

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest
filed by Prometric Inc. with respect to
the procurement of a Licensing Test
Administrator conducted by the
New York State Insurance Department
Contract Number C000337

Determination
of Bid Protest
SF-20070367

March 6, 2008

This Office has completed its review of the above-referenced procurement conducted by the New York State Insurance Department (hereinafter "NYSID") and the bid protest filed by Prometric Inc. (hereinafter "Prometric") with respect thereto. As outlined in further detail below, this Office has determined that the grounds advanced by the protestor are without sufficient merit to overturn the contract award by NYSID. As a result, we are today approving the contract.

BACKGROUND

Facts

On April 26, 2007, NYSID issued a Request For Proposal (hereinafter "RFP") to obtain services for the administration of insurance licensing examinations, including test development, data support, and other administrative services on behalf of NYSID.

The RFP stated that the method of award would be based on a "Best Value"¹ determination taking into consideration the most beneficial combination of qualifications, services and cost, among proposals that met the requirements of the RFP.² Technical and cost sections would be evaluated separately and after completion of the technical and cost evaluation, a composite score would be assigned to each proposal with the technical score weighted at 70 points/percent and the cost score weighted at 30 points/percent. An award would be made to the proposal with the highest composite score.³ The RFP described the technical and cost evaluation criteria stating:⁴

Technical Evaluation - (70%

The extent to which the bidders meet the functional descriptions as defined in Section 2 of the RFP.

¹ See State Finance Law § 163(1)(j) (defining "Best Value" as the "basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers").

² RFP at page 31.

³ RFP at page 32.

⁴ RFP at page 30-33.

The proposal's clarity, explicitness, completeness and reasonableness.
The relevant experience and qualifications of the bidder
The ability of the bidder to perform the tasks within the specified
timeframes.

Cost Evaluation - (30%)

The proposed personnel expenses (i.e. price) for the term of the
agreement.
The estimated amount of non-personnel out-of-pocket expenses and
customary administrative fees, if applicable.

Three proposals were submitted in response to the RFP , one from Prometric, one from Promissor, Inc., A Pearson VUE Business,⁵ and one from PSI Services, LLC (hereinafter "PSI"). After determining that the PSI proposal offered the best value, NYSID made a contingent award to PSI. Because the existing contract for these services with Prometric expired on November 18, 2007, and the filing of this protest precluded a new permanent contract from being in place by that date, NYSID first proposed to enter into an interim extension of Prometric's contract in order to permit the continuation of the testing program. When Prometric declined to enter into such an extension, NYSID entered into a six-month interim contract with PSI for these services.⁶

Procedures and Comptroller's Authority

Under Section 112 of the State Finance Law, generally, before any contract made for or by a state agency, which exceeds \$50,000 in amount, becomes effective it must be approved by the Comptroller. As part of the Comptroller's review of the contract, this Office considered the issues raised by the protest.

In determination of this protest, this Office considered the following correspondence/submissions from the parties: (i) correspondence from Keith Harris of Braff, Harris & Sukoneck, attorneys for Prometric, dated October 25, 2007 to the New York State Office of General Services (with a copy to NYSID), which protested the award to PSI and which was sent to this Office on October 29, 2007; (ii) the reply/protest determination letter from NYSID, dated October 31, 2007; and (iii) correspondence from Keith Harris to this Office, dated December 3, 2007.

Protesting Party

The protestor, Prometic, was the incumbent license test administrator and one of the entities that submitted a proposal in response to the RFP.

⁵ Promissor filed a separate protest. We have also reviewed the issues raised in that protest, and have today determined in a separate determination (SF-20070368) that Promissor's protest does not provide sufficient grounds for OSC to withhold its approval of the contract award to PSI.

⁶ By its terms, the six-month interim contract will terminate if a permanent contract, whether with PSI or another vendor, is in place prior to that date.

