

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by
Penn Power Group LLC (d/b/a Penn Power
Systems)
with respect to the procurement of
Stockpile Equipment Maintenance: Generators,
Trash Pumps, Light Towers, and Sandbaggers
conducted by the New York State Division of
Homeland Security and Emergency Services.

**Determination
of Bid Protest**

SF-20220112

December 2, 2022

Contract Number – C400018

The Office of the State Comptroller (Office or OSC) has reviewed the above-referenced procurement conducted by the New York State Division of Homeland Security and Emergency Services (DHSES) for stockpile equipment maintenance for generators, trash pumps, light towers, and sandbaggers. We have determined the grounds advanced by Penn Power Group LLC, d/b/a Penn Power Systems (Penn Power) are insufficient to merit overturning the contract award made by DHSES and, therefore, we deny the Protest. As a result, we are today approving the DHSES contract with Kinsley Group, Inc., d/b/a Kinsley Power Systems (Kinsley) for stockpile equipment maintenance.

BACKGROUND

Facts

DHSES provides leadership, coordination, and support to prevent, protect against, prepare for, respond to, recover from, and mitigate disasters and other emergencies across New York State. In support of this mission, DHSES issued an invitation for bids (IFB) on June 16, 2022, seeking bids from qualified bidders “to provide large generator (50 Kw and above), 6-inch trash (water) pump, light tower and sandbag maintenance to equipment housed for disaster relief in ten (10) disaster logistic stockpiles located throughout New York State” (IFB, Section 1, at p. 1). The IFB required the “selected contractor to provide adequate staff to maintain inventory at the ten (10) New York State locations” and “[s]ervices [as] required for Off-Site deployed assets at locations and times to be identified” (*Id.*).

DHSES specified “[t]he contract will be awarded to the responsible and responsive bidder who meets all mandatory contract requirements . . . and all [m]andatory [b]id [s]ubmission [r]equirements . . . at the lowest total bid amount” (IFB, Section 10, at p. 3).¹

Prospective bidders were given the opportunity to ask DHSES questions prior to submission of bids, and DHSES publicly posted responses (IFB, Section 6, at p. 3). DHSES received four bids prior to the IFB due date of July 14, 2022, including one each from Kinsley and Penn Power.

Following evaluation, DHSES determined that three out of the four bids were non-responsive to one or more mandatory contract requirements. Accordingly, DHSES awarded the contract to Kinsley, the only responsive bidder, and notified all bidders of award status on August 10, 2022. Penn Power requested a debriefing which was held via video conference on August 15, 2022. Subsequently, Penn Power submitted a Protest, dated August 16, 2022, to this Office (Protest). DHSES responded to the Protest on August 30, 2022 (Answer).

Comptroller’s Authority and Procedures

Under State Finance Law (SFL) § 112(2), with certain limited exceptions, before any contract made for or by a State agency which exceeds fifty thousand dollars becomes effective, it must be approved by the Comptroller.

In carrying out this contract approval responsibility, OSC has promulgated the 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.² 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.

In the determination of the Protest, this Office considered:

¹ State Finance Law provides that, generally, contracts for services shall be awarded on the basis of “best value” to a responsive and responsible offeror (SFL § 163(4)(d)). In *Transactive Corporation v. State Department of Social Services*, the Appellate Division, Third Department, held that, while a State agency typically may not award a contract for services solely on the basis of price, it could be permissible when such approach effectively represents a cost-benefit analysis (236 A.D.2d 48, 53 (1997), *aff’d on other grnds*, 92 N.Y.2d 579 (1998)). In addition, the New York State Procurement Council recognizes that “[f]or certain services procurements, best value can be equated to low price” (NYS Procurement Guidelines, Section IV(A); *see* Section V(B)(11)). Applying the rational in *Transactive Corporation* and consistent with the NYS Procurement Guidelines, this Office has upheld awards of service contracts based on cost alone where the services were routine in nature and the solicitation sufficiently defined the qualitative requirements, so that there is little room for technical variances which will have any meaningful value to the procuring agency (*see, e.g.*, OSC Bid Protest Determination SF-20160139, at fn. 1). For this procurement, which is primarily for services, DHSES concluded that an award based on best value equated to lowest price and used an invitation for bids instead of a request for proposals, the typical method to procure services. Notwithstanding the fact that Penn Power did not raise this issue, based on our review of the procurement record, our Office is satisfied that DHSES’ award of this contract based on lowest price was appropriate.

