

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by LogistiCare Solutions, LLC with respect to the procurement of Medicaid Transportation Management - NYC conducted by the New York State Department of Health

**Determination
of Bid Protest**

SF-20160248

Contract Number – C032076

February 17, 2017

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Health (DOH) for Medicaid Transportation Management in the New York City Region (MTM). We have determined the grounds advanced by LogistiCare Solutions, LLC (Logisticare) are insufficient to merit the overturning of the contract award made by DOH and, therefore, we deny the Protest. As a result, we are today approving the DOH contract with Medical Answering Services, LLC (MAS) for MTM.

BACKGROUND

Facts

DOH is responsible for ensuring the availability of non-emergency medical transportation for Medicaid enrollees in New York State (RFP as defined below, pg. 1). In furtherance of that obligation, DOH issued Request for Proposals No. 16683 (RFP) on June 16, 2016. The RFP required that the successful offeror perform all management and administrative functions in connection with the provision of Medicaid covered transportation services, to and from medical practitioners, for Medicaid enrollees in the New York City Region (RFP § 3.1 et seq.).

The RFP provided that the contract would be awarded on the basis of best value, as determined by combining the scores of each offeror based upon the evaluation of the offeror's technical and cost proposals. The technical proposal was weighted at 80 percent of the total score and the cost proposal was weighted at 20 percent of the total score (RFP § 8.2). A team of four evaluators awarded scores from 0-5 for each of the technical performance criteria set forth in RFP (RFP § 6.2). These individual scores were averaged and weighted to produce a raw score for that particular criterion. The raw scores for the criteria were added together for a total raw technical score. The technical proposal with the highest raw score received 80 points and the other technical proposals received a proportionate score according to the formula established in the RFP (RFP § 8.4-8.6).

As for the cost evaluation, the cost proposal offering the lowest price per Medicaid enrollee/per month received the maximum score of 20 points, with the other cost proposals receiving a relative, proportionate score. The technical and cost scores were then combined to produce a total score.

DOH received three proposals in response to the RFP. After an evaluation of the technical proposals, Logisticare received the highest technical score and was awarded 80 points for its technical proposal. MAS submitted the cost proposal offering the lowest price per enrollee/per month and received the highest cost score and was awarded 20 points for its cost proposal. The weighted scores were then combined to reach total composite scores for each offeror. MAS received the highest composite score and DOH awarded the contract to MAS. Logisticare requested a debriefing that was provided on November 7, 2016. On November 15, 2016, Logisticare filed a protest with this Office (Protest). MAS filed a response to the Protest dated December 9, 2016 (MAS Answer). DOH filed a response to the Protest dated January 4, 2017 (DOH Answer). Logisticare filed a reply to the Answers of MAS and DOH, dated January 13, 2017. (Logisticare Reply).¹

Logisticare has submitted several requests to this Office asking that this protest determination be held in abeyance pending its receipt of documentation from DOH in response to Logisticare's request under the Freedom of Information Law (Public Officers Law Article 6, "FOIL"). As was stated in correspondence from this Office to counsel for Logisticare, dated November 29, 2016 and consistent with prior bid protest determinations, issues related to the procuring agency's action or inaction on a FOIL request does not impact our review of the contract award and are not considered as part of our review of bid protests. Moreover, outstanding FOIL requests to the procuring agency do not provide a basis to extend the bid protest filing date.

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 the aforementioned responsibilities prescribed by SFL § 112, this Office has issued a Contract Award Protest Procedure that governs the process to be used when an interested party challenges a contract award by a state agency. 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 3 of the OSC Protest Procedure.²

In the determination of the Protest, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by DOH with the DOH/MAS contract;

¹ DOH filed an additional submission on January 20, 2017, and Logisticare filed a further reply dated January 30, 2017. These submissions do not raise any new issues relating to the Protest and will not be formally addressed in this determination.

