

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest Appeal
filed by Bank of America, N.A.,
with respect to the procurement for the
Statewide Debit Card Services conducted by
the New York State Office of General Services in
conjunction with the New York State Department of
Taxation and Finance

Determination
of Bid Protest
Appeal
SF-20100328

October 26, 2010

This Office has completed its review of a procurement conducted by the New York State Office of General Services (hereinafter "OGS") and the New York State Department of Taxation and Finance (hereinafter "DTF") for Statewide Debit Card Services, together with the bid protest Appeal (hereinafter "Appeal") filed by Bank of America, N.A. (hereinafter "BOA"), with respect thereto. As outlined in further detail below, we have determined that the initial proposal submitted by J.P.Morgan was not responsive to the solicitation to acquire such services, and, as a result, we are returning the proposed OGS/J.P.Morgan contract unapproved.¹

Summary of Facts

On January 12, 2010, DTF and OGS issued a Request for Proposals (hereinafter "RFP") #10-02, entitled "Personal Income Tax Refund Controlled Disbursement, Direct Deposit and Statewide Debit Card Services" for the above referenced services. Prior to the proposal due date, BOA asked that the RFP be amended to offer pricing flexibility that better reflects market conditions and program size. Specifically, in its correspondence to DTF dated March 18, four days prior to the RFP's proposal due date, BOA stated that the "multiple free ATM balance inquiries and withdrawals" made pricing very challenging and requested a potential modification of the RFP and an extension of the proposal due date. DTF responded to BOA on March 19 stating that the RFP would not be modified and encouraging BOA to take advantage of the opportunity to bid.

¹ We note that the RFP consisted of two Modules resulting in separate contracts. Module 1 was for Personal Income Tax Refund Controlled Disbursements and Direct Deposit and Module 2 was for Statewide Debit Card Services. This determination relates to this Office's review of Module 2.

By the March 22 proposal due date, three proposals were received in response to the RFP, one from J.P.Morgan, one from Citibank and a third from Insurecard.² BOA chose not to bid on the procurement.

DTF was unable to verify that either the proposal received from J.P.Morgan or from Citibank was responsive to the above-noted requirement. As a result, DTF provided J.P.Morgan and Citibank with an opportunity to "clarify" their proposals to "confirm that your bank will provide at least three fee-free ATM withdrawals and three free account balance inquiries per month as required by Functional Requirements A.3.1." Citibank did not confirm and was disqualified. J.P.Morgan confirmed, in part, and further stated "[f]or single load, low value cards, we assume the State did not intend fee-free ATM withdrawals each month indefinitely as part of this requirement. An infinite number of withdrawals would present a serious financial challenge to any program provided by any vendor."³ Because, in fact, the RFP did require the three free monthly withdrawals indefinitely, a second clarification was requested of J.P.Morgan asking it to confirm it would provide at least three fee-free ATM withdrawals and three free account balance inquiries per month as required by Functional Requirement A.3.1. This time J.P.Morgan confirmed that it would.

OGS made a tentative award to J.P.Morgan. By letter dated July 9, 2010, BOA protested the "Tentative Awards" of Modules 1 and 2 to J.P.Morgan.⁴ The protest was based on the grounds that: (i) DTF's failure to respond to BOA's Freedom of Information Law (hereinafter "FOIL") request had prevented BOA from reviewing and presenting all of the facts that may form the basis of its protest; (ii) the winning bidder will have failed to abide by the rigid pricing schedule set forth in the RFP; (iii) the winning bidder submitted a bid that does not fully comply with the relevant Functional Requirements of the RFP; and, (iv) the winning bid may contain terms that, during the implementation process, undergo revisions inconsistent with relevant Functional Requirements, such that the final contract will contain provisions not compliant with those requirements.

BOA sent an additional letter to DTF on July 26, 2010 objecting to the Bid Protest Policy applicable to this RFP. By letter dated August 6, 2010, DTF and OGS jointly decided to reject BOA's protest.

