STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by
Promissor, Inc., A Pearson VUE Business
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-20070368

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 Promissor, Inc., A Pearson VUE Business (hereinafter "Promissor") with respect thereto. As outlined in further detail below, we have 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. The 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%)

[1] *See* State Finacne 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 extent to which the bidders meet the functional descriptions as defined in Section 2 of the RFP.
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 Inc.,[5] one from Promissor 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.

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.[6] 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:
(i) the documentation contained in the procurement record forwarded to this Office by NYSID with the NYSID/PSI contract;
(ii) the correspondence and communications between this Office and NYSID arising out of our review of the proposed NYSID/PSI contract; and
(iii) the following correspondence/submissions from the parties (including the attachments thereto):

Promissor's Protest[7] dated December 4, 2007 (correspondence from Gary L. Rubin of Mazur, Carp & Rubin, P.C. to Charlotte E. Breeyear, Director. Bureau of Contracts OSC)

- PSI's Response to Protest, dated December 13, 2007 (correspondence from Elizabeth K. Clyne of Featherstonhaugh, Wiley & Clyne, LLP to Charlotte E. Breeyear, Director, Bureau of Contracts OSC)

[5] Prometric filed a separate protest. We have also reviewed the issues raised in that protest, and have today determined in a separate determination (SF-20070367) that Prometric's protest does not provide sufficient ground s for OSC to withhold its approval of the contract award to PSI.

[6] NYSID has entered into an interim agreement with PSI to provide the necessary administration services during the resolution of the protests filed with respect to this procurement.

[7] Correspondence was received prior to this date from Art Valentine, a general manager at Promissor, protesting the award to PSI which was incorporated into the December 4th letter.

- NYSID's Response to Protest, dated December 14, 2007 (correspondence from Martha A. Lees, of NYSID to Charlotte E. Breeyear, Director, Bureau of Contracts OSC)
  Promissor's Reply to the Responses, dated December 19, 2007 (correspondence from Gary L. Rubin of Mazur, Carp & Rubin, P.C. to Charlotte E. Breeyear, Director, Bureau of Contracts OSC)
  NYSID's response dated February 26, 2008, to a request from this Office for further clarification of one issue raised in the protest by Promissor.

Protesting Party

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

ANALYSIS OF BID PROTEST/APPEAL

Promissor's Protest

NYSID failed to administer the process in accordance with express statutory provisions governing a "best value" procurement.

> There was no definition of best value specific to this procurement. NYSID did not document the process to be used in the determination of best value and the manner in which the evaluation process and selection were to be conducted. The use of a single consensus evaluation sheet violates the State Finance Law and is inconsistent with the agency's procurement manual as there is no way to discern whether the evaluation criteria was quantifiable or objective and whether it was applied evenhandedly, without error or bias.

Agency's Response to Protest

In reply, NYSID states:

- The statement attributed to NYSID that there is "no definition of best value that is specific to this procurement" is made in the context of Promissor's FOIL request in that NYSID did not create a narrative definition of best value.
  The RFP contained an overview of the award process, including a discussion of best value and a discussion of the 70%-30% technical submission/cost submission evaluation process.
  The RFP defines Best Value as "the proposal that yielded the highest combined score when all of the aspects referenced in the Criterion Weight document had been taken into consideration."
  Promissor cites no authority to support its position that a consensus review violates the State Finance Law or NYSID's procurement manual.
  The NYSID's General Administration Manual does not require individual score sheets.

PSI's Response to Protest

NYSID followed all New York State Laws, rules, guidelines, manuals and the provisions of the RFP in awarding the contract to PSI.

> There is no prohibition of a consensus review by the Evaluation Team in the State Finance Law, the Procurement Guidelines, the NYSID procurement manual or the RFP.
> PSI had the lowest cost and the highest technical score and therefore the highest composite score.

Promissor's Reply

By using fractional scores by consensus, the technical evaluation was not performed in accordance with the scoring mechanism described in NYSID's procurement manual.

The cost evaluation was based on only two equally weighted factors, the cost of the exam and electronic fingerprinting, which were not disclosed in the RFP.

Applicable Statutes

The requirements applicable to this procurement are set forth in Article 11 of the SFL. SFL Section 163(10) provides that contracts for services shall be awarded on the basis of "best value" from a responsive and responsible offerer. SFL Section 163(7) 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. SFL Section 163(1)(j) 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."

Issues

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

(1) whether NYSID established an evaluation system in accord with the law.
(2) whether the evaluation system provided for consensus scoring.
(3) whether consensus scoring is permitted by State Finance Law § 163.
(4) whether NYSID's evaluation of cost was consistent with the terms of the RFP and its own evaluation instrument.

