

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Protest filed by Knowledge Builders Inc. with respect to the procurement of Information Technology and Analysis Services conducted by the New York State Office of the Attorney General

**Determination
of Protest**

SF-20140496

Contract Numbers -- C103373-C103384

February 27, 2015

The Office of the State Comptroller has completed its review of the above-referenced procurement conducted by the New York State Office of the Attorney General (OAG), for information technology and analysis services in six different categories (collectively, IT Services). We have determined that the grounds advanced by Knowledge Builders Inc. (KBI) are insufficient to merit the overturning of the contract awards made by the OAG and, therefore, we deny the protest. As a result, we are today approving the OAG contract awards for IT Services as set forth in the Purchasing Memorandum dated November 3, 2014.

BACKGROUND

Facts

The OAG issued Request for Proposals #14-002 (RFP) for IT Services on July 18, 2014. Bidders were permitted to submit proposals in any (or all) of six categories of services. Awardees in a particular category would then form a pool of "qualified contractors" that could be eligible for selection in subsequent solicitations in that category of services. Selections among the qualified contractors were to be awarded on the basis of highest combined (financial and technical) score. The OAG received 29 bids, of which two were deemed nonresponsive and one was received after the bid due date. On November 3, 2014, the OAG awarded 12 bidders a total of eight contracts in each of the six categories. KBI submitted proposals for each of the six categories but was not awarded a contract. By email on November 3, 2014, KBI requested a debriefing in accordance with the terms of the RFP. The OAG provided an electronic debriefing on November 5, 2014, which set forth KBI's score for the technical component, the financial component and the KBI's overall score, relative to other bidders. Additionally, the OAG informed KBI that its scores on the technical component, which accounted for 70% of the overall score, "were fairly low (mostly ranking in the bottom half), therefore it caused your overall scores to fall out of the top 8 in all these categories."

By email dated November 7, 2014, KBI continued to challenge the scoring of the technical component of its proposals. KBI claimed that the fact that it is a current OAG vendor should "bolster" its technical score. KBI also claimed that its proposal was more detailed than

the one it submitted in response to the OAG's Request for Proposals #13-006,¹ yet resulted in a lower technical score. In response to KBI's request, the OAG sent KBI a detailed breakdown of the evaluators' scores for KBI's technical component in each of the six categories. By letter dated December 1, 2014, KBI filed a protest of the OAG's contract awards with this Office (Protest) and by letter dated December 19, 2014, the OAG responded to the Protest (Answer). Upon seeking this Office's permission, KBI submitted an email reply (Reply) to the OAG's Answer on February 9, 2015.

Comptroller's Authority and Procedures

Under section 112(2) of the State Finance Law (SFL), with certain limited exceptions, before any contract made for or by a state agency, which exceeds fifty thousand dollars (\$50,000) in amount, becomes effective, it must be approved by the Comptroller.

In carrying out the aforementioned responsibilities prescribed by SFL §112, this Office has issued a Contract Award Protest Procedure that governs the process to be used when an interested party challenges a contract award by a State agency.² This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because this is an initial protest of an agency's contract award, the Protest is governed by section 3 of this Office's procedure for initial protests.³

In the determination of this Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by the OAG in conjunction with this procurement;
2. the correspondence between this Office and the OAG arising out of our review of the proposed OAG contract awards; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. KBI's Protest dated December 1, 2014;
 - b. OAG's Answer to the Protest dated December 19, 2014; and
 - c. KBI's Reply to OAG's Answer dated February 9, 2015.
 - d.

¹ RFP #13-006 was issued for the same IT Services but, after non-approval by this Office, was cancelled by the OAG because of issues with the timely delivery of the proposals. The OAG re-bid the IT Services under RFP #14-002. In a November 7, 2014 email to KBI, the OAG represented that the evaluation process used in RFP #14-002 did not change from that used in RFP #13-006; however, the number of criteria used to evaluate the technical component was reduced from five to four. This reduction caused a change in the maximum number of points allocated to each criterion.

² OSC Guide to Financial Operations, Chapter XI.17.

³ KBI states in the Protest that it is appealing the OAG's protest determination; however, since the OAG did not provide for an agency-level protest procedure in the RFP, this Office considers KBI's Protest to be an initial protest.

ANALYSIS OF BID PROTEST

Protest to this Office

In its Protest, KBI challenges the procurement conducted by the OAG on the following grounds:

1. The Bidder Technical Evaluation Score Sheet (Score Sheet) did not provide a means for assigning the maximum point value of 25 to Technical Component Evaluation Criterion #2, "Past experience in deploying staff resources" (Criterion #2).
2. The Score Sheet does not provide an objective means by which evaluators may assign additional points above the "Meets the criteria" range for Criterion #2 and thus, it "does not enable the evaluator to properly and consistently score any qualifying, thorough, and complete Technical Response."
3. The OAG may have inadvertently reviewed and evaluated KBI's technical proposals from the 2013 solicitation rather than its more complete technical responses submitted in connection with the RFP.

