

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by H2M
Architects, Engineers, Land Surveying and
Landscape Architecture, D.P.C. with respect to the
procurement of air quality monitoring consultant
services conducted by the New York State
Department of Public Service.

**Determination
of Bid Protest**

SF-20230075

Contract Number – C222351

September 21, 2023

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Public Service (DPS) for environmental consultant services, specifically air quality monitoring during the decommissioning of the Indian Point nuclear power generation facility in Buchanan, New York (“air quality monitoring”). We have determined the grounds advanced by H2M Architects, Engineers, Land Surveying and Landscape Architecture, D.P.C. (H2M) are insufficient to merit overturning the contract award made by DPS and, therefore, we deny the Protest. As a result, we are today approving the DPS contract with Sound Environmental Associates, LLC (SEA) for air quality monitoring.

BACKGROUND

Facts

DPS issued a request for proposals for air quality monitoring (RFP) on January 9, 2023. DPS is a State agency with “jurisdiction over utility rates and practices” and is “charged with ensuring safe and adequate utility service at just and reasonable rates for New York utility ratepayers” (RFP, Section I.A., at p. 1). The RFP sought to procure “environmental consulting services to develop and implement a Community Air Monitoring Plan (CAMP) to be in place during the decommissioning of Indian Point” (RFP, Section I.B, at p. 1).¹ The RFP indicates Indian Point “is currently undergoing work to safely transfer and store its remaining spent nuclear fuel, decommission the facility, and restore the site for future use” (*Id.*).

The RFP specified DPS “desires to select the Bidder who will provide the ‘best value,’ taking into consideration the most beneficial combination of qualifications, services, cost, and the consistency of the bid with the requirements of [the] RFP” (RFP, Section VI.A, at p. 10). The RFP clearly articulated a “Not-to-Exceed Cost” requirement, stating “[t]he total not-to-exceed costs for the entire project is [*sic*] \$500,000” (RFP, Section III.A, at p. 4). The RFP provided that “[o]nly proposals deemed to be responsive to the submission requirements set forth in this RFP will be evaluated” (RFP, Section VI.A, at p. 10). The technical proposals would comprise 65% (up to 65 points) of an offeror’s final score, while the cost proposal would comprise 35% (up to 35 points)

¹ Indian Point was permanently shut down in April 2021, and is scheduled to start a heavy demolition phase in late 2023 (RFP, Section I.B, at p. 1).

of an offeror's final score (RFP, Section VI. B, at pp. 10–11). The offeror with the highest overall score would be selected for contract award (RFP, Section VI.C, at p. 11).

DPS received four proposals by the due date of March 3, 2023. After an initial review by DPS, two proposals were rejected as non-responsive;² the proposals submitted by H2M and SEA were found to be responsive and proceeded to technical and cost evaluation. DPS awarded the contract to SEA,³ the offeror with the highest overall score. DPS held a debriefing with H2M on June 21, 2023. H2M submitted a protest to this Office on June 23, 2023 (Protest), which DPS answered on June 29, 2023 (Answer), and H2M replied to on July 3, 2023 (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 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.⁴ 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. the documentation contained in the procurement record forwarded to this Office by DPS with the DPS / SEA contract;
2. the correspondence between this Office and DPS arising out of our review of the proposed DPS / SEA contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Protest;
 - b. Answer; and,
 - c. Reply.

² For submitting cost proposals that exceeded the not-to-exceed cost requirement of \$500,000 set forth in Section III.A of the RFP.

³ DPS initially awarded the contract to H2M. However, on June 12, 2023, DPS notified H2M that DPS was rescinding H2M's contract award as DPS had erroneously calculated the technical scores and H2M no longer had the overall highest score. H2M does not dispute the correction of the technical scoring (*see* Protest, at p. 2).

⁴ 2 NYCRR Part 24.

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, H2M challenges the procurement conducted by DPS on the following grounds:

1. DPS failed to follow the cost evaluation methodology disclosed in the RFP, and instead utilized a cost evaluation methodology that was not disclosed in the RFP; and,
2. The cost evaluation methodology used by DPS was faulty in design.

DPS Response to the Protest

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

1. DPS's cost evaluation methodology was consistent with the terms of the RFP and requirements of State Finance Law.

H2M's Reply to the Answer

In its Reply, H2M further elaborates on the grounds contained in its Protest and alleges that DPS's cost evaluation methodology did not result in a best value award.

DISCUSSION

Disclosure of Cost Evaluation Methodology

H2M asserts "[t]he RFP contains no statement that the sole [cost] evaluation criteria will consist of a ratio of the proposer's bid to the lowest bidder's bid" (Protest, at p. 2). H2M contends "[t]he methodology that will be used is required to be set forth clearly and explicitly in the RFP[, and that] [t]he RFP contained a single metric – the cost threshold [but] DPS used a different, unpublished method, its secret relative cost ratio" (Reply, at p. 1).

DPS responds "[the RFP] state[d] that the cost proposals will be scored based on a *maximum* cost score of 35 points" (Answer, at p. 1 (emphasis in original)).

