

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Optum with Respect to the Procurement of Services for the Mental Health and Substance Abuse Program for the Empire Plan, Excelsior Plan and Student Employee Health Plan Conducted by the New York State Department of Civil Service

**Determination
of Appeal**

SF-20150160

February 26, 2015

Contract Number – C000625

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Civil Service (DCS) to provide the Mental Health and Substance Abuse Program (MHSA Program) for the Empire Plan, Excelsior Plan and Student Employee Health Plan, certain plans offered under the New York State Health Insurance Program. We have determined the grounds advanced by Optum are insufficient to merit the overturning of the contract award made by DCS and, therefore, we deny the Appeal. As a result, we are today approving the DCS contract with Beacon Health Options, Inc., formerly known as ValueOptions, Inc. (BHO), to administer the MHSA Program.

BACKGROUND

Facts

On March 13, 2014, DCS issued Request for Proposals #2014-MH-1 seeking a vendor to administer the MHSA Program. Consistent with the requirements of State Finance Law § 163, the RFP provided for a contract award based on best value (RFP, at Section VI, pgs. 6-9 – 6-10). Each offeror's proposal was to consist of three distinct parts: the administrative proposal, the technical proposal and the cost proposal (RFP, at Sections III, IV and V). DCS reviewed each offeror's administrative proposal to determine responsiveness and then scored the technical and cost proposals on a weighted point system. The technical proposal and cost proposal were worth 70 percent and 30 percent, respectively, of the total score (RFP, at Section VI, pg. 6-2). Pursuant to the RFP, DCS assigned a raw score to each technical proposal and then converted such score to points. The technical proposal with the highest score received 700 points (i.e. the maximum points available) and other technical proposals were assigned fewer points in accordance with a pre-determined formula (RFP, at Section VI, pg. 6-7). The cost proposal with the lowest calculated cost received the maximum 300 points and other cost proposals were assigned points based on a one-point reduction for each \$50,000 an offeror's cost exceeded the lowest calculated cost (RFP, at Section VI, pg. 6-9). By letter dated January 8, 2015, DCS awarded the contract to BHO, the offeror receiving the highest total combined score.¹

¹ The maximum total combined score available under the RFP was 1000 points.

DCS provided Optum a debriefing on January 15, 2015. By letter dated January 22, 2015, Optum filed a protest with DCS challenging its award of the contract to BHO. Optum supplemented its agency-level protest with letters dated March 6, 2015 and March 20, 2015. Ultimately, DCS denied Optum's protest by letter dated May 6, 2015.² Meanwhile, pursuant to an investigation conducted by the Health Care Bureau of the Office of the New York State Attorney General (AG), BHO entered into an Assurance of Discontinuance (AOD) on March 4, 2015, in order to settle allegations of State and Federal law violations by BHO in its administration of behavioral health benefits for several New York health plans. In the AOD, BHO neither admitted nor denied culpability.

Optum filed an appeal of DCS' protest decision with this Office by letter dated May 19, 2015 (Appeal) and DCS responded to the Appeal by letter dated November 30, 2015 (Answer).³

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.⁴ 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 DCS with the DCS/BHO contract;

² DCS' Director of Employee Benefits initially addressed Optum's protest by sending a written analysis to DCS' Director of Internal Audit, concluding that the protest has no merit and should be denied. DCS' Director of Internal Audit reviewed the issues and made a recommendation to DCS' Commissioner, by letter dated May 5, 2015, that Optum's protest was procedurally flawed in that it did not comport to the protest procedure outlined in the RFP and, moreover, was substantively without merit. DCS' Commission adopted the recommendation and denied Optum's protest.

³ The Appeal contains only one of the issues raised in the agency-level protest. For purposes of this determination, we only address the particular issue raised in the Appeal to this Office. While it be could assumed that Optum was satisfied with DCS' response to the other issues raised in the agency-level protest, we note that, as part of our review of the procurement record, we examined the other issues raised in the agency-level protest and are satisfied that DCS scored the technical and cost proposals in accordance with the evaluation methodologies set forth in the RFP and the evaluation instrument that was finalized before receipt of offers.

⁴ OSC Guide to Financial Operations, Chapter XI.17, <http://www.osc.state.ny.us/agencies/guide/MyWebHelp/> (accessed on the date of issuance of this Determination).

2. The correspondence between this Office and DCS arising out of our review of the proposed DCS/BHO contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
 - a. Optum's Appeal dated May 19, 2015; and
 - b. DCS' Answer dated November 30, 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.⁵ 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."⁶ A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."⁷ We discuss the requirement that a proposed contract awardee be "responsible" in detail below.

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, Optum challenges the procurement conducted by DCS on the following grounds:

1. The AOD casts doubt on the reliability of BHO's technical and cost proposals and substantially impacts BHO's ability to deliver behavioral health benefits.

Response to the Appeal

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

1. The AOD does not impact DCS' evaluation of BHO's proposal nor BHO's ability to provide the required services.

DISCUSSION

Optum's arguments on appeal relate to BHO's status as a responsible vendor. Below, we first address Optum's specific allegations. Next, we consider the broader issue of DCS' vendor responsibility determination.

⁵ SFL § 163(10).

⁶ SFL § 163(1)(j).

⁷ SFL § 163(1)(d).

