

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest
filed by Group Health Incorporated
with respect to the procurement for the
New York State Empire Plan Prescription Drug
Program conducted by the New York State
Department of Civil Service Employee Benefits Division
Contract Number C000577

Determination
of Bid Protest
SF-20060062

February 26, 2006

This Office has completed its review of the above-referenced procurement conducted by the New York State Department of Civil Service Employee Benefits Division (hereinafter "DCS") and the bid protest filed by Group Health Incorporated (hereinafter "GHI") with respect thereto. As outlined in further detail below, we have determined that the proposal submitted by GHI was not responsive to the Request For Proposals, entitled "Empire Plan Description Drug Program", issued by DCS (hereinafter "RFP") and, therefore, the protest is denied. In addition, our review of the procurement record reveals that the proposal submitted by WellChoice, Inc., doing business as Empire BlueCross BlueShield and its partner Caremark (hereinafter "Empire") was similarly not responsive to the RFP and, as a result, we are returning the proposed DCS/Empire contract unapproved.

BACKGROUND

Facts

On February 10, 2005 DCS issued the RFP seeking competitive proposals to secure the services of an insurer qualified to insure and administer the Empire Plan and the Student Employee Health Plan Prescription Drug Program (hereinafter "Program") either directly or through subcontracts with organizations qualified to perform all or some of the program services required under the RFP. The Program provides access to a network of participating pharmacies, a Mail Service Pharmacy, and a loose network of participating specialty pharmacies. The management of the Program includes a number of utilization management controls including mandatory generic substitution, prior authorization, patient education, as well as various other cost containment provisions. The Program provides benefits to enrollees and covered dependents for covered drugs subject to applicable copayments, supply limits and benefit maximums.

Prior to the proposal due date of April 4, 2005, DCS received proposals in response to the RFP from the following entities: (i) Empire; (ii) GHI/Express Scripts; (iii) CIGNA/CIGNA; and (iv) United HealthCare/Medco. After a review of the proposals,

by letter dated September 13, 2005, DCS made a conditional award under the procurement to Empire and notified the other unsuccessful Offerers of such award. By letter dated September 22, 2005, GHI filed a formal Selection Protest with DCS. DCS Commissioner Daniel Wall designated Joseph F. Kulkus, DCS Director of Internal Audit, to perform a review of the procurement conducted by DCS and the issues raised in the Selection Protest filed by GHI. By letter dated October 7, 2005, the DCS Employee Benefits Division responded to the issues raised by the GHI Selection Protest. By letter dated November 8, 2005, Mr. Kulkus issued his report and recommendation to DCS Commissioner Wall concluding that the Selection Protest was without merit and recommending that it be dismissed. By letter dated November 10, 2005, DCS Commissioner Wall adopted the recommendation of Mr. Kulkus and dismissed the Selection Protest filed by GHI.

Subsequently, DCS signed a contract with Empire for the services required under the RFP and forwarded such contract to this Office for approval. The DCS/Empire contract was received by this Office on November 28, 2005.

By correspondence dated December 5, 2005, GHI filed a Protest with this Office.

Procedures and Comptroller's Authority

Under Section 112 of the State Finance Law, before any contract made for or by a state agency, which exceeds \$15,000 in amount, becomes effective it must be approved by the Comptroller.² Because DCS had already entered into a proposed contract with Empire resulting from this procurement, the Comptroller has reviewed the Protest filed by GHI as part of his review of the contract award to Empire.

