

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Quest
Diagnostics Incorporated with respect to the
procurement of Referenced Laboratory Services
conducted by the State University of New York
Upstate Medical University

**Determination
of Appeal**

SF-20150051

Contract Number – C503720-3320211

April 22, 2015

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the State University of New York Upstate Medical University (Upstate) for laboratory testing services. We have determined the grounds advanced by Quest Diagnostics Incorporated (Quest) are insufficient to merit the overturning of the contract award made by Upstate and, therefore, we deny the appeal. As a result, we are today approving the Upstate contract with Laboratory Corporation of America (LabCorp) for laboratory testing services.

BACKGROUND

Facts

Upstate issued Request for Proposal #S-1086 (RFP) for Referenced Laboratory Services on March 18, 2014. Four bidders submitted proposals by the April 22, 2014 deadline. The RFP provided a three phase evaluation approach and stated “[u]pon completion of all Phases one award will be made to [the] Bidder whose proposal met all bidder qualifications, obtained the highest combined score for all phases and whose proposal represents the best value to the State” (*see* RFP Section VIII [emphasis in original]). Phase I confirmed that a bidder met the qualifications required by the RFP. One proposal was eliminated during Phase I as non-responsive. Phase II consisted of the technical evaluation and was worth 50 points. Phase III encompassed the cost evaluation and was worth 50 points. On June 24, 2014, Upstate notified Quest that it had awarded the contract to LabCorp. Quest requested and received a debriefing by phone on July 1, 2014. Although Quest received the maximum number of points for its cost score, it ranked third for its technical score and second overall for its combined score. Thus, Upstate awarded the contract to LabCorp since its proposal obtained the highest combined score.

Quest filed a protest with Upstate by letter dated July 8, 2014. Upstate denied the protest on August 22, 2014 and Quest filed an appeal of the determination with Upstate by letter dated September 12, 2014. On January 7, 2015, Upstate notified Quest that it had denied the appeal. By letter dated January 22, 2015, Quest filed an appeal of Upstate’s contract award with this Office (Appeal).

Comptroller's Authority and Procedures

Under State Finance Law (SFL) § 112(2), with certain limited exceptions, before any contract made for or by a state agency, which exceeds fifty thousand dollars, becomes effective it must be approved by the Comptroller.

In carrying out the contract approval responsibility prescribed by SFL § 112, this Office has issued a Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency.¹ This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because this is an appeal of an agency protest decision, the Appeal is governed by section 4 of the OSC Protest Procedure.

In the determination of the Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by Upstate with the Upstate/LabCorp contract;
2. the correspondence between this Office and Upstate arising out of our review of the proposed Upstate/LabCorp contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Quest's protest to Upstate dated July 8, 2014;
 - b. Upstate's protest determination dated August 22, 2014;
 - c. Quest's appeal of Upstate's protest determination dated September 12, 2014;
 - d. Upstate's appeal determination dated November 12, 2014; and
 - e. Quest's Appeal dated January 22, 2015.

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.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 minimum specifications or requirements described in a solicitation for commodities or services by a state agency."⁴

¹ OSC Guide to Financial Operations, Chapter XI.17, <http://www.osc.state.ny.us/agencies/guide/MyWebHelp/>.

² SFL § 163(4)(d), (10).

³ SFL § 163(1)(j).

⁴ SFL § 163(1)(d).

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)(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 THE APPEAL

Appeal to this Office

In its Appeal, Quest challenges the procurement conducted by Upstate on the following grounds:

1. Upstate erroneously based its technical evaluation on a subjective evaluation of inconsequential terms rather than an objective review of quantifiable information contained in Quest’s proposal.
2. When evaluating the proposals, Upstate relied on information not required by the RFP and, therefore, Upstate’s determination was inconsistent with the RFP.

Response to Appeal

Upstate declined to formally respond to the Appeal, advising this Office that the issues raised have been addressed in the protest and appeal determinations previously issued to Quest.

