

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by
Thomas Reuters (Healthcare), Inc. with
respect to the procurement of Services to
Create a Secure & Comprehensive Medicaid
Data Warehouse & Operational Support for
the Office of Health Insurance Programs
Data Mart conducted by the New York
State Department of Health

**Determination
of Bid Protest**

SF-20090315

Contract Number – C024937

February 2, 2010

This Office has completed its review of the above-referenced procurement conducted by the New York State Department of Health (hereinafter "DOH") and the bid protest filed by Thomas Reuters (Healthcare), Inc. (hereinafter "Reuters") 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 DOH. Therefore, we hereby deny the protest and are today approving the DOH contract with CMA Consulting Services (hereinafter "CMA").¹

BACKGROUND

Facts

On November 10, 2008 the DOH issued a Request for Proposals for the New York State Department of Health Medicaid Data Warehouse Replacement/ Office of Health Insurance Programs (hereinafter "OHIP") Data Mart Operational Support Project (hereinafter "RFP"). The successful vendor will be required to design, develop and implement a secure & comprehensive Medicaid Data Warehouse (hereinafter "MDW") and to provide operational support for the OHIP Data Mart. The purpose of the procurement was to create a new MDW capable of meeting the needs of the next decade. The program is necessary to store and maintain Medicaid data and to supply data to Data Marts maintained by State agencies and municipalities. One of the State Data Marts is the DOH OHIP Data Mart which supports research and analytical services for OHIP.

Prior to issuance of the RFP, the DOH developed an evaluation plan, prescribing five key technical evaluation areas, evaluation criteria applicable to the five technical evaluation areas, scoring sheets, relative weights of each the five technical evaluation areas, and evaluation team membership. The technical evaluation areas were: (1) firm

¹ We are also today denying a protest to this procurement by Ingenix, Inc.

capabilities; (2) technical requirements; (3) facilities management; (4) project management; and (5) business requirements. DOH selected best value as the basis for the award of a contract. The RFP delineated the minimum specifications and requirements for a bidder to be considered responsive, and described, generally, the manner in which proposals would be evaluated. As stated in the RFP, the technical proposal value was weighted at seventy five percent (75%), and the cost value at twenty five percent (25%).

Proposals were due on February 9, 2009. DOH received a total of three proposals in response to the RFP from CMA, Reuters and Ingenix, Inc. (hereinafter "Ingenix"). After reviewing the aforementioned proposals, DOH selected CMA's proposal and, in July of 2009, notified all of the proposers of the same. Reuters requested a debriefing after receiving notice of the award to CMA, and a debriefing was provided by DOH on July 17, 2009.

On July 20, 2009 this Office received a letter of protest filed on behalf of Reuters (hereinafter "Initial Protest"), which was supplemented with additional protest grounds in a letter dated August 13, 2009 (hereinafter "Supplemental Protest"), (collectively hereinafter "Protest") challenging the DOH award of the contract to CMA. By letter dated September 16, 2009, CMA responded to the allegations of the Protest (hereinafter "CMA Answer"). By letter dated September 30, 2009, DOH responded to the allegations of the Protest (hereinafter "DOH Answer").

Procedures and Comptroller's Authority

Under Section 112 of the State Finance Law (hereinafter "SFL"), before any contract made for or by a state agency, which exceeds fifty thousand dollars (\$50,000) in amount, becomes effective it must be approved by the Comptroller.² In carrying out the aforementioned responsibilities proscribed by SFL §112, this Office has issued Contract Award Protest Procedures that govern the process to be used when an interested party challenges a contract award by a State agency.³ These procedures govern initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no Protest process engaged in at the department level, the Protest is governed by this Office's procedures for initial protests.

In the determination of this Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DOH with the DOH/CMA contract;
2. the correspondence between this Office and DOH arising out of our review of the proposed DOH/CMA contract; and

² SFL §112(2).

³ Comptroller's G-Bulletin G-232.