Analysis

NYSID's evaluation system was established in accord with the SFL

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 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)

Consistent with this requirement, the RFP, as stated above, 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 or scoring methodology in the RFP.[8]

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 use of consensus evaluation was consistent with the evaluation methodology established prior to the initial receipt of offers

Implicit in the requirement that agencies establish and document the evaluation instrument/methodology in the procurement record prior to the initial receipt of offers, is a requirement that agencies must follow the procedures so established. [9] Here, the

---

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

[9] We have, however, recognized that a minor, non-material change to the evaluation methodology may not violate this restriction (see, SF-20030003). For example, if the evaluation instrument identifies the members of the evaluation team, and one of these individuals dies or otherwise is not available to score the proposal, a new evaluator may be substituted for the original evaluator. Because we conclude that the use

evaluation instrument that provided for scoring is ambiguous as it does not expressly state that the technical evaluations would be done on a consensus basis or on an individual basis. Where the evaluation methodology is ambiguous, it is appropriate to look at the agency's intent.

In response to an inquiry from this Office, NYSID has stated that it was always its intent to utilize consensus scoring, and in support of this assertion noted that this was discussed at its internal kick off meeting. Additionally, NYSID utilized consensus scoring in the previous 2002 procurement for these services. While NYSID's use of consensus scoring in the prior procurement would tend to support their assertion that it was always their intent to utilize consensus scoring in this procurement, NYSID's use in this procurement of an evaluation sheet with columns for three individual scores (rather than a single column as in the prior procurement) raised an issue concerning NYSID's intent.
As a result, this Office, by letter dated February 21, 2008, requested that NYSID explain the change in the combined evaluation sheet between this procurement and the prior 2002 procurement. In reply to this Office's letter, NYSID stated the change in the documents was simply because the documents were prepared by two different NYSID employees. The preparation of the documents was a ministerial act and did not reflect any intention by NYSID to use individual scoring of the technical evaluation.
This Office is satisfied with NYSID's explanation, and, therefore, in light of NYSID's representations, and the use of consensus scoring in the prior procurement, we are also satisfied that it was always NYSID's intent to utilize consensus scoring for this procurement. As a result, the use of consensus scoring was consistent with the evaluation methodology established by NYSID prior to the initial receipt of offers.

The use of consensus scoring does not violate State Finance Law § 163

As stated above, State Finance Law § 163 (7) require that Agencies document in the procurement record, prior to initial receipt of offers, the criteria and process to be used to determine best value. Nothing in this section in any way precludes the use of consensus scoring.

Promissor asserts, however, that consensus scoring is inconsistent with State Finance Law § 163 (1)(j). That provision 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" and further provides that "[s]uch basis shall reflect, wherever possible, objective and quantifiable analysis." Promissor asserts that the use of consensus evaluations is inconsistent with section 163 (1)(j) because consensus evaluations do not reflect the application of "quantifiable" or "objective" criteria. Promissor further asserts that consensus evaluations are inconsistent with NYSID's own internal guidelines because they cannot be used to verify whether the evaluation criteria were "applied equally and uniformly in the evaluation of proposals."[10]

---

of consensus scoring in this case was consistent with the original evaluation methodology, we need not determine whether a change from individual to consensus scoring would constitute a material change.
[10] NYSID's procurement manual at page 10.

We disagree. Preliminarily, we note that we fail to see how the scoring system utilized by NYSID could be deemed less "objective" or less "quantifiable" based upon the fact that the numeric scores assigned to each proposal with respect to each evaluation criteria, were assigned on a consensus basis, rather than an individual basis. Additionally, we note that section 163 (1)(j) is only a general definition of the term best value that does not, in any event, require, in all cases that the analysis be objective and quantifiable, but rather, only "wherever possible." Furthermore, we note that section 163(7), which actually prescribes the standards for evaluating best value, states only that the evaluation methodology must be "quantifiable" "whenever possible." Therefore, it is clear that there is no overarching requirement that the evaluation methodology used to evaluate best value be, in all cases, both objective and quantifiable. Nonetheless, for the reasons discussed below, we are satisfied that the consensus scoring system utilized by NYSID in this case is clearly based upon quantification as referenced in both sections 163(1)(j) and 163(7), and that the evaluation analysis was objective, and certainly as objective as practicable under the circumstances.

The requirement that the basis of best value shall reflect quantifiable analysis pertains to the quantification of score. Clearly, the method described in the RFP, documented in the procurement and utilized for the award satisfies the requirement that the basis be quantifiable. The RFP disclosed the 70 points/percent technical and 30 points/percent cost allocation to be utilized in the calculation of the composite score. Each proposal was evaluated for each of the 23 technical criteria and assigned a numerical score (on a consensus basis) for each criterion. This score was then multiplied by the weighting factor for that criterion, and then the scores for all 23 criteria were added together to comprise 70 percent of the composite score. Similarly, the cost proposals were scored utilizing a conversion formula, which converted the proposed cost into 30 percent of the composite score. The technical score and the cost score were then added together to determine the composite score of the proposal. We fail to see how such a scoring system could be deemed not to be a quantifiable system.

