

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protests filed by LMGI, Ltd. and Summit Security Services, Inc. with respect to the procurement of Medicaid Fraud Investigative Services conducted by the New York State Office of Medicaid Inspector General, Division of Medicaid Investigations

**Determination
of Bid Protests**

SF-20110203

Contract Number – C201101

February 28, 2012

This Office has completed its review of the above-referenced procurement conducted by the New York State Office of Medicaid Inspector General, Division of Medicaid Investigations (hereinafter "OMIG") and the bid protests filed by LMGI, Ltd. (hereinafter "LMGI") and Summit Security Services, Inc. (hereinafter "Summit"), with respect thereto. A joint determination is rendered here as, throughout the process, the bid protest submissions made by LMGI and Summit have often referred to each other by name and have made reference to each others' arguments. As outlined in further detail below, we determine that the grounds advanced by the protestors, together with deficiencies discovered as part of our review of the contract, specifically the numerous errors and inconsistencies in the scoring of the proposals, are sufficient to justify this Office withholding its approval of the contract. We therefore hereby uphold the protest and are today returning the OMIG contract with Trooper Tech, Inc. (hereinafter "Trooper Tech") not approved.

BACKGROUND

Facts

On March 25, 2011 OMIG issued a Request for Proposals for Medicaid Fraud Investigative Services (hereinafter "RFP"). The purpose of the procurement was to award a contract to an outside investigative vendor, or contracts to multiple vendors, to provide a cumulative total of 27 investigators who would be able to act as "cops-on-the-beat", conduct credentials verification reviews, provide undercover traditional investigative work, and conduct surveillance of health care providers and others who are suspected of attempting to defraud the Medicaid Program.

Since this is a procurement for services, consistent with the requirements of Section 163 of the State Finance Law (hereinafter "SFL"), OMIG selected best value as the basis for the award of the contract and provided for minimum specifications and requirements in the RFP for a bidder to be considered responsive. Additionally, the RFP included preferred qualifications for offerers and individual investigators. As indicated in the RFP, the technical proposal value was weighted at seventy percent

(70%) and the cost value was weighted at thirty percent (30%) of the total value available under the established evaluation methodology.

Proposals were due on May 6, 2011. OMIG received eight proposals; however, two failed to meet the mandatory qualifications and were not scored. Six were sent to the review teams for evaluation: Granite Intelligence, LLC; LMGI Ltd.; McCabe Associates, Inc.; Summit Security Services, Inc.; Terrier Claims Services, Inc.; and Trooper Tech, Inc. After reviewing the proposals, OMIG selected Trooper Tech's proposal as the best value proposal and on July 15, 2011 notified all eight bidders of such selection by letter. LMGI and Summit then each requested a debriefing, which were separately provided on August 10, 2011.

The LMGI and Summit Protests

Subsequently, both LMGI through its attorney, Elizabeth Wolstein, and Summit through its attorney, Arthur J. Kremer, filed protests with this Office challenging the award of the contracts. Both protests, as supplemented, challenged the fairness and consistency of the scoring. In addition, LMGI asserted that OMIG departed from the RFP by impermissibly removing two pre-established subjective criteria without the authority to do so. (These criteria related to interviewing witnesses and the ability to observe and report on situations without benefit of note taking.) Summit additionally asserted that the resumes of its investigators were improperly redacted and that its cost proposal was improperly inflated because OMIG failed to take into account Summit's tiered cost structure that included volume discounting.

OMIG through its attorney, J. Mark Noordsy, answered the allegations made about the scoring by responding that because reviews are subjective, using multiple reviewers and averaging their scores gives offerers the best opportunity to receive all points available; however, OMIG did not change, alter or otherwise sway the scoring of the individual evaluators once completed except to ask reviewers to re-review inconsistencies. OMIG also acknowledged that upon review of LMGI's Protest, it rescored eight resumes that inadvertently did not receive points for the ability to speak a second language; however, OMIG asserted that the rescoring resulted in a nominal change that would not have changed LMGI's overall ranking. In addition, OMIG agreed that the two delineated criteria were subjective which is why they were not considered in the evaluation process and no points were awarded for them. OMIG also stated that it requested offerers to provide their best and final cost proposal; thus, Summit's volume discounting could not be taken into consideration.

Comptroller's Authority and Procedures

Under SFL §112(2), before any contract made for or by a state agency, which exceeds fifty thousand dollars in amount, becomes effective it must be approved by the Comptroller.

