

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Bid Protest filed by New York County Health Services Review Organization with Respect to the Procurement of Quality Assurance, Surveillance and Investigation Services Conducted by the New York State Department of Health

**Determination of  
Bid Protest**

**SF-20160188**

November 16, 2016

Contract Numbers C031294, C031295, and C031296

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The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Health (DOH) for surveillance and investigation activities for Adult Care Facilities, Licensed Home Care Services Agencies, Nursing Homes, Intermediate Care Facilities, and Psychiatric Residential Treatment Facilities (these types of facilities are herein referred to as Component A, Component B, Component C, Component D, and Component E, respectively). We have determined the grounds advanced by New York County Health Services Review Organization (NYCHSRO) are insufficient to merit the overturning of the contract awards for Components A, C, D, and E made by DOH and, therefore, we deny the Protest. As a result, we are today approving the DOH contracts with Island Peer Review Organization (IPRO) for surveillance and investigation activities for these Components.<sup>1</sup>

## **BACKGROUND**

### **Facts**

DOH “is responsible for the oversight of compliance with State and Federal Medicare and Medicaid health and safety standards for continuing care providers” (RFP, as defined below, at pg. 1). DOH issued Request for Proposals No. 16113 (RFP) on June 24, 2015 to procure services in furtherance of meeting these obligations. In addition to the surveillance and investigation activities, the RFP required successful offerors to perform administrative functions under the resulting contracts (*see* RFP, at pg. 4). Offerors could bid on one or more of the Components, but were required to provide all services within a Component as set forth in the RFP (*see* RFP, at pg. 35).

The RFP provided that contracts would be awarded on the basis of best value, with a single contract awarded for each Component, based on the highest total score when cost and technical scores were combined (*see* RFP, at pgs. 44-45).<sup>2</sup> The technical proposal and the cost proposal were worth 60 percent and 40 percent, respectively, of the final score (*see* RFP, at pg. 44). A team of three evaluators reviewed the technical proposals for each Component, based on the criteria for that Component set forth in the RFP.<sup>3</sup> Evaluators awarded scores ranging from 0-5 for each criterion and these individual scores were averaged and weighted to produce a raw score for that particular criterion. The raw scores for the criteria were added together for a total raw technical score. For each Component, the technical proposal with the highest raw score received 60 points and the other proposals for that Component received a proportionate score according to a formula established in the RFP (*Id.*).

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<sup>1</sup> DOH awarded the contract for Component B to NYCHSRO and, as a result, the award for Component B was not part of NYCHSRO’s protest.

<sup>2</sup> DOH reserved the right to enter into a single contract with an offeror selected for multiple Components (*see* RFP, at pg. 45).

<sup>3</sup> There were different team members for each Component.

DOH evaluated the cost proposals by multiplying an offeror's per unit price by the estimated annual units for a particular Component (*Id.*). The estimated annual units were disclosed in the RFP. As was done with the technical proposals, the highest scoring cost proposal (the proposal with the lowest annual price) for each Component received the maximum score of 40 points, with other cost proposals receiving a relative proportionate score (*Id.*). The technical and cost scores for each offeror in each Component were combined to produce a total score.

I PRO received the highest total score for Components A, C, D, and E. NYCHSRO received the highest total score for Component B. DOH awarded contracts to I PRO and NYCHSRO for their respective Components. DOH provided NYCHSRO a debriefing on August 2, 2016.

NYCHSRO filed a protest with this Office by letter dated August 23, 2016 (Protest) and DOH filed an answer to the Protest, received by our Office on September 2, 2016 (DOH Answer). I PRO filed a response to the Protest by letter dated September 1, 2016 (I PRO Answer). NYCHSRO filed a reply to the Answers of DOH and I PRO by letter dated September 8, 2016 (NYCHSRO Reply).<sup>4</sup>

### **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 aforementioned responsibilities proscribed by SFL § 112, this Office has issued a Contract Award Protest Procedure that governs the process to be used when an interested party challenges a contract award by a State agency.<sup>5</sup> This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no protest process engaged in at the department level, the Protest is governed by section 3 of the OSC Protest Procedure related to initial protests to this Office.

In the determination of the Protest, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by DOH with the I PRO and NYCHSRO contracts;
2. The correspondence between this Office and DOH arising out of our review of the proposed I PRO and NYCHSRO contracts; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
  - a. NYCHSRO's Protest dated August 23, 2016;
  - b. I PRO's Answer to the Protest dated September 1, 2016;
  - c. DOH's Answer to the Protest dated September 2, 2016; and
  - d. NYCHSRO's Reply to the Answers of DOH and I PRO dated September 8, 2016.

