

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Total Control Training, Inc., with respect to the procurement of an administrator for the New York State Motorcycle Safety Program conducted by the New York State Department of Motor Vehicles.

**Determination
of Bid Protest**

SF-20180263

Contract Number – C000893

June 20, 2019

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Motor Vehicles (DMV) for an administrator of the New York State Motorcycle Safety Program (Program). We have determined the grounds advanced by Total Control Training, Inc. (TC) are insufficient to merit overturning the contract award made by DMV and, therefore, we deny the Protest. As a result, we are today approving the DMV contract with the Motorcycle Safety Foundation (MSF) for administrator of the Program.

BACKGROUND

Facts

New York Vehicle and Traffic Law § 410-a requires DMV to establish and administer the Program, consisting of motorcycle rider training courses, motorcycle course instructor training, program promotion and promotion of public awareness. On June 25, 2018, DMV issued Request for Proposals for Motorcycle Safety Program (RFP) seeking a motorcycle riding training coordinating organization to administer the Program (*see* RFP, at Section 1-1). The RFP provided for the selection of an offeror based on, among other things, “(1) the most favorable financial advantage for the state; (2) the greatest utility to the motorcyclist; (3) the comprehensiveness of the program and effectiveness of the provider; and (4) compatibility with existing rider education programs” (RFP, at Section 1-2).

The RFP provided that an offeror’s proposal would be scored on the basis of Cost (20%), as well as a review of three technical components, Administration (25%), Program (50%), and Diversity (5%) (*see* RFP, at Section 4-4). The Administrative and Program components consist of mandatory requirements, evaluated on a pass-fail basis, as well as scored criteria (*Id.*). The Diversity component consists of a questionnaire relating to an offeror’s diversity practices and is also scored (*see* RFP, at Section 4-4 and Appendix J). For the Cost component, the RFP requires offerors to submit an all-inclusive price-per-student fee based on DMV’s forecasted number of clients over the five-year contract term up to a maximum total contract amount of \$8 million (*see* RFP, at Section 4-2). The cost proposal with the lowest total cost would receive the full number of available points and other cost proposals with higher costs would receive proportionately

lower cost scores (*see* RFP, at Section 4-5). The cost score would be added to the scores for the other three components of an offeror's technical proposal and the offeror receiving the highest combined score would be awarded the contract (*see* RFP, at Sections 4-4 and 4-5).

DMV received three proposals prior to the proposal due date of September 7, 2018, one from TC and two from MSF.¹ DMV awarded the contract for administrator of the Program to MSF, the offeror submitting the proposal receiving the highest combined score.²

TC requested a debriefing on October 30, 2018, and DMV provided the debriefing on November 26, 2018. On December 2, 2018, TC filed a protest with this Office (Protest). On December 11, 2018, MSF responded to the Protest (MSF Answer) and on May 7, 2019, DMV responded to the Protest (DMV Answer). On May 13, 2019, TC replied to the Answers of DMV and MSF (TC Reply).

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.³ 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.⁴

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DMV with the DMV/MSF contract;
2. the correspondence between this Office and DMV arising out of our review of the proposed DMV/MSF contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):

¹ The RFP permitted offerors to propose alternate solutions, however, each proposal was required to fully conform to the requirements of the RFP (*see* RFP, at Section 1-9). MSF submitted two separate proposals, Proposal Number One and Proposal Number Two.

² MSF's Proposal Number Two received the highest combined score.

³ 2 NYCRR Part 24.

⁴ MSF claims TC improperly filed an initial protest with this Office instead of complying with the protest procedure set forth in the RFP (*see* MSF Answer, at pg. 2). However, the RFP clearly requires initial protests of the contract award be made to OSC and provides bidders detailed instructions as to the filing of such protests with this Office (*see* RFP, at Section 1-18).

- a. TC's Protest dated December 2, 2018;
- b. MSF's Answer to the Protest dated December 11, 2018;
- c. DMV's Answer to the Protest dated May 7, 2019; and
- d. TC's Reply to the Answers of DMV and MSF dated May 13, 2019.⁵

Applicable Statutes

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 offerer.⁶ 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."⁷ A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."⁸

SFL § 163(9)(b) requires that the solicitation issued by the contacting agency prescribe the minimum specifications or requirements that must be met in order to be considered responsive and describe and disclose the general manner in which the evaluation and selection shall be conducted. SFL § 163(7) requires the contracting agency to 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."

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, TC challenges the procurement conducted by DMV on the following grounds:

1. DMV did not make a best value award as required by the RFP and SFL § 163, but instead awarded the contract on the basis of price alone. Furthermore, this change in method of award represents an impermissible material variance in the RFP's requirements.