SFL § 163(9)(b) provides,

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. 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.

(emphases added).

The RFP clearly articulated the general manner in which the evaluation would be conducted: “Cost Proposals [would] be scored based on a maximum cost score of 35 points” (RFP, Section VI.B, at p. 11). State Finance Law does not require the solicitation specifically prescribe how the procuring agency will award points (such as weighting of particular criteria or, as in this instance, the use of mathematical formulas). Therefore, despite H2M’s assertion that DPS should have disclosed in the RFP the actual formula used to calculate an offeror’s cost score, DPS was not required to disclose further specifics regarding its cost methodology in the RFP (*see* OSC Bid Protest Determination, SF-20170111, at pp. 5–6). Thus, we are satisfied that the RFP met the applicable legal requirements with respect to disclosure of the cost evaluation methodology.

Cost Evaluation Methodology

H2M asserts the cost methodology is “faulty in design” as “[t]he conceived ratio does not account for the cost of quality” (Protest, at p. 3). H2M contends the “RFP expresses only one metric (\$500,000) and does so in a binary fashion ([not-to-exceed])” accordingly “[a]ny proposer whose bid does not exceed \$500,000 should therefore be awarded the full measure of cost evaluation points (that is 35)” (*Id.*, at p. 2). Under this methodology, H2M claims it “[would] have not only the superior technical merit score, but the superior overall score, and should be awarded the contract pursuant to [] the RFP” (*Id.*, at p. 3).

DPS counters “the [DPS’s] approach to reviewing the cost proposals was consistent with the RFP, as well as the requirements of State Finance Law” (Answer, at p. 1). DPS asserts that “[t]he fact that the RFP indicated that up to 35 points could be awarded, does not mean that 35 points must be automatically awarded across the board to all bidders” (*Id.*). To support its position, DPS explains “[i]f every qualified bid received all 35 points in the cost evaluation, it would set up inflexible criteria focused solely on technical qualifications . . . contrary to prudent public policy as well as State Finance Law” (*Id.*, at p. 2).

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.” State Finance Law requires that service contracts be awarded on the basis of best value which “optimizes quality, cost and efficiency, among responsive and responsible offerers” and “[s]uch basis shall reflect, wherever possible, objective and quantifiable analysis” (SFL § 163(1)(j)). A “best value” determination shall “be based on clearly articulated procedures which require . . . a balanced and fair method, established in advance of the receipt of offers, for evaluating offers and awarding contracts” (SFL § 163(2)(b)).

As described above, the RFP clearly articulated “[t]he Cost Proposals will be scored based on a maximum cost score of 35 points (35% of the final score)” (RFP, Section VI.B, at p. 11). The procurement record reflects that DPS crafted a scoring tool for cost proposals using a mathematical formula to calculate each offeror’s cost score by converting the price offered to a weighted point

score using the following formula: (lowest cost / cost being evaluated) x the total cost points. Accordingly, the offeror with the lowest cost received the full 35 points and other offerors received proportional scores based on the application of the formula. Our review of the procurement record confirms the methodology used to evaluate cost proposals and the corresponding scoring tool that evaluators used to score cost proposals were finalized before the initial receipt of offers in accordance with applicable statutory requirements. As a result, the evaluation of the cost proposals conducted by DPS was consistent with the RFP and met the applicable legal requirements.

H2M's contention that it (or any offeror for that matter) should be awarded the full available points for proposing a cost that did not exceed \$500,000 fails to distinguish between a mandatory requirement and cost evaluation methodology. The requirement that cost proposals not exceed \$500,000 was mandatory for all offerors; the consequence of failure to meet the requirement was being found non-responsive (which, in fact, occurred with two offerors).⁵ Meeting the requirement meant an offeror was responsive but did not entitle an offeror to a particular number of cost points, nor did DPS establish a cost evaluation methodology in that manner. Rather, as set forth above, DPS awarded the highest available points to an offeror proposing the lowest cost and then awarded points to other offerors proportionally in comparison to the lowest cost. To accept H2M's contention here (H2M should have received the full amount of cost points for simply meeting a mandatory requirement) would be to disregard the cost evaluation methodology established by DPS, consistent with the RFP and SFL, and adopt a cost evaluation methodology crafted by one of the offerors. This Office generally defers to agency determinations where they are properly within the agency's expertise and supported by the procurement record. DPS, as the State agency responsible for ensuring safe and adequate utility service at just and reasonable rates for New York utility ratepayers, possesses the expertise to develop an RFP and methodology to evaluate proposals submitted in response to the RFP to effectively meet the needs and requirements for air quality monitoring services related to the decommissioning and future use of the Indian Point facility. Our review of the procurement record confirms DPS complied with the statutory requirements in developing the cost evaluation methodology and, for the reasons set forth above, we will not disturb such methodology.

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 DPS. As a result, the Protest is denied and we are today approving the DPS / SEA contract for air quality monitoring.

⁵ The RFP provided "[i]f a cost proposal is found to be non-responsive, that proposal may not receive a cost score and may be eliminated from consideration" (RFP, Section VI.B, at p. 11).