Similarly, the process described above is germane to the objectivity of the analysis. The cost proposals were clearly scored based upon an objective formula which converted a Proposer's cost (price in dollars) into a weighted point score based upon its relationship to the lowest cost proposal. With respect to the technical scoring, as noted earlier, the evaluation methodology required that each proposal be rated on each of the 23 technical criteria on a 0 to 5 standard, and further contained suggested standards to be utilized in assigning these scores.[11] Additionally, the scoring sheets provided a space for the evaluators to provide a descriptive narrative for the reasons of the particular consensus score for each score assigned, and, in fact the evaluation team did so utilizing the suggested scoring standard. In light of these clearly articulated standards, we are

[11] Specifically, the evaluation instrument issued to the technical evaluation team suggested the following standards to be utilized in assigning scores: (i) 0, scope of service fails to meet any of the requirements of the RFP or is non-responsive; (ii) 1, scope of service does not meet one or more of the significant requirements of the RFP; (iii) 2, scope of service does not meet some of the specified requirements of the RFP; (iv) 3, scope of service meets only the specified requirements of the RFP; (v) 4, scope of services moderately exceeds the specified requirements of the RFP; and (vi) 5, scope of services substantially exceeds the specified requirements of the RFP.

satisfied that the basis of the evaluation methodology was as objective as practicable under the circumstances.

We are also satisfied that by following the methodology the evaluation team's scoring was applied equally and uniformly. There are no apparent scoring abnormalities in the procurement record. Each of the 23 technical criteria was scored, weighted pursuant to weights established prior to the issuance and the RFP, and supported by a descriptive narrative explaining the reason for each score. [12]

We also disagree that the use of fractional scores violates the State Finance Law or applicable procurement guidelines. The NYSID's procurement manual, similar to OGS' procurement guidelines, is intended to assist the agency when conducting its procurements. The NYSID's procurement guidelines, as pointed out by Ms. Lees, "suggest" that the evaluation team produce a numeric rating of 0, 1, 2, 3, 4, or 5. The permissive nature of this direction is buttressed by the fact that the plain language used in the procurement manual pertaining to the scoring of proposals states: "[t]he following rating system is **suggested** for use in evaluating proposals..."[13] (emphasis added) Promissor concedes that fractional scores would be acceptable if it were derived from an averaging of each evaluator's score. We perceive no difference in whether a fractional score is derived by averaging individual scores or reached by consensus.
Absent language mandating a whole number score, an individual evaluator should not have to compromise his or her professional judgment, knowledge and experience in order to score a criterion using a whole number. Lastly, in each instance that a fractional score was given, the evaluators provided a descriptive narrative for the basis of the fractional score.

The cost evaluation is rational and consistent with the established methodology

In its reply, Promissor questions the propriety of NYSID's decision to score only the exam fee and fingerprinting fee and weight them equally in the cost evaluation. This statement is not accurate. If the exam fee and the fingerprinting fee were weighted equally, then each component would comprise 50% of the cost score (15 points for the exam fee and 15 points for the fingerprinting fee). NYSID properly added the two fees together then applied a conversion formula, established prior to the initial receipt of offers, to convert the proposed cost into a raw score. NYSID's Cost Evaluation sheet which was attached to Promissor's December 19th reply provides its basis for only evaluating the two fees. The Cost Evaluation sheet states, in part: "[e]very time a prospective licensee takes a test, he/she will incur a test fee (electronic, paper & pencil or walk-in), and a fingerprinting fee. The number of occurrences of other items (reinstatements/reschedules, credit card payments, practice tests) is deemed to be

[12] As suggested by NYSID's procurement manual at page 12.
[13] NYSID's procurement manual at page 12.

insignificant by the Licensing Bureau. These items were added to the RFP to avoid any possible disputes during the contract term."[14]

This Office does not necessarily agree with NYSID's determination to only score the two fees. In the first place, we generally believe that all fees to be assessed by a bidder should be factored into the scoring of the cost proposal. Obviously, where some fees are incurred less frequently than others, the cost scoring should ascribe weights based upon historic or expected frequency. Furthermore, contrary to NYSID's assertions, at least some of the fees (for example the fee for photographs and the fee for the use of credit cards) would appear to occur with some frequency. If exclusion of these other fees from the scoring of costs had any effect on the outcome of this procurement, we would have serious concerns. In this case, however, the exclusion of such fees from the scoring of costs had no effect on the outcome of the procurement, since PSI did not assess any fees other than those included by NYSID in the calculation of cost, whereas both Prometeric and Promissor did assess fees in some other categories. As a result, if NYSID had utilized a better cost scoring system, PSI would still have been determined to be the best value proposer – and indeed the margin between PSI and both Prometeric and Promissor would have increased. Therefore, the use of this cost scoring methodology by NYSID in this case was harmless error.

In light of this fact, we find no issue with the scoring of the cost proposals.

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 will be approved by the Comptroller's Bureau of Contracts.

[14] If a proposer was aware that a particular fee would not be utilized in the scoring of the cost proposal, then there would be no incentive to keep the costs down in those categories resulting in higher fees to the State (users).