

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Quest
Diagnostics, Inc. with respect to the procurement of
Statewide Centralized Laboratory Services
conducted by the New York State Department of
Corrections and Community Supervision

**Determination
of Bid Protest**

SF-20150080

Contract Number – CC161311

June 29, 2015

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Corrections and Community Supervision (DOCCS) for Statewide Centralized Laboratory Services. We have determined the grounds advanced by Quest Diagnostics, Inc. (Quest) are insufficient to merit the overturning of the contract award made by DOCCS and, therefore, we deny the protest. As a result, we are today approving the DOCCS contract with BioReference Laboratories, Inc. (BioReference) for Statewide Centralized Laboratory Services.

BACKGROUND

Facts

On September 29, 2014, DOCCS issued a Request for Proposal (RFP) for the procurement of Statewide Centralized Laboratory Services for all New York State correctional facilities. The awarded contractor is responsible for the collection and handling of lab specimens and ultimately providing laboratory results (RFP at § I). DOCCS awarded the contract on the basis of best value as determined by a combination of technical and cost scores. The scoring process was broken down into three phases: Phase I – a pass/fail checklist of mandatory requirements; Phase II - the technical component, which required a score of at least 49 out of 70 points to advance to the next phase; and Phase III - the cost component, which was worth a maximum of 30 points. (RFP at § XI).

Two bidders submitted proposals by the submission deadline of December 11, 2014: 1) BioReference, the incumbent contractor for these services; and 2) Quest. Both proposals passed Phase I. However, the proposal submitted by Quest did not receive a passing technical score in Phase II and did not move on to the final phase. On January 22, 2015, DOCCS awarded the contract to BioReference as the offerer with the best value proposal. Upon learning of the contract award, Quest requested a debriefing which was provided by DOCCS on February 5, 2015. Thereafter, Quest submitted follow-up questions to DOCCS that were answered by letter dated March 3, 2015. By letter dated March 20, 2015, Quest filed a protest with this Office challenging the award made by DOCCS to BioReference (Protest). On May 4, 2015, DOCCS submitted the contract with BioReference to this Office for review and approval pursuant to State Finance Law (SFL) § 112.

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 aforementioned responsibilities prescribed by SFL § 112, this Office has issued a Contract Award Protest Procedure (OSC Protest Procedure) that governs the process to be used when an interested party challenges 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 there was no protest process provided for by the procuring agency, the Protest is governed by Section 3 of the OSC Protest Procedure.

In the determination of the Protest, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by DOCCS with the DOCCS/BioReference contract;
2. The correspondence between this Office and DOCCS arising out of our review of the DOCCS/BioReference contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
 - a. Quest's Protest dated March 20, 2015;
 - b. BioReference's Answer to the Protest dated March 30, 2015;
 - c. DOCCS's Answer to the Protest dated April 28, 2015; and
 - d. Quest's Reply dated April 2, 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

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

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

² SFL § 163(10).

³ SFL § 163(1)(j).

⁴ SFL § 163(1)(d).

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

In its Protest, Quest challenges the procurement conducted by DOCCS on the following grounds:

1. DOCCS scored the proposals in an arbitrary and inconsistent manner:
 - a. Inconsistency in scoring among evaluators suggests that scoring was either unduly subjective or instructions given by DOCCS to the evaluators were unclear.
2. DOCCS did not adhere to the scoring methodology set out in the RFP and failed to make an award on the basis of best value.
3. DOCCS favored the incumbent:
 - a. DOCCS refused to provide clarification to Quest with respect to the RFP specification on conducting DNA Testing, failing to provide information that only the incumbent would have knowledge of; and
 - b. DOCCS cancelled the bidders’ conference at the request of BioReference.
4. DOCCS failed to provide Quest with a meaningful debriefing.

Response to the Protest

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

1. DOCCS evaluated all proposals appropriately:
 - a. A clear scoring tool and instructions were provided to the evaluation committee, however, differences in scoring among evaluators is expected.

2. DOCCS did indeed comply with the scoring methodology set out in the RFP and, although Quest did not receive a passing score in Phase II, its cost component was nevertheless scored and the total score of Quest's proposal was lower than BioReference's total score.
3. There is no evidence of favoritism toward the incumbent:
 - a. The RFP specification on DNA testing involved standard procedures commonly used in criminal justice situations and did not require specific information that only the incumbent would be aware of; and
 - b. DOCCS did not cancel the non-mandatory bidders' conference at the request of BioReference but rather, because no other bidder, including Quest, signed up to attend the conference and BioReference, as the incumbent, was already familiar with the site and advised DOCCS it would not be attending.
4. DOCCS provided a sufficient debriefing to Quest.