² OSC Guide to Financial Operations, Chapter XI.17, <http://www.osc.state.ny.us/agencies/guide/MyWebHelp/>. During the pendency of this Protest, our Office formally promulgated regulations that update and codify the Contract Award Protest Procedure for contract awards subject to the Comptroller's approval (2 NYCRR part 24, effective January 25, 2017).

2. The correspondence between this Office and DOH arising out of our review of the proposed DOH/MAS contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
 - a. The Protest dated November 15, 2016;
 - b. The MAS Answer dated December 9, 2016;
 - c. The DOH Answer dated January 4, 2017; and
 - d. The Logisticare Reply dated January 13, 2017.

Applicable Statutes

The requirements applicable to this procurement are set forth in SFL Article 11 which provides that contracts for services shall be awarded on the basis of “best value” to a responsive and responsible offeror.³ Best value is defined as “the basis for awarding contracts for services to the offeror which optimizes quality, cost and efficiency, among responsive and responsible offerors.”⁴ A “responsive” offeror is an “offeror meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency.”⁵

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.”

SFL § 163(9)(a) provides that “[t]he commissioner or a state agency shall select a formal competitive procurement process . . . [which] shall include . . . a reasonable process for ensuring a competitive field.”

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.”

SFL § 160(5) provides that “costs” as used in Article 11 “shall be quantifiable and may include, without limitation, the price of the given good or service being purchased; the administrative, training, storage, maintenance or other overhead associated with a given good or service; the value of warranties, delivery schedules, financing costs and foregone opportunity costs associated with a given good or service; and the life span and associated life cycle costs of the given good or service being purchased. Life cycle costs may include, but shall not be limited to, costs or savings associated with construction, energy use, maintenance, operation, and salvage or disposal.”

³ SFL § 163(10).

⁴ SFL § 163(1)(j).

⁵ SFL § 163(1)(d).

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, Logisticare challenges the procurement conducted by DOH on the following grounds:

1. DOH's review of the technical components called for by RFP § 6.2.D.6.b was not undertaken fairly or in accord with the terms of the RFP and applicable procurement guidelines, in that one evaluator considered information that was not part of Logisticare's proposal.
2. The scoring error in Argument one, above, and the paucity of information given to Logisticare at the debriefing calls into question the propriety of all of DOH's scoring on this procurement. Moreover, if Logisticare had been fairly evaluated, its technical superiority would have resulted in its winning the award of the contract.
3. MAS proposed a cost that it knows is inadequate to perform the contract successfully, in order to overcome its technical score deficit, and raising questions as to whether MAS is a responsible bidder and whether the award is the best value to the state. DOH also placed an unreasonably high emphasis on the weight of the cost score.

DOH Response to the Protest

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

1. While one of the four evaluators relied on actual knowledge of Logisticare's performance under the previous contract in scoring the criterion set forth in RFP element 6.2.D.6.b, the evaluator adhered to the State Procurement Guidelines, which permit reliance upon an "Offeror's overall past performance" in evaluating their submission.
2. The DOH evaluators properly applied scores based on the information provided in Logisticare's proposal. Moreover, even if the evaluator in question was required to ignore Logisticare's past performance, the evaluator's failure to do so had a de minimis impact on the technical score total and would not have changed the ultimate result.
3. MAS is an experienced Medicaid transportation management contractor, performing essentially the same functions in three other regions of the state. DOH requested and reviewed the MAS projected costs, revenues and budget, and is satisfied that MAS' bid price is reasonable and that MAS can perform the contract for the price it bid.

MAS Response to the Protest

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

1. The evaluator in question acted appropriately in considering Logisticare's past performance under the prior contract. The Procurement Guidelines permit the consideration of that information as an "additional factor," in conjunction with submitted information.
2. MAS is a highly experienced Medicaid transportation management contractor, holding contracts for essentially the same services in three other regions within New York State. As such, MAS is thoroughly familiar with the costs, revenue stream and budgetary considerations implicated by the assumption of the contractual responsibilities set forth in the RFP.
3. MAS compiled, analyzed and compared numerous factors in arriving at its cost proposal. MAS responded with a cost proposal which will provide ample revenue to responsibly discharge its contractual obligations, realize a reasonable profit and provide the "best value" from among all of the offerors who responded to the RFP.