ANALYSIS OF BID PROTEST/APPEAL

Prometric's Protest

Prometric asserts that it is legally and equitably entitled to an award of the contract because:

- The bid submitted by Prometric received the highest composite score, and that to the extent that the award to PSI was based upon weighting factors applied by NYSID, the use of such weighting factors was impermissible because such weighting factors were not set forth in the RFP.
- Based upon information from unnamed sources at NYSID, it believed that PSI would not be ready to commence examinations at 15 geographically diverse locations on November 19, 2007. Prometric further asserts that this inference is supported by the fact that NYSID asked Prometric to agree to an interim extension of its existing contract.⁷

Agency's Response to Protest

NYSID responded to the protest stating:

Although the proposal submitted by Prometric received the highest raw score (by one-hundredth of a point), the proposal submitted by PSI received the highest composite score after the weighting provided for by the evaluation methodology was applied. NYSID is satisfied that PSI will be able to provide the services described in the RFP and has given assurances that it will do so. Any discussions with Prometric concerning an interim contract were not based upon doubts concerning PSI's ability to perform, but rather as a cautionary measure in case the permanent contract was not approved by the Attorney General and the Comptroller by November 18, and therefore was not in place by such date.

Prometric's Appeal to the Comptroller's Office

Prometric's December 3, 2007 letter contains affidavits from employees of Prometric which assert that PSI, in its operations under the interim contract, was not meeting several requirements contained in the RFP. Based upon these assertions, Prometric implies that PSI would not have been able to commence examinations under a permanent contract by November 19, 2007, and therefore is not responsive to the RFP.

⁷ We note that the Prometric protest also asserted that NYSID was "stonewalling" its ability to obtain information. The appropriate venue for resolving this matter is provided in the Public Officers Law regarding Freedom of Information Law requests.

Applicable Statutes

The requirements applicable to this procurement are set forth in Article 11 of the State Finance Law. Section 163(10) of the State Finance Law provides that contracts for services shall be awarded on the basis of “best value” from a responsive and responsible offerer. Section 163(7) of the State Finance Law requires that agencies document in the procurement record, prior to initial receipt of offers, the criteria and process to be used to determine best value. Section 163(1)(j) of the State Finance Law defines best value as “the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers.”

Discussion

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

- (1) whether NYSID established the evaluation methodology in accordance with the requirements of the State Finance Law;
- (2) whether, consistent with the evaluation methodology established in accordance with the State Finance Law, the proposal submitted by PSI had the highest composite score; and
- (3) whether PSI was capable of meeting the requirements set forth in the RFP, and therefore was responsive to the RFP.

For the reasons discussed below, this Office’s review and examination of the procurement record does not support Prometric’s assertion that it was the bidder with the highest composite score, or that PSI failed to meet the RFP requirement to demonstrate an ability to have all systems operable and in place to commence examinations on November 19, 2007.

NYSID properly established the evaluation methodology used in the award to PSI

Prometric asserts that when the scores for its cost and technical proposals are added together, its proposal has the highest composite score by one-hundredth of a point. Prometric further asserts that, even though the RFP explicitly describes how NYSID would determine the scores, a “secret” never before disclosed weighting criteria was used by NYSID which resulted in PSI receiving the highest composite score. Such a scoring of proposals, Prometric argues, suggests impropriety and irregularity.

The RFP states that “[t]he basis of award will be the highest composite score”⁸ Section 163(9)(b) of the State Finance Law provides that:

The solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered

⁸ RFP at page 32.

responsive and shall describe and disclose the **general manner** in which the evaluation and selection shall be conducted. Where appropriate, the solicitation shall identify the relative importance and/or weight of cost and the overall technical criterion to be considered by a state agency in its determination of best value. (emphasis added)

As required by Section 163(9)(b), the RFP set forth the general evaluation criteria and the relative weight/importance of cost and technical, i.e., cost 30 points/percent, technical 70 points/percent. While an agency certainly can provide greater detail concerning the award methodology in the RFP, nothing in the State Finance Law requires any further specification of the evaluation criteria, weighting or scoring methodology in the RFP.⁹ As a result, the agency was not required to outline in the RFP the specific method or weighting which would be used to calculate the technical and cost scores.