Response to the Protest

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

1. The Protest is not timely and for that reason alone should be rejected.
2. The Protest does not sufficiently support the assertion that DOCCS failed to adhere to the evaluation methodology set forth in the RFP.
3. Quest's argument that DOCCS favored the incumbent is meritless:
 - a. Quest provides no basis for its assertion that scoring by DOCCS evaluators was inconsistent and, therefore, improper. Indeed, varying scores by multiple evaluators is a routine part of the RFP process; and
 - b. DOCCS did not cancel the bidders' conference at the request of BioReference and Quest failed to register for the event although it was provided ample notice and the opportunity to register.

DISCUSSION

I. Timeliness of The Protest

In its Answer to the Protest, BioReference asserts that the Protest was filed with this Office more than a month late and, as a result, should be denied (BioReference Answer at pg. 3). BioReference relies on Section 3(c) of the OSC Protest Procedure which provides that "[w]here an interested party that wants to file an initial protest with [this Office] under these guidelines was

provided notice of a contract award, the interested party must file the protest with [this Office] within ten business days of notice of the contract award with respect to such procurement.” However, Section 3(c) also goes on to state: “[a]ny filing deadlines may be waived by [this Office] as provided in Section 3(i) of these guidelines.” Section 3(i) indicates that “[this Office] may, in its sole discretion, waive any deadline or requirements set forth in these guidelines”

While the Protest was filed late with this Office, in this instance, we conclude that it is appropriate to exercise our discretion to waive the filing deadline. In considering such a waiver, this Office takes into consideration several factors including: whether a debriefing was requested and granted, when the interested party had access to the facts giving rise to the protest, whether the protest raises potentially meritorious issues, when the contract was submitted to this Office for review, and whether a waiver would result in unnecessary or harmful delays in our review of the contract.

Here, it appears from the procurement record that even after the February 5, 2015 debriefing, Quest had follow-up questions for DOCCS (*see* Protest Attachment #2). DOCCS responded to these questions by letter dated March 3, 2015. Quest claims that the answers to these follow-up questions raised additional concerns and, as a result, Quest filed the Protest with this Office on March 20, 2014 (Protest at pgs. 2-3). Additionally, at the time Quest filed the Protest, the contract had not yet been submitted to this Office for review. Based on the foregoing, we exercised our discretion to waive the filing deadline.

II. Arbitrary and Inconsistent Scoring

Quest asserts DOCCS’s scoring of its proposal was arbitrary and inconsistent. Specifically, Quest claims that while components of its technical proposal were described by certain DOCCS evaluators as “outstanding” and “exceeding expectations,” it inexplicably did not receive a passing technical score. Quest later learned that while some evaluators awarded Quest high scores in certain categories, other evaluators gave Quest a low score in those same categories (Protest at pgs. 2-3). Quest maintains that the inconsistency in scoring is the result of either overly subjective scoring by the evaluators or unclear scoring instructions.

To meet the objective of ensuring that “proposals are evaluated objectively, fairly, equally and uniformly and that the agency selects the best value solution among the submitted proposals,” Section V.E of the New York State Procurement Guidelines “strongly [recommends] that the agency establish an evaluation team.” Here, the DOCCS technical evaluation team was comprised of seven evaluators tasked with evaluating proposals based on the criteria established in the RFP to determine which proposal is most qualified to perform the services being procured (DOCCS Answer at pg. 1; RFP at § XI). According to DOCCS, the evaluation committee was provided with instructions and a pre-established evaluation tool. DOCCS also notes that a reasonable variance in scoring among evaluators is expected and purposeful (DOCCS Answer at pg. 2). This point is also supported by guidance issued by the State Procurement Council and prior opinions of this Office (*see* New York State Procurement Guidelines at Section V.H [“the technical evaluation ... relies upon the evaluators’ expertise in assessing the strengths and weaknesses of each response”]; Bid Protest Determination SF20140496, found at <http://www1.osc.state.ny.us/Contracts/decisionsearch.cfm>). Based on our review of the

procurement record, we find no evidence suggesting that the DOCCS evaluation committee did not score Quest's proposal in accordance with the instructions or evaluation tool provided by DOCCS. Additionally, this Office generally defers to agency determinations with respect to factual determinations, including the relative technical merit of proposals, particularly where, as here, these determinations are within the agency's expertise.