In carrying out the aforementioned responsibilities prescribed 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.¹ These procedures govern initial protests to this Office of agency contract awards, contract awards made by this Office, and appeals of agency protest determinations. Because this is an initial protest to this Office of an agency contract award, the Protest is governed by Section 3 of this Office's procedures for an initial protest filed with the Office of the State Comptroller.

In the determination of this Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by OMIG with the OMIG/Trooper Tech contract;
2. the following correspondence/submissions from LMGI and OMIG (including the attachments thereto):
 - a. LMGI's September 29, 2011 Protest;
 - b. OMIG's November 3, 2011 Answer to the Protest;
 - c. LMGI's November 15, 2011 Reply to the Answer;
 - d. LMGI's December 23, 2011 Supplemental Submission;
 - e. OMIG's January 6, 2012 Answer to the LMGI Supplemental Submission; and
 - f. LMGI's January 13, 2012 Reply to the OMIG Answer to the LMGI Supplemental Submission.
3. the following correspondence/submissions from Summit and OMIG (including the attachments thereto):
 - a. Summit's August 15, 2011 Protest;
 - b. OMIG's August 22, 2011 Answer to the Protest;
 - c. Summit's October 4, 2011 Supplement to the Initial Protest;
 - d. Summit's December 23, 2011 Supplemental Brief;
 - e. OMIG's January 6, 2012 Answer to the Summit Supplemental Brief; and
 - f. Summit's January 13, 2012 Reply to OMIG's Answer to the Summit Supplemental Brief.

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" from a responsive and responsible offerer.² 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."³ A "responsive" offerer is an "offerer meeting the

¹ Comptroller's G-Bulletin G-232 (http://www.osc.state.ny.us/agencies/gbull/g_232.htm).

² SFL §163(10).

³ SFL §163(1)(j).

minimum specifications or requirements as prescribed in a solicitation for commodities or services by a state agency.”⁴

SFL §163(2)(b) requires the state procurement process “[t]o be based on clearly articulated procedures which require a clear statement of product specifications, requirements or work to be performed; a documentable process for soliciting bids, proposals or other offers; a balanced and fair method, established in advance of the receipt of offers, for evaluating offers and awarding contracts”

SFL §163(7) provides that “[w]here 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.”

SFL §163(9)(a) provides that “[t]he commissioner or a state agency shall select a formal competitive procurement process ... [that] shall include ... a reasonable process for ensuring a competitive field” and “[w]here the basis for the award is best value, documentation in the procurement record shall, where practicable, include a quantification of the application of the criteria to the rating of proposals and the evaluation results, or where not practicable, such other justification which demonstrates that best value will be achieved.”

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” and “[w]here 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.”

SFL §163(9)(g) provides that “[a] procurement record shall be maintained for each procurement identifying, with supporting documentation, decisions made by the commissioner or state agency during the procurement process. The procurement record shall include, but not be limited to each contract amendment and the justification for each.”

DISCUSSION

Scoring Issues

As noted previously, OMIG gave 70 points to technical and 30 points to cost. Of the 70 technical points, 35 points were awarded for Offerer’s Preferred Qualifications, 15 points for Individual Investigator’s Preferred Qualifications, 10 points for Offerer’s Proposed Services and 10 points for References.

⁴ SFL §163(1)(d).

Based upon our review of the procurement record, it is apparent to this Office that there are many inconsistencies in the application of the evaluation methodology. A sampling of the errors and inconsistencies found by this Office, as well as others noted by the protesting parties and confirmed by this Office, are as follows:

1. Offerer's Preferred Qualifications

As part of the scoring of the Offerer's Preferred Qualifications, the RFP and applicable scoring sheet specified that offerers will be awarded 5 points for meeting the "minimum preferred qualifications" and an additional bonus point for each additional year of experience up to a maximum of 4 bonus points (RFP at p. 22).⁵ This appears to allow offerers to receive a maximum of 9 points for the first three stated minimum preferred qualifications.⁶

However, while the evaluation team that scored the Offerer's Preferred Qualifications consisted of 3 reviewers, only Reviewer 2 awarded any score of 9 in any of these categories to any bidder.⁷ Reviewers 1 and 3 awarded no more than 5 points in these categories. Thus, at best, there appears to be an inconsistent application of the scoring instructions. At worst, reviewers appear to have misread and/or misapplied this scoring instruction, particularly with regard to the first category ("Possess at least one (1) year of experience investigating the health care arena") as the protesting parties (LMGI and Summit) and the winning bidder all clearly have experience in excess of 5 years, entitling them all to the maximum points allowable. These irregularities in scoring appear to have affected all 6 bidders scored across the first four categories of minimum preferred qualifications, calling into question the validity of those scores.