3. the various correspondence/submissions from the parties and the attachments thereto, including:
 - a. Reuters' July 16, 2009 Protest letter;
 - b. Reuters' August 13, 2009 supplemental Protest letter;
 - c. CMA's August 25, 2009 letter to this Office;
 - d. CMA's September 16, 2009 Answer to the Protest;
 - e. DOH's September 30, 2009 Answer to the Protest; and
 - f. Reuters' October 12, 2009 Reply Letter.

Applicable Statutes

The requirements applicable to this procurement are set forth in SFL Article 11 which provides that contracts for services shall be awarded on the basis of "best value" to a responsive and responsible offerer.⁴ 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."⁵ A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."⁶

SFL §163(9)(a) provides that " a state agency shall select a formal competitive procurement process The process shall include, but is not limited to ... a description of the required specifications governing performance and related factors; a reasonable process for ensuring a competitive field; a fair and equal opportunity for offerers to submit responsive offers; and a balanced and fair method of award."

SFL §163(9)(b) provides that the "solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted."

ANALYSIS OF BID PROTEST

Reuters' Protest to this Office

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

1. The indictment of Joseph Bruno, who was at the time CMA's Chief Executive Officer,⁷ makes CMA a non-responsible proposer because:

⁴ SFL §163(10).

⁵ SFL §163(1)(j).

⁶ SFL §163(1)(d).

⁷ As discussed below, Mr. Bruno was subsequently convicted on two charges and immediately resigned from his position with CMA.

- a. such an indictment could lead to suspension or debarment from Federal contracts under applicable Federal Laws and Regulations;
 - b. CMA may have failed to disclose the indictment; and
 - c. assuming CMA did properly disclose the indictment, DOH's "responsibility determination was unreasonable." Initial Protest at 5-6.
2. Reuters' proposal was the best value proposal because "Reuters' technical proposal either was or should have been evaluated better than the [CMA] technical proposal." Initial Protest at 7.
 3. DOH miscalculated and applied different evaluation standards to the proposals from CMA and Reuters as evidenced by the facts that
 - a. "[DOH] credited CMA for its unproven proposed software" while the Reuters software has been proven and was accompanied by letters of recommendation (Supplemental Protest at 9);
 - b. Reuters' proposed a software solution that was tailored to the NYSDOH's requirements (Supplemental Protest at 2-3); and
 - c. "[c]ontrary to the [DOH's] incorrect assessment, [Reuters' proposed software] was not a fixed software solution that 'was not tailored' to the [DOH's] needs." Supplemental Protest at 7.
 4. "[DOH] acted arbitrarily by not allowing a demonstration of the offerors' proposed software solutions." Supplemental Protest at 9.
 5. DOH should have provided the documents requested by Reuters under the New York State Freedom of Information Law (Public Officers Law Article 6, hereinafter "FOIL"). Protest at 7.

CMA's Response to the Protest

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

1. CMA is a responsible vendor and Reuters' arguments on this point are without merit because:
 - a. CMA disclosed Joseph Bruno's indictment and explained that "Joseph Bruno has not been involved in any aspect of the subject agreement and shall not engage in efforts associated with this contract with the Office of the State Comptroller, or any other NYS Consulting Contracts, until such
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time as the pending charges are finally resolved in his favor.” Furthermore, Mr. Bruno’s indictment relates solely to his activities while a New York Senator and do not relate in any way to CMA’s business activities. CMA Answer at 7.

- b. DOH’s award of the contract to CMA was reasonable since “[t]he mere existence of a criminal investigation or indictment of a contractor’s officer or agent does not compel a finding that the contractor is not ‘responsible’” and “CMA presented DOH with ample indicia of ‘skill, judgment and integrity.’” CMA Answer at 7.
 - c. “[T]he mere specter of a Federal sanction, however remote, cannot be a sufficient basis to disqualify an otherwise qualified bidder.” CMA Answer at 8.
2. CMA’s Bid was responsive and was the best value. CMA Answer at 9.
 3. Reuters “misses the point of the procurement” and in fact the CMA proposal provided what DOH was looking for by providing a comprehensive architectural solution to Medicaid data warehousing needs, rather than “a single software program used to interface with the data.” CMA Answer at 9.
 4. “It was neither necessary nor advisable for DOH to sponsor ‘software demos’ before selecting a winning bidder.” CMA Answer at 13.
 5. The FOIL request was properly denied because it is improper procedurally as well as a matter of substantively. CMA Answer at 14.

