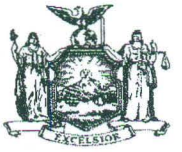
THOMAS P. DiNAPOLI
STATE COMPTROLLER



110 STATE STREET
ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

March 31, 2009

Marybeth Hefner
Director of Accounts Management
NYS Department of Health
Corning Tower, Room 1315
Empire State Plaza
Albany, NY 12237

Stephen B. Hanse, Esq.
Featherstonhaugh, Wiley & Clyne, L.L.P.
99 Pine Street
Albany, NY 12207

Arthur J. Kremer, Esq.
Ruskin Mosou and Faltischek, P.C.
East Tower, 15th Floor
1425 RexCorp Plaza
Uniondale, NY 11556-1425

Dear Ms. Hefner, Mr. Hanse and Mr. Kremer:

Re: Contract C024161
Island Peer Review Organization

We are returning unapproved the above referenced agreement between the Department of Health and Island Peer Review Organization based upon issues identified as part of our review of the agreement. Please see the attached copy of the letter to the Department of Health for the particular issues, which caused this Office to return said agreement unapproved. As a result, it was not necessary for us to resolve the issues raised in the protest filed by Ruskin Mosou Faltischek, P.C., on behalf of New York County Health Services Review Organization.

We recognize the need for these services and would consider an extension of your existing contracts to cover the time required to do a new procurement.

Sincerely,

Charlotte E. Breeyear

Charlotte E. Breeyear
Director, Bureau of Contracts

emm
Att.
cc: John K. Dalton, Esq.
Dan Ryan

Attachment

THOMAS P. DiNAPOLI
STATE COMPTROLLER

110 STATE STREET
ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

March 31, 2009

Ms. Marybeth Hefner
Director of Accounts Management
NYS Department of Health
Room 1315, Corning Tower
Empire State Plaza
Albany, NY 12237

Dear Ms. Hefner:

Re: Contract C024161
Island Peer Review Organization

We have completed our review of the procurement record submitted to this Office in conjunction with the proposed contract between the Department of Health (hereinafter "DOH") and Island Peer Review Organization (hereinafter "IPRO") for the provision of quality assurance services for nursing homes, intermediate care facilities, home care service agencies, adult care facilities, hospital, diagnostic and treatment centers (hereinafter "Services"). Based on our review we are returning the above referenced agreement without our approval based upon the concerns/issues outlined below. Please note that, while a bid protest was filed by New York County Health Services Review Organization with respect to this contract award, our determination is based upon issues identified as part of our review of the contract, and, therefore, we need not resolve the issues raised in the protest.

- **None of the Bidders Achieved the Minimum Score Threshold for the Unit Reviews**

The Evaluation Plan established by DOH provided that a total of 70 points were to be allocated to the Technical Review, 30 for the General Technical Criteria (with a minimum passing score requirement of 20), and 40 points for the Unit Criteria (with a minimum passing score requirement of 35).

None of the bidders, in fact, received the minimum score of 35 required by the evaluation plan for the Unit Criteria. As a result, consistent with the pre-established evaluation criteria (which cannot be changed), no award can be made.

The fact that no bidder, including two firms that have been providing similar services to DOH for a number of years, achieved the minimum score may have been the result of confusion among the various reviewers. Since a new procurement will be necessary, this Office recommends in developing the new evaluation and scoring methodology, DOH consider the appropriateness of including a minimum threshold, and if such threshold is included, that any minimum threshold and the respective evaluation methodology utilized be designed in a manner that responsible vendors with appropriate experience be capable of meeting said threshold.

- **Questions and Answers Regarding the Evaluation Process**

The procurement record included a compilation of questions asked by the reviewers during the evaluation process and the answers given to such by DOH officials. A review of these questions indicates that varying degrees of confusion existed among the reviewers in understanding/interpreting the instructions provided to them in performing the evaluation process and in understanding the application of the evaluation criteria. The following are examples of questions asked by the reviewers:

- Question #5 "I have read the instructions and have many questions regarding them. From reading them I still do not understand what to do. I am finding this to be very confusing";
- Question #8 "I am having a hard time interpreting the instructions provided";
- Question #23 "I am still having difficulty understanding how I am supposed to score the various rows on Form 11."