In determination of this Protest, this Office considered:

- (i) the documentation contained in the procurement record forwarded to this Office by DCS with the DCS/Empire contract;
- (ii) the correspondence between this Office and DCS arising out of our review of the proposed DCS/Empire contract; and
- (iii) the following correspondence/submissions from the parties (including the attachments thereto):

- GHI Selection Protest, dated September 22, 2005 (correspondence from Mr. James W. Lytle, Esquire, of Manatt, Phelps & Phillips, LLP to DCS Commissioner Daniel Wall)
DCS Response to Selection Protest, dated October 7, 2005
(correspondence from Robert W. DuBois, Director of the DCS Employee Benefits Division, to Joseph Kulkus, Director of Internal Audit)

¹ On December 28, 2005, to continue benefits under the Program pending our resolution of the Protest and our review of the procurement award to Empire, this Office approved an interim single source contract award to Empire.

² SFL Section 112(2).

- Report and Recommendation of Joseph Kulkus, dated November 8, 2005
GHI Protest to OSC (correspondence from James D. Featherstonhaugh, of Featherstonhaugh, Wiley, Clyne & Cordo, LLP, dated December 5, 2005)
- DCS Response to Protest (correspondence from Brian S. Reichenbach, DCS Counsel dated December 12, 2005)
Empire's Response to Protest (correspondence from Sean M. Doolan, Esquire, Hinman Straub, Counsel to WellChoice, Inc., the parent company of Empire dated December 8, 2005)
Reply memorandum from GHI (correspondence from James D. Featherstonhaugh, of Featherstonhaugh, Wiley, Clyne & Cordo, LLP, dated December 20, 2005)
Empire's Reply to the December 20, 2005 submission of GHI (correspondence from Sean M. Doolan, Esquire, Hinman Straub, dated January 17, 2006)

Protesting Party

The protestor, GHI, is one of the entities that submitted a proposal in response to the RFP issued by DCS.

Applicable Statutes

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

Section 163(9)(b) provides that the "solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive

Section 163(1)(e) defines a "specification" or "requirement" as "... any description of the work to be performed, the service or products to be provided, the necessary qualifications of the offerer, the capacity and capability of the offerer to successfully carry out the proposed contract, or the process for achieving specific results and/or anticipated outcomes or any other requirement necessary to perform the work . . . Specifications shall be designed to enhance competition, ensuring the commodities or services of any offerer are not given preference except where required by this article. "

³ SFL Section 163(10).

⁴ SFL Section 163(1)(j).

⁵ SFL Section 163(1)(d).

Section 163(9)(c) provides that “[w]here provided in the solicitation, state agencies may require clarification from offerers for purposes of assuring a full understanding of responsiveness to the solicitation requirements . . . ”

ANALYSIS OF BID PROTEST

Basis of GHI Protest

GHI challenged DCS’s decision to reject its proposal as non-responsive on the following grounds:

1. The specialty drug proposal offered by GHI was “entirely consistent with the requirements of the RFP – particularly as those terms were subsequently clarified by DCS in its answers to bidder questions.”

The RFP authorized the submission of proposals that offered alternative channels of distribution for specialty drugs if they satisfied certain requirements.

- The language of the RFP required that only specialty drugs dispensed on a retail basis be priced in accordance with the discount applicable to brand drugs dispensed at retail; this requirement did not apply to mail service pharmacy drugs. Accordingly, since GHI was not proposing to dispense specialty medications through conventional mail service (GHI was proposing to utilize CuraScript, a specialty pharmacy), GHI “reasonably” concluded that the otherwise applicable pricing rules did not apply.
- The questions and answers issued by DCS, after the RFP was released, further confirmed GHI’s interpretation of the requirements of the RFP as related to specialty drugs.

2. “Nothing in the RFP or in any subsequent communication from DCS rendered the inclusion of mail order fulfillment and pricing of specialty drugs a mandatory provision of the RFP that would justify the disqualification of a ‘variant bid’”.

- The RFP did not list the mail order fulfillment and pricing of specialty drugs as a mandatory requirement.
The RFP failed to disclose that any variation from the mail order fulfillment and pricing requirement would result in disqualification of the bid.

3. The GHI “specialty drug dispensing proposal offered DCS a pricing methodology that did not materially differ from an across the board mail order discount and that provided DCS with an adequate opportunity to evaluate the bid.”

