

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by PTC Properties LLC with respect to the procurement of snow removal and ice control services conducted by the New York State Office for People with Developmental Disabilities.

**Determination
of Appeal**

SF-20230096

Contract Numbers – C0SBR00634, C0SBR00635,
and C0SBR00636

November 3, 2023

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Office for People with Developmental Disabilities (OPWDD) for snow removal and ice control services in Broome, Chenango, Delaware, Tioga, Tompkins, and Otsego counties. We have determined the grounds advanced by PTC Properties LLC (PTC) are insufficient to merit overturning the contract awards¹ made by OPWDD and, therefore, we deny the Appeal. As a result, we are today approving the OPWDD contracts with multiple awardees for snow removal and ice control services in Clusters 1-6, 11-13 and 15.

BACKGROUND

Facts

On April 21, 2023, OPWDD, on behalf of the Broome Developmental Disabilities State Operations Office,² issued an invitation for bid (IFB) seeking snow removal and ice control services at community residences in Broome, Chenango, Delaware, Tioga, Tompkins, and Otsego Counties (IFB, at p. 19). OPWDD is responsible for “provid[ing] care, treatment, rehabilitation, education, training and support services to developmentally disabled persons” (IFB, at p. 3). The IFB specified that “[s]now removal and ice control services are required at OPWDD residences which are occupied by a developmentally disabled population [and such residents often] require an additional level of care regarding snow and ice removal due to functional mobility limitations” (IFB, at p. 19).

The IFB included a site listing that provided a breakdown of geographic sites to be serviced under the contract, referred to as “clusters” (IFB, Exhibit A). Bidders were instructed to submit bids by cluster and they were able to “bid on one or multiple Clusters” (IFB, at p. 17). The IFB specified that there are seventeen (17) Clusters and “each Cluster will be evaluated separately”

¹ OPWDD awarded multiple contracts under this procurement to the following entities: A Great Choice Lawn Care and Landscaping, LLC for Clusters 1–6; Edmund Rajmer d/b/a All Weather Enterprises for Clusters 11–13; and Daniel G. Snyder d/b/a DGS Construction for Cluster 15. OPWDD did not make awards under this solicitation in Chenango, Delaware, Otsego and Tompkins counties (i.e., Clusters 7-10, 14, 16 and 17).

² The Broome Developmental Disabilities State Operations Office is an agency of OPWDD that serves Broome, Chenango, Delaware, Tioga, Tompkins, and Otsego Counties (IFB, at p. 3).

(*Id.*). For each Cluster outlined, the IFB required “[a]ll sites included in a Cluster [] be serviced by the bidder who is awarded the contract for that Cluster” (IFB, at p. 17). The IFB provided that “OPWDD will select the responsible and responsive Bidder that will provide the lowest Total Annual Seasonal Cost per Cluster” (*Id.*) (emphasis omitted).³

PTC submitted its bid for consideration to OPWDD prior to the June 6, 2023, submission deadline. On June 12, 2023, OPWDD notified PTC it would not be awarded a contract. Following its June 12, 2023, debriefing, PTC submitted a protest to OPWDD on June 20, 2023 (Protest). OPWDD issued its determination denying the Protest on July 6, 2023 (OPWDD Determination). PTC then submitted an appeal to this Office on July 13, 2023 (Appeal), to which OPWDD responded on July 26, 2023 (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 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.⁴ 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.

In the determination of the Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by OPWDD with respect to the snow removal and ice control services contracts;

³ 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 service and technology procurements where qualifications can be determined on a pass-fail basis, best value can be equated to low price” (NYS Procurement Guidelines (2023), Section 4.5.2; *see* Section 4.4). Applying the rationale in *Transactive Corporation*, and consistent with the NYS Procurement Guidelines, this Office has upheld awards of service contracts based on cost alone where the service was 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. For this procurement, which is primarily for services, OPWDD 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 PTC did not raise this issue, based on our review of the procurement record, our Office is satisfied that OPWDD’s award of these contracts based on lowest price is appropriate.

⁴ 2 NYCRR Part 24.

2. the correspondence between this Office and OPWDD arising out of our review of the proposed snow removal and ice control services contracts;
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Protest;
 - b. OPWDD Determination;
 - c. Appeal; and
 - d. Answer.

