STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Transportation Resource Associates, Inc., with respect to the procurement of technical assistance, administrative services and oversight activities for the New York State Rail Fixed Guideway System Safety and Security Oversight Program, conducted by the New York State Department of Transportation.

Contract Number – C031486

Determination of Appeal

SF–20170179

September 14, 2017

The Office of the State Comptroller (OSC) has reviewed the above-referenced procurement conducted by the New York State Department of Transportation (DOT) for technical assistance, administrative services and oversight activities for the New York State Rail Fixed Guideway System Safety and Security Oversight Program (Program). We have determined the grounds advanced by Transportation Resource Associates, Inc. (TRA) are sufficient to merit overturning the contract award made by DOT and, therefore, we uphold the Appeal. As a result, we are today disapproving the DOT contract with Vital Assurance, Ltd (Vital Assurance).

BACKGROUND

Facts

On October 28, 2016, DOT advertised a Request for Proposals (RFP) in the New York State Contract Reporter. The RFP sought responsive proposals to competitively select one qualified and responsible consultant team to provide the services (Services) related to the Program. The Program provides safety oversight for the heavy rail systems operated by the MTA New York City Transit Authority (NYCTA), and the light rail system operated by the Niagara Frontier Transportation Authority (NFTA). The Program is subject to the regulations issued by the Federal Transit Administration (FTA) in 49 CFR Part 659 and all new requirements for FTA's Safety and Security Oversight program in the current surface transportation authorization, Moving Ahead for Progress in the 21st Century (MAP-21), in 49 USC Section 5329 (RFP § 1.1).

The RFP stated that DOT would select an offeror based upon the "best value" method. Scoring of each submission was based on a normalized 100 point scale. Out of that 100 possible points, the technical component received a maximum of 70 points (up to 60 points for the written submission and up to 10 points for the technical interview) and the cost component received a maximum of 30 points (RFP § 6.1.1).

Two offerors submitted proposals and made technical presentations to DOT personnel: TRA, the protestor, and Vital Assurance, the designated awardee. On February 8, 2017, both

offerors were notified of DOT's decision as to the contract award. On February 9, 2017, TRA requested a debriefing, which was conducted by telephone with DOT on February 13, 2017.

TRA submitted a formal protest to DOT, dated February 23, 2017, regarding the selection of Vital Assurance as the awardee (Protest). DOT denied the Protest by determination dated April 14, 2017 (DOT Determination). TRA then appealed the DOT Determination by letter dated April 21, 2017 (DOT Appeal). By determination dated May 26, 2017, DOT denied the DOT Appeal (DOT Appeal Determination).[1] TRA then appealed to OSC by letter dated June 14, 2017 (OSC Appeal). DOT responded with its answer dated June 22, 2017 (DOT 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 the aforementioned responsibilities prescribed by SFL § 112, OSC has promulgated 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 appeal of an agency protest determination, the OSC Appeal is governed by section 24.5 of Title 2 of the Codes, Rules and Regulations of the State of New York.

In the determination of the OSC Appeal, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by DOT with the DOT/Vital Assurance contract;

2. The correspondence between this Office and DOT arising out of our review of the DOT/Vital Assurance contract; and

3. The following correspondence/submissions from the parties (including the attachments thereto):

    a. The Protest;
    b. The DOT Determination;
    c. The DOT Appeal;
    d. The DOT Appeal Determination;
    e. The OSC Appeal; and
    f. The DOT Answer.

Applicable Statutes

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[1] TRA submitted an affidavit of Joshua Wolson, attesting to the fact that TRA received the DOT Appeal Determination on May 31, 2017 (OSC Appeal, at Exhibit 5). Thus, the appeal to OSC is deemed timely (*see* 2 NYCRR § 24.5).

[2] 2 NYCRR Part 24.

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 offeror.[3] Best value is defined as "the basis for awarding contracts for services to the offeror which optimizes quality, cost and efficiency, among responsive and responsible offerors."[4] A "responsive" offeror is an "offeror meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."[5]

SFL § 163(7) provides that "[w]here the basis for award is the best value offer, the state agency shall 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."

SFL § 163(9)(b) provides that the "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."

SFL § 160(5) provides that "costs" as used in Article 11 "shall be quantifiable and may include, without limitation, the price of the given good or service being purchased; the administrative, training, storage, maintenance or other overhead associated with a given good or service; the value of warranties, delivery schedules, financing costs and foregone opportunity costs associated with a given good or service; and the life span and associated life cycle costs of the given good or service being purchased. Life cycle costs may include, but shall not be limited to, costs or savings associated with construction, energy use, maintenance, operation, and salvage or disposal."