### **Applicable Statutes**

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<sup>4</sup> NYCHSRO supplemented its Protest on September 23, 2016. As the supplemental submission does not raise any new issues relating to the Protest, this submission will not be formally addressed in this determination.

<sup>5</sup> OSC Guide to Financial Operations, Chapter XI.17, <http://www.osc.state.ny.us/agencies/guide/MyWebHelp/>.

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.<sup>6</sup> 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.”<sup>7</sup> A “responsive” offerer is an “offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency.”<sup>8</sup>

## **ANALYSIS OF THE PROTEST**

### **Protest to this Office**

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

1. DOH failed to comply with statutory and common law procurement requirements because DOH did not analyze whether IPRO’s cost proposals were unreasonably low.
2. The 60/40 technical to cost scoring ratio did not achieve best value pursuant to SFL § 163.
3. The RFP did not specify that evaluation criteria would be given different weights and, therefore, the use of such weighting to score proposals constitutes an impermissible change from pre-established review criteria.
4. Scoring variances indicate that evaluators inconsistently scored the technical proposals, including objective criteria.
5. Evaluators who worked closely with, or were former employees of IPRO may have scored proposals which indicates DOH did not ensure impartiality in the evaluation process.

### **DOH’s Response to the Protest**

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

1. DOH evaluated IPRO’s cost proposals consistent with applicable procurement requirements. DOH did not question IPRO’s ability to perform the required services based on the costs bid since these costs were similar to historical average pricing for these services.
2. The RFP set forth the relative weights of cost and technical factors, as required by SFL § 163, which DOH deemed to provide the best value under budgetary constraints and market forces within the industry.
3. DOH was not required to disclose the weight assigned to each evaluation criterion in the RFP. DOH established the evaluation criteria, including the weighting, prior to submission of proposals and applied the evaluation criteria uniformly to each technical proposal.

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<sup>6</sup> SFL § 163(10).

<sup>7</sup> SFL § 163(1)(j).

<sup>8</sup> SFL § 163(1)(d).

4. DOH established a protocol to review scoring variances of greater than three points.
5. DOH took all appropriate measures to ensure a fair and impartial evaluation process, including reviewer training and a requirement that each evaluator sign a Conflict of Interest statement prior to reviewing the proposals.

### **IPRO's Response to the Protest**

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

1. DOH undertook the necessary cost benefit analysis for an award based on best value pursuant to SFL § 163 and is not required to further assess the feasibility or reasonability of IPRO's proposals.
2. Agencies have broad discretion in setting a procurement's technical to cost scoring ratio; thus, the 60/40 ratio set by DOH should be accorded deference.
3. The RFP disclosed the relative weight of cost to technical, the general criteria on which the technical proposals would be evaluated and that the proposal receiving the highest combined point value would be selected for award. Thus, DOH complied with the statutory requirements of SFL § 163(9)(b).
4. DOH is in the best position to evaluate the technical proposals and significant deference should be given to DOH's scoring of those proposals.
5. NYCHSRO has not provided evidence to support its claim that DOH's evaluation of the proposals was biased.

### **Reply to the Answers**

In its Reply, NYCHSRO reiterates the original arguments raised in the Protest.

## **DISCUSSION**

### **A. Best Value Award and Review of IPRO's Cost Proposals**

NYCHSRO alleges DOH failed to meet its obligations as a procuring state agency because DOH did not test the reasonableness or feasibility of IPRO's cost proposals. Specifically, NYCHSRO argues that IPRO's cost proposals were unreasonably low and DOH's acceptance of such calls into question whether the awards to IPRO were the result of a fair competitive process and achieved best value (*see* Protest, at pgs. 2-5). To support its allegation, NYCHSRO cites SFL§ 163(11) for the proposition that "State Finance Law requires the head of each agency to test for reasonableness and to ensure that the quality and the price of the purchase makes sense" (*see* Protest, at pg. 2; emphasis omitted).

In addition, NYCHSRO points out what it perceives to be the substantial difference between IPRO's bid price for Component A and price proposed by other bidders for that Component, and asserts DOH was required to test the reasonableness of this price to determine whether IPRO "intentionally submitted an unreasonably low bid to take advantage of the scoring formula and effectively eliminate other competitive bidders" (Protest, at

pg. 3). NYCHSRO further suggests IPRO will be unable to perform the services required under the contract for Component A for such a low price (*see* Protest, at pgs. 4-5). Below, we discuss DOH's method of determining "best value" and DOH's assessment of IPRO's cost proposals prior to making awards to IPRO.

