

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by EXPLUS, Inc. with respect to the procurement of construction of Philipse Manor Hall State Historic Site Exhibits conducted by the New York State Office of Parks, Recreation, and Historic Preservation.

**Determination
of Appeal**

SF-20220003

Contract Number – C003539

February 17, 2022

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Office of Parks, Recreation, and Historic Preservation (OPRHP) for the construction of a series of new exhibits and exterior interpretive signage at the Philipse Manor Hall State Historic Site (Philipse Manor Hall Exhibits). We have determined the grounds advanced by EXPLUS, Inc. (Explus) are insufficient to merit overturning the contract award made by OPRHP and, therefore, we deny the Appeal. As a result, we are today approving the OPRHP contract with Sommerville-Wilson, Inc. d/b/a Split Rock Studios (Split Rock) for the Philipse Manor Hall Exhibits.

BACKGROUND

Facts

On October 21, 2021, OPRHP issued an Invitation for Bids (IFB) seeking “proposals from Exhibit Fabrication firms that specialize in the construction of interpretive exhibits” to provide the Philipse Manor Hall Exhibits (*see* IFB, Section 1.2, at p. 7). The resulting contract would be awarded to “a responsive, responsible, and qualified bidder who offer[ed] the lowest Grand Total bid to perform work as outlined in [the IFB]” (IFB, Section 2.5, at p. 18). To be considered qualified, bidders were required to submit “(3) successful exhibit projects (Project References) produced within the last five (5) years for which the Bidder was the prime contractor” (IFB, Sections 1.3-1.3.1, at pp. 7-8). Using a combination of the three Project References, bidders were required to illustrate performance of ten functions, including “[h]ighly realistic human figures” (IFB, Section 1.3.1, at p.8). The IFB provided that the Project References would be scored on a pass/fail basis for the highest ranked bidder (i.e., the bidder submitting the lowest bid) (*see* IFB, Section 1.3.2, at p. 8). If a bidder was unable to meet the minimum qualifications, including experience requirements as illustrated by Project References, the bidder would be disqualified (*see* IFB, Section 1.3, at p. 7).

OPRHP received bids from multiple bidders including Explus and Split Rock prior to the proposal due date of December 6, 2021. Following review of bids, OPRHP found Explus to have the lowest Grand Total bid and conducted a Project Reference check. OPRHP determined Explus’s Project References did not demonstrate that Explus met all ten functions and therefore,

Explus failed to meet the minimum qualifications set forth in the IFB. OPRHP thereafter awarded the contract to Split Rock, the responsive and qualified bidder submitting the next lowest Grand Total bid.

By letter dated January 4, 2022, Explus filed a protest with OPRHP challenging the disqualification of its proposal and the contract award to Split Rock (Protest). By letter dated January 11, 2022, OPRHP denied the protest (Protest Determination). By email dated January 18, 2022, Explus filed an appeal with this Office (Appeal). By letter dated January 25, 2022, OPRHP provided our Office with an answer to Explus's appeal (Answer).

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 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.¹ 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 OPRHP with the OPRHP / Split Rock contract;
2. the correspondence between this Office and OPRHP arising out of our review of the proposed OPRHP / Split Rock contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Protest;
 - b. Protest Determination;
 - c. Appeal; and,
 - d. Answer.

Applicable Statutes

The requirements applicable to this procurement are set forth in Public Buildings Law § 8. Specifically, Public Buildings Law § 8(6) provides that

¹ 2 NYCRR Part 24.

[a]ll contracts for amounts in excess of five thousand dollars for the work of construction, reconstruction, alteration, repair or improvement of any state building . . . must be offered for public bidding and may be awarded to the lowest responsible and reliable bidder, as will best promote the public interest, by the said department or other agency with the approval of the comptroller

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, Explus challenges the procurement conducted by OPRHP on the following grounds:²

1. OPRHP used project reference requirements that were not disclosed in the IFB, specifically that OPRHP would contact references and require them to fill out a form; and
2. OPRHP improperly deemed Explus non-responsive based on undisclosed project reference requirements.

OPRHP Response to the Appeal

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

1. The IFB provided for project reference requirements which were apparent; and
2. To verify a bidder met the project reference requirements, OPHRP used a standard reference check form. Although OPHRP provided ample opportunities to Explus to fulfill the project reference requirements, Explus failed to meet the minimum qualifications to bid and OPHRP properly determined Explus was non-responsive.

DISCUSSION

IFB Disclosure of Reference Requirements

Explus alleges that OPRHP “did not specify ... [Project Reference] requirements in [the IFB] and attempted to create an ad hoc process to make up for the absence of a clear and concise process” (Protest, at p.1). More specifically, Explus contends that “there is nothing noted in the [IFB] that says [Project] [R]eferences would be contacted and asked to fill out a form” (*Id.*). In response, OPRHP points to the Project Reference requirements that are included in Section 1.3.1 and 1.3.2 of the IFB (*see* Answer, at pp. 1-2). OPRHP further states that it “uses a standard Reference Check Form...for each reference of a qualifying bid to ensure that [OPRHP] obtain[s]

² In the Appeal, Explus incorporates by reference the grounds advanced in its Protest to OPRHP. Thus, in resolving the Appeal, we considered the arguments advanced in the Protest to OPRHP.

the same information for each reference...[and] to verify the bidder successfully completed projects in the ten functions [set forth in the IFB]" (Answer, at p. 2).

