-20160139, SF-20160248, and SF-2018224). That is, while there may have been an error/ flaw in the procurement process, the correction of the error/ flaw would not change the outcome (i.e., the award) and, therefore, the error/ flaw is harmless. In this instance, assuming *arguendo* there was a concern with this evaluator’s scoring, removing that particular evaluator’s scores for all technical proposals would not have changed the outcome of the award and J&B would still have received the highest total combined score.

D. MWBE Goals

Amazing alleges the procurement “does not appear to be in compliance with current New York State Law and Regulations with respect to MWBE goals” (Protest, at pg. 3). Parks asserts that since the contract resulting from the RFP is not a “state contract” within the meaning in Executive Law Article 15-A (Article 15-A), the RFP and the License are not subject to any MWBE requirements under Article 15-A (*see* Answer, at pgs. 6-7).

Article 15-A was enacted to promote “maximum feasible participation in the performance of state contracts” by *certified* MWBEs (*see* Executive Law 313[1], [2]; 5 NYCRR § 141.7). State agencies are required to structure procurement procedures to aspire to meet designated participation goals and to report to the New York State Department of Economic Development (DED) with respect to activities undertaken to increase participation in state contracts for *certified* MWBEs (*see* Executive Law § 315; 5 NYCRR § 142.2).

MWBEs are certified pursuant to a procedure managed by DED’s Division of Minority and Women’s Business Development (DMWBD) (*see* Executive Law § 314; 5 NYCRR Part

144). DMWBD prepares a directory of certified MWBE businesses to assist agencies in carrying out the directive of Article 15-A (*see* Executive Law § 314[2]; 5 NYCRR § 141.2[b]).

As relevant to the instant matter, Article 15-A defines “state contract” as “a written agreement...whereby a contracting agency is committed to expend or does expend funds in return for labor, services..., supplies, equipment, materials or any combination of the foregoing, to be performed for, on behalf of, or rendered or furnished to the contracting agency” (Executive Law § 310[13]). As previously stated, the License is a revenue contract, not a contract involving the expenditure of State money for the purchase of goods or services. Accordingly, the License resulting from the RFP is not a “state contract” under Article 15-A and, therefore, not subject to the MWBE requirements.

Furthermore, we note that Amazing acknowledges in its Protest that it is not a certified MWBE (*see* Protest, at pg. 3). Thus, in this instance, Amazing cannot assert any harm as a result of Parks purported non-compliance with the requirements of Article 15-A.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the award of the License by Parks. As a result, the Protest is denied and we are today approving the Parks/J&B License for retail concessions.