

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Optum Behavior Health with respect to the Protest Determination of the New York State Department of Civil Service regarding the single source emergency contract award for the Mental Health and Substance Abuse Program for the Empire Plan, Excelsior Plan and Student Health Plan
Contract Number – C000617

**Determination
of Appeal**

SF20130581

December 30, 2013

The Office of the State Comptroller has completed its review of the above-referenced single source emergency procurement conducted by the New York State Department of Civil Service (DCS) and the Appeal filed by Optum Behavior Health (Optum) of the protest decision issued by DCS with respect thereto. We have determined that the grounds advanced by Optum are insufficient to merit the overturning of the single source emergency contract award made by DCS, and, therefore, deny the Appeal. As a result, we are today approving the DCS single source emergency contract with ValueOptions, Inc. (ValueOptions) for the Mental Health and Substance Abuse Program (MHSA) services.

BACKGROUND

Facts

On February 15, 2013, DCS issued a Request for Proposal (RFP) for a successor to the MHSA services contract which expires on December 31, 2013. DCS received four proposals in response to the RFP, including proposals from ValueOptions and Optum.

DCS conducted an evaluation of the proposals and issued a conditional award to ValueOptions. On September 23, 2013, Optum filed a protest with DCS of the conditional award to ValueOptions. On November 4, 2013, DCS issued a determination denying the protest. On November 19, 2013, Optum filed an Appeal of the DCS protest determination with this Office. Based on the information contained in the submissions to this Office as part of the Appeal, DCS concluded that the procurement process was flawed and that it was in the best interest of the State to withdraw the RFP and conduct a new procurement.¹ DCS also determined that a single source emergency contract of a limited duration would be required to assure the continuation of the necessary services to the plan members. On December 17, 2013, DCS advised Optum and ValueOptions that it intended to make a single source emergency contract

¹ By letter dated December 5, 2013, ValueOptions filed a protest with DCS regarding DCS' decision to withdraw its contract award to ValueOptions. In addition, by letter dated December 16, 2013, Optum wrote to this Office asserting that "[s]ince the error identified by the Department in its rescoring is of a ministerial nature we believe that the appropriate result is to declare Optum's bid superior and award it the contract." These protests are pending before this Office.

award for the MHSA services and requested that these entities provide DCS with their best and final offers with respect to the provision of such services.

By letter dated December 18, 2013, Optum filed a “protest of any competitive bid process that DCS may be undertaking to award the [MHSA] Services.” By letter dated December 23, 2013, DCS denied Optum’s protest. On December 24, 2013, DCS made a single source emergency contract award to ValueOptions to provide MHSA services commencing January 1, 2014 and ending no later than 90 days following the earlier of this Office’s determination that an award should be made under the original procurement, or this Office’s approval of a contract resulting from a new procurement conducted by DCS in 2014. By letter dated December 24, 2013, Optum filed an Appeal of the DCS protest determination with this Office.

Procedures and Comptroller’s Authority

Under State Finance Law (SFL)§112, generally before any contract for, or by, the State which exceeds \$50,000 becomes effective it must be approved by the Comptroller.

To carry out its contract review and approval responsibilities under 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.² Since this is an Appeal of DCS’ protest determination, the process is governed by Section 4 of the Contract Award Protest Procedures.

In the determination of this Appeal, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by DCS with the DCS/ValueOptions single source emergency contract;
2. The correspondence between this Office and DCS arising out of our review of the DCS/ValueOptions single source emergency contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
 - a. Optum’s protest to DCS, dated December 18, 2013;
 - b. DCS’ protest determination, dated December 23, 2013;
 - c. Optum’s Appeal to OSC, dated December 24, 2013;
 - d. DCS’ Response to the Appeal, dated December 26, 2013;
 - e. Optum’s Correspondence, dated December 26, 2013; and
 - f. ValueOptions Response to the Appeal, dated December 27, 2013.

² Guide to Financial Operations, Chapter IX.17.

DISCUSSION

In its Appeal, Optum asserts that:

- (i) The award of the single source contract to ValueOptions will create considerable disruption and dislocation of plan members;
- (ii) There is no need for DCS to withdraw the original procurement and make a single source award, rather the appropriate result would be properly score the proposals and award the five year contract to Optum;
- (iii) DCS revealed Optum's confidential pricing information, giving ValueOptions an unfair advantage in preparing its pricing for the single source emergency contract; and
- (iv) The cost evaluation of best and final offers by DCS was arbitrary and capricious.

The specific issues raised in the Appeal are addressed below.