DOH’s Response to the Protest

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

1. CMA is a responsible vendor and Reuters’ arguments on this point are without merit because:
 - a. CMA fully disclosed the fact that Joseph Bruno was under federal indictment. DOH Answer at 4.
 - b. DOH fully investigated the matter, relying on both independent sources and written assertions made by CMA, and also received certain assurances from CMA. DOH Answer at 5-7.
 - c. DOH reviewed the Federal Laws and Regulations that are relied on by the protestor, and if such laws and regulations are applicable, such laws are permissive and clearly indicate “federal acknowledgement that the

awarding agency is in the best position to determine, and should, to the greatest extent possible, have discretion to select, the bidder best suited to the agency's needs, as determined by the agency itself." DOH Answer at 8.

- d. DOH believes that 48 CFR regulations are not the applicable regulations, rather 42 CFR regulations govern this contract. DOH Answer at 8.
2. Utilizing the established evaluation methodology CMA is a responsive and responsible proposer offering the best value. DOH Answer at 8-10.
3. Reuters' proposal was evaluated properly and equitably utilizing the established evaluation methodology and scored lower than CMA because
 - a. "Reuters simply failed to provide clear and specific discussions detailing *how* the software could and would meet the Department's needs in all business subject areas, even though the RFP expressly required that each bidder articulate exactly how each proposed solution would meet the requirements in each area." (emphasis in original) DOH Answer at 12.
 - b. Reuters' references were required to allow DOH "to provide the Department the ability to verify the claims made in the proposal by the Offeror." See RFP, p. X11-2, § B.3 (1). DOH Answer at 13.
4. The evaluation methodology established prior to the issuance of the RFP did not provide for any demonstrations of a proposer's software, and when asked if such a demonstration would be allowed by Reuters during the question and answer period, DOH stated no, and the fact that DOH "did not conduct the evaluations in the manner that would have been the most favorable to Thomas Reuters was not arbitrary." DOH Answer at 14-15.
5. There has been a proper FOIL request made and the decision as to whether the Supplemental Protest "fulfills the basic requirements of a FOIL request falls to the DOH's Records Officer and will necessarily be addressed by the Records Office." DOH Answer at 10.

DISCUSSION

We recognize that Reuters sought a variety of documents from DOH under the New York State Freedom of Information Law (hereinafter "FOIL") which, presumably, Reuters would have utilized in framing and supporting the issues identified in its Protest. Consistent with prior determinations of this Office, since issues raised in the FOIL process do not directly relate to the procurement process at issue, this Office does not consider FOIL issues as part of its review of bid protests and therefore will not consider Reuters' argument concerning asserted violations of FOIL. This Office does, however, as part of our review process, review allegations that a protestor might assert, based on

documentation in the procurement record, whether or not that documentation was made available to the protestor.

ISSUE 1:

Reuters' assertions that CMA is a non-responsible proposer because of Joseph Bruno's indictment, and subsequent conviction, for mail fraud.⁸

a.) Possible Suspension or Debarment from Federal Contracts:

This Office has been informed that the Centers for Medicaid and Medicare Services, the Federal Agency responsible for overseeing the Federal program for which the underlying services were solicited, will also have to approve the contract. Based on this fact, this Office will defer to the Federal Agency as to the applicability and, if applicable, the consequences of such laws as they relate to the contract at hand.

b.) Disclosure of the Federal Indictment:

Contrary to Reuters' implication, CMA's certified vendor responsibility questionnaires, submitted in relation to this procurement, have consistently disclosed the Federal Indictment and, subsequently, the conviction of Former Senator Joseph Bruno.

c.) DOH Finding that CMA Is Responsible:

CMA included a written explanation with its certified vendor responsibility questionnaire to elaborate on the aforementioned disclosure regarding the Federal Indictment, which stated:

[o]ver the course of CMA's twenty-five years of service to New York State government, it has established a reputation for honesty and integrity. During this period, neither the Company nor its founder, Kay Stafford, has ever been the subject of criminal investigation or indictment.