⁵ The offerer's minimum preferred qualifications are: a. Possess at least one (1) year of experience investigating the health care arena (i.e., physicians, pharmacies, and durable medical equipment dealers); b. Possess at least one (1) year experience testifying; c. The proposal includes investigative staff assigned to this contract that possess a minimum of five (5) years experience and related skills; d. Ability to supply investigators with specialized skills to support investigations; and e. Offerers should have an appropriate mix of the investigator staff to mimic the actual Medicaid client pool. (RFP at p. 12).

⁶ It appears that it was OMIG's intent to allow for a maximum of 9 points for the fourth minimum preferred qualification as well. OMIG's Attachment 10 "Vendor Tabulation Sheet" submitted as part of the RFP Evaluation Plan notes that the total points for the Offerer's Preferred Qualifications is 63, which appears to require 9's to be the maximum points given for the first four minimum preferred qualifications (plus related bonus points). However, we do not believe that the fourth minimum qualification lends itself to bonus points as it does not refer to additional years of experience as required to receive bonus points. Furthermore, while this qualification (ability to supply investigators with specialized skills) does not appear to lend itself to bonus points based upon additional years of experience, one reviewer (Reviewer 2) assigned bonus points to several offerers (including Trooper Tech) but not to others (including Summit).

⁷ The RFP Evaluation Plan Team Briefing states that three teams were to be used in the evaluation and selection of proposals. The Technical Team and the Cost Team were to perform the evaluations and the Selection Team was to make the final determination and recommendation for approval. As noted in the OMIG Answer to the LMGI Supplemental Submission, the Technical Team was further broken down into two panels; one panel of three reviewers to review offerers' qualifications ("Reviewer") and a panel of five to review individual investigators' qualifications ("Evaluators").

In addition, it is unclear whether reviewers scoring the Offerer's Preferred Qualifications were given sufficient information (such as individual investigator's resumes) to properly score the qualifications. It is reasonable to conclude that resumes would be required to evaluate the offerer's fifth minimum preferred qualification ("an appropriate mix of investigator staff to mimic the actual Medicaid client pool") and additional bonus points provided for resumes representing the appropriate Medicaid mix (1 bonus point is provided for each additional resume that mimics the mix, up to a maximum of 4 bonus points). Similarly, we have concluded that resumes would be necessary to evaluate the offerer's ability to supply investigators with specialized skills. Our conclusions that it was necessary to provide the resumes to the reviewers is confirmed by the comments of Reviewer 1 who notes at various times on the review sheets "no resumes," "no resumes to review," "only 1 resume need others," "no resume need them to determine if have these types of investigators."⁸

2. Individual Investigator's Preferred Qualifications

a. Speak a second language

In its Answer to LMGI's allegation that OMIG failed to properly credit LMGI for all of its bilingual investigators, OMIG conceded that upon review of the allegations provided in LMGI's Protest, OMIG determined that eight resumes inadvertently did not receive points for a second language and these resumes were then rescored. However, OMIG failed to rescore this section for the other bidders. Due to the significant error made in LMGI's case, numerous other inconsistencies as outlined below, and the fact that there was no rescoring effort made for bidders other than LMGI, we are unable to conclude that OMIG's scoring of the second language qualification was accurate.

For example, even in the case of the winning bidder who stated "yes" to the qualification "speak a second language" on six of their individual investigator's resumes, Evaluator 5 only gave credit for the ability to speak a second language on three resumes.

Among evaluators there are numerous other inconsistencies in scoring the language qualification. For example, the resume of Summit's individual investigator identified as 7E by OMIG states "Bilingual English/Spanish" however, of the 5 evaluators, Evaluator 3 failed to award any points to the investigator for this qualification. Similarly, the resume of Granite's individual investigator identified as A6 was not awarded a bonus point for Spanish by Evaluator 3 despite the statement on the resume "Speaks, reads & writes Spanish." Scoring of this preferred qualification should depend on a consistent objective determination based on the resumes provided, while OMIG's scoring of this qualification is rife with numerous examples of similar inconsistencies. These inconsistencies appear to be clear errors that were not resolved in the final scoring.

b. Experience testifying in court

⁸ It is, of course, possible that the resumes were provided to the reviewers at a later time however, there is nothing in the procurement record that documents that this occurred.

