

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by HP
Enterprise Services, LLC with respect to the
procurement of Medicaid Administrative Services
and Fiscal Agent Services conducted by the New
York State Department of Health.

**Determination
of Bid Protest**

SF-20150072

Contract Number – C029586

April 17, 2015

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Health (DOH) for Medicaid Administrative Services and Fiscal Agent Services (collectively MAS). We have determined the grounds advanced by HP Enterprise Services, LLC (HP) are insufficient to merit the overturning of the contract award made by DOH and, therefore, we deny the Protest. As a result, we are today approving the DOH contract with Xerox State Healthcare, LLC (Xerox) for MAS.

BACKGROUND

Facts

On June 25, 2013, DOH issued a Request for Proposal (RFP) for the procurement of a MAS contractor to provide fiscal agent services and other administrative services for the New York State Medicaid Program. The resultant contractor is expected to replace the current New York State Medicaid Management Information System (MMIS) with a new claims processing and information retrieval system that satisfies all federal and state requirements for purposes of receiving enhanced federal matching funds (RFP, at § I - A). To save on cost and speed up implementation, DOH asked vendors to focus on configuring existing commercial off-the-shelf (COTS) infrastructure and platforms for claims processing, customer service, care management, and other services, rather than following a traditional approach of building a new system from the ground up. DOH indicated that to support the leveraging of COTS technology, it increased its flexibility on technical details to focus on achieving the outcomes provided in the RFP (RFP, at § I - A).

Since this was a procurement for services, consistent with the requirements of State Finance Law (SFL) § 163, the method of award was based on best value. The RFP provided that all proposals submitted would undergo an initial Compliance Assessment to assure the mandatory requirements were satisfied. Proposals that passed the Compliance Assessment were then evaluated based on the following criteria and weighting: Technical Evaluation (based on the detailed requirements set forth in the RFP as well as official guidance from the Centers for Medicare and Medicaid Services [CMS]) (70%); and Cost Evaluation (the lowest cost proposal

meeting the mandatory requirements) (30%). The technical and price scores were then combined to determine the highest scoring vendor (RFP, at §§ IV - G.2, G.3, G.4).

Two bidders submitted proposals by the November 25, 2013 submission deadline: 1) Xerox and 2) HP. The technical proposals were independently evaluated against predetermined criteria by an evaluation team consisting of 28 evaluators (MAS Contract Procurement Executive Summary, at pgs. 3-4). The proposal with the highest raw technical score received 70 points, while the other proposal was then normalized using the 70-point scale (MAS Contract Procurement Executive Summary, at pg. 7). Similarly, a full 30 points were awarded to the lowest cost proposal, while the other proposal's cost score was normalized in the same manner. The final technical and cost scores were then combined to determine the final score for each bidder. Xerox proposed a lower cost than HP and received the highest technical score.

After determining Xerox to be the highest scoring proposer, DOH conducted a vendor responsibility assessment to ensure the proposed contract award was made to a responsible proposer as required by SFL § 163 (RFP, at § IV – D.8; DOH Answer, at pg. 1). According to DOH, this process included a detailed Vendor Responsibility Profile analysis as well as discussions with representatives in states where Xerox implemented other MMIS projects (DOH Answer, at pg. 2). After determining Xerox to be a responsible vendor, DOH proposed an award of the contract to Xerox as the highest scoring proposer (DOH Answer, at pg. 1).

On May 23, 2014, DOH advised HP that Xerox was awarded the MAS contract. By letter dated June 16, 2014, HP filed a protest with this Office challenging the award of the contract on the basis that Xerox is not a responsible vendor. HP followed up with a supplement to the protest, submitted to this Office on August 13, 2014 (collectively the Protest). DOH thereafter submitted the contract for review to this Office on December 9, 2014. On February 13, 2015, this Office non-approved the contract without prejudice to allow DOH sufficient time to address this Office's outstanding audit questions. On February 23, 2015, DOH provided its responses to the audit questions and this Office resumed its review of the contract.