In July, 2008, following a distinguished public career of over 32 years, Joseph Bruno, the State's former Senate Majority Leader, joined CMA as its Chief Executive Officer. In a well publicized event, Senator Bruno was recently indicted under

⁸ We note that at the time of the protest was filed, there had not been a verdict with regard to any of the charges alleged by the Federal Government in the indictment of Senator Joseph Bruno. Subsequently, however, former Senator Joseph Bruno was found guilty of 2 of the 7 charges in the indictment. In light of these convictions, this Office required DOH to revisit the issue of vendor responsibility, including the submission of an updated vendor responsibility questionnaire. DOH after revisiting the issue of vendor responsibility again found that CMA was a responsible vendor. This opinion, where applicable, addresses the arguments raised by the Protestor accordingly.

federal charges. This indictment pertains exclusively to Senator Bruno's business activities while serving New York State as a public official and does not relate to CMA's business activities in anyway.

Further, it should be noted that Joseph Bruno has not been involved in any aspect of the subject agreement and shall not engage in efforts associated with this contract with the Office of the State Comptroller, or any other NYS Consulting Contract, until such time as the pending charges are fully and finally resolved in his favor. Too, should there be a change in the status of Senator Bruno's legal matter that might have an impact on this Contract, CMA will provide the OSC with full and immediate disclosure regarding same.

CMA remains unwavering in its commitment to the highest standard of Corporate Ethics, and to the provision of exceptional service to the State.

While it is clear that an indictment or conviction of a company or senior official for a serious crime may justify a finding of non responsibility (*In the Matter of Konski Engineers v. Levitt*, 49 N.Y.2d 850, *Matter of Schiavone Constr. Co. v. Larocca*, 117 AD2d 440), they do not in our opinion mandate such a finding. Rather, in making a determination concerning the responsibility of a vendor, we believe a government agency may consider not only any criminal indictment or conviction, but also, the circumstances involved and any curative action taken by the company. See, *Abco Bus Co. v Macchiarola*, 52 NY2d 938, *revg on dissenting memo of Hopkins, J* at 75 AD2d 831, 833.⁹

Here as noted by CMA the activities for which Mr. Bruno was indicted, and convicted, related solely to his activities while a state senator and majority leader, prior to his employment by CMA; and they did not in any way relate to CMA or Mr. Bruno's activities at CMA. Furthermore, upon conviction Mr. Bruno resigned his position with CMA, and his ten percent stake in the company was recaptured by CMA without any compensation to Mr. Bruno.

In light of the foregoing considerations, this Office accepts the DOH decision to find CMA responsible despite the conviction of former Senate Majority Leader Joseph L. Bruno.¹⁰

⁹ In his dissenting opinion in the Appellate Division, which was adopted by the Court of Appeals in its reversal, Justice Hopkins, while concluding that New York City had a rational basis for finding the vendor non-responsible, clearly recognized that "the extent of the criminal record of petitioner's stockholders is a matter to be weighed by the board."

¹⁰ After all papers were submitted in this matter, the New York State Inspector General's Office issued findings relating to an investigation of CMA and one of its employees in connection with a State Agency contract. The Report was dated December 30, 2009, and found that the employee in question "did

ISSUE 2:

Reuters' allegation that it provided the superior technical proposal, and as such was the best value proposal.

a.) Reuter's Technical Proposal Verses CMA Technical Proposal:

In the Initial Protest Reuters contends that it because its proposal, it asserts, is technically superior, it is the best value proposal, and therefore should be awarded the contract. For the reasons set forth under Issue 3 below, we do not agree that Reuters has established that its proposal was technically superior. However, even if its proposal were technically superior, this would not establish that it was the best value proposal. A best value award is based on a composite evaluation of both cost and technical criteria. Therefore, a proposer with a superior technical proposal may not be the best value proposer, dependent on such proposer's cost in relation to other proposers.

ISSUE 3:

Reuters' contention that DOH must have misevaluated Reuters proposal .