⁵ While DMV submitted additional correspondence dated May 29, 2019, to this Office, this submission was outside the scope of documentation permitted as of right under 2 NYCRR Part 24. Therefore, while considered, that correspondence is not referenced or formally addressed in this Determination. In addition, TC has submitted requests under the Freedom of Information Law (Public Officers Law Article 6, "FOIL") to DMV and this Office seeking information relating to the procurement. In the Protest, TC requests the ability to submit supplemental material which may be later discovered through such efforts (*see* Protest, at pg. 6). Consistent with prior bid protest determinations and the long standing policy of this Office, issues related to an 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 bid protests. Furthermore, in making this Determination, we have reviewed the entire procurement record which includes any documentation related to the procurement that would have been within the scope of TC's FOIL requests.

⁶ SFL § 163(10).

⁷ SFL § 163(1)(j).

⁸ SFL § 163(1)(d).

2. Since DMV had already chosen MSF as the winning vendor on the basis of price, DMV failed to consider TC's reference as required by the RFP, and therefore failed to completely evaluate TC's proposal.
3. DMV failed to conduct a reasonable inquiry into TC's claim that MSF is illegally using TC's intellectual property in violation of SFL and against the best interests of New York State.
4. MSF is a conflicted and non-responsible bidder because (i) MSF's relationship with the Motorcycle Industry Council, the national motorcycle industry trade organization, creates a conflict of interest with MSF's ability to properly perform under the contract, (ii) MSF is self-insured which violates the RFP's insurance requirements, (iii) MSF is selling insurance to site sponsors without a valid New York license and profiting thereby, (iv) MSF colluded with DMV, before and during the current procurement process, to eliminate competition and prevent TC from being the successful vendor in violation of the procurement lobbying law (SFL § 139-j), and (v) MSF failed to disclose material information relating to defects in MSF's curriculum that resulted in deaths during class trainings.

DMV's Response to the Protest

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

1. DMV evaluated and scored proposals in accordance with the methodology set forth in the RFP and the contract was awarded on the basis of best value.
2. DMV did not score the references as part of evaluation of the proposals but rather checked references as part of the vendor responsibility review of the tentative awardee.
3. DMV conducted a thorough vendor responsibility review of MSF, including MSF's legal capacity and integrity, and found no substantiation for TC's claims of infringement. Further, TC did not provide any proof, specific accusations, or court findings in support of TC's assertions.
4. The relationship between MSF and MIC is well established and all states that have and currently contract with MSF, including New York State, are aware of this relationship. MSF's relationship with MIC in no way conflicts with MSF's responsibilities under its contract with DMV, nor does it negatively impact the proper discharge of MSF's duty to the public.
5. TC fails to substantiate its allegation that MSF is improperly acting as an insurance broker and, moreover, this is not the appropriate forum for an analysis of those claims.
6. While DMV is required to meet and communicate with MSF in connection with the current contract, none of these meetings or communications were for the purpose of keeping TC from winning. Finally, DMV states MSF was not involved in the development of the RFP, the evaluation process, or consulted in any way.
7. MSF's curriculum has been delivered to New York State continuously since 1996, to over a quarter million motorcyclists, without a single death due to the curriculum or other aspects of the Program. The cause of the sole death associated with the Program was determined to be unrelated to MSF's curriculum, or any aspect of the course itself.

MSF's Response to the Protest

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

1. DMV properly awarded the contract to MSF on the basis of best value. Further, in addition to being the best value, MSF was the low bidder.
2. TC failed to raise its claims that MSF "may be" using TC's intellectual property prior to submitting its proposal and is therefore precluded from raising such claims in the Protest.
3. MSF and MIC are separate organizations with independent boards of directors, separate budgets and different missions.
4. MSF is not self-insured nor does MSF sell insurance. Rather, MSF provides the opportunity to become additional insureds under MSF's insurance policies to those sponsors who cannot obtain reasonably priced insurance on their own.
5. MSF's Basic *RiderCourse* is based on years of scientific research and field experience and has proven successful in developing entry-level skills for riding in traffic.

TC's Reply to the Answers

In its Reply, TC reiterates the original arguments raised in the Protest.

DISCUSSION

A. Best Value Award

TC alleges DMV failed to make a best value award as required by the RFP and SFL § 163 and instead awarded the contract to MSF on the basis of price alone (*see* Protest, at pgs. 8-10). DMV responds that it adhered to the award methodology set forth in the RFP and made the award "on the basis of best value, including a [sic] evaluation and scoring of each bidders [sic] technical proposal" (DMV Answer, at pg. 2). DMV also emphasizes that cost was only worth 20% of the total score (*Id.*). MSF states "[t]he fact that the 'best value' in this instance is also provided by the 'lowest bidder' is not an indication of wrongdoing" (MSF Answer, at pg. 4).