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, PTC challenges the procurement conducted by OPWDD on the following grounds:

1. OPWDD violated the terms of the IFB which indicated each Cluster would be evaluated separately by arbitrarily rejecting PTC's bid for Clusters 7–10, 14, 16 and 17 based on a comparison of its bid pricing to bids received for other Clusters; and⁵
2. The winning bids for Clusters 1–6, 11–13, and 15, were so unrealistically low that the awardees risk non-performance of the contracts as the low bids proposed could not have considered all the costs necessary to provide the required services outlined by the IFB's Scope of Work.⁶

OPWDD Response to the Appeal

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

1. In accordance with its rights reserved under the IFB, OPWDD properly determined not to issue contract awards to PTC, the only bidder, for Clusters 7–10, 14, 16 and 17, because PTC's bid exceeded OPWDD's estimated cost for a contract servicing those Clusters; and⁷
2. OPWDD properly awarded contracts to the responsive and responsible bidders with the lowest cost bids for Clusters 1–6, 11–13, and 15 in accordance with the terms of the IFB.

⁵ OPWDD did not award contracts for Clusters 7–10, 14, 16 and 17 (Answer, at p. 1). On July 28, 2023, this Office informed PTC that OSC Protest Procedures are applicable to contract awards subject to the Comptroller's approval under the provisions of SFL § 112, or otherwise submitted to OSC for approval (*see* 2 NYCRR § 24.1). OPWDD advised this Office that it did not award contracts for Clusters 7–10, 14, 16 and 17, therefore, this Office will not address the issues raised in the Appeal regarding these Clusters in this Determination.

⁶ PTC contends that it raised this ground in the Protest and OPWDD failed to address it. OPWDD addressed the merits of this ground in its Answer to the Appeal.

⁷ *See* footnote 5, *supra*.

DISCUSSION

Responsiveness of Low Bids

PTC asserts the bids for Clusters 1–6, 11–13, and 15 are so unrealistically low that it would not be feasible for the awardees to perform services required under the IFB. PTC alleges the low bids “create[] a legitimate risk of nonperformance” since “the bid amounts provided by the apparent low bidders represent unrealistic cost proposals that did not accurately or responsibly consider all of the costs to be incurred for snow and ice removal for those Clusters” (Appeal, at pp. 5–6). PTC contends that “[f]or these Clusters, [its] bid – unlike the other, lower bids – accurately and responsibly accounts for cost, weather and scope of work issues, as well as the ‘additional level of care’ required by the agency’s residents” (*Id.*, at p. 6).

OPWDD counters “[it] determined that the other bidders that were tentatively awarded contracts were responsible and responsive bidders with the lowest cost bid for the awarded Clusters in accordance with section 17.1 of the IFB” (Answer, at p. 2). OPWDD asserts that “PTC has not alleged specific facts that would show why any of the three other vendors selected through this IFB would not be capable of satisfactory performance” and furthermore, “none of the other contract awardees have had contract performance issues in the IFB counties or in any other part of the State” (*Id.*).

State agencies are required to award service contracts based on best value to a responsive and responsible offeror (SFL § 163(4)(d); § 163(10)).⁸ 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 stated for a bid to be determined responsive “a Bidder should submit complete proposals that satisfy all the requirements stated in this IFB” (IFB, at p. 9). Our review of the procurement record reflects that the IFB clearly set forth the minimum qualification requirements that a bidder had to satisfy to be responsive and that OPWDD conducted a review of each bidders’ proposal to determine whether a bidder met the minimum qualifications of the IFB. The procurement record shows that OPWDD concluded that each awarded bidder was responsive as required by the IFB in accordance with the applicable statutory provision. The procurement record further reflects that OPWDD determined that the cost bid by the tentative awardees for each Cluster was reasonable. OPWDD determined that the prices bid by the tentative awardees were comparable to other contracts awarded by OPWDD for similar services, location, and adjusted for property size. Our independent review reflects that there was no evidence to indicate an inability

⁸ See footnote 3, *supra*.

of any tentative awardee to perform the required services at the costs proposed.⁹ We find PTC's conclusory allegations with respect to the winning bidders' ability to perform the required services under the IFB meritless. Therefore, there is no basis to disturb OPWDD's determination that the contract awardees are responsive and able to perform the services under the contracts at the prices bid.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the contract awards by OPWDD. As a result, the Appeal is denied and we are today approving the OPWDD contracts for snow removal and ice control services awarded under the IFB.

⁹ Furthermore, this Office, as part of our review of the procurement record, confirmed with OPWDD that OPWDD was confident that the awarded bidders could fulfill the contract obligations at the price bid and no evidence has been presented that would cast doubt on OPWDD's affirmation.