- The alternative approach offered by GHI, through CuraScript, satisfied the financial conditions required of “alternative distribution channels”.
While the GHI proposal, utilizing CuraScript, did not extend the discounts applicable to conventional mail order drugs, the difference in cost, if any, would have been trivial.

4. There was an actual and apparent conflict of interest between the requirements of the Procurement Stewardship Act and the requirements of Chapter 1 of the Laws of 2002 and Section 161-a of the Civil Service Law.

Since the Procurement Stewardship Act required that the DCS procurement be awarded on the basis of “best value” and Chapter 1 of the Laws of 2002 required that the board of the Public Asset Fund maximize the value of stock it holds in Empire, it was improper to have senior State officials actively involved in both the negotiation of the WellPoint WellChoice merger and the evaluation of the offers received in response to the RFP.

In light of this actual and apparent conflict, during the pendency of the merger discussions, New York State was required to recuse itself from the evaluation of the responses to the RFP and to provide an independent and impartial evaluator.

DCS’s Response to the Protest

DCS responded to the Protest as follows:

The explicit terms of the RFP required guaranteed pricing for all drugs, including specialty drugs, whether dispensed from a retail pharmacy or through the mail service pharmacy. Further, this requirement was reinforced by the questions and answers promulgated by DCS after the release of the RFP, and subsequent communications from DCS to the bidders.

The proposal from GHI did not provide any assurance that its alternative pricing methodology would conform to the RFP’s requirement that it be equal to or better than its proposed guaranteed mail pricing.

GHI specifically stated, in response to requests from DCS, that it would not include specialty drugs in the guarantees applicable to brand and generic drugs dispensed through the mail service process.

DCS made every effort throughout the procurement process to provide all competitors a full opportunity to participate in the procurement.

No person involved in the procurement had any financial interest in the WellPoint WellChoice merger or any involvement in the merger negotiations.

- There were no communications regarding the status of the procurement between any persons involved in the procurement and any State official with any role in the WellPoint WellChoice merger negotiations.

Empire’s Response to the Protest

Empire, the offerer selected by DCS under the procurement, responded to the Protest as follows:

- While it was public knowledge that Empire submitted an offer in response to the RFP, neither GHI (or any other offerer) questioned Empire’s participation, or requested an alternative review process, until Empire was awarded the contract.

The Public Asset Fund, the owner of WellChoice stock, is a separate legal entity and acts independently of the State.

- The existing procurement procedures provide sufficient safeguards to ensure that the selection process conducted by DCS was fair and impartial.

DISCUSSION

The resolution of this protest requires that we address the following issues:

- (1) Did the RFP contain any “material” requirements with respect to the pricing of specialty drugs?
- (2) If so, was the proposal submitted by GHI responsive to such material requirements?
- (3) Did DCS conduct the procurement in a fair manner and in accordance with statutory requirements?

1. Specifications or Requirements of the RFP

Initially, we note that as required by Article 11 of the SFL, the RFP provided that the contract award under this procurement would be made to the “**responsive** and responsible Offeror whose Proposal offers the best value to the DCS and the State . . .” (emphasis supplied).⁶ As defined in the SFL, a “responsive” offer is an “offer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency.”⁷ The introductory portion of Section III of the RFP, “Technical Proposal Requirements”, expressly provides that “DCS will accept Proposals only from qualified Offerors and will consider for evaluation and selection purposes only those Proposals that it determines to be in compliance with the requirements of this Section.”⁸ Accordingly, any “qualified” offerer was on notice that a failure to meet the requirements of the RFP could result in its proposal being eliminated from the competition.