DISCUSSION

As previously stated, Quest received the maximum number of points allocable to the cost portion of the evaluation. Thus, the Appeal solely concerns Upstate’s evaluation of the technical component. Both at the agency-level protest and appeal and in the Appeal to this Office, Quest has argued that the resulting contract award was not based on a best value determination because Upstate’s evaluation focused on subjective terms rather than quantifiable facts and relied on information not required by the RFP. Below we address Quest’s two general arguments, as well as several specific examples cited in the Appeal and the agency-level protest.

A. Upstate’s Technical Evaluation

Quest asserts that Upstate did not base its technical evaluation of Quest on the quantifiable information submitted in its proposal. Instead, Quest maintains that Upstate based its evaluation on the evaluators’ subjective opinion of less important details, such as how the responses were phrased. Quest purports that “elevating subjective opinion and response technicalities over

quantifiable quality information is inconsistent with the State Finance Law and fails to determine best value” (*see* Appeal, at pg. 2).

In support of its position, Quest cites SFL § 163(7) which requires best value determinations to be based on “evaluation criteria, which whenever possible, shall be quantifiable.”

Here, the RFP required that a bidder agree to “correct any billing irregularities within thirty (30) days written notification by Hospital personnel” (*see* RFP Section IV[A][20]). The RFP further provided that a bidder’s inability to provide this service “will result in a non-responsive proposal” and, moreover, failure to comply with this requirement may result in termination of the contract, evidencing the importance of this criterion to Upstate. During the debriefing, Upstate indicated that Quest scored lower than LabCorp on this criterion because LabCorp unconditionally accepted this requirement while Quest responded in its proposal that it would “make every effort” to comply (*see* Upstate protest determination, at pg. 2). Quest argues in the Appeal that the difference between the two responses should not warrant “a sufficiently higher score” for LabCorp (*see* Appeal, at pg. 2). In its agency-level protest to Upstate, Quest provided another example of this evaluation and scoring in relation to the requirement that technical updates and other changes be communicated to Upstate at least 30 days before implementation (*see* Quest agency-level protest, at pg. 2; RFP Section IV[A][5]). In its proposal, Quest agreed to comply with this requirement “whenever possible” and Upstate’s evaluators again deducted points for Quest’s response to this criterion. Quest argues that Upstate should have focused on the quality of its technical information dissemination system instead of the choice of words used in its proposal.

Further, throughout the protest and appeal process Quest has consistently maintained that it provided significant quantifiable information demonstrating its technical superiority and highlighted in its agency-level protest the proficiency testing results included in its proposal (*see* Quest agency-level protest, at pg. 4, and agency-level appeal, at pg. 3). Quest claims that Upstate did not objectively evaluate that information but instead subjectively focused on inconsequential items such as the level of detail provided for those items. While Quest argues that Upstate inappropriately ignored items such as “its highly accurate proficiency testing results” (*see* Quest agency-level appeal, at pg. 2-3), that was not one of Upstate’s predetermined evaluation criteria. Indeed, the RFP required a bidder to submit its proficiency testing policy (*see* RFP Section III[B][18]) not its testing results, and provided that the “method used for each test will be evaluated to determine the overall technical quality of each Bidder” (*see* RFP Section VIII, Phase II, paragraph B). The RFP also required bidders to submit documentation of all reviews and corrective actions taken as part of a proficiency-testing program during 2012 and 2013 (*see* RFP Section III[B][9]). Instead of providing such documentation with its proposal, Quest invited Upstate to review the reports at Quest’s offices. After Upstate clarified that the RFP required bidders to submit the documentation for evaluation and scoring as part of their proposal, Quest submitted what Upstate deemed to be a “very brief, inexact overview” (*see* Upstate protest determination, at pg. 2). Additionally, the RFP clearly described other quantitative criteria, and our review of the procurement record reveals that the evaluators in fact did use these quantitative criteria in the technical evaluation and scoring.