III. Scoring Methodology

Quest argues that DOCCS improperly awarded the contract solely on the basis of technical merit without considering the cost component of the evaluation methodology (Protest at pg. 2). Quest's argument is premised on the fact that because its technical proposal did not receive a passing score of 49 points, BioReference's proposal was the only proposal to move on to Phase III, the evaluation of the cost component. As a result, Quest asserts that BioReference was awarded the contract by default on the basis of technical score alone, as opposed to a combination of its technical and cost scores pursuant to the RFP (Protest at pg. 2). We believe the logic of Quest's argument is flawed. Whether the procuring agency's award is based on "best value" is not dependent on the number of proposals that are ultimately evaluated on both technical merit and cost. Rather, the determinative factor is whether the award was made to the proposal "which optimizes quality, cost and efficiency, among responsive and responsible offerers"⁵ and is consistent with the evaluation methodology and selection process documented in the procurement record by the procuring agency before the initial receipt of proposals.⁶

Furthermore, as noted by DOCCS and evidenced in the procurement record, DOCCS scored both Quest and BioReference's cost proposals and Quest's overall score was lower than that of BioReference. As such, any concern raised by DOCCS failure to score Quest's cost proposal would constitute harmless error and, therefore, would not provide a basis to overturn the contract award.

Additionally, based on information provided during its debriefing, Quest also claims that DOCCS deviated from the evaluation methodology prescribed in the RFP by deducting points from Quest's technical score based on its responses to a category entitled "Logistics," that was a subset of the Service Delivery Requirements criterion, but was not specifically allocated any points in the RFP. (Protest at pg. 3). In addition to the requirements in SFL § 163(7) and § 163(9)(b) noted above, Section V.H of the New York State Procurement Guidelines provides that in evaluating technical proposals, "[a]s a preliminary step, proposals should be reviewed for compliance with the minimum mandatory technical requirements set forth in the RFP. After the preliminary review, the technical proposal evaluation must be conducted as documented in the RFP and the evaluation instrument. The evaluation team members apply scores to the pre-determined criteria and subcriteria if applicable."

Here, we are satisfied that DOCCS followed the process as outlined in the RFP. Section XI of the RFP set out the four technical evaluation criteria, and Attachment B to the RFP further broke down the allocation of points among those technical criteria. With respect to the particular criterion at issue in the Protest, Service Delivery Requirements, points were allocated among five

⁵ See SFL § 163(1)(j).

⁶ See SFL § 163(7).

different subcriteria. These subcriteria were followed by an additional section entitled “Logistics” which was not allocated any specific point value, but required that offerers describe how they would meet certain logistical requirements in conjunction with providing the Service Delivery Requirements (RFP at Attachment B, pg. 5). DOCCS has averred that, despite mention of Quest’s logistics responses at the debriefing (and a comment on the evaluator’s scoring tool), the logistics responses were not independently scored as part of the technical evaluation. Our review of the procurement record confirms that “logistics” were not independently scored.

IV. Favoring the Incumbent

Quest asserts that throughout the procurement process, DOCCS favored the incumbent by: A) refusing to provide clarification to Quest with respect to an RFP specification; and B) cancelling the bidders’ conference at the request of BioReference. We address each of these assertions below.

A. Bid Specification

To support its contention that DOCCS favored the incumbent, Quest asserts DOCCS refused to provide Quest with clarification on a question it had during the Q&A process pertaining to the technical category of DNA testing. Quest believes that only BioReference would possess the information necessary to adequately respond to that criterion because of its experience as the incumbent contractor. As a result, Quest argues that its relatively low score in this category is the result of a specification that was favorable toward the incumbent (Protest at pg. 4).

The DNA Testing category consisted of two subcategories. The first subcategory indicated that “[t]he bidder’s proposal must describe [the] organization’s experience in collecting DNA samples, including equipment used. . . .” The second subcategory asked bidders to “[d]escribe your organization’s Chain of Custody procedures for processing DNA samples” (RFP at Attachment B, pg. 6). With respect to these subcategories, Quest asked DOCCS the following questions:

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| <i>Quest’s Question:</i> | Please define what constitutes DNA testing under the bid? |
| <i>DOCCS’s Answer:</i> | Collection of specimens via oral swab and handling specimens with chain of custody. Please see Attachment B, p.6, DNA Testing, Section IV, #1 |
| <i>Quest’s Question:</i> | Is there a NY State specific standard for chain of custody protocols? . . . |
| <i>DOCCS’s Answer:</i> | Please see Attachment B, p.6 of DNA Testing, Section IV, #2. |

(RFP 2014-08 Questions & Answers, Nos. 6, 7).