The evaluators were also inconsistent in their scoring of the qualification of testifying in court. For example, the resume of LMGI's individual investigator identified as H-25 in its proposal and as 6C by OMIG states "testify in Federal and State Courts" and "testified in Civil and Criminal matters [sic]." However, Evaluator 3 awarded the point for testifying in court but not the additional bonus point for Federal Courts, nor the bonus point for State courts. Evaluator 4 awarded a point for testifying in court as well as a bonus point each for Administrative Hearings, Federal Court and State courts. Evaluator 5 awarded the point for testifying in court, as well as a bonus point for State courts but no bonus point for Federal court.

Again, scoring of this preferred qualification should depend on a consistent objective determination based on the resumes, at least for the scores related to testifying in court, Federal Court and State courts. Furthermore, it is not altogether clear why the point was awarded for Administrative Hearings by Evaluator 4 (although, this perhaps was based on the statement that the individual testified in Civil and Criminal matters). Thus, the scoring of this category is also rife with unexplained inconsistencies and, therefore, our Office is unable to conclude that the evaluation methodology was properly executed.

c. Possess a working knowledge of the NYS Medicaid program rules and regulations

Scoring of this qualification also contained inconsistencies similar to the previous two qualifications discussed above which, again, should have been based on objective criteria. For example, the winning bidder's resumes all contained a "yes" or "no" in response to whether it met this qualification. Yet, Evaluator 5 awarded a point in this category to the resume identified by OMIG as F23 which clearly noted that it did not meet this qualification.

d. Possess a working knowledge of the NYS Penal Law, preferably Section 177 regarding Health Care Fraud

The inconsistent scoring among evaluators in this category is the most extreme in our view and is perhaps best illustrated by the scoring of Summit's resumes. For example, Evaluator 1 awarded no points in this category to any of the 27 resumes submitted, while Evaluator 5 awarded a point to each of the 27 resumes in this category.

A cursory review of the resumes submitted by Summit indicates a number of proposed investigators had backgrounds as New York City police officers and in Medicaid fraud investigation. It is readily apparent that the evaluators were not sure how to properly award points for this qualification where working knowledge of the Penal Law was indicated but was not specifically stated as such.

However, even in the case of the winning bidder where all resumes reflected "yes" in response to whether it met this qualification, evaluators still neglected to give points to

all resumes. For example, 3 evaluators failed to give credit for this qualification to at least one of the individual investigator's resumes.

e. Process

Additionally, although there appears to have been a plan to re-evaluate individual investigators' resumes where there were inconsistencies between reviewers, it is also apparent that where evaluators failed (and therefore did not score) certain resumes because they did not meet the mandatory qualifications, these same resumes were scored by other reviewers (presumably after such evaluators had concluded that such resumes met the mandatory qualifications) and the points were awarded in the total scores. For example, Evaluator 1 failed a resume of the winning bidder identified as F18, while the other 4 evaluators scored the resume (3 evaluators awarding 8 points each and one awarding 5 points to the resume). There are numerous examples of this which affected all bidders. It is unclear from the procurement record what process, if any, actually took place to resolve the issue of individual investigator's resumes which fail a mandatory qualification yet are scored by other evaluators. In any event, these discrepancies appear to have remained in the final scoring.

3. Offerer's Proposed Services

In this category, Reviewer 2 left blank all four rating criteria with regard to scoring the winning bidder, thus awarding no points. The individual review sheet did not explain why scoring for these criteria were left blank.

4. Redactions of Offerers' Technical Proposals

In our view, the redactions, intended to omit references to information that might bias the reviewers such as the vendor's name and address, the word "OMIG", the names of any OMIG employees, and the names of individual investigators, were inconsistent and distracting. In one area, OMIG's redactions completely eliminated bidders' client reference information. It is unclear from the procurement record whether evaluators were given this information in order to verify that the bidders satisfied the RFP requirements related to each Technical Proposal. For example, the RFP required bidders to "Provide three (3) client references, for which you have performed a similar project for [sic] within the last ten (10) years, whom [sic] can verify the scope of the project performed and may be contacted by the OMIG..." (RFP at pp. 16-17). Reviewer 1 answered "Yes, Redacted" to this item on the review sheet for the winning bidder and simply yes for Summit. In both cases, however, all information under client references was redacted. In light of these redactions, it is difficult to see how Reviewer 1 (or the other reviewers who presumably were provided the same redacted materials) came to these conclusions. While one could conclude from the redactions that references were provided, it is unclear how reviewers could have verified the 10-year timeframe.

In addition, Granite's entire organizational chart was redacted including names and titles. It is questionable how a reviewer could score questions regarding the company's organizational chart when it appears to be completely redacted.