Logisticare Reply

In its Reply, Logisticare asserts that:

1. Even if the DOH evaluator in question was entitled to consider past performance in this instance, DOH had waived the relevant technical requirement on the prior contract and, regardless, Logisticare represented in its proposal that it would fully satisfy that requirement if awarded the new contract.
2. Logisticare's debriefing failed to provide sufficient information as to five of the nine components upon which it received relatively low scores. This lack of information renders those scores suspect and calls into question the credibility of the entire technical evaluation process. If the disparity between its superior technical score and that of MAS were greater, Logisticare's overall score might have exceeded MAS' overall score and resulted in the contract being awarded to it.
3. Logisticare performed its own evaluation of the savings achievable by MAS via economies of scale and asserts that it does not justify the cost proposal submitted by MAS.

DISCUSSION

Technical Proposal Evaluation and Information Considered

Logisticare alleges that one of the four DOH technical evaluators improperly considered information which was outside of the RFP and/or its proposal (Protest, at pg. 6). Specifically, Logisticare points to performance criterion 6.2.D.6.b of the RFP which asks the offeror to “Describe the written notification process upon denying a request for transportation services for an individual that informs the enrollee of the denial and the enrollee’s right to challenge the decision by requesting a State Fair Hearing” (RFP § 6.2.D.6.b, at pg. 33).⁶ One evaluator gave Logisticare a score of “1” out of a possible “5” on that criterion; the other three evaluators each gave Logisticare a “3” out of “5.” In its Answer, DOH denies that it waived the notification requirement on the previous contract (DOH Answer, at pg. 6), but does not dispute that one of the evaluators relied on Logisticare’s past performance, which was not part of this procurement’s technical criteria (DOH Answer, at pgs. 2-3).

The central purposes of New York’s competitive bidding statutes are “(1) protection of the public fisc by obtaining the best work at the lowest possible price; and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts” (*Matter of New York State Ch., Inc., Associated Gen. Contrs. V New York State Thruway Auth.*, 88 NY2d 56, 68 [1996]). Indeed, a fundamental principle of section 163 of the State Finance Law is that the award of contracts be based upon “a balanced and fair process.” This requires that the award methodology, both as designed and as applied, must be balanced and fair. Implicit in this is a requirement that evaluators apply the predetermined evaluation criteria to only that information contained in a bidder’s proposal. The State Procurement Council has recognized this, noting in its guidance for “Evaluating Technical Proposals” that “The evaluation team members apply scores to the predetermined criteria and sub-criteria if applicable. *Scoring is based on information provided in the submitted proposal*” (NYS Procurement Guidelines, at pg. 36 [emphasis added]). While additional factors outside the proposal, such as interviews, presentations or reference checks, may be considered and scored (if established in the evaluation instrument), these additional factors are based on information provided by bidders during the procurement process and would, therefore, be uniformly considered for every bidder (NYS Procurement Guidelines, at pgs. 36-37).⁷ Once the evaluation has concluded and the agency has made a contract award, the past performance of a proposed awardee on prior state contracts is also a consideration in determining whether the vendor is responsible.

Here, we find that it was inappropriate for the DOH evaluator to have considered Logisticare’s past performance on a previous contract when evaluating the performance criterion since this factor was not part of the pre-determined evaluation criteria. However, we also find that in this instance such consideration was harmless error. Indeed, Logisticare was awarded the

⁶ Medicaid enrollees have a right to a hearing upon a determination that such enrollee’s request for transportation services is denied.

⁷ Moreover, we note that offerors’ “overall past performance” is cited as a “typical technical evaluation criteria” in the State Procurement Guidelines (NYS Procurement Guidelines, at pgs. 34-35). While an agency is not legally required to disclose in the RFP every technical criterion to be considered, any such technical criteria must be set forth in advance of the initial receipt of offers (*see* SFL § 163[7]).

maximum 80 points for its technical proposal. Furthermore, based on our review of the score sheets provided in the procurement record, even under a scenario with all four evaluators awarding a score of “4” for RFP component 6.2.D.6.b, Logisticare’s raw technical score only rises by 1.5 points to 206 and its total composite score is still insufficient to change the outcome of the contract award.⁸ The contract would still have been awarded to MAS based on the total combined technical and cost scores. Therefore, in this instance, the scoring error did not affect the ultimate outcome.