The RFP set forth certain “Minimum Mandatory Requirements” (e.g., the Offerer must possess the legal capacity to enter into a contract for the services with the Commissioner of DCS; the Offerer must be licensed as an insurance company to transact accident and health insurance business in New York State, or subject to Article 43 of the Insurance Law; the Offerer’s principal place of business must not be located in a State that penalizes New York State vendors, nor will the goods or services be substantially performed in such State; the Offerer must either own or have subcontracted with a fully operational Mail Service Pharmacy facility that is operational with available capacity to administer the Program).⁹ These minimum mandatory requirements, however, merely

⁶ RFP page 5-1.

⁷ SFL Section 163(1)(d).

⁸ RFP page 3-1

⁹ RFP page 3-1

relate to the eligibility of a potential Offerer to submit a proposal in response to the RFP. That is, an Offerer that did not satisfy these mandatory requirements would not be “qualified” to submit a proposal in response to the RFP.

These minimum mandatory requirements, however, are not the only specifications or requirements that an offerer had to meet to be considered “responsive” to the RFP. Under the SFL, the term “specification” or “requirement” is defined to include (in addition to the necessary qualifications of the offerer) “any description of the work to be performed, the service or products to be provided, . . . or the process for achieving specific results and/or anticipated outcomes or any other requirement necessary to perform the work . . .” (See the statutory definition of “specification” or “requirement” set forth in SFL §163(1)(e)). Section III of the RFP “Technical Proposal Requirements” contains 70 pages replete with technical specifications/requirements applicable to proposals and Section IV of the RFP “Cost Proposal Requirements” contains 23 pages of various specifications/requirements applicable to the submission of cost proposals.

However, a procuring entity may waive a technical noncompliance with bid specifications if the defect is a mere irregularity and it is in the best interest of the procuring entity to do so (Le Cesse Bros Contr v Town Bd of the Town of Williamson, 62 AD2d 28 [4th Dept 1978] affd 46 NY2d 960 [1979]). Therefore, while a proposal did not have to satisfy each and every specification/requirement listed in the multi-hundred page RFP¹⁰ to be considered responsive, the proposal did have to meet, or comply with, each “material or substantial” specification/requirement (Id). Where the variance between the offer and the specification is material or substantial the defect may not be waived and the procuring entity must reject the offer so that all bidders may be treated alike and the possibility of fraud, corruption or favoritism is avoided (Id). The test of whether a variance is material or substantial is whether it gives the bidder a substantial advantage or benefit not enjoyed by the other bidders (Id; See also Matter of Glen Truck Sales & Services v Board of Estimate and Contract of the City of Mount Vernon, 31 Misc 2d 1027, 220 NYS2d 939 [1961]). Furthermore, we note that in the first instance it is the procuring agency that determines whether a variance from the bid requirements or specifications is material (A&S Transportation Co v County of Nassau, 154 AD2d 456 [2nd Dept 1989]; AT&T Communications v County of Nassau, 214 AD2d 666 [2nd Dept 1995]; Hungerford & Terry, Inc v Suffolk County Water Auth, 12 AD3d 675 [2nd Dept 2004]).

Part F of Section III (Technical Proposal Requirements) of the RFP addresses “Specialty Pharmacies”. This portion of the RFP states that

“The Program is experiencing increased utilization of a class of prescription drug referred to a[s] ‘specialty’ drugs. These generally high

¹⁰ The RFP was separated into six sections: Section I – Introduction; Section II - Administrative Protocol and Process; Section III -Technical Proposal Requirements; Section IV – Cost Proposal Requirements; Section V – Evaluation and Selection Criteria; and Section VI – Contract Provisions.

cost drugs often require special handling, special administration protocols, as well as additional testing and monitoring of patients receiving the medications. The prescription drug program is responsible for the cost of these drugs when dispensed from a retail pharmacy, a mail pharmacy, and for infusion drugs dispensed by a licensed pharmacy for use at home . . . The Offeror must have the capability to ensure dispensing of specialty drugs from its proposed participating network utilizing its standard pricing formulas . . . **Specialty drugs shall be included in the guaranteed discount off brand drugs at retail, or the guaranteed discount off brand drugs at mail order if dispensed through the mail service pharmacy.**¹¹ (emphasis added)