ANALYSIS OF THE PROTEST

Appeal to this Office

In the OSC Appeal, TRA challenges the procurement conducted by DOT on the following grounds:

1. Vital Assurance's proposal included two subcontractors who had "disabling" conflicts of interest due to existing contracts with the FTA's Office of Transit Safety and Oversight, the Metropolitan Transportation Authority and the New York City Transit Authority. TRA posits that those alleged conflicts in the original Vital Assurance proposal rendered it non-responsive. TRA argues that DOT's decision to permit Vital Assurance to substitute new subcontractors "undermines" the competitive process.

2. DOT failed to design the RFP so as to require and score evaluation of unit costs, as well as total cost, and therefore the RFP did not achieve best value.

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[3] SFL § 163(10).
[4] SFL § 163(1)(j).
[5] SFL § 163(1)(d).

3. DOT erred in its initial, technical evaluation of TRA's proposal in that DOT concluded that TRA lacked "heavy rail" experience.

DOT's Answer to the Appeal

In its Answer, DOT relies on its agency-level Protest Determination and Appeal Determination, and contends the OSC Appeal should be rejected on the following grounds:

1. The removal of the two potentially conflicted subcontractors from Vital Assurance's proposal was within DOT's discretion to manage potential conflicts of interest.

2. DOT is not required to evaluate cost proposals on any basis other than that set forth in the RFP. DOT believes total cost for each proposal was the most effective criteria by which to evaluate and score cost and the agency designed the RFP accordingly.

3. TRA's original submission failed to completely describe its heavy rail experience and the Technical Evaluation Committee (TEC) based its evaluation on the four corners of that document. The subsequent technical interview, during which TRA clarified its level of heavy rail experience, resulted in a proportional upward revision of TRA's technical score which fully reflected its level of experience.

DISCUSSION

Conflicts of Interest

The initial proposal submitted by Vital Assurance identified six subcontractors. TRA claims two subcontractors included in Vital Assurance's proposal had "disabling" conflicts of interest due to existing contracts they held with the FTA and State public transportation entities, including the Metropolitan Transportation Authority (MTA) and the NYCTA, and these conflicts rendered Vital Assurance's proposal non-responsive (OSC Appeal, at pgs. 12, 16-17). Those subcontractors were subsequently withdrawn by Vital Assurance and their portion of the Services was distributed among the remaining subcontractors. Although TRA tacitly acknowledges the remaining subcontractors do not suffer from any actual or apparent conflict (OSC Appeal, at pgs. 12-13, 17, 19), TRA claims that DOT erred in allowing Vital Assurance to make a post-award substitution of these members of its proposed consultant team. TRA argues this substitution provided a competitive advantage to Vital Assurance, because Vital Assurance was permitted to negotiate with the "new" subcontractors after the award had been made in its favor. TRA claims this negotiation gave Vital Assurance a "substantial advantage not enjoyed by other bidders" in that Vital Assurance negotiated with the substituted subcontractors from a position of strength and certainty, which presumably resulted in more favorable pricing to Vital Assurance (*Id.*).

DOT counters that an incurable conflict of interest was not present at the time of tentative contract award, and the existing applicable federal law allows the state agency to define what constitutes a conflict of interest (DOT Answer, at pg. 2). DOT also asserts that "the criteria for non-responsiveness is set forth in section 1.3 of the RFP, and is limited to proposals that fail to

provide all of the following by the RFP deadline: [Technical and Management submissions; Cost and Administrative submissions; Procurement Lobbying Law Compliance Forms; Meeting the DBE subcontracting goal or submission of acceptable good faith effort documentation]" (DOT Answer, at pg. 2).

a. Potential or Actual Conflict of Interest at Time of Award

Turning first to whether a potential or actual conflict of interest existed for these subcontractors at the time of Vital Assurance's proposal, while DOT does not concede this point, in the DOT Determination, DOT states "*Per NYSDOT's direction*, Vital Assurance has removed the two potentially conflicted subcontractors and replaced both with in-kind substitutions ..." (DOT Determination, at pg. 1 [emphasis added]). To support its contention that a conflict was present, TRA points to the newly enacted federal statute (MAP-21) and the regulations promulgated thereunder (49 CFR Part 674) as imposing new and far more stringent restrictions on the independence of contractors participating in state fixed rail safety oversight programs and cites current contracts between the subcontractors at issue and the FTA, MTA and/or the NYCTA as clear evidence that a conflict of interest existed at the time Vital Assurance submitted its proposal (OSC Appeal, at pgs. 13-15, 20).