As stated above, SFL § 163(10) requires that service contracts be awarded on the basis of best value. SFL § 163(1)(j) defines best value as "the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers. Such basis shall reflect, wherever possible, objective and quantifiable analysis." Additionally, SFL § 163(9)(b) requires that the solicitation issued by the procuring state agency prescribe the minimum specifications or requirements that must be met in order to be considered responsive and describe and disclose the general manner in which the evaluation and selection shall be conducted. Finally, SFL § 163(7) requires the contracting agency 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."

Here, the RFP issued by DMV sets forth the general evaluation criteria consisting of a review of cost and the technical components of the proposal, and the relative scoring weight of those components (*see* RFP, at Section 4-4). More specifically, the RFP disclosed that cost would be worth 20% of the scoring and the technical review would be worth 80% of the scoring: Administration (25%), Program (50%) and Diversity Practices (5%) (*Id.*). The RFP also stated that the contract would be awarded to the offeror receiving the highest score (*Id.*).

This general description of the evaluation and selection process set forth in the RFP satisfied the statutory requirement of SFL § 163(9)(b). Additionally, the prior record indicates DMV filed its evaluation instrument in the procurement record prior to the initial receipt of bids on September 7, 2018. The evaluation instrument further defined and detailed the evaluation process, establishing a 1000-point scoring plan consistent with the relative weights set forth in the RFP (Cost – 200 points, Administration – 250 points, Program – 500 points, and Diversity Practices – 50 points). Therefore, DMV's evaluation plan satisfied the requirements of SFL § 163(7).

Finally, our review of the procurement record confirms that DMV evaluated the proposals in accordance with the criteria set forth in the RFP (and the evaluation tool) resulting in a total score of 512.57 for the proposal submitted by TC and a total score of 652.80 for the proposal submitted by MSF (*see* also Debriefing Summary attachment to DMV's Answer). DMV made the contract award to MSF, the offeror submitting the proposal receiving the highest score. Accordingly, it is clear that the evaluation and selection process conducted by DMV was consistent with the RFP and the requirements of the SFL, and the award made to MSF was based on a best value determination.⁹

B. Evaluation of TC's Proposal/References

TC alleges DMV failed to completely evaluate TC's proposal in accordance with the process set forth in the RFP and that "the only actual evaluation of the Total Control bid appears to have occurred after the award and after the request for debrief" (Protest, at pg. 9). To support its allegation, TC claims DMV neglected to verify TC's past performance with one of the references it submitted as part of its proposal (*see* Protest, at pg. 3).¹⁰ DMV states that it completed the evaluation of TC's proposal in accordance with the RFP on October 5, 2018 (i.e., prior to both DMV's contract award to MSF on October 29, 2018, and TC's debrief on November 26, 2018) (*see* DMV Answer, at pg. 2). DMV explains it did not score references as part of the evaluation of proposals but rather checked references as part of the vendor responsibility review of the tentative awardee (in this instance, MSF) (*Id.*).

As stated above, 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

⁹ Having determined that DMV awarded the contract to MSF on the basis of best value (rather than on the basis of cost alone as alleged by TC), we have also rejected TC's associated claim that DMV materially changed the method of award stated in the RFP.

¹⁰ It appears that TC's assertion that DMV failed to evaluate proposals according to the RFP stems from its allegation that DMV awarded the contract solely on the basis of price. However, as stated above, DMV did, in fact, award the contract on a best value basis.

and shall describe and disclose the general manner in which the evaluation and selection shall be conducted.” Section 3 of the RFP sets forth, in detail, the requirements to be addressed in an offeror’s technical proposal. Each requirement is designated either “M” – mandatory or “S” – scored (*see* RFP, at Section 1-22).¹¹

Section 3-1 of the RFP relates to “Bidder Experience” and sets forth certain mandatory experience requirements and instructs bidders to describe their relevant experience which is designated “S” – a scored criterion. This section also requires that offerors submit references verifying that the offeror meets all experience requirements of the RFP. However, the reference requirement is clearly designated “M” – Mandatory, but not scored. Thus, TC’s assertion that “the RFP was clear that...references were a mandatory and scored requirement (emphasis added)” is not correct (*see* TC Reply, at pg.4).¹² Based on our review of the procurement record, we are satisfied that DMV reviewed the proposals in their entirety and scored those requirements designated “S” in the RFP. Further, DMV’s use of the submitted references only to validate the experience requirements of the tentative awardee is not contrary to the RFP, the evaluation tool, or general State procurement practices.