In addition in Section IV (Cost Proposal Requirements) of the RFP, addressing “Mail Service Pharmacy Pricing”, provides that:

The cost of all Program covered prescriptions dispensed by the Mail Service Pharmacy shall be charged to the Program at a guaranteed contracted percentage discount off AWP for brand and generic drugs plus a dispensing fee, if any, as proposed by the bidder in Exhibit IV.A. **The proposed Mail Service Pharmacy discounts must be guaranteed for the term of the Agreement . . .** (emphasis in original).¹²

Finally, Exhibit IV.A of the RFP (See Attachment A to this Determination) was the form to be utilized by an Offerer to submit its “Proposed Claim Reimbursement Formulas”. On this form, the Offerer was required to provide its guaranteed discount off AWP with respect to the dispensing of drugs under four scenarios: (i) retail brand drugs; (ii) retail generic drugs; (iii) mail service brand drugs; and (iv) mail service generic drugs. The form provided the Offerer with a ½ inch by ¾ inch rectangle in which to propose its guaranteed discount off AWP under each of the scenarios. This required format did not provide an Offerer with the opportunity to except, or separately treat, the pricing of specialty drugs. The only two bases of distinction related to the pricing of prescriptions involved the distinction between brand or generic and the distinction between retail and mail. Accordingly, it was clear that for cost purposes, specialty drugs were to be treated in the same manner as other drugs being provided whether at retail or by mail.

Reading the above-referenced portions of the RFP it appears clear to us that an Offerer was required to provide guaranteed percentage discounts off AWP for brand and generic drugs (including specialty drugs) offered at retail and mail and that DCS intended that such pricing be a material requirement of the RFP. We note that at no point did DCS waiver from its determination that this was a material requirement of the RFP.

However, even assuming arguendo that there was ambiguity as to whether the guaranteed percentage discounts off AWP applied to specialty drugs, this requirement was made

RFP page 3-44.

¹² RFP page 4-9.

abundantly clear in light of a Written Question and DCS's Answer thereto which were provided to all Offerers prior to the proposal due date.¹³ The Question and the DCS Answer (underscored) read as follows:

Q. Will the state consider removing specialty products from having to be provided at the mail service pharmacy if the Offeror can demonstrate savings through a specialty pharmacy provider while insuring the member is achieving plan design savings?

A. The Offeror must have the capacity to process prescriptions for specialty drugs through the mail order pharmacy. With the prior approval of DCS, an Offeror may be authorized to process mail service prescriptions for specialty drugs through an alternative distribution channel provided the process meets all mail order standards, imposes no additional burden on the enrollee, and pricing is on a net cost basis equal to or better than the cost resulting from Offeror's guaranteed mail order discounts plus pharma revenue generated. If the Offeror intends to request authorization to utilize an alternative distribution channel if awarded the contract, the Offeror must disclose it in its proposal, including the basis for any expected savings if authorization is granted (RFP, Vendor Questions and Answers, at p.12). (emphasis added)

Initially, we note that the Question is written in terms of a request that the State remove specialty products from mail service pharmacy if additional savings could be realized. Implicit in the wording of the Question is an apparent recognition that under the RFP, specialty products were not excluded from the Offerer's mail service proposal. More telling, however, is the DCS response to the Question which advises Offerers that:

- (i) the Offerer must be capable of processing specialty drugs through its mail order pharmacy;
- (ii) while an alternative distribution channel may be authorized by DCS, any alternative would require the prior approval of DCS; and
- (iii) the request for such prior approval would be made after contract award.

In light of this Question and Answer, it was clear that specialty drugs delivered by mail order had to be provided at the guaranteed discount price. Therefore, even assuming there was any doubt that the RFP required that the pricing of specialty drugs be included within the Offerer's guaranteed discount pricing, any such doubt was erased by this Question and Answer that was disseminated to Offerers prior to the deadline for the receipt of proposals.