Comptroller's Authority and Procedures

Under 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. Since this is an initial protest of an agency's contract award, the Protest is governed by section 3 of the OSC Protest Procedure.

In the determination of the Protest, this Office considered:

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

1. the documentation contained in the procurement record forwarded to this Office by DOH with the DOH/Xerox contract;
2. the correspondence between this Office and DOH arising out of our review of the DOH/Xerox contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. HP's Protest dated June 16, 2014;
 - b. HP's Supplemental Protest dated August 13, 2014;
 - c. MAS Contract Procurement Executive Summary submitted by DOH on August 25, 2014; and
 - d. DOH's Answer to the Protest dated December 5, 2014.

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 In this context, "responsible" means the financial ability, legal capacity, integrity, and past performance of a business entity.⁴

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 "a state agency shall select a formal competitive procurement process ... [which] shall include ... a reasonable process for ensuring a competitive field."

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 PROTEST

Protest to this Office

² SFL § 163(10).

³ SFL § 163(1)(j).

⁴ SFL § 163(1)(c).

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

- a. Xerox's unsatisfactory performance on past MMIS (or similar) contracts makes Xerox a nonresponsible vendor.
- b. OSC's independent assessment of DOH's responsibility determination should lead to the non-approval of the contract.

Response to the Protest

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

- a. DOH conducted a vendor responsibility assessment of Xerox and properly determined it to be a responsible vendor.

DISCUSSION

HP asserts Xerox is not a responsible offerer pursuant to the requirements of SFL § 163. Specifically, SFL § 163(4)(d) requires that “[s]ervice contracts shall be awarded on the basis of best value to a responsive and **responsible** offerer . . .” (emphasis added). Further, SFL § 163(9)(f) provides that “[p]rior to making an award of contract, each state agency shall make a determination of responsibility of the proposed contractor” SFL § 163(1)(c) defines “responsible” as “the financial ability, legal capacity, integrity, and past performance of a business entity” As a part of our review of the DOH/Xerox contract, this Office carefully examined and assessed the information provided in the procurement record, the Protest, and additional information provided by DOH in response to our questions regarding the responsibility of Xerox. Below, we address HP's assertion that Xerox is not a responsible bidder due to its poor performance on several prior contracts with other states.

A. System Implementation Delays in Other States

1. HP provided the following examples where Xerox's performance record is allegedly unsatisfactory on prior MMIS contracts with other states.

Montana: HP asserts Xerox promised to implement its MMIS contract with Montana in 35 months but is now scheduled to complete implementation in 62 months, resulting in cost increases to the state (Supplemental Protest, at pgs. 1-2). HP further asserts Montana is dissatisfied with Xerox's work and the two parties have been unable to agree to a resolution plan, in part, because Xerox will not agree to terms preventing any increase in the contract price or agreeing to be liable for liquidated damages (Protest, at pgs. 10-11). HP contends, at one time, Montana was considering cancellation of the contract (Supplemental Protest, at pg. 2).

Alaska: HP states Xerox failed to implement its MMIS system with Alaska in 32 months as originally scheduled, and when the system was implemented 72 months later, it was unsatisfactory, with errors in claim and payment processing and poor service from call centers

(Protest, at pgs. 12-13). Additionally, HP contends Xerox used unqualified staff to implement the project and repeatedly failed to meet performance measures, resulting in several contract amendments and increased costs (Protest, at pgs. 12-13).⁵

North Dakota: HP alleges the Xerox implementation in North Dakota has been plagued with “chronic delays,” and was originally scheduled to be completed in 37 months, but is now not scheduled to complete implementation for 99 months from the contract start date (Protest, at pgs. 13-14). HP states North Dakota continued with the contract to avoid, among other things, the risk of losing providers that have been waiting several years for implementation of the system, and creating an obligation to repay CMS for the federal matching funds that have been provided (Protest, at pg. 14).