At the outset, we note that the standard for awarding a contract for public work, such as the contract at issue, is whether the apparent low bidder is "responsible and reliable" and whether the award will "best promote the public interest," as opposed to whether the bidder is "responsive" (*compare* Public Buildings Law § 8(6) to SFL §§ 163(1)(d) and 163(9)(b)). Clearly, however, a bidder on a procurement for public work must be responsive to the requirements of the IFB and must be disqualified if non-responsive to a material requirement. In furtherance of this and the public interest in fair competitive procurements, the IFB should be objectively clear in setting forth what is required for a bidder to meet its requirements and be qualified.

Here, the IFB sets forth unambiguous minimum qualifications that bidders needed to meet to be considered qualified (*see* IFB, Section 1.3, at p. 7).³ Specifically, the IFB notes that bidders must provide three Project References collectively illustrating ten functions, with one such function being "highly realistic human figures" (*see* IFB, Sections 1.3-1.3.1, at pp. 7-8). The IFB goes on to state that these Project References "will be scored on a pass/fail basis...[i]f a reference is not accepted for evaluation, the reference will be scored as a fail" (IFB, Section 1.3.1, at p. 8). Finally, "Bidders not meeting the [minimum] qualifications [] will be disqualified" (IFB, Section 1.3, at p. 7). Although Explus claims that requesting a Project Reference complete a standard reference check form verifying that the bidder did, in fact, execute certain services for the particular Project Reference should have been identified as a minimum qualification in the IFB, we view this more appropriately as OPRHP's internal process of verifying that the bidder actually met the minimum requirements.

Therefore, we are satisfied that the IFB adequately discloses the minimum requirements a bidder needed to meet to submit a bid.

Non-Responsive Determination

Explus contends that its "proposal...met all the requirements outlined in the [IFB]" (Protest, at p.1). Explus asserts that OPRHP "deemed [Explus's] proposal non-responsive and removed [it] from further consideration because [Explus's Failed Reference] could not comply with a process that was not specified in the [IFB], or in any subsequent addendum or Q & A portion of this [IFB]" (*Id.*).

In response, OPRHP contends that "Explus's only reference in their proposal that demonstrated [Explus] had project experience in '[h]ighly realistic human figures'...was the [Failed Reference]" (Answer, at p. 2). OPRHP elaborates that "[t]he practice for all bids reviewed by OPRHP's [] staff is to verify all references independently of the contractor" and "OPRHP made several attempts to secure verification of references to the [Failed Reference] using the [] Reference Check Form, to which the reference was unable to respond (Protest

³ The terms "responsive" and "qualified" are used interchangeably for purposes of this Determination to describe a bidder who has met the minimum qualifications to bid set forth in Section 1.3 of the IFB.

Determination, at p. 1). Since the reference was unable to reply to our reference check, OPRHP considered [Explus] as failing the reference check” (*Id.*).

Public Buildings Law § 8(6) requires contract award to a “reliable and responsible” bidder who is qualified to meet the requirements in the IFB. As explained above, the IFB sets forth minimum qualifications for a bidder to be considered qualified (*see* IFB Sections 1.3, 1.3.1 and 1.3.2, at pp. 7-8). As part of its determination that a bidder is reliable and responsible, OPRHP followed its regular practice of contacting Explus’s listed references to conduct a reference check with a standard reference check form in order to verify that Explus met the minimum requirements.

Here, one of Explus’s Project References (the Failed Reference), the only Project Reference provided by Explus that was able to illustrate Explus’s experience with “highly realistic human figures,” was unable to complete OPRHP’s reference check form either verbally or in writing, despite OPRHP’s willingness to deviate from its standard reference check procedure (*see* OPRHP/Explus Emails, dated December 16-17, 2021).⁴ Thus, Explus was unable to demonstrate that it met the minimum qualification of the “highly realistic human figures” function. As a result, Explus was not qualified to submit a bid and OPRHP’s determination that Explus was non-responsive to the IFB was proper.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the contract award by OPRHP. As a result, the Appeal is denied and we are today approving the OPRHP / Split Rock contract for the Philipse Manor Hall Exhibits.

⁴ Our review of the procurement record shows OPRHP did the following to assist Explus in completing the Project Reference check: extended the time for the Failed Reference to complete the Project Reference form by two business days; offered the Failed Reference the option to respond to the Project Reference form questions verbally rather than in writing; and, offered Explus the option of providing a different individual to contact at the Failed Reference to provide the Project Reference information instead.