¹³ DCS issued this Question and Answer on March 10, 2005, prior to the proposal due date of April 4, 2005.

2. Responsiveness of GHI's Proposal

As stated above, the RFP (as clarified by the Question and Answer discussed above) clearly required that specialty drugs, whether provided through retail or mail, be included in the Offerer's guaranteed discount pricing.

It is undisputed that GHI's Proposal with regard to the pricing of the specialty drugs by mail varied from the across-the-board mail service discounts set forth in its cost proposal. On Exhibit IV.A of the GHI proposal, GHI proposed "AWP- 23%" in the box related to mail service pharmacy brand drugs. However, in addition to its guaranteed discount pricing under the four scenarios, GHI also submitted two pages entitled "Proposed Specialty Drug Pricing". These two additional pages set forth a range of discounts off AWP, by product, for specialty drugs processed by mail. The discounts were over a range of 9% - 40% off AWP.

Clarifications Requested From GHI

Finally, we note that in an attempt to clarify its understanding of the GHI proposal with respect to the pricing of specialty drugs, DCS requested "confirmation" from GHI on two points regarding its specialty drug pricing after receipt of its proposal.¹⁴ The DCS requests for clarification and the GHI responses thereto (underscored) are set forth below:

Please confirm that the Offeror understands that the Program makes no distinction for "specialty" drugs for pricing purposes and that the pricing terms applicable to brand and generic drugs shall apply to all dispensed drugs either at retail or at mail.

Express Scripts confirms that there is no distinction for specialty drugs for pricing purposes when dispensed at retail. Therefore, retail pricing terms applicable to brand and generic drugs will apply to specialty drugs dispensed at retail. Due to the unique nature of these medications . . . , Express Scripts will not apply the brand and generic drug mail pricing terms to specialty medications . . . (emphasis added)

In addition, please confirm that pricing for "specialty" drugs dispensed through the mail service pharmacy (or dispensed through any approved alternative distribution channel utilized by the Offeror to fill mail order prescriptions) will be based on the Offeror's proposed guaranteed discounts off AWP for brand and generic drugs dispensed through mail.

Express Scripts confirms that there is no distinction for specialty drugs for pricing purposes when dispensed at retail. Therefore, retail pricing terms applicable to brand and generic drugs will apply to specialty drugs dispensed at retail. Due to the unique nature of these medications, Express

¹⁴ DCS requested this clarification from GHI on June 22, 2005 in a follow-up to GHI's technical management interview.

Scripts will not apply the brand and generic drug mail pricing terms to specialty medications. However, we have demonstrated that providing these specialty products through CuraScript does offer the plan a net cost basis equal to or better than the mail service pricing with no additional burden to the enrollee.

The responses of GHI to these requests for clarification from DCS confirmed that GHI did not intend to apply its guaranteed pricing to specialty drugs. Since the proposal submitted by GHI did not include specialty drug pricing in its guaranteed percentage off AWP pricing, the GHI proposal was not responsive to the RFP.

3. Alleged Conflict of Interest

GHI asserts that the pendency of merger discussions between WellChoice and the New York State Public Asset Fund (as majority owner of WellChoice, Inc. doing business as Empire) while DCS was evaluating proposals, including one by Empire, for administration of the prescription drug program for State employees created a “statutory conflict”. This phrase, on first reading, seems to suggest a conflict of interest under a statute governing conflicts of interest of State officers and employees such as section 73 or section 74 of the Public Officers Law. However, a more in-depth review of GHI’s argument reveals there is no such “conflict of interest” presented, or even asserted.