² 2 NYCRR Part 24.

1. the documentation contained in the procurement record forwarded to this Office by DHSES with the proposed DHSES / Kinsley contract;
2. the correspondence between this Office and DHSES arising out of our review of the proposed DHSES / Kinsley contract; and,
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Penn Power's Protest, dated August 16, 2022; and,
 - b. DHSES' Answer, dated August 30, 2022.

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, Penn Power challenges the procurement conducted by DHSES on the following grounds:

1. Kinsley failed to meet the minimum requirements prescribed by the IFB, specifically maintaining regional operation centers in New York State, including the Capital District, Western New York and the Lower Hudson Valley; therefore, DHSES erred in finding Kinsley responsive and awarding the contract to Kinsley; and,
2. If any other bidder submitted a waiver of certified service-disabled veteran-owned business (SDVOB) participation goals, such waiver should be rejected. Penn Power is aware of one SDVOB who is available to perform work under the contract, and no bidders besides Penn Power contacted this SDVOB; so, no other bidder is able to provide the required documented evidence of good faith efforts to obtain SDVOB participation that would be required for a waiver.

DHSES Response to the Protest

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

1. DHSES properly concluded Kinsley met the requirements of the IFB; therefore, DHSES properly awarded the contract to Kinsley, the responsive bidder with the lowest bid; and,
2. Kinsley has not submitted a request for waiver of SDVOB participation goals, thus Penn Power's assertion is premature and without merit.

DISCUSSION

Responsiveness

Penn Power asserts Kinsley “does not appear [to] meet [] specific [IFB] requirements, based on the definition of a Regional Operational Center” (Protest, at p. 4) (emphasis omitted).³ Penn Power claims that “the definition of . . . a Regional Operational Center should be a legally owned or leased facility, which provides adequate tooling, support equipment, safety equipment meeting OSHA regulations, an adequate back-office support staff assigned to full time staffed positions whom are based and physically report to these Regi[o]nal Operation[al] Centers[,] such as service managers, service advisors, support staff, service technicians and parts person[nel] to support the contracted service attributes for that designated specific region in support of this IFB” (*Id.*) (emphasis omitted).⁴ To support its assertion, Penn Power contends that Kinsley’s business address in Tonawanda, New York “may appear to meet the requirement for a legal business address within the Western NY Region but would not meet the definition of a ‘Regional Operational Center’” (*Id.*) (emphasis omitted).

DHSES submits that they “properly evaluated Kinsley’s bid” and “concluded that Kinsley produced satisfactory proof of its business locations to satisfy the IFB’s requirements” (Answer, at p. 2). Moreover, DHSES notes that regional operation centers were “understood [by bidders] to be physical brick and mortar locations, in the requisite areas” (*Id.*).

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.” A “responsive” offerer is an “offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency” (SFL § 163(1)(d)). The IFB required bidders to submit supporting documentation to prove how they met certain mandatory contract requirements in order to be determined responsive (*see* IFB, Sections 3, 10, and 11, at pp. 1-5). The mandatory requirement at issue here states “all bidders must submit supporting documentation providing . . . [p]roof of maintaining regional operation centers in New York State to include the Capital District, Western NY, and Lower Hudson Valley” (IFB, Section 3, at p. 1). While the IFB does not define “regional operation center,” the procurement record includes DHSES’ minutes of Penn Power’s debriefing in which DHSES states that a regional operation center, for purposes of the IFB, is a physical business location, a unit of the main office or headquarters offering the same/comparable services.