² OGS determined that the Insurecard proposal was fundamentally non-responsive, and did not score its proposal.

³ J.P.Morgan characterized this requirement as a "serious financial challenge" in its response to the clarification and BOA stated this requirement "ha[s] made pricing the deal very challenging."

⁴ While BOA protested the awards of both modules, they provided no substantive objections with respect to the award of Module 1. Since BOA has provided no basis for us to withhold our approval of Module 1, we have no basis to withhold our approval of the contract award to J.P.Morgan with respect to Module 1. We therefore reject BOA's Appeal with respect to Module 1, and have approved the contract with J.P.Morgan for these services.

Basis for BOA's Appeal

On August 11, 2010 BOA appealed the denial of BOA's bid protest for the RFP and contract award by OGS to J.P.Morgan.⁵ BOA's appeal is based, in part, on its belief that J.P.Morgan submitted a bid that does not fully comply with the functional requirements of the RFP and/or has failed to abide by the rigid pricing schedule, and BOA's request pursuant to FOIL was denied.

OGS Response to BOA's Appeal

OGS states that section 163(9)(c) of the State Finance Law (hereinafter "SFL") allows J.P.Morgan to clarify and validate its proposal by any means DTF and OGS deem necessary. Functional Requirement A.3.1. was never changed from the original RFP so, therefore, no bidder was disadvantaged as J.P.Morgan was the only bidder willing to comply with this requirement. Moreover, OGS and DTF could have waived the requirement and should not be penalized for taking a less drastic action.

Procedures and Comptroller's Authority

Under section 112 of the SFL, before any contract made for or by a State agency, which exceeds \$50,000 in amount (\$85,000 for OGS), becomes effective it must be approved by the State Comptroller.⁶ Because OGS had already entered into a proposed contract with J.P.Morgan resulting from this procurement, the State Comptroller has reviewed the Appeal filed by BOA as part of his review of the contract award to J.P.Morgan.

In determination of this Appeal and our review pursuant to section 112, this Office considered: (i) the documentation contained in the procurement record forwarded to this Office by OGS and DTF with the OGS/J.P.Morgan contract; and, (ii) the correspondence between this Office, OGS and DTF arising out of our review of the proposed OGS/J.P.Morgan contract.

Applicable Statutes

The requirements applicable to this procurement are set forth in Article 11 of the SFL, which provides that contracts for services shall be awarded on the basis of "best value" from a responsive and responsible offerer.⁷ 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."⁸ A "responsive" offerer is an "offerer meeting the minimum specifications or requirements as prescribed in a solicitation for commodities or services by a State agency."⁹

⁵ The contract for Module 2 was signed by OGS and J.P.Morgan.

⁶ SFL section 112(2).

⁷ SFL section 163(10).

⁸ SFL section 163(1)(j).

⁹ SFL section 163(1)(d).

Section 163(9)(b) provides that the "solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive...."

Section 163(1)(e) defines a "specification" or "requirement" as "any description of the work to be performed, the service or products to be provided, the necessary qualifications of the offerer, the capacity and capability of the offerer to successfully carry out the proposed contract, or the process for achieving specific results and/or anticipated outcomes or any other requirement necessary to perform the work... Specifications shall be designed to enhance competition, ensuring the commodities or services of any offerer are not given preference except where required by this article."

Section 163(9)(c) provides, "[w]here provided in the solicitation, State agencies may require clarification from offerers for purposes of assuring a full understanding of responsiveness to the solicitation requirements...." It continues, "[w]here provided in the solicitation revisions may be permitted from all offerers determined to be susceptible of being selected for contract award, prior to award."

Analysis and Discussion

First, we recognize that OGS and DTF attempted an onerous task in very short order in an attempt to establish Statewide Debit Card Services. As such, despite our returning this contract unapproved, it is clear on the record before us that the actions taken by OGS and DTF were in good faith and in an effort to serve the best interest of the State. However, there are certain bedrock principles of public bidding that this Office cannot disregard or overlook in its review of this proposed contract award resulting from this procurement.