Response to the Protest

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

1. The OAG accidentally sent KBI a draft of the Score Sheet. After acknowledging its error, the OAG sent the correct Score Sheet to KBI, which provided a method for assigning up to 25 points, and stated that all evaluators had used the correct version of the Score Sheet.
2. The evaluators focused on the quality of the proposals for Criterion #2 and considered, among other things, the relevancy of the submissions to the specific bid category and to current OAG projects when assigning additional points.
3. The OAG did not give the evaluators the technical proposals from the previous solicitation so they could not have mistakenly reviewed them. Also, the number of evaluation criteria in this RFP differed from that in the prior solicitation; therefore, it would be unlikely that the technical responses for this RFP could be confused with those of the 2013 solicitation.

Reply to OAG's Answer

In its Reply, KBI challenges the Answer provided by the OAG on the following grounds:

1. As described by the OAG, the criteria used to assign additional points for Criterion #2 are largely subjective and the Score Sheet still does not explain how evaluators could determine that a proposal exceeded the "Meets the criteria" range.

DISCUSSION

Since this is a procurement for services, it is governed by the provisions of SFL §163, which generally provide for a formal competitive process by which an award is made to a responsive and responsible bidder on the basis of "best value."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 as prescribed in a solicitation for commodities or services by a state agency."⁶ The OAG awarded eight contracts in each of six categories of services. SFL §163(10)(c) permits a State agency to make multiple awards where "the basis for the selection among multiple contracts at the time of purchase shall be the most practical and economical alternative and shall be in the best interests of the state."

In the Protest, KBI raises concerns regarding the Score Sheet used by evaluators and the assignment of points for each of its technical proposals. Specifically, with respect to Criterion #2, KBI argues that an evaluator is unable to assign the maximum point value using the OAG's scoring instrument and that the Score Sheet does not describe how additional points are assigned above the "Meets the criteria" range. KBI also questions whether the OAG actually reviewed KBI's proposals submitted in response to the RFP. We separately address each of KBI's arguments below.

1. Score Sheets Used by Evaluators

KBI claims the Score Sheet does not provide for the assignment of up to 25 points for Criterion #2, notwithstanding that this was the stated maximum point value. The OAG acknowledged that, as part of its debriefing of KBI, it accidentally sent KBI a draft score sheet which did not contain an option for awarding the correct maximum point value for Criterion #2. The OAG subsequently sent KBI the Score Sheet used by the evaluators which did permit evaluators to assign a maximum of 25 points. The OAG stated in its Answer that the evaluators did not see or utilize the incorrect draft score sheet.

The Score Sheets actually used by the evaluators form part of the procurement record for the RFP that was submitted to this Office. We reviewed such Score Sheets and confirmed that the Score Sheets used provide for the correct allocation of up to 25 points for Criterion #2. Thus, KBI's first argument has no merit.

2. Assigning additional points for two highest rating options for Criterion #2

KBI claims that the Score Sheet "does not enable the evaluator to properly and consistently score any qualifying, thorough, and complete Technical Response." More

⁴ SFL §163(4)(d), (10).

⁵ SFL §163(1)(j).

⁶ SFL §163(1)(d).

specifically, KBI questions the methodology used in assigning additional points above the “Meets the criteria” range for Criterion #2.

Criterion #2 consists of two components worth a maximum of 25 points, (i) a compilation of prior IT placements and (ii) references (*see* RFP, Part 6). Parts 4.5(1)(D) of the RFP sets forth the minimum qualifications for Criterion #2 and requires bidders to submit “three (3) distinctly different project/client references from three (3) distinctly different project/client sites/locations for each category being submitted for each project” and “a minimum of twenty (20) IT resources (placements) actually put into place per category being bid within the last three years.” The RFP provided that although a bidder may submit more than the minimum number of placements, doing so will not result in a more favorable bid (*see* RFP, Part 4.5[1][D] and Purchasing Memorandum dated July 31, 2014, Question 46). Therefore, a bidder submitting the required minimum number of references and placements should be deemed responsive and should fall within the “Meets the criteria” scoring band.⁷ KBI argues, however, that neither the RFP nor the Score Sheet provide guidance to evaluators on how to determine that responses to Criterion #2 exceed the minimum qualifications and how to award additional points. In the Appeal, KBI does not question the methodology for evaluating the reference component, so we turn our focus to the OAG’s scoring of the placement component of Criterion #2.

Part 4.5(1)(D) of the RFP sets forth the information to be provided for each of the twenty placements. In the Answer, the OAG indicated that “[o]ur evaluators considered and potentially awarded additional points as applicable to: presentation quality of the submissions (easy to read, alphabetical order, etc.), subject matter expertise of the placements, relevancy of the submissions to the specific bid category, variety of the placements in the subject areas of expertise and how well they corresponded to the bid category, as well as relevance to similar projects ongoing at the OAG. It was an emphasis on quality not quantity that earned an ‘exceeding the criteria’ score.”