The classic conflict of interest as defined in the Public Officers Law is a conflict between an individual’s duties as a public officer and the individual’s financial or other personal interests. For example, a financial interest in a contract that the individual has a role in awarding in his/her official capacity would typically present a conflict of interest; that is, a conflict between public and private roles. There is no allegation here that any of the individuals involved in evaluating this contract had a financial or other personal interest in any of the companies that submitted proposals.

The “statutory conflict” asserted is, in essence, an allegation that the State’s procurement statute (specifically, State Finance Law §163(2)) is in conflict with the State law governing the Public Asset Fund (Insurance Law §4301(j)(4)(F)). It is not clear how this creates a conflict, since the statutory duties regarding the procurement, which are generally for the procuring agency, do not reside in the same agency as the duties with respect to the Public Asset Fund. In fact, while we reject Empire’s contention that the Public Asset Fund is legally separate from, and acts independently of, the State¹⁵, it is, nevertheless, a State entity that is statutorily separate from other State agencies. The Public Asset Fund’s investment and disbursement decisions are made by a board, comprised of members drawn from the private sector, in consultation with the Director of the Division of the Budget.

GHI also alleges a conflict with Civil Service Law §161-a, which relates to implementation of negotiated agreements between the State and employee organizations

¹⁵ The Comptroller is the sole custodian of the Fund and the moneys of the Fund are statutorily designated as moneys of the State (Insurance Law §7317(e)).

for health insurance benefits and establishes a Council on Employee Health Insurance (“Council”) comprised of the President of the Civil Service Commission, the Director of the Budget and the Director of the Governor’s Office of Employee Relations (“GOER”). The Council is required to supervise the administration of changes to the health insurance plan negotiated in collective bargaining and to provide policy direction to insurance plans administered by the State.

GHI asserts that, as a result of this so-called “statutory conflict”, the State or its officers have been placed in a situation where they have multiple roles and must make judgments according to conflicting standards. This suggests something closer to incompatibility of public offices, which is a prohibition upon dual office holding by one person where (1) one office is subordinate to the other, or (2) there is an inherent inconsistency between the duties of the two offices (People ex rel Ryan v Green, 58 NY 295 [1874]; Matter of Dupras v County of Clinton, 213 AD2d 952 [1995]; 1988 Opns NY AG 12).

Initially, we note that the prohibition against dual office holding is a common law standard which can be overcome by statute. Moreover, this prohibition relates to one person occupying two offices, which is not the situation presented here. Even assuming, as is alleged here, that a State agency or office is required by statute to discharge multiple, even “conflicting” roles, there is no prohibited incompatibility or illegality. Rather, a State agency’s multiple or conflicting roles can be managed by the imposition of internal controls. This Office generally comments in audits of such agencies that the conflicting duties should be segregated so that different employees discharge the different roles (See Opn St Comp No. 89-35).

In the situation presented by this protest, it is clear that the State’s procurement statute and the criteria set out in the solicitation govern the prescription drug program procurement. The goal under the procurement statute is to achieve “best value” to the State for the specific contract resulting from that procurement (State Finance Law §163(2)). On the other hand, the sale of the stock of Empire by the Public Asset Fund is guided by the goal of maximization of the value of the asset (See Insurance Law §4301(j)(4)(F)(i) and §7317(e)). Statutes should be interpreted as being in harmony where possible (See McKinney’s Statutes §221). Therefore, we do not view the provisions of the State Finance Law governing the award of the subject contract to be in conflict with the provisions of Chapter 1 of the Laws of 2002 requiring the board of the Public Asset Fund to maximize the value of the stock it holds in Empire. Moreover, even assuming that these statutes or section 161-a of the Civil Service Law prescribe multiple statutory roles for certain agencies, that does not create an impediment to action if those roles were anticipated and authorized by the Legislature. To the extent that there is a concern that one person should not have to “wear two hats” - - participating in the procurement and in the Public Asset Fund sale of stock - - the solution would be to have a different officer or employee in each of the two roles.

