

██████████ v. ACCES-VR, ██████████, New York

Hearing Officer Preliminary Statement

This is a proceeding of the New York State Department of Education in which ██████████ ("Petitioner") petitioned for appeal of Administrative Review by the ACCES-VR agency ("Agency") of ██████████ New York. Petitioner appeared on ██████████ own behalf and called no witnesses. The Agency was represented by ██████████, Director of Counseling at the ██████████, ██████████, Assistant District Office Manager, ██████████, ACCES-VR Counselor for Adult Career and Continuing Education Services and ██████████, Senior ACCES-VR Adult Career and continuing Education Senior Counselor, appeared as witnesses on behalf of the Agency.

In a Notice of Hearing dated ██████████ by the New York State Department of Education to ██████████ New York, and in accordance with the Commissioner of Education's Regulations, the undersigned received appointment as the Impartial Hearing Officer from ██████████ ██████████ Adult Career and Continuing Education Services-Vocational Rehabilitation ("ACCES-VR") as Impartial Hearing Officer pursuant to 8 N.Y.C.R.R. Part 247.4. The hearing was held on ██████████, beginning at approximately 10:09 am and concluding at approximately 1:45 pm at the ACCES-VR ██████████, ██████████. All parties had the opportunity to make opening and closing statements, to examine and cross examine witnesses and to present evidence.

All parties were advised of their right to appear with counsel, however, both parties chose to appear pro se on the issues presented. It is the Agency's position that a new Request for Bids pursuant to New York State Finance Law must be issued for the purchase of Petitioner's modified motor vehicle to accommodate ██████████ need to have the modification work done locally in the ██████████ New York area. It is Petitioner's position that a new Request for Bids is not necessary; that since the low bidder's bid was non-responsive pursuant to New York State Procurement Guidelines, the Agency need only go to the next lowest bidder by the same authority; and that, moreover, the same is required pursuant to Agency Consumer Involvement Policy (100.00), in pertinent part, that services must lead directly to employment goals within fiscal constraints of the program, supporting cost effectiveness to meet the individual's needs. It is Petitioner's further position that manufacturer's warranty on the new van and its modifications should not be limited in any way by the winning bidder, pursuant to Vehicle Modification Procedure 441, that when awarding a modification contract, ACCES-VR will assure that the vendor selected has the ability to provide all warranty services in a timely manner and without additional cost.

Decision:

The Decision, rendered on ██████████ is for the Agency in part and the Petitioner in part. ACCES-VR will put out a new invitation for bids on behalf of Petitioner for vehicle modification pursuant to New York State Finance Law and NYS Procurement Guidelines, reflecting Petitioner's need for all fitting, final inspection and warranty work on

■■■ modified van to be done locally; and moreover, that all warranty servicing shall be done pursuant to manufacturer's warranty, which should not be limited in any way by the winning bidder, all of which shall be considered material terms expressly written in such request for bids in addition to any others that are required to provide the modifications prescribed by the ■■■■ and ACCES-VR. Any and all bids not in compliance with all such material terms shall be considered non-responsive, and treated as such pursuant to NYS Procurement Guidelines.

Procedural History

Sealed bids were received and opened by ACCES-VR in ■■■■ for the Petitioner's vehicle modification and ■■■■ was named the winning bidder.

Petitioner requested an informal review of the decision to award the winning bid to ■■■■ with Senior Counselor, ■■■■ in that Petitioner cannot travel due to ■■■■ disability and employment status. The decision was that if ■■■■ can meet Petitioner in ■■■■ for all required fittings and adjustments, then ACCES-VR must authorize the modification to ■■■■

■■■■ next requested and received an Administrative review of the same, which was held on ■■■■, during which ■■■■ adequately demonstrated that, due to ■■■■ disability and the physical and emotional stress caused to ■■■■ by travel, ■■■■ needed the fittings for the van modifications and warranty service to be done locally; and moreover, that ■■■■ could experience adverse consequences concerning ■■■■ employment status if ■■■■ had to take time off to be out of town on the multiple occasions the van modifications and service would require. The result of the Administrative Review was that, if ■■■■ could come to ■■■■ for the fittings, then ACCES-VR must authorize the modifications to ■■■■ Petitioner did not agree and requested that the bid be awarded to the next lowest bidder, a local company, instead.

Petitioner's request was denied with the reasoning that putting out a new request for bids would both accommodate Petitioner's needs and avoid favoring a particular vendor. Such rebid was determined to be allowed by NYS Finance Law, due to the change in bid specifications that came to light at the Administrative review, that Petitioner suffers adverse physical and emotional stress due to travel; and as a result, cannot be required to travel for modification fittings and service on her vehicle. The same five bidders that bid the first time would be requested to bid again.

An impartial hearing was held in this matter on ■■■■ at the ACCES-VR offices located at ■■■■ during which the parties stipulated to all exhibits and no material facts were disputed.