State Finance Law §163(7) requires, however, that:

Where 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.

Our review establishes that NYSID detailed, in the procurement record on April 23, 2007, four days prior to the RFP release date of April 26, 2007, the complete evaluation methodology, including, how the technical proposals would be evaluated and scored and the weights to be assigned to each of the technical criteria. Similarly, the instrument for the cost evaluation was in place prior to the release of the RFP.

We are therefore satisfied that NYSID complied with the requirements of both subdivisions (7) and (9) of section 163 of the State Finance Law.

The award went to the bidder with the highest composite score

Consistent with the 70% technical/30% cost weighting stated in the RFP, the evaluation methodology provided for the allocation of a total of 500 points, 350 points (70%), was allocated to technical and 150 points (30%), was allocated to cost. The 150 cost points were allocated in the following manner. Administration staff assigned each cost proposal a raw score of between 0 and 5. PSI as the lowest bidder received a raw score of 5.00; the Prometric cost proposal received a raw score of 4.26.¹⁰ Allocating a 30%

⁹ *Transactive v. New York State Department of Social Services*, 236 A.D.2d 48, 53 (1997); *aff'd on other grounds*, 92 N.Y.2d 579 (1998).

¹⁰ PSI, having bid the lowest cost (345, as determined by the cost of the one exam and fingerprinting fee for each of the five years), received the maximum points, after applying the conversion formula, 5 which was multiplied by 30, thus representing 30% of its composite score or 150 points. Prometric, having the highest cost (405), received a score of 4.26 points. This was derived by applying the conversion formula as

weighting to cost, the respective raw scores for cost were multiplied by 30 resulting in a weighted cost score of 150 for the PSI cost proposal and a weighted cost score of 127.80 for the Prometric cost proposal.

The 350 technical points were allocated in the following manner. The technical proposals were rated on 23 technical criteria receiving a raw score between 0 and 5. These individual raw technical scores were then multiplied by the respective weighting factor that was assigned to the respective technical criteria by an independent Weighting Committee of NYSID staff members that were not involved in the evaluation process (the procurement record documents that the Independent Weighting Committee established the weights which were to be assigned to each of the 23 technical criteria prior to the issuance of the RFP). After applying the pre-established weighting, the PSI technical proposal received a total weighted score of 226.10 and the Prometric technical proposal received a total weighted score of 219.10. Combining the total weighted cost and technical scores, the PSI proposal received a total composite score of 376.10 and the Prometric proposal received a total composite score of 346.90. Accordingly, the award to PSI was an award to the proposal receiving the highest composite score as stated in the RFP and the evaluation methodology developed by NYSID prior to the initial receipt of offers.

PSI's ability to perform as required by the RFP

Additionally, our review of the procurement record and Prometric's October 25th and December 3rd letters, and the affidavits attached to the December 3rd letter, regarding the observations of three PSI testing facilities are not sufficient to overturn the award made by NYSID.

We begin by addressing the assertion that the "conditional" award was an extraordinary accommodation for PSI because they were not ready to perform as of the November 19, 2007 commencement date set forth in the RFP. As stated in NYSID's letter of October 31, 2007 the use of the words "conditional award" simply reflects the fact that the award is not final until a contract is negotiated¹¹ and binding upon the State having obtained all requisite approvals.¹² It is well settled that Comptroller approval of a contract is required as a condition precedent to State liability.¹³ Therefore, we are satisfied that NYSID's references to a "conditional award" was nothing more than the a statement by a state agency that the contract is not final until it has been approved by the Comptroller.

The grounds raised in Prometric's initial October 25th protest letter concerning PSI's ability to perform are insufficient to uphold its protest. Prometric states it was informed

follows: $5 \times (1.0 - (405 - 345)/405)$. Prometric's point score (4.26) was then multiplied by 30, representing 30% of its composite score or 127.80.