C. Intellectual Property Infringement

TC asserts MSF is illegally using TC’s intellectual property and, as a result, DMV cannot properly award the contract to MSF until TC’s infringement claim is resolved (*see* Protest, at pg. 12). DMV replies that it conducted a thorough vendor responsibility review of MSF, including a review of MSF’s legal capacity and integrity, and found nothing to support TC’s claim (*see* DMV Answer, at pgs. 2-3). DMV also asserts TC failed to provide any proof, specific accusations or court findings in the Protest (*see* DMV Answer, at pg. 3).

Initially, we note that TC’s assertion appears to arise out of a long standing and apparently ongoing dispute with MSF concerning MSF’s use of intellectual property.¹³ As to the present claim of infringement, Section 3.5 of the RFP (entitled “Course Ownership/Legal Authority”) requires that the offeror (i) have the legal authority to use the proposed course curricula and maintain such authority for the term of the contract; (ii) have the legal authority to

¹¹ Section 1-22 of the RFP further provides that “[w]here a Mandatory requirement instructs the Bidder to submit material, the Bidder must submit such material with its proposal. The Bidder’s failure to do so may result in its proposal being deemed non-responsive.”

¹² TC cites OSC Bid Protest Determinations SF20180105 and SF20070056 to support TC’s assertion that DMV was required to score TC’s references, both of which are distinguishable from the facts present in this case (*see* Protest, at pg. 10; TC Reply, at pg. 4). In SF20180105, the contracting agency refused to accept itself as one of the protester’s references and, as a result, found the protester non-responsive due to an insufficient number of references. As the RFP did not preclude offerors from naming the contracting agency as a reference, we concluded the contracting agency had impermissibly changed the reference requirements after the submission of bids. Here, TC is not asserting DMV determined TC to be non-responsive relative to the reference requirement and thus, SF20180105 is inapplicable. In SF20070056, the evaluation methodology required references to be scored, which is not the case here, and therefore, that determination is inapposite to TC’s position.

¹³ TC asserts DMV had an affirmative duty to investigate similar claims related to MSF’s use of intellectual property in connection with DMV’s 2013 procurement for administration of the Program and failed to do so (*see* Protest, at pg. 12). TC states that if DMV had conducted an inquiry, TC “would have provided documentation and evidence dating back to at least 2007...of several instances between [sic] MSF’s illegal use of Total Control intellectual property” (*Id.*). The Protest does not contain documentary evidence of TC’s claims of infringement.

effect changes to the curricula delivered under the contract and maintain such authority for the term of the contract; and (iii) submit evidence of its authority to submit its proposed curricula and use the proposed curricula during the term of the contract including “proof of legal ownership.” In response to this requirement, MSF represented that its Basic *RiderCourse*, Basic *RiderCourse 2*, 3-Wheel Basic *RiderCourse* as well as the other 15 *RiderCourses* listed in the MSF curriculum catalog (with variations) are the “intellectual property of the MSF and copyrighted by MFS” and provided a letter from Harley-Davidson Riding Academy (HDRA) granting permission to MSF to use HDRA’s curricula, course materials and logos. Based on the documentation submitted by MSF and DMV’s own vendor responsibility review, DMV determined that MSF satisfied this requirement. Our review of the procurement record does not provide any basis to disturb DMV’s determination that MSF has the legal authority to administer the Program in accordance with its proposal.

D. Conflicts of Interest and Collusion

1. MSF’s Relationship with Motorcycle Industry Council

TC alleges MSF’s interest in supporting the Motorcycle Industry Council (MIC), the primary trade organization for the national motorcycle industry whose members are motorcycle manufacturers, conflicts with MSF’s ability to properly discharge its duties under the contract (*see* Protest, at pgs. 13-14). TC further claims MSF has an emphasis on promoting the motorcycle industry and its members as a whole rather than providing services to individual riders (*Id.*, at pg. 13).¹⁴ DMV replies it is aware of the relationship between MSF and MIC and has determined that such relationship in no way conflicts with, or negatively impacts, MSF’s contractual obligations (*see* DMV Answer, at pg. 3). MSF emphasizes that it and MIC are “separate organizations with independent Boards of Directors, separate budgets, and different missions” (MSF Answer, at pg. 6).