### 1. Best Value Award

As stated above, SFL § 163(1)(j) defines best value as "the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers. Such basis shall reflect, wherever possible, objective and quantifiable analysis." Before rendering such an award, the agency must undertake a cost-benefit analysis and adopt an evaluation methodology reasonably designed to accomplish this result (*see Transactive Corporation v New York State Department of Social Services*, 236 AD2d 48 [1997]; *aff'd* 92 NY2d 579 [1998]). In *Transactive*, the Court concluded that "[g]iven the fact that [the procuring State agency] subjected the proposals to technical and financial evaluations, we find that it engaged in the requisite cost-benefit analysis" (*Id.*, at 53).

Based on its programmatic experience in surveillance and investigative activities for long term facilities licensed by it, DOH fashioned a procurement process that assigned relative weights to the costs proposed as well as the technical quality of proposals for each Component. The separate technical and cost evaluations produced a result that, in our opinion, reflects the requisite cost-benefit analysis to meet the standard set forth in the *Transactive* case.

Moreover, we conclude that the method of determining best value undertaken by DOH satisfied the requirements of SFL § 163(7), which requires the contracting agency to 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."

### 2. Review of IPRO's Cost Proposals

In regard to the DOH's review of IPRO's cost proposals, DOH stated that "[a] vendor's ability to meet the financial burdens of performing under a contract with the Department are, and rightly so, a matter of investigation undertaken as part of the vendor responsibility assessment" (DOH Answer, at pg. 5).<sup>9</sup> DOH was required to make a determination of responsibility before rendering the awards to IRPO (*see* SFL § 163[9][f]). After completing its review, DOH found IPRO to be responsible, stating "IPRO has the legal authority, financial and organizational capacity, business integrity, and positive past performances" (DOH Answer, at pg. 5).

NYCHSRO claims that DOH was statutorily required to conduct a feasibility or reasonability analysis of IPRO's cost proposals pursuant to SFL § 163(11) (*see* NYCHSRO Reply, at pgs. 2-4). We disagree with NYCHSRO's reading of the statute. Subdivision (11) of section 163 requires that a state agency "periodically sample the results of the procurement process to test for reasonableness; to ensure that the results withstand public scrutiny and that the quality and the price of the purchase make sense ...." The plain language of SFL § 163(11) indicates a post procurement review of an agency's procurement results, but does not impose any additional requirements on a procuring agency prior to making an award.

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<sup>9</sup> A responsibility determination includes a review of the "financial and organizational capacity; legal authority to do business in [the] state; integrity of the owners/officers/principals/members and contract managers; and past performance of the bidder on prior government contracts" (New York State Procurement Guidelines, Section III.H, <http://www.ogs.ny.gov/bu/pc/Docs/Guidelines.pdf>, Revised May 2014).

In any event, DOH has stated that it “had no basis for questioning the reasonableness of the cost proposed by IPRO since IPRO’s bid price was on par with historical average pricing for this service” (DOH Answer, at pg. 3). The range of historical costs for these types of services is information that is available to DOH and we have no basis to question DOH’s assessment in this regard. DOH also suggested that IPRO may have taken into consideration the economies of scale (i.e. cost savings based on increased volume) since IPRO was bidding on all five Components which may have allowed IPRO to formulate a highly competitive bid price (*see* DOH Answer, at pgs. 4-5). Therefore, we are satisfied that DOH’s evaluation of IPRO’s cost proposals according to the manner stated in the RFP, together with DOH’s responsibility determination of IPRO, and the fact that DOH considered IPRO’s pricing to be consistent with historical pricing for such services, provides a sufficient basis for DOH’s determination that IPRO’s proposals constituted the best value.

## **B. DOH’s Evaluation and Scoring Methodology**

In the Protest, NYCHSRO raises a number of issues pertaining generally to DOH’s evaluation and scoring methodology. We address each of these concerns separately below.

### **1. Relative Weight of Cost and Technical**

NYCHSRO claims DOH inappropriately allocated too much weight to the cost score and suggests the 70/30 technical to cost scoring ratio used by DOH in other procurements is more suitable (*see* Protest, at pg. 6).<sup>10</sup> DOH contends that the scoring weights it assigned – 60 percent technical and 40 percent cost – “would provide the best value under the budgetary constraints and market forces within the industry” (DOH Answer, at pg. 5).

The statutory definition of “best value” (quoted in Section A.1, above) makes clear that it is a flexible concept based on the balancing of the cost and the technical benefits of each proposal that turns on the particular circumstances of a given procurement. In addition, this Office previously interpreted the cost-benefit analysis required by *Transactive, supra*, by saying such analysis “necessarily requires subjective judgments [by the procuring state agency] concerning the potential for meaningful technical variances between responsive proposals and the potential value to the State from such technical variances” (SF20120233/20120281, found at [http://www.osc.state.ny.us/contracts/bidprotestdecisions/bpd\\_SF20120233\\_SF20120281.pdf](http://www.osc.state.ny.us/contracts/bidprotestdecisions/bpd_SF20120233_SF20120281.pdf)). This Office generally gives substantial deference to agency determinations concerning the benefits of potential technical differences between responsive proposals, particularly where such determinations are within the expertise of the agency.