Apparently, employees from DOB and GOER participated with DCS staff in the evaluation process. (See Empire Plan Prescription Drug Program, Evaluation Assignments). Moreover, the Director of the Budget and/or senior staff of DOB

reportedly participated actively in the merger negotiations. (See “State Pushed Better WellChoice Deal”, James Odat, Times Union, September 29, 2005). In our opinion, none of these roles is inappropriate. However, if GHI is alleging that evaluators or decision makers on the contract review and award by DCS inappropriately “imported” into that process an unstated evaluation criteria (i.e., the positive impact on the value of the Public Asset Fund of an award to Empire) and if that were established, it potentially would be a ground to refuse to approve the award to the apparent best value. Such refusal would not be based upon a conflict of interest or a conflict between statutes; rather, it would be based on the fairness of the evaluation process and the deviation from stated evaluation criteria established before the receipt of proposals (See State Finance Law §163(2)(b)).

DCS has expressly denied that the same State employees played a role in the procurement and the merger discussions or that they consulted each other. (See Response to Selection Protest, December 12, 2005, p 1). Moreover, the record currently before us does not establish that either situation occurred. In any event, we need not resolve these questions in order to make our decision on this procurement, since (1) as discussed supra, we are denying GHI’s bid protest on the ground that GHI’s proposal was properly rejected by DCS as nonresponsive to the RFP, and (2) as more fully discussed infra, we are returning without our approval the proposed contract award to Empire on the ground that Empire’s proposal should also have been rejected as nonresponsive by DCS.

4. Empire Proposal

As set forth above, we have determined that the proposal submitted by GHI was not responsive to a material requirement of the RFP in that the GHI proposal did not include its pricing for specialty drugs within its proposed guaranteed discounts off AWP. Additionally, our review of the procurement record leads us to conclude that the proposal submitted by Empire is, likewise, not responsive to the same requirement of the RFP.

On Exhibit IV.A of the Empire proposal, Empire proposed “AWP-16.5%” and “AWP-23%”, respectively in the boxes related to retail and mail service pharmacy brand drugs. However, also attached to the Exhibit IV.A of the proposal submitted by Empire, were two pages entitled “Proposed Specialty pricing for State of NY”. Similar to the GHI proposal, these two additional pages set forth a range of discounts off AWP, by product, for specialty drugs. The discounts were over a range of 5% - 45% off AWP.

Subsequently, in response to a request for “clarification” by DCS after the deadline for the submission of proposals, Empire “confirmed” that its proposal offered specialty drugs at its proposed guaranteed rates and, ultimately, Empire entered into a contract including the specialty drugs within its proposed guaranteed rates. However, the proposal submitted by Empire did not comply with this requirement of the RFP at the time of the deadline for the submission of proposals. Since the Empire proposal did not comply with a material requirement of the RFP, it was not responsive to the RFP in the same manner that GHI’s proposal was non-responsive. Furthermore, this defect could not be waived by DCS and DCS could not (by means of a purported clarification or otherwise) provide

Empire with an opportunity to cure this defect by revising its bid (See Le Cesse Bros Contr v Town Bd of the Town of Williamson, supra; Matter of Glen Truck Sales & Services v Board of Estimate and Contract of the City of Mount Vernon, supra.) In essence, Empire's "confirmation" that its proposal offered specialty drugs at its proposed guaranteed discount rates constituted an impermissible revision of its proposal after the deadline for the submission of proposals and could not be characterized as a permissible "clarification".

CONCLUSION

We find that the proposal submitted by GHI was not responsive to a material requirement of the RFP with respect to the pricing of specialty drugs. Therefore, DCS properly rejected the GHI proposal. Furthermore, our review of the procurement record leads us to conclude that the proposal submitted by Empire was, similarly, not responsive to the same material requirement of the RFP and, therefore, should have been rejected by DCS. As a result, we are returning the proposed DCS/Empire contract to DCS unapproved.

OFFICE OF THE STATE COMPTROLLER