Factual Summary

Petitioner ■■■■ suffers from cerebral palsy with spastic quadriplegia and a continuous flow of tension throughout ■■■■ body as a result. ■■■■ relies on a motorized wheelchair to get around. Petitioner requires multiple vehicle adaptations to ensure that ■■■■ is a safe driver, including fittings, floor and seat modifications, EZ lock, and steering

requirements. Several fittings are required with the Petitioner to ensure proper posture and positioning of controls and modification features.

Petitioner resides in [REDACTED] an eastern suburb of the [REDACTED] area. [REDACTED] has been working with ACCES-VR on a vehicle modification request as the modified van [REDACTED] is currently driving is performing poorly, due to age and wear. [REDACTED] requires a modified vehicle to commute to and from [REDACTED] employment as a lead publishing coordinator at [REDACTED] in the city of [REDACTED].

A request for bids (RFB) was sent out by [REDACTED] counselor, [REDACTED]. As to warranty, the request stated the warranty must be *at least one year*. As for out of town bidders, the request for bid specifies that their bid must include costs of consumer going to the bidder for modification and that all warranty services should be provided in a timely manner and without additional cost to the individual or ACCES-VR. Sealed bids were received and opened in [REDACTED] naming [REDACTED] of [REDACTED], near [REDACTED] approximately [REDACTED] miles from Petitioner's home the winning bidder. [REDACTED] was the only bidder whose quote named a one year warranty, while all other bidders quoted the manufacturer's warranty of two years. In a letter to ACCES-VR on [REDACTED] Petitioner raised the issue of [REDACTED] inability to travel for service on the vehicle as well as fittings.

Petitioner's Administrative Review was held on [REDACTED] that due to [REDACTED] disability, [REDACTED] is unable to travel for fittings and service for the new van. [REDACTED] quoted NYS Procurement Guidelines, page 24, if the winning bidder is not found to be responsive by meeting all mandatory requirements and specifications of the IFB, then the apparent low bidder must be rejected as non-responsive and the next lowest bidder must be reviewed.

Petitioner further showed that [REDACTED] would use [REDACTED] as a manufacturer for lower floor modifications. In a letter dated [REDACTED] from [REDACTED] the local vendor who is authorized to provide warranty work for [REDACTED] stated that [REDACTED] could provide service on the flooring, but that [REDACTED] could not service the additional modifications such as hand controls, steering, power parking and transfer seat, because doing so would increase their liability as they have no such service agreement with those providers.

In an email dated [REDACTED] from ACCES-VR to Petitioner [REDACTED] the agency provided two alternatives: accept the [REDACTED] bid and have transportation provided or have the job rebid for the vendors to include transportation costs (for travel to [REDACTED]). The Agency's rebid option is pursuant to Petitioner responded that [REDACTED] wished to continue with [REDACTED] appeal.

Discussion

The Petitioner raises the issue as to whether [REDACTED] bid was non-responsive pursuant to NYS Procurement Guidelines, such that its bid must be rejected and the next lowest bidder considered. I find this not to be the case. [REDACTED] bid was, in fact, responsive according to the specifications set out in the request for bids, that warranty be at least one year and that costs involving the customer's travel be included, specific issues raised by the Petitioner, in addition to those other specifications not at issue here.

The pivotal point of this matter requiring that a new Request for Bids be sent out is the Petitioner's medical proof provided after the first [REDACTED] was issued and accepted by the Agency, that [REDACTED] is unable to travel for fittings or for service. Petitioner's competence in

advocating for █████ provided new information which gave rise to a newly discovered need that must be included in the █████, that the Petitioner not be required to travel. An █████ is a unilateral contract, of sorts. When such terms are met (under state guidelines by the lowest bidder) a contract is created. Since this material term of no customer travel was not a part of the original █████, a new one must be created making that a material term. That would mean that both local vendors as well as out of town vendors who wish to provide the work must do so locally in the █████ area. For instance, if █████ wished to rebid, it would have to consider its costs for travel to the █████ area to accommodate Petitioner for fittings and for warranty service that could not be covered locally, pursuant to Autocrafting's █████ letter to Petitioner.

Petitioner also raises the issue of █████ offering merely a one year warranty when the other vendors offered the full, two year manufacturer's warranty. Petitioner's argument has merit, because it raises the question of whether █████ quote was, in fact, comparable to that of the other vendors, making █████ the true lowest bidder. It cannot be disputed that warranty length is value added, both as it applies to parts and service. The shorter the warranty, the more financial liability is incurred by either the individual or the Agency. However, in this case, there cannot be an exact accounting of the aggregate loss in value because one cannot accurately predict what parts will fail and at what times. At the same time, it can be said that such a difference could prove to not be a disparity at all, given the possibility that nothing could go mechanically wrong until 3 or more years have passed, well after the manufacturer's warranty has expired. However, it can be reasonably said that the values in time of one year versus two years is not equal. Moreover, there appears to be no compelling policy to deny the customer the value of the manufacturer's warranty when the same is made available to all purchasers of the equipment. It is for this reason that I find the manufacturer's warranty should be expressly written as a term material to the new █████ in addition to the material term that Petitioner must not be required to travel.

Signature: █████
Impartial Hearing Officer