Best Value and Review of MAS’ Cost Proposal

In regard to Logisticare’s assertion that MAS’ cost proposal is “reckless and actuarially unsound,” Logisticare calls into question whether or not MAS is a responsible bidder (Protest, at pg. 2). DOH responds that MAS is a highly experienced Medicaid transportation management contractor and is well aware that inadequate contract performance would bring financial penalties and possible contract termination (DOH Answer, at pg. 5). DOH notes that MAS currently holds contracts covering Medicaid transportation services in 55 counties in the state which would enable MAS to take advantage of economies of scale to effectively deliver services more efficiently (DOH Answer, at pgs. 5-6). DOH also required that MAS justify and demonstrate the reasonableness of its bid price and how it would be supported by the company’s financial profile (DOH Answer, at pg. 5). DOH avers it conducted an independent analysis of the predicted revenue stream as it relates to the costs of the numerous expenses associated with the contractual obligations MAS will undertake and was satisfied with MAS’ explanation (DOH Answer, at pg. 6). Ultimately, DOH concluded that the price offered by MAS was reasonable and MAS could perform the contract for the price it bid (DOH Answer, at pg. 7). Furthermore, in its Answer to the Protest, MAS states that it conducted detailed planning regarding the anticipated costs, budgets and efficiency and supported this claim by attaching significant documentation to its Answer, including detailed considerations of the projected cost of staffing, technology, office space, fixtures and comparisons of those costs to those born under its existing state contracts for essentially the same services (MAS Answer, at pg. 4 et seq.). Based on the foregoing and our review of the procurement record, we find no reason to question DOH’s determination that MAS can perform the contract at the price it bid.

As to Logisticare’s assertion that the cost proposal submitted by MAS was so low as to raise questions concerning MAS’ responsibility, we note that DOH was obliged to make a determination as to whether or not MAS was in fact a responsible offeror prior to making the contract award (State Finance Law § 163[9][f]). The factors to be considered in making that determination include: financial and organizational capacity; legal authority to do business in this state; integrity of the owners, officers and principals; and past performance of the offeror on prior government contracts (*see* SFL 163 § [1][c]; NYS Procurement Guidelines, at pg. 18). In our view, DOH engaged in a sufficient review of MAS, pursuant to established procedures and criteria, in reaching its determination that MAS was a responsible offeror (*see* DOH Answer, at pgs. 5-7). Logisticare’s contention that MAS’ cost was unreasonably low and it will be unable to meet its contractual obligations is based almost entirely upon the size of the disparity between the two cost proposals. This, without more, does not form a basis to find an offeror non-responsible.

⁸ We note that no offeror received an average score of “5” for any of the technical components.

We will now address the weight assigned to cost in the evaluation of the proposals. Given that “best value” requires the contracting agency to award the contract to an offeror in such a manner so as to optimize quality, cost and efficiency among responsive and responsible offerors (State Finance Law § 163[1][j]), it is incumbent upon the contracting agency to determine an appropriate relative weight to be afforded to the technical and cost scores. In the present case, DOH determined that 80 percent for the technical proposal and 20 percent for the cost proposal were appropriate, given the specifics of this procurement. Logisticare claims this placed an “undue emphasis on price” (Protest, at pg. 8) which encouraged irresponsibly low cost proposals. In the majority of service procurements, to ensure that state dollars are efficiently managed, cost must be accorded a weight of at least 20 percent. In this instance, Logisticare has offered no evidence to substantiate its claim that affording a 20 percent weight to cost placed an undue emphasis on cost.

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 DOH. As a result, the Protest is denied and we are today approving the DOH/MAS contract for MTM.