



Nassau County Office of the Inspector General

JODI FRANZESE
Inspector General

One West Street
Mineola, N.Y. 11501

November 20, 2019

Hon. Laura Curran
Nassau County Executive
1550 Franklin Avenue
Mineola, NY 11501

Dear County Executive Curran:

Enclosed for your information and appropriate action is an Office of the Inspector General (OIG) Advisory Report, entitled *Bid Withdrawals for Claimed Clerical Errors*. The report describes an opportunity identified by the OIG for enhancement in an aspect of the procurement process.

Please advise me within 30 days of any actions taken in response to the recommendations in the report.

We appreciate the courtesy and cooperation afforded to us by Department of Public Works staff during our review. If you have any questions, please do not hesitate to call me at (516) 571-1470.

Very truly yours,

A handwritten signature in black ink, appearing to be "Jodi Franzese", written over a light blue horizontal line.

Jodi Franzese
Inspector General

Enclosure

Cc: Richard J. Nicoletto, Presiding Officer, Nassau County Legislature
Kevan Abrahams, Minority Leader, Nassau County Legislature
Helena Williams, Chief Deputy County Executive
John Chiara, Deputy County Executive for Compliance



Jodi Franzese
Inspector General

NASSAU COUNTY
OFFICE OF THE INSPECTOR GENERAL
Advisory Report
Bid Withdrawals for Claimed Clerical Errors
2019-A002

Issued: November 20, 2019

"Good government is everybody's business"

Origin of This Report

On August 8, 2019, the Office of the Inspector General (OIG) submitted to the Legislature a Contract Review Statement in connection with Item #B-14-19, a Department of Public Works (DPW) contract (Contract Number S3P11-11G) noting, in part, that the OIG identified opportunities for improvement in the procurement process. This advisory report describes an opportunity for policy enhancement that the OIG observed in the course of its contract review, concerning bidder requests to withdraw their bids based upon claimed mistakes.

Background – Bid Mistakes and Withdrawal Requests

There are several types of bid mistake situations that can arise in the procurement process. This report concerns the circumstance where a bidder raises a claim, after bid opening but pre-award, of its discovery of a clerical price error in its bid submission – an error which is not obvious or apparent on the face of the bid to the County – and seeks to withdraw its bid.

In the matter of the contract reviewed by the OIG, the ultimate awardee was not the lowest bidder. This was so because, prior to award, the apparent low bidder notified DPW that a review of its bid sheets revealed a mistake in its price stemming from a clerical error; that its true (intended) price was not represented in the bid it submitted; and that the company would be unable to perform the work at that price. DPW requested the bidder provide copies of its original take-off (calculation) sheets which document the total bid amount and include the error. In response to DPW's request, the bidder emailed scans of two calculation tables. DPW's Commissioner approved the request to withdraw the bid and DPW awarded the contract to the next lowest bidder.

OIG's review of the Countywide Procurement Policy revealed that, while the policy addresses certain bid withdrawal and mistake matters, it does not explicitly address the situation where a bidder seeks to withdraw its bid based upon the assertion of a pricing error discovered and raised after the bid was opened but prior to award.

We ascertained that DPW likewise does not have its own written Departmental guidance for such an event. DPW officials advised the OIG that, in such instances, the department



Jodi Franzese
Inspector General

NASSAU COUNTY
OFFICE OF THE INSPECTOR GENERAL
Advisory Report
Bid Withdrawals for Claimed Clerical Errors
2019-A002

Issued: November 20, 2019

"Good government is everybody's business"

follows the provisions of New York General Municipal Law (GML) § 103 subsection 11 and associated case law.¹ DPW told OIG that GML §103 (11) provides that a bidder may withdraw a bid containing a unilateral mistake if: the bidder promptly notifies the County of the mistake; the mistake was material; and that the mistake was subject to objective determination, i.e., it could be observed upon review and comparison of the calculation sheets and bid proposals. OIG was also advised that DPW's practice is to bring vendor requests for mistake-based withdrawals to the attention of its Department Chief Contracting Officer (DCCO) who is also DPW's agency counsel. The DCCO will then make a recommendation to the deciding official, DPW's Commissioner, regarding whether to approve the withdrawal of the vendor's bid.