The objective of DMV’s procurement effort is to acquire the services of a motorcycle riding training coordinating organization to administer the Program, the goals of which are to promote rider education, make rider education affordable and readily available to the public, increase public awareness of the presence of motorcyclists on our roadways, and reduce the number of motorcyclists injuries and fatalities (*see* RFP, at Sections 1-1 and 1-2). “The primary purpose of the [Program] is to promote and encourage the fullest possible access to, and use of a nationally recognized motorcycle training curriculum in order to improve the safety of motorcyclists on the State’s streets and highways” (RFP, at Section 1-2). TC has failed to provide evidence that the relationship between MSF and MIC presents an organizational conflict of interest that would impair MSF’s ability to perform its obligations as administrator of the Program.

¹⁴ In the Protest, TC seems to suggest that MSF’s relationship with MIC and its promotion of the national motorcycle industry will negatively influence MSF’s obligation to adequately warn Program participants of the dangers associated with motorcycling (*see* Protest, at pg. 13). However, TC does not provide any support for its proposition.

2. Sale of Insurance

TC claims MSF is selling insurance to site sponsors and students without a valid New York license (*see* Protest, at pg. 14).¹⁵ TC posits that site sponsors may feel pressured to buy insurance from MSF because MSF is the administrator of the Program, thereby creating a conflict of interest (*Id.*). DMV responds TC failed to provide proof that MSF is illegally acting as an insurance broker and furthermore, this is not the appropriate forum for an analysis of those claims (*see* DMV Answer, at pg. 3). MSF states it does not sell insurance but does offer sponsors the option to become additional insureds under MSF's insurance policies if they cannot obtain reasonably priced insurance on their own (*see* MSF Answer, at pg. 7).

TC has failed to provide any documentary evidence to support its allegations that MSF is selling insurance or violating provisions of the Insurance Law.

3. Collusion

TC alleges MSF colluded with DMV before and during the procurement process to prevent TC from being awarded the contract in violation of SFL § 139-j (*see* Protest, at pg. 17). DMV replies that, while DMV and MSF are required to meet and communicate regarding the current contract these meetings and communications were not to develop a strategy to keep TC from winning and MSF was not "involved in the development of the RFP or the evaluation process or consulted in any way" (DMV Answer, at pg. 4).

TC's allegations of collusion are unsupported and are rebutted by DMV's explanation for ongoing communications with MSF as the incumbent service provider.

E. Vendor Responsibility Determination

TC asserts MSF is a non-responsible bidder because MSF failed to disclose material information relating to defects in MSF's curriculum that resulted in deaths during class training, "thereby exposing the state to liability by delivering a proven-dangerous training product" (Protest, at pgs. 20-21). DMV states MSF's curriculum has been delivered in New York State continuously since 1996, to over a quarter of a million motorcyclists, without a single death due to the curriculum or other aspects of the program, and DMV has "no reason to believe that any aspect of the curriculum creates an undue risk to the safety of participants" (DMV Answer, at pg. 4). Furthermore, DMV points out that the cause of the sole death in connection with the Program was unrelated to MSF's curriculum or any aspect of the course itself (*Id.*). MSF maintains its "Basic *RiderCourse* is based on years of scientific research and...[MSF's] current course has been extensively field tested and proven successful in developing the entry-level skills for riding in traffic" (MSF Answer, at pg. 8).

¹⁵ TC also asserts MSF is self-insured in violation of the RFP's insurance requirements (*see* Protest, at pg. 14). MSF replies it is not self-insured (*see* MSF Answer, at pg. 7). The RFP sets forth the insurance requirements for the contractor (*see* RFP, at Section 5-1). The RFP also requires that the contractor provide DMV with copies of certificates of insurance satisfying these requirements (*Id.*). Our review of the procurement record confirms that MSF provided evidence of its compliance with the insurance requirements of the RFP.

SFL § 163(4)(d) provides that “[s]ervice contracts shall be awarded on the basis of best value to a responsive and responsible offerer...” (emphasis added). Further, SFL § 163(9)(f) provides that “[p]rior to making an award of contract, each state agency shall make a determination of responsibility of the proposed contractor” For purposes of SFL § 163, “responsible” means the financial ability, legal capacity, integrity, and past performance of a business entity.¹⁶

DMV states it conducted a thorough vendor responsibility review of MSF, including a review of MSF’s legal capacity and integrity (*see* DMV Answer, at pgs. 2-3). As documented in the procurement record, DMV determined MSF to be a responsible bidder that can successfully perform the services required under the contract. As part of our review of the DMV/MSF contract, this Office examined and assessed the information provided in the procurement record and conducted an independent vendor responsibility review of MSF. Our review did not provide any basis to upset DMV’s responsibility determination.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the contract award by DMV. As a result, the Protest is denied and we are today approving the DMV/MSF contract for administrator of the Program.

¹⁶ SFL § 163(1)(c).