1. AOD's Impact on BHO's Proposal

Optum asserts the AOD “calls into question all aspects of ValueOptions’ response to the RFP” (Appeal, at pg. 2). Optum points out two instances in which it believes the AOD impacts BHO’s proposal: use of low utilization projections based on BHO’s improper denial of benefits (which could result in BHO receiving a lower cost score) and allegations of BHO’s inadequate provider network (*see* Appeal, at pg. 2).⁸

DCS contends that the AOD does not impact its technical or cost evaluation of BHO’s proposal. Specifically, DCS states it evaluated cost proposals based on normalized utilization data, using DCS’ most up-to-date data under the current administration of the MHSA Program. DCS states that this approach “ensured that any improper denial of benefits...had no impact on the Procurement’s evaluation” (Answer, at pg. 2). DCS also noted in the RFP that this normalization approach was intended to “result in a more accurate and fair comparison of the Offerors’ Cost Proposals as applied to the normalized claim base” (RFP, Section VI, at pgs. 6-8 and 6-9). Additionally, the RFP required bidders to “[d]escribe your utilization review process and confirm that it is parity compliant” (RFP, Section IV, at pg. 4-83). DCS claims this requirement results in consistent utilization among offerors “since a parity compliant Program would not result in improper denial of benefits” and “utilization incurred would be approximately the same” (Answer, at pg. 2, emphasis in original). Thus, DCS asserts that any prior improper denial of benefits affecting BHO’s utilization projections would not impact DCS’ evaluation of BHO’s cost proposal. Finally, DCS notes that “while Offerors supported their Guaranteed Average Unit Cost amount with their estimates of utilizations, those utilization projections were not used in the Procurement’s evaluation of cost proposals” (Answer, at pg. 3). Our review of the procurement record confirms that DCS used such normalized utilization and we are satisfied with DCS’ explanation as to why the AOD did not impact DCS’ evaluation of cost.

With regard to the technical evaluation, the RFP set forth detailed requirements to be met by an offeror’s provider network (*see* RFP, Section IV, at pg. 4-40, et seq.). DCS determined BHO’s proposed network to be acceptable and consistent with the network access set forth in its proposal (*see* Answer, at pg. 3). We generally defer to agency determinations where they are properly within the agency’s expertise and supported by the procurement record. Certainly, whether a provider network is adequate to meet its needs is well within DCS’ area of expertise and nothing in the procurement record contradicts DCS’ assessment of the adequacy of BHO’s provider network. For this reason, we will not disturb DCS’ conclusion that the terms of the AOD would not have impacted its evaluation of BHO’s proposed provider network.

⁸ Our review of the record did not reveal other provisions of BHO’s proposal that may have been affected by the terms of the AOD. Thus, our discussion is limited to the two examples raised in the Appeal.

2. Responsibility Determination

While not expressly referenced in the Appeal, the Appeal could be read to infer that the AOD raises issues with respect to the responsibility of BHO (*see* Appeal, at pg. 1).⁹

SFL § 163(4)(d) provides that “service 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” For purposes of SFL § 163, “responsible” means the financial ability, legal capacity, integrity, and past performance of a business entity.¹⁰

Since there does not appear to be any question as to BHO’s financial ability or legal capacity to enter into a contract for the MHSA Program, we will review any impact the AOD may have on an assessment of BHO’s integrity and past performance.

The AOD arises out of an investigation by the AG following its receipt of complaints from consumers alleging that BHO had improperly denied coverage for behavioral health services (*see* AOD, at pg. 2). The AG’s investigation related to BHO’s provision of services during the years 2011 through 2013. Based on its investigation, the AG determined BHO violated certain State and Federal laws (*see* AOD, at pg. 22). Pursuant to the terms of the AOD, BHO agreed to implement reforms to its administration of behavioral health benefits for certain State and local government health plans, including the Empire Plan (*see* AOD, at pgs. 24-37).

DCS disputes the significance of the AOD, stating that the deficiencies cited in the AOD occurred “prior to [BHO’s] administration of MHSA benefits for the Empire Plan Program” (Answer, at pg. 1).¹¹ DCS also states that certain improper conduct described in the AOD does not apply to the MHSA Program, and other deficiencies have been corrected by BHO at DCS’ request (*see* Answer, at pg. 1). Additionally, DCS notes that the Empire Plan covers over 1.1 million members and that “[i]t would be unrealistic to expect every member to be completely satisfied with the administration of the Program and, as with any transition to a new administrator, a certain level of disruption is expected” (Answer, at pg. 2). Since BHO is the current administrator of the MHSA Program, DCS is thoroughly aware of BHO’s past performance, and clearly believes that the services provided have been satisfactory.

As documented in the procurement record, DCS conducted a vendor responsibility review of BHO after the date BHO entered into the AOD. Despite the AOD, DCS determined BHO to be a responsible bidder and able to successfully perform the services required under the contract. As part of our audit of the DCS/BHO contract, this Office also conducted an independent vendor responsibility review of BHO. This Office carefully examined and assessed the information

⁹ Optum initially raised this issue in its March 6, 2015 letter to DCS supplementing its initial bid protest, stating “it seems likely that the settlement would impact their technical proposal, cost proposal and responses to the Vendor Responsibility Questionnaire” (Optum March 6, 2015 letter, at pg. 2). However, the Appeal lacked a specific reference to responsibility.

¹⁰ SFL § 163(1)(c).

¹¹ BHO began administering the MHSA Program in January 2014.

provided in the procurement record, the Appeal, the AOD, and additional information provided by DCS in response to our questions regarding the responsibility of BHO. Based on this and the above discussion, we will not upset DCS's responsibility determination.

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 DCS. As a result, the Appeal is denied and we are today approving the DCS/BHO contract to administer the MHSA Program.