¹¹ Section 7 (VI)(A)(1) and Section 7 (VI)(A)(2) of the Procurement Guidelines.

¹² We note that Experior Assessments, LLC, received a conditional award from NYSID in the prior procurement for these services that the Supreme Court, New York County, refers to the conditional award without question in an Article 78 action regarding a New York Freedom of Information Law request. See CAT*ASI v. New York State Insurance Department, 195 Misc.2d 456, 458 (2002).

¹³ Konski v. Levitt, 69 A.D.2d 940, 941 (3rd Dept. 1979).

that PSI was unable to meet the requirement to commence examinations on November 19th. This statement, Prometric asserts, combined with NYSID's inquiry whether Prometric would be willing to extend its current contract demonstrates that PSI was not ready to commence examinations on November 19th and therefore, should have been disqualified. In support of its position, Prometric states there is no rational reason for NYSID to ask for an extension if PSI was ready and able to perform. First, we place no merit on an uncorroborated, unidentified source alleged to have made a statement that PSI was not ready to commence examinations on November 19th. Second, it is rational for an agency to request an extension of an existing contract until all issues pertaining to a procurement, including resolution of bid protests and contract approval, are complete.

Additionally, in Prometric's October 25th protest letter, it cites to NYSID's web-site that test site locations will not be available until November 11, 2007 as evidence that PSI was not ready to commence examinations. November 11th is eight days before the commencement date stated in the RFP, and as of November 11, 2007, this Office had not approved any contract, interim or otherwise, between NYSID, PSI or any other vendor, and, therefore there was no binding contract after November 18, 2007 between any parties to provide these services. It is reasonable therefore that these test site locations were not available since no contract was in place for examinations.

Prometric's December 3, 2007 letter contains affidavits from employees of Prometric which assert that PSI, in its operations under the interim contract, was not meeting several requirements contained in the RFP. Based upon these assertions, Prometric implies that PSI would not have been able to commence examinations under a permanent contract by November 19, 2007, and therefore is not responsive to the RFP.

Because these assertions concerning PSI's operation under the interim contract were first raised in Prometric's appeal to this Office, neither NYSID nor PSI have had an opportunity to respond to such assertions. We cannot, therefore make any final determination concerning the validity of such claims. However, even assuming that the Prometric's assertions were correct, we do not believe for the reasons outlined below, that such assertions warrant our withholding our approval of the contract award to PSI.

The requirement in the RFP that the bidders "demonstrate an ability to have all systems operable and in place to commence examinations on November 19, 2007",¹⁴ are, in our view, simply a statement that the bidder must document that they will be able to meet the RFP requirements immediately upon commencing work on the contract. Assuming, arguendo, that PSI, in its operations under the interim contract, is not in full compliance with all of the requirements applicable to the permanent contract, this would not, in our view prove that they will not be in compliance with such requirements by the commencement of the permanent contract; or indeed would not have been in compliance by November 19, 2007 if the permanent contract had gone into effect on such date. Rather, given some of the exacting requirements of the RFP, it is reasonable to assume that a vendor would only expend the funds necessary to meet such requirements (particularly capital improvements to facilities) when a permanent contract is in place;

¹⁴ RFP page 18.

and would not expend funds for such purposes in connection with an interim contract that could have a duration of only several months. Therefore, we cannot conclude that the observations of Prometric's employees, even assuming they are accurate, prove that PSI failed to "demonstrate an ability to have all systems operable and in place to commence examinations on November 19, 2007". Whether, after the permanent contract is in effect, PSI is compliant with the terms of the contract is a question of contract monitoring for NYSID.

Conclusion

This Office finds that the procurement process followed by NYSID was fair and in accordance with the law. Therefore, the protest is denied and the contract with PSI is today being approved by the Comptroller's Bureau of Contracts.

Office of the State Comptroller