Second, we recognize that BOA sought a variety of documents from DTF under FOIL that, presumably, BOA would have utilized in framing and supporting the issues identified in its Appeal. DTF denied access to the records requested by BOA. Consistent with prior determinations of this Office, since issues raised in the FOIL process do not directly relate to the procurement process, this Office does not consider FOIL issues as part of its review of bid protests. This Office does, however, as part of our review process review allegations that a protestor might assert, based on documentation in the procurement record, whether or not that documentation was made available to the protestor under FOIL.

Article 11 of the SFL requires that contract awards for services are made to the "responsive and responsible" offerer whose proposal offers the best value to OGS and the State . . ." (emphasis supplied).¹⁰ As defined in the SFL, a "responsive" offer is an "offer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a State agency."¹¹ RFP Section V, Evaluation Process for

¹⁰ SFL section 163(10). Although the RFP does not utilize the term "best value," it is governed by this Article and the Evaluation Process in Section V of the RFP is consistent with a best value procurement.

¹¹ SFL section 163(1)(d).

Module 2 - Debit Cards, expressly provides that "[a] failure to meet a requirement may lead to disqualification of a bidder's proposal."¹² Accordingly, any offerer was on notice that a failure to meet the requirements of the RFP could result in its proposal being eliminated from the competition.

The RFP required that "[c]ontractor must enable at least three free ATM withdrawals and at least three account/balance inquiries per month." (Module 2 Functional Requirement A.3.1.)

Proposals included financial tables that listed the charges and fees for the debit cards that were associated with each card type.¹³ For single load debit cards, J.P.Morgan's proposal, in part, provided for: (1) one free ATM withdrawal anywhere (including Chase and Allpoint ATMs); (2) one free ATM withdrawal within the Chase network; and, (3) one additional free withdrawal within the Chase network for programs with an anticipated average load greater than \$500.¹⁴

Thus, it is apparent that, at the time of J.P.Morgan's submission of its proposal, the proposal was substantively inconsistent with a fundamental requirement of the RFP that users would, in all cases, have three free withdrawals per month; therefore, J.P.Morgan's submission was non-responsive to Functional Requirement A.3.1.¹⁵ To illustrate, in the case of a single load debit card for a program with an anticipated average load of less than \$500, a fund recipient would receive only two ATM withdrawals, one free ATM withdrawal anywhere (including Chase and Allpoint ATMs), and one free withdrawal within the Chase network. Since the RFP required the three free monthly withdrawals in all cases without reference to the anticipated average load, J.P.Morgan's proposal was not responsive.

Based upon our review of the procurement record, it is clear that the three fee-free withdrawals requirement (without reference to the anticipated average load) was a material and fundamental part of the procurement. In reaching this conclusion, we note that: (i) BOA expressly objected to this requirement and requested that it be modified; (ii) DTF and OGS refused to modify the requirement; (iii) based upon the refusal of DTF and OGS to modify the requirement BOA declined to submit a proposal; and, (iv) when Citibank declined to "clarify" its proposal to satisfy this requirement, Citibank was disqualified. Thus, it is clear Functional Requirement A.3.1. was a material requirement.

A procuring entity may waive a technical noncompliance with bid specifications or requirements if the defect is a mere irregularity and it is in the best interest of the procuring entity to do so (Le Cesse Bros Contr. v Town Bd. of Town of Williamson, 62

¹² RFP Pg. 65.

¹³ There were three debit cards listed in the RFP: (i) single load; (ii) reloadable; and (iii) stored value.

¹⁴ The fees for the stored value debit cards as related to this portion of the proposal were the same as the single load debit card.

¹⁵ We note that, literally, the J.P.Morgan proposal did not explicitly state that the enumerated free withdrawals were "per month". For purposes of this analysis, we have assumed that this was the intended substance of its proposal. Obviously, if this was not the case, then the proposal would not have been responsive even for programs with an anticipated average load in excess of \$500.