The procurement record shows that DHSES evaluated all bidders with respect to whether they met the requirement of maintaining regional operation centers in the designated locations using the same evaluation tool. Specifically, DHSES reviewed each bid to determine whether a bidder had a physical office location in each of the three specific geographic regions, which is consistent with DHSES’ description of a regional operation center as discussed above. The

³ The Protest is not paginated. For purposes of this Determination, this Office includes page numbers as they would have appeared, if included.

⁴ Penn Power makes this claim based on a definition of “regional operation center” crafted by Penn Power, and not found in the IFB (*see* fn. 5, *infra*).

procurement record shows that DHSES found Kinsley met this requirement. Furthermore, the photographs in the Protest showing Kinsley had a physical office location in Western New York do not contradict DHSES' determination.⁵ Thus, we have no basis to disturb DHSES' finding that Kinsley was responsive to the requirements of the IFB, as written.

Compliance with SDVOB Participation Requirement

Penn Power asserts “if there were [SDVOB] waivers filed [] by any bidder [for the IFB]” they should be “rejected” (Protest, at p. 13). Penn Power continues that other bidders would have been unable to provide the required “documented evidence that a good faith effort was made to solicit services from [an SDVOB]” because the SDVOB “Storm Power Solutions was not solicited by another [bidder] [besides] Penn Power” despite the fact that the owner of Storm Power Solutions “verbally announced to all bidders in attendance [at the mandatory pre-bid meeting] of his capabilities to execute the services in part as a certified SDVOB subcontractor” (*Id.*).

DHSES counters that “[a]s a waiver for the utilization of an SDVOB has not been submitted at this time, [Penn Power’s] request is premature” (Answer, at p. 2). DHSES further asserts that “the anecdotal information provided by [Penn Power] regarding its interactions with a subcontractor is irrelevant” (*Id.*, at p. 3).

Article 17-B of the Executive Law sets aspirational goals for State contracts made directly or indirectly to certified SDVOBs (Executive Law § 369-j(1); 9 NYCRR § 252.2). “Where practical, feasible and appropriate, State agencies shall seek to achieve a six percent goal on all State contracts for [SDVOBs]. Where achieving the goal is not practical, feasible or appropriate, State agencies shall seek a waiver . . .” (9 NYCRR § 252.2(h)(1)). Here, the IFB required bidders to “submit a completed SDVOB Utilization Plan” or, if applicable, an application for waiver of SDVOB goals (*see* IFB, Section 11, at p. 5; *see also* IFB, Attachment A, at p. 23). Additionally, the IFB indicated “DHSES may disqualify a Bidder’s bid or proposal as being non-responsive . . . [i]f a Bidder fails to submit an SDVOB utilization Plan . . . [or] a request for a waiver” (IFB, Attachment A, at p. 23).

DHSES reviewed Kinsley’s bid and determined it contained the necessary documentation, as required by the IFB, with respect to the SDVOB participation requirement; specifically, Kinsley submitted an SDVOB utilization plan. The procurement record shows that Kinsley did not submit a request for waiver of SDVOB participation goals. Our independent review of the procurement record confirms Kinsley submitted an SDVOB utilization plan demonstrating how Kinsley intended to meet the 6% SDVOB participation goal, as required by the IFB and therefore, there is no merit to Penn Power’s speculative assertions.

⁵ To interpret the IFB, bidders must look to what is contained within its four corners, and not any subjective assumptions. To the extent that a prospective bidder was uncertain about the meaning of an IFB requirement, several opportunities were provided to ask DHSES questions prior to the bid due date, both at the pre-bid conference and during the formal question and answer period.

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 DHSES. As a result, the Protest is denied, and we are today approving the DHSES / Kinsley contract for stockpile equipment maintenance for generators, trash pumps, light towers, and sandbaggers.