The federal regulations, which must be fully implemented by all states before April 2019, provide in pertinent part that the state must ensure:

> The SSOA [State Safety Oversight Agency] is financially and legally independent from any public transportation agency the SSOA is obliged to oversee.
>
> 49 CFR § 674.13(a)(1).

Moreover, with respect to conflicts of interest, the new regulations provide:

> A contractor may not provide services to both an SSOA [State Safety Oversight Agency, here, DOT] and a rail fixed guideway public transportation system under the oversight of that SSOA, unless the [Federal Transit] Administrator has issued a waiver of this prohibition.
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> 49 CFR § 674.41(c)

Notably, as part of the Services, the MTA and NYCTA would be public rail transportation providers that the subcontractors would oversee.[6]

Initially, we disagree with DOT's position that the only basis for finding a proposal non-responsive was an offeror's failure to submit the documentation listed in Section 1.3 of the RFP (entitled "Minimum RFP Responsiveness Requirements"). Under SFL, a "responsive" offeror is an "offeror meeting the minimum specifications or requirements described in a solicitation for

[6] The only contracts that are verified by documentation in the procurement record are contracts between each of the subcontractors at issue and the NYCTA.

commodities or services by a state agency" (SFL § 163[1][d]). Therefore, while an offeror's failure to provide the documents listed in Section 1.3 of the RFP would also provide a basis for finding the proposal non-responsive, likewise any proposal that failed to satisfy another minimum specification or requirement of the RFP would be deemed non-responsive.

Based on our review of the procurement record, it is clear that one of the central purposes of the procurement was to bring the State's railway safety oversight program into compliance with the new federal requirements, including MAP-21 and the regulations promulgated thereunder in 49 CFR Part 674. Specifically, the RFP provides "the designated Consultant will assist [DOT] to continue to meet SSO requirements under Part 659 and to lead development of a revised State Safety Program Standard (SSPS) and State regulations that meet the enhanced requirements for State Safety Oversight under MAP-21 (RFP, at §1.1). Further, the proposed contract awarded under DOT's procurement effort was for an initial term of three years, with two optional one-year extensions (RFP § 3.2.4). This intended contract term goes well beyond the mandatory implementation date of the new MAP-21 requirements, which is April 2019.

It is equally clear that the contractual relationships between the two subcontractors at issue and, at a minimum, the NYCTA, which were affirmatively disclosed in Vital Assurance's proposal, would constitute a conflict of interest under the MAP-21 regulations. Even assuming that DOT is correct in its position that current regulations would not prevent these subcontractors from participating in the contract, the April 2019 changeover to the requirements of MAP-21 would fall squarely within the initial term of the contract (as well as any of the contemplated extensions thereto). Accordingly, it is our view that Vital Assurance's proposal relied on two subcontractors with actual or potential conflicts of interest that would have rendered such subcontractors incapable of performing the Services during the term of the contract. This, we believe, rendered Vital Assurance's proposal non-responsive to the requirements of the RFP.

b. Post-Award Changes to Vital Assurance's Proposal

Having determined that an actual or potential conflict of interest was present in Vital Assurance's proposal, we now address DOT's decision to permit Vital Assurance to cure those actual or potential conflicts of interest by removing the subcontractors. TRA argues this substitution constituted a material change to the Vital Assurance proposal and gave Vital Assurance a competitive advantage in the procurement process (OSC Appeal, at pgs. 13, 19). DOT maintains its position that an incurable conflict of interest was not present at the time of tentative contract award, and DOT's "fulfillment of VA's request for a subcontractor replacement was discretionary" and consistent with the terms of the RFP (DOT Answer, at pg. 2).

The competitive procurement process is designed with sole reference to the public interest, not to help or enrich corporate bidders (*see e.g. Conduit & Foundation Corp. v Metropolitan Transportation Authority*, 66 NY2d 144, 148 [1985]). A procuring entity may waive technical non-compliance with bid specifications or requirements if the defect is a mere irregularity and it is in the best interest of the procuring agency to do so (*see* OSC Bid Protest Determination SF20100328; *Le Cesse Bros. Contracting, Inc. v. Town Board of the Town of Williamson*, 62 AD2d 28 [1978]). However, the procuring entity may not waive a material or substantial requirement, and a proposal would have to satisfy each and every material specification to be considered

responsive (*id.*). A variance is material if it would impair the interests of the contracting public entity *or* give one of the bidders a substantial advantage or benefit not enjoyed by the other bidders (*see id.*; *Hungerford & Terry, Inc. v Suffolk County Water Auth.*, 12 AD3d 675 [2004]; *Matter of Dan's Hauling & Demo, Inc. v City of Troy*, 31 Misc. 3d 1220(A) [Sup Ct, Rensselaer County, 2011]).