AD2d 28, affd 46 NY2d 960. Therefore, while a proposal did not have to satisfy each and every specification/requirement listed in the RFP to be considered responsive, the proposal did have to meet, or comply with, each "material or substantial" specification/requirement (id). Where the variance between the offer and the specification is material or substantial the defect may not be waived and the procuring entity must reject the offer so that all bidders may be treated alike and the possibility of fraud, corruption or favoritism is avoided (id). The test of whether a variance is material or substantial is whether it gives the bidder a substantial advantage or benefit not enjoyed by the other bidders (id; See also Matter of Glen Truck Sales & Services v Board of Estimate and Contract of the City of Mount Vernon, 31 Misc 2d 1027.)

In Glen Truck, a bidder had submitted a bid with trucks that were noncompliant with specifications for weight, and the municipality had allowed the bidder to submit additional materials after bid opening, in order to award the contract to that bidder. The court held that "permitting a bidder to add to his bid ... after the bidding is public [allows that bidder] to decide whether to remain in the competition or not, and thus to enjoy an advantage which the other bidders cannot have."¹⁶ Both Citibank and J.P.Morgan enjoyed this advantage. Citibank elected not to remain in the competition and J.P.Morgan did. Just because OGS was fortunate that J.P.Morgan elected to remain in the competition does not change the fact that it was given an impermissible advantage to remain in the competition, or walk away.

Since J.P. Morgan's proposal did not comply with this material requirement of the RFP at the time of the deadline for submission of proposals it was not responsive to the RFP. Furthermore, this defect could not be waived by OGS, and OGS could not, by means of a purported clarification or otherwise, provide J.P. Morgan with an opportunity to cure this defect by revising its bid. J.P.Morgan's confirmation that its proposal offered three fee-free ATM withdrawals constituted an impermissible revision of its proposal after the deadline for the submission of proposals and could not be characterized as a permissible "clarification".¹⁷

This Office reached a similar result in the bid protest filed by Group Health Incorporated with respect to the procurement for the New York State Empire Plan Prescription Drug Program conducted by the New York State Department of Civil Service Employee Benefits Division (SF-20060062). In that procurement, bidders were required to bid a guaranteed discount from average wholesale price for all brand name drugs including

¹⁶ See Also Generally Sinram-Marnis Oil Co., Inc. v. City of New York, 74 N.Y.2d 13 (1989). The cited cases all involve low-cost evaluations pursuant to an Invitation for Bid. We recognize that a state agency conducting a best value procurement may have more flexibility in seeking clarification of technical proposals. However, we believe that, consistent with the central principles discussed in these cases, such flexibility does not permit an offerer to correct a deviation which is, as here, substantively inconsistent with a fundamental requirement of the RFP.

¹⁷ We note that section 163(9) of the SFL does permit agencies to reserve the right to seek revisions from all offerers determined to be susceptible of being selected for contract award. However, in this case, DTF did not reserve this right, and, in any event, since no offerers were responsive, there would be no offerers susceptible of being selected for contract award.

specialty drugs. The selected proposer did not do so, instead offering a range of discounts, by product, for certain specialty drugs. Subsequently, in response to a request for "clarification" from the Department of Civil Service, the selected proposer "confirmed" that its proposal would provide its guaranteed discount for all drugs, including specialty drugs. We determined that since the proposal submitted by the selected proposer did not comply with this material requirement of the RFP at the time of the deadline for the submission of proposals it did not comply with a material requirement of the RFP and was not responsive. Therefore, the Department of Civil Service could not by means of clarification, or otherwise provide the proposer with an opportunity to cure this defect in its proposal.

Conclusion

We find that the proposal submitted by J.P.Morgan was non-responsive to a material requirement of the RFP and should have been rejected by OGS. As a result, we are returning the proposed OGS/J.P.Morgan contract unapproved.

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