While vendor requests to withdraw bids may well be based in good faith on clerical errors, it should also be noted, from a risk management perspective, that requests for bid withdrawal can conceivably arise from other reasons, including judgment errors and even collusive bidding schemes.

Best Practice

In the local area, both the City of New York and the Metropolitan Transportation Authority, as well as the Federal government, have established written policies and procedures providing explicit guidance for addressing the circumstances in which vendors are permitted to withdraw bids based on claimed errors.

Recommendations

1. The County should enhance its procurement policy by providing Countywide instruction for handling pre-award requests to withdraw bids due to claimed mistakes where the error (the intended correct bid) is not evident on the face of the bid. This guidance should conform to applicable state law (GML §103 (11)).
2. The above enhancement should also provide guidance regarding the process to be followed upon receipt of a mistake-based bid withdrawal request, including:
 - a. Specify time limits for vendor notification of bid mistakes, and for vendor submission of supporting documentation;



Jodi Franzese
Inspector General

NASSAU COUNTY
OFFICE OF THE INSPECTOR GENERAL
Advisory Report
Bid Withdrawals for Claimed Clerical Errors
2019-A002

Issued: November 20, 2019

"Good government is everybody's business"

- b. Delineate roles and responsibilities, including decision-making authority;
 - c. Establish records keeping requirements;
 - d. Describe the criteria for allowing withdrawal of a bid, including requiring the bidder to submit clear and credible evidence of good faith, inadvertent clerical error, and of its intended bid;
 - e. Require, for evidentiary purposes, that the bidder submit to the County, within a specified time, the following:
 - i. Original, complete documents demonstrating the error and the intended correct bid;
 - ii. A signed explanation by a principal of the bidder, specifically describing the circumstances as to where, when, how, and by whom the mistake was committed, with an attestation that all information and documentation provided to the County is true, accurate, and unaltered.¹ The County should consider having the bidder swear to their statement or the inclusion of a perjury jurat.
3. The County should consider including in its procurement policy a provision that gives the County the option to hold a pre-decisional hearing on the matter when deemed necessary, where the bidder may give testimony, present documentation and be asked questions by the County.
 4. For each occasion of a bid withdrawal request, responsible County officials should generate a record-of-decision memorandum outlining the circumstances and rationale for allowing or declining the bid withdrawal.
 5. To promote uniformity and consistency of application across all County departments and agencies, Countywide procurement policy should require the concurrence of the Chief Procurement Officer for all approvals of bid withdrawal requests.
 6. The County should maintain a central record of all occasions in which bidders have submitted bid withdrawal requests, with the capability of identifying the extent to

¹ A claim that the bidder intended, but failed, to apply a markup, discount or other differential should also be supported and ascertainable by clear evidence.



Jodi Franzese
Inspector General

NASSAU COUNTY
OFFICE OF THE INSPECTOR GENERAL
Advisory Report
Bid Withdrawals for Claimed Clerical Errors
2019-A002

Issued: November 20, 2019

"Good government is everybody's business"

which a given bidder has made such requests. This record should include all memoranda of decision per Recommendation 4.

ⁱ New York General Municipal Law § 103 (11) provides:

Bid mistake; public projects. (a) In all contracts governed by this section, where a unilateral error or mistake is discovered in a bid, such bid may be withdrawn after a showing of the following: (1) the mistake is known or made known to the awarding officer, board or agency prior to the awarding of the contract or within three days after the opening of the bid, whichever period is shorter; and (2) the price bid was based on an error of such magnitude that enforcement would be unconscionable; and (3) the bid was submitted in good faith and the bidder submits credible evidence that the mistake was a clerical error as opposed to a judgment error; and (4) the error in the bid is actually due to an unintentional and substantial arithmetic error or an unintentional omission of a substantial quantity of work, labor, material, goods or services made directly in the compilation of the bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of the original work paper, documents, or materials used in the preparation of the bid sought to be withdrawn; and (5) it is possible to place the public agency, board, officer, or subdivision in status quo ante.

(b) Unless otherwise required by law, the sole remedy for a bid mistake in accordance with this section shall be withdrawal of that bid and the return of the bid bond or other security, if any, to the bidder. Thereafter, the awarding officer, board or agency may, in its discretion, award the contract to the next lowest responsible bidder or rebid the contract. Any amendment to or reformation of a bid or a contract to rectify such an error or mistake therein is strictly prohibited.