I. Continuation of Services

Optum asserts that the award to ValueOptions will create considerable disruption of services and dislocation of plan members. Specifically, Optum states that the provider network to be offered by ValueOptions will be different than the current provider network offered to plan members by Optum, and, therefore, plan members will not be allowed to continue treatment with their current providers in all instances.

In response, DCS states that it does not anticipate any disruption in services for plan members since there is no reason to assume that existing Optum in-network providers would not also be in-network providers with ValueOptions. Additionally, DCS states that to ensure that the plan members' needs are met, DCS included a transition benefit in the plan to address this possibility. Under the transition benefit, if a plan member is seeing an existing in-network provider under Optum, who is not an in-network provider with ValueOptions, the plan member may continue to see the medical provider for a period of up to 90 days and have claims treated as if they were in-network.

We are satisfied with DCS' response to this issue.

II. Single Source Award

Optum asserts that a single source award is not necessary in light of the original competitive process undertaken by DCS. Optum suggests the proposals submitted in response to the original RFP be "scored properly" which would result in the award of a five year contract for the MHSA services to Optum.

SFL §163(10)(b) provides that

- (i) Single ... source procurements for services or commodities, or procurements made to meet emergencies arising from unforeseen causes, may be made without a formal competitive process and shall only be made under unusual circumstances and shall include a determination by ... the state agency that the specifications or requirements for said purchase have been designed in a fair and equitable manner. The purchasing agency shall document in the procurement record, subject to review by the state comptroller, the bases for a determination to purchase from a single source ... or the nature of the emergency giving rise to the procurement.
- (ii) State agencies shall minimize the use of single source procurements and shall use single source procurements only when a formal competitive process is not feasible. State agencies shall document in the procurement record the circumstances and the material and substantial reasons why a formal competitive process is not feasible. The term of a single source procurement contract shall be limited to the minimum period of time necessary to ameliorate the circumstances which created the material and substantial reasons for the single source award.

For purposes of Section 163, an “emergency” is defined as “an urgent and unexpected requirement where health and public safety or the conservation of public resources is at risk” (Emphasis added, SFL §163(1)(b)).

The protests filed by Optum and ValueOptions regarding DCS’ initial award and later decision to withdraw its original contract award to ValueOptions are still pending before this Office and the issues raised by these protests will not be resolved prior to December 31, 2013 (the expiration date of the current contract for MHSA services). As a result, an award could not be made under the original competitive procurement conducted by DCS . Therefore, to ensure that MHSA services are available to plan members beyond December 31, 2013, DCS must enter into an agreement for the continuation of such services. These facts clearly give rise to an “emergency” as defined in SFL §163(1)(b) and, therefore, a single source emergency award is authorized under SFL §163(10).

While a single source award can be made without a competitive process, since there was more than one vendor capable of providing the necessary MHSA services, DCS undertook an expedited process, consisting of a request for best and final offers, to determine which vendor was best able to meet the needs arising under this emergency. Since both Optum and ValueOptions challenged aspects of the original cost evaluation criteria developed by DCS, and since DCS’ own review of the original cost evaluation criteria lead it to conclude that the use of such criteria undermined the validity of the original contract award to ValueOptions, DCS determined that the vendor’s responses to its request for best and final offers would be evaluated solely on the proposed Administrative Fee. While the manner in which DCS conducted and ultimately awarded the single source emergency contract is subject to criticism, in light of the emergency situation and the limited duration of the award, we will not upset the single source emergency award to ValueOptions to continue the MHSA services pending resolution of the protest and/or the completion of a new procurement process by DCS.

III. Confidential Information

Optum asserts that ValueOptions had a distinct advantage in preparing its pricing in response to DCS' request for a best and final offer as a result of the release of Optum's confidential pricing information. As a result, Optum claims the single source emergency award to ValueOptions was not conducted in a fair and equitable manner.

DCS states that the only pricing information that has been released was in relation to the initial protest filed by Optum. Further, the pricing information was initially given to Optum and only later shared with ValueOptions so that both parties had the same access to pricing information. Finally, DCS states that since DCS ultimately determined that the best and most objective factor upon which to make the single source emergency award was the proposed Administrative Fees, sharing claims pricing would not have provided anyone an unfair advantage.

As state above, while the manner in which DCS conducted and ultimately awarded the single source emergency contract is subject to criticism, the disclosure of each vendor's total pricing numbers did not provide either bidder an unfair advantage.

CONCLUSION

For the reasons outlined above, we have determined that the issues raised in the Appeal are not of sufficient to merit to overturn the protest determination of DCS. As a result, the Appeal is denied and we are today approving the DCS/ValueOptions single source emergency contract for MHSA services.