5. Evaluation Plan

In its RFP Evaluation Plan and RFP Team Briefing, OMIG documented a plan to address evaluation team questions via email to the Project Liaison and to resolve disparities and issues through evaluation team meetings. The RFP Evaluation Team Briefing also provides that the Selection Team would (at some future date) review the evaluation teams' work for completeness and accuracy where sufficient disparity exists, to clarify the intent of the qualification being evaluated and to resolve issues to get the most accurate evaluation from each team member. However, it is unclear from the procurement record whether this process actually took place. Furthermore, the fact that the erroneous scores are averaged and weighted (or normalized) does not adequately address their deficiencies.

ANALYSIS AND CONCLUSION

A fundamental principle of section 163 of the State Finance Law (and, indeed of the State's competitive bidding laws generally) is that the award of contracts be based upon a balanced and fair process. This requires that the award methodology, both as designed and as applied, must be balanced and fair. Here, however, our review shows many errors and inconsistencies in the scoring of the proposals. It also appears that the evaluation teams did not fully understand how to properly execute the scoring methodology and, even upon re-review of the scoring sheets by each evaluator as directed by OMIG, errors remained in the final scoring. This raises the additional questions of whether OMIG failed to properly instruct the evaluation teams and also whether at least some of the evaluation criteria, as stated, were too vague to be applied consistently.

We recognize that evaluators, in reviewing subjective criteria, may, and frequently do, reach different conclusions and assign different scores. Furthermore, this Office will generally give significant deference to the technical judgments made by agencies – particularly with respect to matters within their expertise. However, the process must demonstrate that: 1) the scoring system itself was clear and reasonably developed in a manner designed to arrive at best value; and 2) the evaluators, in assigning scores, arrived at reasonable conclusions. Here, we cannot say that these standards were met. *Indeed, in this case, the inconsistencies are particularly troublesome since a number of the evaluation criteria appear to be more or less objective; for example, knowledge of the Penal Law, experience testifying in various tribunals and foreign language abilities.*⁹

⁹ While there may be subjective elements to the criteria, for example the extent of the language proficiencies asserted with respect to various investigators, unless a significantly greater review were undertaken of the abilities and experience asserted in the resumes (for example, through an oral examination designed to measure the language abilities asserted), the evaluators were left to rely on the resume assertions which are objective. Indeed, unless OMIG intended to review the assertions obtained

With respect to such objective criteria, it would be reasonable to assume that multiple evaluators, who were only provided a general summary on a response or resume, should reach the same conclusion and assign the same scores. Nonetheless, as discussed above, in this case the evaluators reached different and inconsistent conclusions with respect to these objective standards.

Given the unexplained nature of the numerous errors and inconsistencies in the scoring documented in the procurement record and described above, and the reasonable possibility that other errors also occurred with respect to both the objective and the more subjective components of the scoring system, we are unable to conclude that the errors constitute harmless error (that is, error that clearly did not affect the ultimate outcome of the procurement). Likewise, we are unable to conclude that the proposed contract was actually awarded on the basis of "best value" consistent with the requirements of section 163 of the State Finance Law. Accordingly, we are upholding the protests and returning the contract unapproved.¹⁰

in the resumes, it could, and probably should, have simply assigned a single evaluator to complete the scores for these objective criteria – just as is customarily done with respect to the scoring of cost proposals.

¹⁰ LMGI and Summit each raised other grounds in their Protests and Supplemental Submission/Briefs which were not determinative of the conclusion reached by this Office. However, comment is made here regarding certain assertions made by LMGI and Summit.

First, Summit asserted that the bid scoring calculation unfairly distorted Summit's cost proposal by improperly inflating it, particularly, by disregarding Summit's tiered cost proposal that included a discounted daily per diem rate if OMIG awarded 15 or more investigators under the RFP and a further discount if OMIG awarded 25 or more investigators under the RFP. Summit's cost proposal also included an annual escalation in the rate per day for each investigator over the five years of the proposed contract. In our view, OMIG was correct in disregarding the volume discount and rate escalation included as part of Summit's cost proposal because the RFP did not request cost proposals to be submitted in this manner.

Second, LMGI's assertion that OMIG did not award any points to LMGI for its investigators with specialized skills in computer forensics, accounting and nursing is, in our view, incorrect. LMGI received points in the Offerer's Preferred Qualifications section of the RFP, as also noted by OMIG in its Answer, which is where the ability to provide investigators with specialized skills was scored. However, we note that scoring of these qualifications among the Reviewers was not completely consistent as also discussed above.