

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Bolla Oil Corp. with respect to the procurement for the Renovation and Operation of a Fuel Service Station Facility on the Hutchinson River Parkway conducted by the New York State Department of Transportation.

**Determination
of Appeal**

SF-20220129

Contract Number – L03806R

May 2, 2023

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Transportation (NYSDOT) for the renovation and operation of a fuel service station facility on the Hutchinson River Parkway. We have determined the grounds advanced by Bolla Oil Corp. (Bolla) are insufficient to merit overturning the contract award made by NYSDOT and, therefore, we deny the Appeal. As a result, we are today approving the NYSDOT contract with CPD NY Energy Corp. (CPD) for the renovation and operation of a fuel service station facility on the Hutchinson River Parkway.

BACKGROUND

Facts

NYSDOT issued a request for proposals (RFP) “seeking proposals from qualified firms interested in renovating and operating a [fuel] service station facility at a rest area located on the Hutchinson River Parkway (HRP), in the vicinity of North St., White Plains, N.Y.” (RFP, Section 1.1, at p. 1). The successful offeror would execute a lease with NYSDOT (*Id.*).

The RFP specified proposals would “be evaluated by [NYSDOT] using a Best Value Method evaluation process based on the technical and cost criteria” (RFP, Section 6.1, at p. 14). Prior to any substantive evaluation of a proposal, the RFP provided that “[p]roposals shall be pre-screened to determine if they meet the minimum RFP responsiveness, referenced in Section 1.3” (*Id.*). Notably, proposals “which do not [meet minimum RFP responsiveness requirements] shall be deemed non-responsive and shall be removed from further consideration” (*Id.*; *see also* RFP, Section 1.3, at p. 3). Minimum responsiveness requirements included providing all specified proposal documents in a specified format by the proposal deadline (*see* RFP, Section 1.3, at p. 3).

Once it was determined that the proposal met minimum RFP responsiveness, the RFP provided that technical proposals would be worth 40% (40 points), cost proposals 50% (50 points), and oral presentations 10% (10 points) of the total score for a proposal (*Id.*; RFP, Section 6.2, at p. 14; RFP, Section 6.3, at p. 15; RFP, Section 6.5, at p. 16). The RFP provided that NYSDOT would score technical and cost proposals to make an “initial best value determination” (RFP, Section 6.4, at p. 15). NYSDOT would “shortlist” “any Proposer within 10 points of the top initial

Best Value ranked Proposal” to continue with the evaluation process, including the oral presentation (*Id.*; RFP, Section 6.5, at p. 16). NYSDOT determined “[p]roposals which do not make the shortlist shall not be included in the remaining best value evaluation process steps” (RFP, Section 6.4, at p. 15). A “Final Best Value Determination” would be made by adding the oral presentation scores and perfected cost scores (following any best and final offers) to the technical scores (RFP, Sections 6.9, at p. 17). Award would be made to the offeror with the highest “Final Best Value score” (*Id.*).

NYSDOT received eight proposals by the proposal due date of August 3, 2022, at 12:00 p.m. EST. Six responsive proposals proceeded to initial best value determination, and only one was shortlisted (CPD). NYSDOT awarded the contract to CPD, the offeror with the highest Final Best Value score.

NYSDOT notified Bolla on September 7, 2022, that Bolla’s proposal was non-responsive and was not evaluated for contract award. Subsequently, Bolla submitted an initial protest to NYSDOT of its non-responsive determination on September 9, 2022 (Protest), which NYSDOT denied on September 12, 2022 (NYSDOT Determination). Bolla submitted an appeal, dated September 9, 2022, and electronically transmitted to this Office on September 20, 2022 (Appeal). NYSDOT filed an Answer to the appeal on February 15, 2023 (Answer).

Comptroller’s Authority and Procedures

Under State Finance Law (SFL) § 112(3), before any revenue contract made for or by a state agency which exceeds twenty-five 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.¹ 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 decision, the Appeal is governed by section 24.5 of the OSC Protest Procedure.

This procurement is not subject to the competitive bidding requirements of SFL § 163, as this is not an expenditure contract involving the purchase of goods or services, but rather a revenue contract, i.e., a contract that generates revenue for the State. However, in fulfilling this Office’s statutory duty under SFL § 112, we generally require that revenue contracts be let pursuant to a competitive process.