California: HP contends Xerox originally promised to deliver the California MMIS in 58 months, but is now scheduled to complete implementation in 64-67 months (Protest, at pg. 15). HP references a report issued by the Auditor of California detailing delays by Xerox in implementing California’s new MMIS. The Auditor of California reported significant staff turnover by Xerox resulting in the loss of key employees, and attributed many of the delays to project teams “proceeding as if they were developing new software, instead of determining how to adapt Xerox’s existing software product to meet California’s needs” (Protest, at pg. 15). The California audit also listed delays in other states where Xerox implemented MMIS systems, in particular, New Hampshire, Alabama, North Dakota and Montana (Protest, at pgs. 15-16).

New Hampshire: HP asserts Xerox exceeded its original implementation schedule in New Hampshire by 65 months which resulted in substantial increased costs to the state (Protest, at pgs. 16-17). HP indicates New Hampshire officials raised the possibility of cancelling the contract, but ultimately did not terminate over concerns the state would become ineligible to obtain federal funding (Protest, at pgs. 16-17). HP also refers to a report released by the New Hampshire Department of Health and Human Services about a year after the MMIS went live, listing the MMIS as an “operations challenge” (Protest, at pg. 17).

2. DOH’s measures to mitigate potential performance issues or delays.

As part of its vendor responsibility assessment of Xerox, DOH contacted several of the aforementioned states where Xerox worked on MMIS contracts (DOH Answer, at pg. 2). In August 2014, DOH began participating in a state user group for Xerox Health Enterprise consisting of representatives from California (who ran the group), New Hampshire, Alaska and Montana. (Xerox did not participate in these conferences.) DOH attended conference calls to develop relationships with the states and learn more about the implementation of the projects in those states (DOH Response to OSC’s Audit Question No. 1). According to DOH, “[b]oth California and New Hampshire state representatives described Xerox as a responsive and **responsible** contractor, with good access up the chain of command as necessary, and willing to replace staff or alter the project approach when the states raised issues” (DOH Answer, at pg. 2 [emphasis added]). DOH also noted California and New Hampshire “described the [Xerox Health Enterprise] product as living

⁵ This Office is also aware of an administrative claim filed by the Alaskan Department of Health and Human Services against Xerox related to its work on Alaska’s MMIS. It is our understanding that the claim in Alaska is still pending and has not been finally resolved.

up to its representation by Xerox as a flexible, highly configurable system that removes the need for most code development work during [Design, Development, Implementation]” (DOH Answer, at pg. 2). In addition, New Hampshire stated its new system has been “remarkably stable” and able to meet its needs since becoming operational (DOH Answer, at pg. 3).

DOH also advised some of the delays in California and New Hampshire were due, in part, to a failure by Xerox and the contracting state to configure the already-established XHE product, as originally planned. Instead, the project managers shifted to the more traditional MMIS approach of developing an entirely new “from the ground up” system (DOH Answer, at pg. 3). DOH indicated other reasons given for delays in New Hampshire were attributable to factors outside of Xerox’s control, including: 1) a major change in scope and requirements of the system after development was already in progress,⁶ and 2) new federal requirements established during the implementation (DOH Answer, at pgs. 2-3). DOH advised that the implementation of the MMIS contracts in North Dakota and Alaska commenced shortly after New Hampshire’s and thus, experienced similar issues (DOH Answer, at pg. 3). However, DOH pointed out that the implementation of the New York MMIS will begin seven to nine years later and, moreover, DOH has provided evidence that the Xerox Health Enterprise (XHE) continues to show a decreasing trend in delay periods as used in other states (DOH Answer, at pgs. 3-4). While Alaska referred to unresolved issues with its MMIS, it did indicate the system was versatile and had great potential (DOH Answer, at pg. 2). Further, DOH noted Montana and Xerox have agreed to a revised work plan and Montana has advised Xerox it is “no longer in breach of the \$70 million state contract” (DOH Answer, at pg. 5).