As previously stated, best value awards optimize quality, cost and efficiency. While SFL § 163(7) does require evaluation criteria to be quantifiable “whenever possible,” that provision does not speak to how the criteria is to be scored. In the New York State Procurement Guidelines (Guidelines), the state procurement council has indicated that “[t]he technical evaluation measures the extent by which a proposal will meet the agency’s needs and relies upon the evaluators’ expertise in assessing the strengths and weaknesses of each response” (Guidelines, Section V.H). Furthermore, while the Guidelines delineate the general process to be used in conducting the technical evaluation (i.e., the development of criteria, the assignment of point values to each criteria, and the proper use of an evaluation instrument tool), the Guidelines also generally recognize that “[t]he nature, scope, and complexity of evaluation methods vary widely.” *Id.* Here, we do not believe that Upstate erred by basing its technical scores, in part, on the level of detail for a stated criterion or the level of commitment to a stated requirement. Less detail regarding a particular specification would reasonably curtail a reviewer’s ability to fully understand the quality of such an item, thus potentially resulting in a lower score. Further, it is reasonable for an evaluator to conclude that an intent to meet a stated contract requirement warrants a lower score than an affirmative confirmation to comply with such requirement.

Next, SFL § 163(9)(b) requires that the solicitation must contain the minimum evaluation criteria that must be met to be considered responsive and generally describe how the contract awardee will be selected. Here, the RFP established four main evaluation areas for the technical evaluation with associated point values: Customer Service/Information Technology Service (20 points), Technical Quality (15 points), Reliability (10 points) and Turn-Around-Times and Test Frequency (5 points). Within each area, the RFP set forth the information a bidder was required to submit and how a bidder would receive the most points in that evaluation area (*see* RFP Section VIII, Phase II, paragraphs A, B, C and D).

The information provided in the RFP noted above satisfies the requirements of SFL § 163(9)(b). Further, after examining the procurement record, we find no evidence that Upstate’s evaluation and selection process deviated from the process described in the RFP.

B. Information Required by the RFP

In the Appeal, Quest states that it received a low technical score despite submitting a proposal responsive to the requirements of the RFP because Upstate relied on information not required by the RFP in evaluating the proposals. Quest asserts this approach rendered Upstate’s award determination inconsistent with the RFP. For example, Quest states that, during the debriefing, Upstate informed Quest that it had scored lower on the customer service department description criterion because Quest did not provide enough detail, “including a customer service organization chart” (*see* Appeal, at pg. 2). Quest argues that the RFP did not require the submission of a customer service organization chart (*see* RFP Section III[B][14]). In its August 22, 2014 bid protest determination, Upstate acknowledged that an organizational chart was not required and stated that neither Quest nor LabCorp had in fact provided organizational charts. While Quest attributes the lack of an organizational chart as the reason why Upstate assigned fewer points to its proposal, Upstate explained that it awarded more points to LabCorp for this criterion because LabCorp “provided a level of specificity that Quest did not” (*see* Upstate protest determination, at pg. 2).

Quest also claims that it was informed by Upstate that Quest's technical score was lower because of its response regarding a policy for dealing with inappropriate/compromised specimens (*see* RFP Section III[B][16]). Quest again argues that it provided the required policy and, therefore, in giving a lower score to Quest on this criterion, Upstate must have based such score on information not required by the RFP (*see* Appeal, at pg. 2; Quest agency-level protest, at pg. 3). However, Quest has not provided any evidence to substantiate this claim and this Office's review of the procurement record did not reveal any evidence that would indicate Upstate relied on extraneous information in scoring any of the bidders on this criterion.

Finally, Quest generally takes the position "that [it] did not submit 'as detailed' information as another [bidder] is not relevant to technical quality" (*see* Appeal, at pg. 3). As explained above, we disagree. Indeed, the details contained in a proposal are the basis by which evaluators distinguish among responsive proposals. While SFL § 163(9)(b) requires Upstate to disclose in the RFP the general manner by which proposals will be evaluated, it does not require that Upstate disclose the detailed evaluation methodology. The fact that Upstate chose to award more points to a proposal that provided detailed information reasonably related to the stated evaluation criteria does not make its evaluation inconsistent with the SFL or the RFP.

We note that even if Upstate had awarded Quest the highest number of points available for each criterion Quest claims was improperly evaluated, neither Quest's technical ranking or the overall results of the scoring would have changed.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the contract award by Upstate. As a result, the Appeal is denied and we are today approving the Upstate/LabCorp contract for laboratory services.