In the determination of this Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by NYSDOT with the NYSDOT / CPD contract;

¹ 2 NYCRR Part 24.

2. the correspondence between this Office and NYSDOT arising out of our review of the proposed NYSDOT / CPD contract; and
3. the following correspondence / submissions from the parties (including the attachments thereto):
 - a. Protest;
 - b. NYSDOT Determination;
 - c. Appeal; and,
 - d. Answer.

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, Bolla challenges the procurement conducted by NYSDOT on the following grounds:

1. NYSDOT unreasonably and arbitrarily determined Bolla's initial proposal submission was non-responsive as Bolla's timely initial submission substantially complied with RFP requirements to separate the technical proposal from the cost proposal; and,
2. NYSDOT unreasonably and arbitrarily determined Bolla's proposal resubmission was non-responsive as Bolla timely resubmitted both the technical proposal and the cost proposal as required by the RFP and requested by NYSDOT.

NYSDOT Response to the Appeal

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

1. NYSDOT properly determined Bolla's initial submission was non-responsive to the requirements of the RFP because Bolla combined the technical and cost proposals in a single document; and,
2. NYSDOT properly determined Bolla's resubmission was non-responsive to the requirements of the RFP because, while NYSDOT received Bolla's resubmitted technical proposal, Bolla failed to resubmit the cost proposal.

DISCUSSION

Non-Responsive Determination

Bolla contends "the basis given for disqualification was factually incorrect, and that Bolla's submissions were, in every respect, timely, complete and in conformity with the requirements of the RFP" (Appeal, at p. 3). NYSDOT responds that the non-responsive determination was

appropriate since “Bolla initially combined the Technical and Cost proposals which contravened the instructions in the RFP, and when provided an opportunity to correct the non-conforming submission, NYSDOT did not receive separate Technical and Cost proposals as required by the RFP” (Answer, at p. 3). As the facts and contentions surrounding Bolla’s initial proposal submission and resubmission vary, we address each separately below.

1. Bolla’s Initial Proposal Submission

Bolla asserts the RFP requirements were met with its initial proposal submission as “no cost information was included in the Part I Technical and Management Proposal/Submittal, nor any Technical and Management information in Part II [Cost and Administrative Proposal/Submittal]” (Appeal, at p. 2). Bolla asserts that “[t]he transmitted proposal consisted of clearly-marked, separated Parts I [technical] and II [cost] . . . [and] [e]ach part was clearly labelled” (Appeal, at p. 5).²

NYSDOT asserts “Bolla omits that this [initial submission] combined the Part I Technical Proposal [in a single document] with the Part II Cost Proposal, a clear deviation from Section 5.1 of the RFP” (Answer, at p. 1).

The RFP set forth unambiguous specifications for proposers to be considered responsive (*see* RFP, Section 1.3, at p. 3).³ Specifically,

For the purposes of evaluation, each Proposal must be submitted in two (2) parts. Part I shall consist of the Technical and Management Proposal/Submittal. Part II shall consist of the Cost and Administrative Submittal/Proposal. Each part of the Proposal must be complete in order that the evaluation of both parts can be accomplished independently and concurrently, and the Technical and Management Proposal/Submittal can be evaluated strictly on the basis of merit. **Cost information must not be included in the Part I: Technical and Management Proposal/Submittal.** . . .

*Note: Cost information is **NOT** to be included in Part I: Technical and Management Proposal/Submittal. Technical information is **NOT** to be included in Part II: Cost and Administrative Proposal/Submittal.*

(emphasis in original) (RFP, Section 5.1, at p. 5). The RFP provided further formatting instructions for submissions: “**Proposer shall submit one (1) electronic copy of Part I – Technical and Management Proposal/Submittal and one (1) electronic copy of Part II – Cost**

² The procurement record shows that Bolla’s initial submission included, among other exhibits, a single document that contained both the technical and cost proposals. The technical proposal was labelled as Part I within the document and spanned pages 3 – 21, while the cost proposal was labelled Part II and spanned pages 21 – 22.