Quest contends that because BioReference was uniquely familiar with DOCCS’ existing chain of custody protocol, BioReference had an advantage in responding to this portion of the RFP. In its Answer to the Protest, DOCCS maintains that its chain of custody procedures are standard procedures commonly adhered to in correctional environments and that it was looking for offerers to describe their company’s chain of custody procedures for processing DNA samples.

In our view, no further information was necessary to adequately respond to the RFP's clear requirement that the offerer describe its own "organization's Chain of Custody procedures."

DOCCS also indicated that, while Quest's response on this category identified its experience in correctional facilities, it did not include a clearly defined chain of custody procedure. While Quest noted that it would follow all chain of custody procedures, it did not identify or describe those procedures.

Based on the information provided and our review of the procurement record, it does not appear that Quest's relatively lower score in the DNA Testing category was due to favoritism to BioReference. Rather, Quest's score appears to relate to Quest's failure to provide sufficient information in response to this RFP requirement.

B. Cancellation of the Bidder's Conference

In support of its position that BioReference received favorable treatment, Quest also asserts that DOCCS improperly cancelled a "mandatory" bidders' conference based on a suggestion made by BioReference. Quest states that by the time it received the RFP, the final date to register for the conference had passed (Protest at pg. 4).

First, it should be noted that the bidders' conference was not mandatory. In fact, Page 23 of the RFP contains a section entitled "Non-Mandatory Bidders' Conference & Site Visit" (emphasis added). This section provided detailed information on the conference stating that bidders were strongly encouraged to attend the conference scheduled for October 21, 2014. In bold letters it is clearly stated that alternate dates for additional conferences would not be available (RFP at pg. 23). The section also indicated that bidders were required to pre-register for the conference by close of business on October 17, 2014. According to DOCCS, the RFP was posted on its website and to the New York State Contract Reporter on September 29, 2014. DOCCS also sent a letter to potential bidders, including Quest, advising of the RFP issuance and the conference scheduled for October 21, 2014 (DOCCS Answer at pg. 2). DOCCS advised that as of October 16, 2014, the only bidder who had registered for the conference was BioReference. At that point, DOCCS reached out to potential bidders, including Quest, to inform them of the upcoming deadline to register for the conference. Even after this phone call, Quest did not register for the conference by the registration deadline. Since BioReference was the only bidder registered to attend the bidders' conference and it was familiar with the site to be toured and decided not to attend the conference, DOCCS cancelled the non-mandatory bidders' conference (DOCCS Answer at pg. 3).

We find no evidence to substantiate Quest's claim that DOCCS favored BioReference by cancelling the non-mandatory bidders' conference. It appears that Quest was given ample opportunity to access the RFP and register for the conference by the October 17, 2014 deadline and failed to do so. Since there were no bidders scheduled to attend the conference, DOCCS did not act inappropriately in cancelling it.

V. Debriefing Provided to Quest

In the Protest, Quest contends that it was not provided with a meaningful debriefing (Protest at pg. 2-3). SFL § 163(9)(c) provides that “[a] state agency shall, upon request, provide a debriefing to any unsuccessful offerer that responded to a [RFP] . . . , regarding the reasons that the proposal or bid submitted by the unsuccessful offerer was not selected for an award. . .” (emphasis added). The Procurement Guidelines provide additional guidance stating that “[d]uring the debriefing, the State agency may . . . [l]imit the discussion to the reasons why the bid was not successful; [d]iscuss the reasons why the winning bid was selected; and [o]ffer advice and guidance to the bidder to improve future bids.” Notably, under the current legal construct, agencies are given considerable latitude in how they can satisfy the statutory requirement for a debriefing.

In its Answer, DOCCS provided a recitation of the information provided during the telephonic debriefing on February 5, 2014. DOCCS informed Quest of the evaluation methodology employed, the fact that “Quest had scored very well in some areas and average in others” and that, ultimately, its technical score was only 47.5 out of a possible 70 points and was therefore not eligible for further consideration (DOCCS Answer at pg.2; *see also* Protest at pg. 2). In addition, DOCCS provided a follow-up letter to Quest dated March 3, 2015, addressing additional questions regarding how its proposal ranked among the others (Protest at Attachment #2). While Quest asserts that its debriefing was insufficient, we disagree. Quest was provided information regarding the reasons that its proposal was not selected for award, and the answers provided by DOCCS in the March 3rd letter were direct and adequate responses to the additional questions submitted by Quest. As such, we find no evidence to support Quest’s claim that it did not receive a meaningful debriefing from DOCCS.

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 DOCCS. As a result, the Protest is denied and we are today approving the DOCCS/BioReference contract for Statewide Centralized Laboratory Services.