Preliminarily, we note that this Office will generally give significant deference to the determination of the procuring agency with respect to the evaluation and scoring of each proposal's technical merits since the procuring agency is normally better suited to evaluate how well a proposal satisfies the technical requirements imposed by such agency.

a.) Proven Verses Unproven Software Solutions and Ability to Tailor Software:

Reuters' alleges that the DOH misevaluated or applied different standards to the CMA's and Reuters' respective proposals based on the articulated supposition that CMA's proposed software solution was untested and Reuters' software solution has proven to meet the needs of other state programs. Reuters further contends that the DOH incorrectly determined that Reuters' software solution was fixed and not adaptable.

DOH contends that Reuters' and CMA's technical proposals were evaluated fairly and equitably. DOH asserts that Reuters received a lower technical score because Reuters failed to provide clear and specific discussions detailing *how* the software could

submit a false voucher for \$9,107.48 purporting to request payment for the movement of computer equipment when, in fact, it was for the requisition of five laptop computers." Following notice of the Inspector General's finding this Office is informed that CMA coordinated with the Office of Temporary and Disability Assistance to remove the employee from the premises and CMA immediately terminated the employee. DOH noted in its updated evaluation of CMA's responsibility review that, because of the appropriate actions taken by CMA upon learning of the employee's misconduct, DOH still considers CMA to be a responsible vendor. This Office accepts this DOH determination.

and would be tailored to meet the Department's many and varied needs in all business subject areas, even though the RFP expressly required that each bidder articulate exactly how each proposed solution would meet the requirements in each area.¹¹ Based upon our review of the protest materials and our normal pre-audit review, we find no evidence to contradict DOH's assertions and conclusions.

Furthermore, we note that Reuters' mere assertion that a software solution was utilized in another State does not, in itself, naturally lead to the conclusion that Reuters' software solution was in any way superior to that proposed by CMA. Nor does a description of a new system tool demonstrate how the software solution being proposed will meet the functionality needs of the DOH. Finally, we note that the procurement record, including comments made by the individual reviewers, supports the scoring of Reuters' technical proposal.

Accordingly we accept DOH's determinations with respect to the technical merits of the proposals.

ISSUE 4:

Reuters' contention, that DOH acted arbitrarily by not permitting a demonstration of the Reuters' software solution.

a.) Preclusion of Demonstration:

The contention that Reuters should have been provided with an opportunity to demonstrate the versatility and/or utility of the proposed software solution is without merit. In Reuters' Supplemental Protest it states "Finally, Thomas Reuters submits that it was arbitrary for [DOH] to conduct its evaluation of a complex software solution based on written proposals only." However, no support for this assertion was provided. The evaluation of the proposals was conducted in accordance with the evaluation methodology established by the DOH prior to the receipt of proposals. This evaluation methodology did not provide for software demonstrations, and, therefore, the DOH could not have utilized such demonstrations as a basis to evaluate the proposals.

To the extent that Reuters is implying that such demonstrations should have been permitted and provided for under the DOH solicitation and corresponding evaluation methodology, we reiterate that this Office generally gives significant deference to the determination of the procuring agency, with respect to the evaluation and scoring of each proposals technical merits since the procuring agency is normally

¹¹ Reuters appears to assert that DOH could have verified Reuter's ability to tailor its software to meet DOH's needs through the references provided by Reuters. However, DOH indicated that references were required to provide DOH "the ability to verify the claims made in the proposal by the Offeror." See RFP, p. X11-2, §B.3(1). DOH Answer at 13. Consistent with the requirements set forth in the solicitation and the evaluation methodology, these references could not and were not used to provide supplemental information or additional support for the information contained in the proposals. Therefore, Reuters' lack of information regarding how the proposed software solution would be adapted to meet the many and varied requirements set forth in the solicitation could not be, and properly were not, remedied through the contacting of the Reuters' references.

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better suited to ascertain its needs and how to evaluate how well a proposal satisfies such needs.

CONCLUSION

We find that the issues raised in the protest are not of sufficient merit to overturn the award by the DOH to CMA. Therefore, the protest is hereby denied and we are today approving the DOH/CMA contract.

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