A review of the answers provided to the above, especially Answer #23 cited below, by DOH further causes this Office concerns with respect to the clarity of the evaluation process, or lack thereof, and explains in part why there was such an inconsistency among the reviewers in applying the evaluation criteria.

- Answer #23: "You may follow any scoring method that works for you for Form 11. We realize that making a decision about whether someone has submitted a good or bad or mediocre proposal may be difficult. Any differences in independent judgment will be evened out in the averaging, scaling and weighting process. While all reviewers who have commented to us on the process so far are finding it difficult, none have said they find it impossible."

A sample analysis of the unit review scores indicated that the reviewers did in fact follow different scoring mechanisms. One reviewer deducted points for certain categories and for the remaining categories assigned Y, N, or N/A. Another reviewer assigned scores of 1, 2, etc. until the total score of 10 was reached; and thereafter assigned Y, N, or N/A.

- **Appropriateness of the Evaluation Form Utilized For the Unit Review**

The Unit Review evaluation form (Form 11) contained 20 questions that the reviewers were to score based upon the bidders response on Form TP-4. While 12 of the 20 questions contained on Form 11 correspond with information that the bidders were

required to provide on Form TP-4, the remaining 8 questions do not appear to relate to any information the bidders were required to provide. Several of the reviewers asked how to evaluate and score these questions. The answer provided by DOH raises further questions as to the appropriateness of any scores assigned to this section.

- Question #45 "Do we give scores to these 8 questions or simply write N/A?"
- Answer #45 "We did not request answers to those last 8 questions of the bidders. We would like reviewers to look at the unit proposal as a whole and answer yes or no whether the bidder answered the questions. You may then use these yes or no answers to help score the Unit."

There appears to have been some confusion regarding these 8 questions among the reviewers, resulting in inconsistent scoring of these 8 questions. Some, in reviewing these questions, used yes and no, some assigned point scores and others assigned N/A.

Similarly, it appears that there was some confusion among the reviewers concerning the questions included on Form 11 regarding the applicability of federal quality activities. Even though the reviewers were informed which units were affected by this requirement, some reviewers still wrote N/A for such questions.

Upon review of the procurement record it has become apparent to this Office that the evaluation methodology was not satisfactorily explained to the reviewers. As a result of the confusion by the reviewers as to how and what to score among the individual criteria contained within the respective sections of the scoring sheets, the reviewers inconsistently scored the proposals. Said inconsistencies make it impossible for this Office to ascertain whether the proposed contract is in fact with the best value proposer as required by law.

- **Material Change in the Scope of Services to Be Provided**

Since the cost proposals submitted by the bidders far exceeded the budgetary amounts allocated for these services, DOH substantially reduced the scope of services to be provided under this agreement from the originally requested scope of services requested under the Request for Proposals. Specifically, the scope of services for Component 1 were decreased by approximately forty-four percent, resulting in a reduction in the cost for the services of approximately fifty-nine percent.

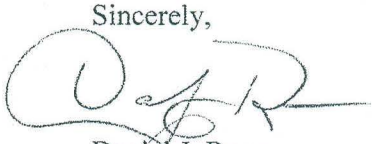
In our view, this clearly constituted a material change in the scope of the services, and therefore required that the agency undertake a new procurement.

As noted above, in light of the fact that the contract is being returned unapproved for issues unrelated to the protest, we need not address the issues raised by the protest. However, we do wish to briefly address one issue, which the Protestor appears to raise, namely the appropriateness of the relative weights assigned to Technical and Cost. While Agencies have broad discretion in establishing the Technical to Cost scoring ratio, said ratio must, consistent with the State Finance Law §163, be designed to determine "best value". Consistent with this requirement, it is generally appropriate to establish a high weight for technical where variations in the technical merits of responsive proposers or their solutions can reasonably be expected to significantly impact the value provided to

the State. In this particular case, it is unclear to this Office whether DOH would have been able to support the 70 to 30 scoring ratio utilized in this procurement. If DOH utilizes the same relative weights on a reprocurement, we will review, as part of our review of that contract, the appropriateness of such weighting.

If you have any questions regarding the above, please feel free to contact our Office.

Sincerely,



Daniel J. Ryan
Chief Auditor of State Expenditures

emm
cc: John K. Dalton, Esq.
Anthony Wilmarth, Esq.
Charlotte Breeyear
Cathy Smith