As an initial matter, we look to the RFP itself to determine whether the existence of these conflicts of interest was material to performance of the Services under the contract. As stated above, the RFP explicitly states that the purpose of the procurement is to retain a contractor/consultant in order to create a passenger rail system safety oversight program which will enable DOT to comply with both current regulations and the enhanced requirements of MAP-21 (RFP § 1.1). The RFP goes on to state that the Program shall be in accordance with the regulations issued by the FTA and all new requirements as they pertain to the "MTA New York City Transit (NYCT) and the light rail system operated by the Niagara Frontier Transportation Authority (NFTA)" (RFP § 1.1; *see also* RFP § 3.1). The RFP also required that the offeror and proposed subcontractors submit a list of past and current oversight contracts and a Vendor Assurance of No Conflict of Interest, as part of its Cost and Administrative Submittal (RFP, Table 2). The two subcontractors at issue complied by disclosing their NYCTA contracts. The RFP also appended a copy of 49 CFR Part 674 as Attachment 21 thereto, thereby further evidencing its relevance to the procurement. Finally, the RFP contained a proposed contract that included an article directly addressing "Conflicts of Interest" (RFP, Attachment 1 [Draft Contract], Article 35) whereby the Contractor/Consultant expressly represents that "there is and shall be no actual or potential conflict of interest that could prevent the Contractor's (Consultant's) satisfactory or ethical performance of duties required to be performed pursuant to the terms of this AGREEMENT."[7] Although the RFP did not expressly state that a conflict of interest under the applicable federal statute would render a proposal nonresponsive, we believe that such a conclusion goes without saying. Moreover, the fact that all proposed consultants were required to formally disclose in writing potential and actual conflicts of interest prior to the evaluation shows this was an important consideration in determining a proposed contract awardee.

Next, the question of materiality was the subject of the court's analysis in the *Application of Glen Truck Sales & Service, Inc.* 31 Misc. 2d 1027 (Sup Ct Westchester County 1961). In *Glen Truck,* a bidder had submitted a bid proposing the use of trucks that were noncompliant with specifications for weight. The municipality allowed the bidder to submit additional materials after bid opening, in order to award the contract to that bidder. In denying the municipality's motion for summary judgment, the Court held that permitting a bidder to add to his bid after bid opening allows that bidder to decide whether to remain in the competition or withdraw, and thus to enjoy an advantage the other bidders do not have. The Court held the following standard to apply: "The test of whether a variance is material is whether it gives a bidder a substantial advantage or benefit not enjoyed by other bidders" (*id.* at 1030).

Vital Assurance enjoyed such an advantage in that it was initially able to formulate its proposal using conflicted subcontractors that TRA purportedly elected not to pursue to avoid these

[7] While it appears that DOT removed Article 35 from the final contract that was submitted to our Office for approval, the draft contract that was appended to the RFP that TRA and Vital Assurance bid on contained this language.

conflicts (OSC Appeal, at pg. 12). Then, DOT permitted Vital Assurance the opportunity to correct that flaw in its proposal or decide not to correct it thereby effectively withdrawing from the procurement. Additionally, Vital Assurance was able to negotiate the cost of a substantial percentage (13.87%) of the Services with the non-conflicted subcontractors after it had been awarded the contract and knew for certain what its expenses and margins would be. It was in a position to promise that the work would materialize, rather than offering it only as a possibility, thus negotiating from a "more favorable position" than its competitors. Vital Assurance should not have been permitted to maintain the contract award from a position of relative advantage to its competitor (*see e.g. Matter of Tony's Barge Service, Inc. v. Town Board of Town of Brookhaven*, 210 AD2d 234, 235 [1994] ["a municipality may not allow a bidder to comply with specifications after bids have been submitted ... Were it otherwise, legitimate bidders who might have been willing to reduce their bids had they known that the specifications of the job would be relaxed, would be unfairly deprived of the opportunity to do so."]; *Gemstar Construction Corp v. County of Nassau, Dept. of Public Works, et al*, 2010 Slip Op 323114[u] [Sup Ct Nassau County 2010] [the successful bidder was "inappropriately permitted to correct its bid after opening and thereby gained an unfair competitive advantage"]; *Le Cesse Bros. Contracting, Inc. v. Town Board of the Town of Williamson*, 62 AD2d at 32, *supra* ["the greater latitude enjoyed by (the awardee) ... put it in a far more favorable position than its competitors"]).