KBI claims that the only qualitative measurement included in the evaluation criteria described in the OAG’s Answer is whether or not the submissions were in alphabetical order.⁸ KBI argues that the Score Sheet does not provide further direction to evaluators as to how to objectively assign additional points for the other factors that OAG asserted in its Answer formed the basis for awarding additional points (to wit, “subject matter expertise of the placements, relevancy of the submissions to the specific bid category, variety of the placements in the subject areas of expertise and how well they corresponded to the bid category, as well as relevance to similar projects ongoing at the OAG.”)

SFL §163 requires that the evaluation criteria and methodology for evaluating proposals must be complete and finalized prior to the initial receipt of proposals. More specifically, SFL §163(7) provides that “[w]here the basis for award is the best value offer, the state agency shall

⁷ The “Meets the criteria” scoring band for Criterion #2 ranges from 11-15 points. All of KBI’s responses to Criterion #2 received a score from each evaluator at least within that range. Furthermore, at least half of the evaluators scored KBI’s responses to Criterion #2 above the “Meets the criteria” scoring band in each category.

⁸ KBI claims in the Protest that neither the RFP nor the Score Sheet included directions that “submissions be in alphabetical order.” We note, however, that Part 4.5(1)(D) of the RFP provides that the information submitted for placements should include “resource (placement) name (**listed alphabetically by last name**), category, company/agency name, their contact information & nature of the project” (emphasis supplied).

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.” Furthermore, SFL §163(9)(b) provides that the procuring agency’s “solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted.” This provision also requires that “[w]here appropriate, the solicitation shall identify the relative importance and/or weight of cost and the overall technical criterion to be considered by a state agency in its determination of best value.” *Id.*

The state procurement council has issued the New York State Procurement Guidelines (Guidelines) to give additional guidance on the State procurement process, including conducting the technical evaluation. Specifically, the Guidelines provide that “[t]he technical evaluation measures the extent by which a proposal will meet the agency’s needs and relies upon the evaluators’ expertise in assessing the strengths and weaknesses of each response” (Guidelines, Section V.H). Furthermore, while the Guidelines delineate the general process to be used in conducting the technical evaluation (i.e., the development of criteria, the assignment of point values to each criteria, and the proper use of an evaluation instrument tool), the Guidelines also generally recognize that “[t]he nature, scope, and complexity of evaluation methods vary widely.” *Id.*

In this instance, the RFP set forth the minimum requirements that needed to be satisfied for proposals to be considered responsive, and specified the criteria that the OAG would evaluate and each criteria’s relative weight in the overall technical evaluation score (*see* RFP, generally and, in particular, Parts 4.5 and 6). The RFP further provides that, for the technical component, “[s]coring will be based on well-written and very detailed responses, which would basically leave the OAG with few or no questions about the bidder’s capabilities to fulfill the OAG’s needs” (*see* RFP, Part 6). Contrary to KBI’s argument, further specifics regarding the OAG’s evaluation method and selection process were not required by law to be disclosed in the RFP or the Score Sheet.⁹ While the OAG could have chosen to provide more detailed evaluation instructions, we are satisfied that the OAG complied with the legal requirements of SFL §163(9)(b).

Additionally, after reviewing the procurement record, we are satisfied that the OAG did in fact develop its evaluation and selection process prior to the initial receipt of bids on August 28, 2014 (*see* SFL §163[7]). Finally, based on the guidance of the state procurement council noted above, we are satisfied that the OAG’s evaluation methodology for Criterion #2 provided its technical evaluation team with sufficient instruction to properly apply the predetermined evaluation criteria to the bidders’ proposals.

⁹ The Appellate Division, Third Department, stated that “State Finance Law §163(9)(b) does not require particularization, but only generalization.” *Transactive Corporation v. New York State Department of Social Services*, 236 A.D.2d 48 (3d Dept. 1997, *aff’d on other grnds*, 92 N.Y.2d 579 [1998]).

3. Possibility that KBI's Technical Responses to this RFP were not evaluated

KBI notes that the individual evaluator scores per category for each of its technical proposals are similar to the scoring breakdowns KBI received for the 2013 procurement for these same services. In the Protest, KBI raises the possibility that the OAG mistakenly re-evaluated the proposals submitted in 2013. The OAG represented in the Answer that, although the evaluators for both procurements were the same, the proposals submitted in response to the 2014 RFP were evaluated. In fact, the evaluators were not permitted to see the prior technical proposals or the previous scores, and "were required to start from scratch with every single bidder." The OAG also confirmed that none of the bidders that submitted proposals for the 2013 procurement received the same scores on the proposals submitted in connection with this RFP.

The OAG also notes that the Score Sheet for the RFP contains fewer criteria than the previous scoring instrument (four rather than five). The number of components in each evaluator's scoring breakdown (provided to KBI during the debriefing) exactly matches the number of criteria contained in the Score Sheet, further supporting the OAG's position that review of the wrong proposals could not have occurred. Our review of the procurement record, leads us to conclude that KBI's claim is without merit.

CONCLUSION

For the reasons outlined above, we have determined that the issues raised in the Protest are not of sufficient merit to overturn the contract awards by the OAG. As a result, the Protest is denied and we are today approving the OAG contract awards for IT Services as set forth in the Purchasing Memorandum dated November 3, 2014.