³ The RFP outlined the requirements for the technical and cost proposal submissions, stating “[a]ny Proposer that does not provide **ALL** the following **by the Proposal Submission Deadline** will be determined to be non-responsive and will be removed from further consideration” (emphasis in original) (RFP, Section 1.3, p. 3; *see also* RFP, Section 6.1, at p. 14).

and Administrative Proposal via email or managed file transfer to the Designated Representative below” (emphasis in original) (RFP, Section 7.1, at p. 18).

It is undisputed that Bolla’s initial submission was sent via email to NYSDOT on August 3, 2022, at 11:22 a.m. EST and was thus received prior to the deadline for receipt of proposals (*see* Appeal, at p. 2, Exhibit 2; Answer, at p. 1). Bolla contends that including technical and cost proposals in a single document with separate headings is substantially compliant, while NYSDOT contends that the technical and cost proposals must be in separate documents (*see* Appeal, at pp. 2, 5; Answer, at p. 1). To interpret the RFP, offerors must look to what is contained within its four corners, and not any subjective assumptions. The RFP requirements were clear and emphasized in multiple sections that the technical and cost submissions needed to be separate. Accordingly, we find NYSDOT properly determined Bolla’s initial proposal submission was non-responsive for failing to meet minimum RFP requirements.⁴

2. Bolla’s Proposal Resubmission

Upon Bolla’s receipt of NYSDOT’s request to re-submit the proposal in two parts as directed by the RFP, Bolla asserts timely compliance through “resub[mission of] all relevant documents and attachments in two separate email transmissions prior to the RFP deadline” (Appeal, at p. 2).⁵ Bolla claims that a “Message Trace Report” from its Microsoft Exchange email server “reflects that all three emails sent from [Bolla], including the resubmitted Parts I and II were received by NYSDOT prior to the bid deadline of August 3, 2022 at 12:00 p.m. [EST]” (*Id.*).

NYSDOT responds “Bolla failed to follow the clear guidance for submission of proposals and then failed to correct its error when afforded the opportunity to do so” (Answer, at p. 1). NYSDOT asserts after requesting Bolla resubmit its proposal in compliance with the two-part requirement of the RFP that while “at 11:58 a.m. [EST] [NYSDOT] received a response from [Bolla] with a file titled ‘Bolla Proposal – Part I RFP L03806R’ . . . [NYSDOT] did not receive another email with the revised Part II [cost] documents” (*Id.*, at p. 2).

It is uncontested that NYSDOT received Bolla’s timely resubmission of its technical proposal (Appeal, at p. 2; Answer, at p. 2). Where the parties differ is in whether NYSDOT timely received Bolla’s cost proposal in compliance with RFP requirements (Appeal, at p. 2; Answer, at p. 2). Bolla submits evidence that purports to show an email from Bolla containing the resubmitted cost proposal that was “received” by NYSDOT at “15:59:15 [UTC] (11:59:15 EDT)” (Appeal, at

⁴ Notably, although NYSDOT could have disqualified Bolla for its proposal being non-responsive based on its initial submission, NYSDOT instead allowed Bolla an opportunity to resubmit its proposal in compliance with RFP requirements. It is undisputed that NYSDOT emailed Bolla on August 3, 2022, at 11:29 a.m. EST requesting Bolla resubmit its proposal “in 2 parts: Part I – Technical and Management Proposal/Submittal and Part II – Cost and Administrative Proposal.” (Appeal, at p. 2, Exhibit 3; Answer, at p. 2).

⁵ We do not address Bolla’s allegation that NYSDOT erroneously found its resubmission non-responsive due to the inclusion of merchandise and food price list information in the Part I Technical and Management Proposal since NYSDOT determined Bolla’s resubmission was non-responsive for “failing to submit its bid in compliance with the RFP” and not related to the merchandise and food price list (*see* Appeal, at pp. 3, 5; Answer, at pp. 2 – 3).

p. 2, Exhibits 3, 4, 5 and 7).⁶ NYSDOT contends Bolla’s “[Message Trace Report] shows a different server associated for that [] email [with the resubmitted cost proposal], which NYSDOT did not receive” (Answer, at p. 2). In addition, NYSDOT asserts that while it “does not know if the server issue resulted in the non-delivery of the second email, [] NYSDOT did not receive the email [containing a separate cost proposal]” (*Id.*). To further support this assertion, NYSDOT states it “conducted an IT review” which confirmed the second email from Bolla “was not delivered by Microsoft Outlook” (*Id.*, at fn. 1).⁷