Following its vendor responsibility assessment, DOH determined staffing deficiencies were the largest problem for Xerox in its performance on past contracts. Specifically, several states experienced high turnover rates, and issues with staff having minimal experience with the XHE or a lack of training on the XHE development methodology (DOH Answer, at pgs. 3, 5). DOH advised, in an effort to address the delays that were occurring in California and New Hampshire, Xerox brought in Cognizant, a global consultant, to help with staffing needs and improve the new system’s development methodology (DOH Answer, at pg. 3). For the New York MMIS, Xerox proposed Cognizant as a subcontractor from the contract start date to provide its expertise and minimize issues with the management of development methodology (DOH Answer, at pg. 3).

To further mitigate risks due to staffing issues, DOH plans to “actively review Xerox’s hiring activities, monitor staff training and develop corrective action plans quickly if staffing is inadequate . . .” (DOH Answer, at pg. 9). DOH avers it “will insist that Xerox commit to using the key staff identified in the proposal rather than replacing with less experienced personnel,” which will be possible since DOH has approval rights under the contract for staff replacements (DOH Answer, at pg. 9). DOH also developed a Service Level Agreement (SLA) to be included in the contract with Xerox that will impose stricter requirements for staffing and the enforcement of damages for the failure to comply (DOH Answer, at pg. 8).

⁶ This scope change was due to the Medicaid transition occurring at that time from Fee For Service to a Managed Care program. DOH indicated that most of its Medicaid recipients have already been moved to Managed Care, thus, eliminating a similar issue (DOH Answer, at pg. 3).

B. Nevada Health Insurance Exchange Contract

In questioning Xerox's responsibility, HP also relies on problems that occurred on a contract Xerox held with the State of Nevada. In May 2014, the Silver State Health Insurance Exchange Board voted to terminate Xerox's contract to build Nevada's health insurance exchange (Protest, at pg. 17). HP further states that, prior to termination, an independent audit of the contract showed Xerox failed to meet various SLAs over the scope of the audit period and an independent audit of the health insurance exchange found numerous gaps and issues in performance (Protest, at pg. 17).

In response, DOH states Xerox's work on the Nevada contract is substantively different from the work it will be performing on the New York MAS contract (DOH Answer, at pg. 6). As described by DOH, health insurance exchanges and MMISs support different functionalities and purposes and, therefore, present different software implementation issues. Additionally, at the time Xerox was working on the contract in Nevada, health insurance exchange solutions and requirements were entirely new to the marketplace, and therefore, would be more difficult to implement than MMIS solutions, the requirements of which have already been well established (DOH Answer, at pg. 6). Finally, DOH notes that several states (including Massachusetts, Oregon and Maryland) and the Federal government experienced difficulties starting up their exchanges (DOH Answer, at pg. 6).

C. Texas Medicaid System Administration Contract

Finally, HP points to occurrences in Texas where the State terminated its Medicaid system administration contract with Xerox and filed a lawsuit to recover improper payments Xerox allegedly allowed in fraudulent Medicaid claims (Protest, at pgs. 18-19). Upon becoming aware of the lawsuit, DOH reached out to the Associate Commissioner for Medicaid in Texas and was advised the lawsuit was still pending and, therefore, there has been no final determination with regard to the allegations raised therein. (We note that as of the date of this Protest Determination, the matter remains pending). Additionally, DOH states the allegations raised in the litigation are "not illustrative of Xerox's performance as the fiscal agent for 10 other state Medicaid programs and the District of Columbia" (DOH Answer, at pg. 7). However, in light of the matters raised in the litigation and DOH's assessment of the information it received during its due diligence of contractor performance issues, DOH has taken steps to manage such risks and incorporate safeguards into the contract (DOH Answer, pgs. 7-8). These steps include:

- i. A SLA that will hold the contractor "liable for the actual amount of all contractor caused incorrect payments, duplicate payments, or payments that should have been denied that are not recovered" (RFP, at § III – E.3.4).
- ii. Language added to the contract during contract negotiations with Xerox providing that "[t]he Contractor shall not employ management staff ... on the MAS project that have been previously assigned to Contractor projects or accounts that were subject to successful litigation, or are under ongoing litigation for failure to meet the terms of the contract, or for which the contract was terminated for cause, without [DOH's] prior written authorization" (DOH Answer, at pg. 8).