Based on the foregoing, it is our determination that Vital Assurance's proposal, which relied on subcontractors legally incapable of performing the Services during the term of the contract, was non-responsive to the RFP and should have received no further consideration. Furthermore, permitting Vital Assurance to substitute different subcontractors to provide a significant portion of the Services, after the award and during the pendency of TRA's agency-level Protest, provided Vital Assurance a competitive advantage that goes beyond mere contract negotiation and, instead, constitutes a material change to Vital Assurance's proposal.

Having concluded that the material post-award changes to Vital Assurance's proposal were not proper, the DOT award to Vital Assurance cannot stand. Therefore, while it is not necessary to address the other grounds raised in the OSC Appeal, we offer the following guidance on those issues.

Cost Evaluation

TRA has challenged the RFP and evaluation of cost submissions on the ground that only total cost was scored, and that unit costs for various components of the cost proposal should have been evaluated and scored separately. TRA argues that the qualifications and breakdown of the proposed personnel and the level of effort proposed render a total cost approach unfair and insufficient to ensure best value (Protest, at pg. 13; OSC Appeal, at pgs. 21-22).

DOT responds to TRA's challenge by pointing to the detailed, comprehensive nature of the cost proposal section of the RFP that expressly sets forth "overall lowest cost" as the cost evaluation methodology. DOT also maintains that the State Finance Law does not require that it "ascribe relative weights to costs based upon the agency's expectations of relative significance...." (DOT Answer, at pg. 2).

SFL 163(9)(b) states "The solicitation . . . shall describe and disclose the general manner in which the evaluation and selection shall be conducted. Where 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" (emphasis added). Interpreting this requirement, the Court in *Transactive Corp. v New York State Dept. of Social Services*, 236 AD2d 48 (1997), *aff'd* 92 NY2d 579 (1998), held that "State Finance Law § 163 (9)(b) does not require particularization, but only generalization." In *Transactive*, the Court determined the RFP complied with Section 169(9)(b) "since it set forth the general evaluation criteria and the weight afforded to each [and] adequately advised thee bidders as to the weight afforded to [cost]" (*id.* internal citations omitted).[8]

The RFP in the present matter contained a highly detailed set of instructions to offerors that requested that costs be presented separately as salary, non-salary, administrative, overhead and total budget (RFP § 5.2.1). These costs were to be further broken down into subsets that accounted for differences between the relative costs of different personnel and other variables. The RFP also contained a formula by which offerors were to calculate costs based upon the guidelines provided, in order to reach the "overall lowest cost" to incorporate into the best value determination (RFP § 5.2.1). The RFP contained a detailed spreadsheet, or "Cost Proposal Worksheet", wherein each offeror was required to detail the complete breakdown of all proposed salaries for the prime and all subcontractors, including overhead and fees, to arrive at a "fully loaded rate" (RFP, Attachment 16). In our view, the RFP described, in detail, the manner in which the cost evaluation would be conducted and identified the relative importance of cost to the total proposal and, therefore, satisfied the requirements of SFL §163(9)(b).

Technical Evaluation

TRA's argument that DOT failed to properly evaluate and score its technical proposal is underpinned by the contention that DOT did not adequately credit TRA's heavy rail experience. TRA further complains that DOT's subsequent upward revision of its technical score was insufficient to correct that error (OSC Appeal, at pgs. 22-23). DOT responds that it properly scored TRA's initial technical submission based on the information provided therein and, moreover, any lack of understanding on the part of DOT with respect to TRA's heavy rail experience was fully ameliorated by the information gleaned during the technical interview and resultant upward revision of TRA's technical score (DOT Answer, at pg. 3). DOT also points out that the raw scores awarded to each offeror were not perfected until evaluation and scoring of all technical information, including that which flowed from the technical interview, was complete (*id.*).

TRA was awarded a near perfect technical score following its technical interview (69.76 out of 70). TRA proposed a higher cost than Vital Assurance and the award ultimately turned on that cost differentiation. Furthermore, there is no evidence to support the contention that improper scoring occurred, or that any negligible change in TRA's raw technical score would have affected the outcome.

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[8] *See also* OSC Bid Protest SF20150291.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are of sufficient merit to overturn the contract award by DOT. As a result, the Appeal is upheld and we are today disapproving the DOT/Vital Assurance contract for the Services.