Based on our review of the procurement record, the evidence submitted by both NYSDOT and Bolla is inconclusive to determine whether the cost proposal resubmission email was timely received by NYSDOT. The emails submitted by Bolla have limited evidentiary value as none show that attachments were included (*see* Appeal, Exhibits 3, 4 and 5). More importantly, these emails lack evidentiary value as, without additional proof of receipt, a copy of an email does not conclusively prove receipt by the intended recipient. The Message Trace Report submitted by Bolla shows the initial proposal submission as well as the technical proposal resubmission, which were indisputably received by NYSDOT, were received in the “SMTP” server; whereas, the cost proposal resubmission email was received in the “STOREDRIVER” server rather than the “SMTP” server (*see* Appeal, Exhibit 7). While this shows the cost proposal resubmission email was received in Bolla’s exchange server, it fails to show that the email was sent out of the exchange server and received by the intended recipient, NYSDOT. Likewise, NYSDOT’s documentary submission of a screenshot of an NYSDOT employee’s inbox fails to satisfactorily refute whether Bolla’s cost proposal resubmission email was received. NYSDOT’s submission does not provide a comprehensive picture of the contents of the NYSDOT employee’s mailbox, nor does it provide the details of the emails shown as received by NYSDOT. Therefore, we find the evidence in the procurement record insufficient to definitively determine whether NYSDOT timely received the cost proposal resubmission email. Nevertheless, even if NYSDOT had timely received the cost proposal resubmission email and had not declared Bolla to be non-responsive, the correction of the error would not change the outcome of the award, as discussed further below.

Harmless Error

Notwithstanding the foregoing, this Office has long recognized the notion of excusable harmless error in the procurement process. That is, while there may have been an error in the procurement process, the correction of the error would not change the outcome (i.e., the award) and, therefore, the error is harmless.

Our review of the procurement record reflects that, even if NYSDOT had found Bolla’s resubmitted proposal responsive, Bolla would not have been susceptible to contract award. Since Bolla’s technical proposal was not scored, for purposes of this discussion, we will assume that Bolla received a perfect technical score of 40 points. If Bolla’s cost proposal were scored pursuant

⁶ In support of this contention, Bolla submitted three emails sent from Bolla to NYSDOT as documentary evidence of Bolla’s initial submission, and subsequent separated technical and cost resubmissions, as well as a Message Trace Report that included sent/receive information for the three emails (Appeal, Exhibits 3, 4, 5 and 7).

⁷ In support of this contention, NYSDOT submitted a screenshot of an NYSDOT employee’s inbox showing search results that included two emails from Bolla, one email from NYSDOT, and one undeliverable email, all of which were received between 11:29 a.m. and 12:00 p.m. on August 3, 2022 (*see* Answer, Exhibit A). Notably absent was a third email from Bolla or any details about the content of the emails received.

to the RFP,⁸ among all responsive offerors Bolla would have ranked last in cost scoring (compared to the top ranked cost score of CPD). Adding Bolla's hypothetical perfect technical score to its cost score to determine Bolla's initial best value score yields a last-place ranking among responsive offerors (compared to the top-rank initial best value score of CPD). Therefore, scoring Bolla's proposal would not have changed NYSDOT's initial best value determination. Additionally, Bolla's initial best value score does not fall within 10 points of the top initial best value ranked offeror (CPD). Therefore, even if Bolla's proposal had been scored, Bolla would have failed to make the shortlist, failed to advance to the remaining best value evaluation process steps, and the results of the procurement would not have changed.

Based on the foregoing, to the extent NYSDOT erred in finding Bolla's proposal non-responsive, such error was harmless.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the contract award by NYSDOT. As a result, the Appeal is denied and we are today approving the NYSDOT / CPD contract for the renovation and operation of a fuel service station facility on the Hutchinson River Parkway.

⁸ The RFP specified NYSDOT would score cost proposals by awarding the offeror submitting the highest proposed yearly rent full points and awarding other offerors a proportionate score based on their relation to the proposal offering the highest proposed yearly rent (RFP, Section 6.3, at p. 15).