- iii. The employment of an independent Quality Assurance contractor, Cognosante, who is helping DOH to develop a Requirements Validation plan for Xerox (DOH Response to OSC's Audit Question No. 12).
- iv. SLAs "that require a minimum review of 10% of each reviewer's prior approvals, prior authorizations, and treatment plans and damages assessments when the consistency and appropriateness threshold is not met to confirm consistent decisions" (DOH Answer, at pg. 8).

D. DOH's Vendor Responsibility Determination

DOH conducted extensive due diligence, including communications with many other states that have contracted with Xerox, and concluded many of the delays and performance issues experienced were due to risks inherent in large, complex IT system projects of this nature and were not an indication that Xerox is a nonresponsible vendor.

In our view, DOH has taken the necessary precautionary measures, including the proper governance and oversight structure and necessary safeguards to help prevent and, if necessary, manage the types of performance issues experienced in other states. Accordingly, we do not find a sufficient basis to overturn DOH's vendor responsibility determination.

E. OSC's Independent Assessment of Xerox's Responsibility

In support of its view that OSC should uphold HP's bid protest, HP cites a protest determination and contract rejection letter issued by this Office arising out of our review of two "large-scale technology-driven procurement contracts" (Protest, at pg. 20). First, Xerox relies on this Office's determination of a bid protest filed by Motorola, Inc. (Motorola) in 2005, challenging an award of a contract by the New York State Office for Technology (OFT) to M/A-COM, Inc. for a Statewide Wireless Network (Motorola Protest Determination).⁷ In denying Motorola's protest, this Office stated that, in reviewing an agency's determination of vendor responsibility, "OSC is [not] limited in its analysis to consideration of whether there was a rational basis for the agency's determination. ... Rather, OSC may conduct a *de novo* review of the record and make its own analysis of the facts pertaining to the procurement" (Motorola Protest Determination, at pg. 12). Ultimately, however, this Office concluded "the record does not support the conclusion that [another State's] experience with the use of M/A-COM's technology casts material doubt on M/A-COM's ability to implement the SWN" (Motorola Protest Determination, at pg. 21). As a result, this Office denied the protest and approved OFT's contract award to M/A-COM, Inc. (*Id.*).

Second, HP relies on this Office's decision in 2011 to return nonapproved a contract between the New York State Education Department (SED) and Wireless Generation, Inc. (Wireless Generation), a subsidiary of News Corporation. This Office informed SED its basis for returning the contract was "the significant ongoing investigations and continuing revelations with respect to News Corporation" that were occurring at that time.⁸ Further, this Office advised "the record remains incomplete with respect to the vendor responsibility issues involving the parent company of Wireless Generation" (*see* OSC Letter to SED, dated August 25, 2011). Unlike the

⁷ See SF-20050147, at http://www.osc.state.ny.us/contracts/bidprotestdecisions/bpd_SF20050147.pdf.

⁸ At that time, News Corporation was involved in an ongoing investigation relating to illegal news gathering tactics.

facts underlying our review of the SED/Wireless Generation contract, we find DOH has presented a complete record regarding Xerox's vendor responsibility issues.

DOH conducted a vendor responsibility assessment of Xerox that included a detailed analysis of Xerox's Vendor Responsibility Profile and communication with representatives in states where Xerox implemented other MMIS contracts. Further, Wireless Generation presented notably different circumstances than are currently presented by Xerox. Wireless Generation involved serious criminal allegations that clearly brought into question the contractor's integrity. While the pending lawsuit in Texas presents some troubling allegations, unlike the facts presented in Wireless Generation, they relate mainly to contract performance and not overall corporate integrity. Based on the information before our Office at this time, and DOH's proactive measures to prevent and manage the types of performance issues identified, we do not find a sufficient basis to overturn DOH's vendor responsibility determination.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the contract award by DOH. As a result, the Protest is denied and we are today approving the DOH/Xerox contract for MAS.