In this case, we are satisfied that DOH determined the technical to cost scoring ratio consistent with the standards outlined above. The RFP was specific in describing the required technical specifications for each

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<sup>10</sup> To support its assertion, NYCHSRO references a letter sent by this Office to DOH in 2009 in connection with a previous procurement for similar services. NYCHSRO had filed a protest of that contract award, and in its protest, NYCHSRO objected to DOH allocating *only* 30 percent to cost in the overall scoring because DOH had indicated price would be a major consideration in vendor selection. NYCHSRO’s price bid was significantly lower than IPRO’s and, even though NYCHSRO received the highest score for its cost proposal, NYCHSRO was not awarded the contract. Although our decision not to approve such contract was based on unrelated issues, in our correspondence rejecting the proposed award, this Office did discuss the appropriateness of the relative weights assigned to technical and cost (i.e., 70/30). In our letter, we acknowledged that assigning a high weight for technical merit was appropriate where variations in the technical merits would reasonably be expected to significantly impact the value to the State. Given the services being procured, however, we questioned whether DOH would be able to support the high weight assigned to technical (70 percent) for such services and stated we would review the use of such a high technical weight in any future DOH procurement for these services. Thus, NYCHSRO’s reliance is misplaced as the prior letter from this Office supports DOH’s decision to increase the relative weight of cost from 30 percent to 40 percent in the instant RFP.

Component (RFP, at pgs. 6-34). Thus, given the narrowly tailored technical requirements, DOH was within its discretion in determining that affording 40 percent of the total score to cost would achieve best value in this particular instance.

Additionally, we do not agree with NYCHSRO's assessment that the 40 percent weight allocated to cost in combination with IPRO's low bid eliminated competition, since, for example, NYCHSRO was awarded the Component B contract even though IPRO received the highest cost score for that Component (*see* NYCHSRO Reply, at pg. 5). Finally, as IPRO points out and NYCHSRO concedes, even if DOH had used a 70/30 technical to cost scoring ratio, IPRO would still have received the highest overall score and been awarded the contracts for Components A, C, D and E (*see* IPRO Answer, at pg. 5 and NYCHSRO Reply, at pg. 6).

For these reasons, we see no basis to upset DOH's 60/40 allocation for the technical and cost scores.

## 2. Weighted Scoring of Technical Criteria

As noted above, the RFP provided that 60 percent of each offeror's total score would be allocated to the technical proposal (*see* RFP, at pg. 43). DOH further determined that the evaluation criteria for the technical proposals would be weighted according to the importance DOH placed on a particular criterion; however, the RFP did not disclose the weighting that would be applied in the scoring of technical proposals (*see* DOH Answer, at pg. 6). NYCHSRO alleges DOH did not establish the weighting prior to receipt of proposals or changed the weighting after offerors submitted proposals (*see* Protest, at pg. 7 and NYCHSRO Reply, at pg. 6). NYCHSRO also asserts that, even if the weighted scoring methodology was pre-established, it "must still be consistent with determining Best Value and the weighting cannot impermissibly favor one bidder over another" (*Id.*).

DOH contends it was not required to publish the weighting of the evaluation criteria in the RFP (*see* DOH Answer, at pg. 6). DOH maintains such weighting was established prior to receipt of proposals and applied uniformly to all technical proposals (*Id.*).

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. Where appropriate, the solicitation shall identify the *relative importance and/or weight of cost and the overall technical criterion* to be considered by a state agency in its determination of best value" (emphasis added).

In this case, the RFP stated the relative weight of the technical proposal in the overall scoring. In addition, the RFP set forth in detail the items to be included in the technical proposals, as well as the general manner in which the technical proposals would be scored (*see* RFP, at pgs. 35-42 and pgs. 43-44). Therefore, we are satisfied that the RFP met the requirements of SFL § 163(9)(b).

SFL § 163(2)(b) requires that state agencies conduct procurements based on a "balanced and fair method, established in advance of the receipt of offers, for evaluating offers and awarding contracts." Our review of the procurement record indicates DOH developed the scoring tool for technical proposals, including the weighting of criteria, prior to receipt of proposals on September 16, 2016, and evaluated the technical proposals in accordance with the criteria listed in the RFP. Additionally, our review confirms that the pre-established weighting of criteria was consistently applied to all technical proposals when awarding points and we found no evidence that such weighting impermissibly favored a particular bidder.

### 3. Technical Scoring Variances and Inconsistent Scoring

NYCHSRO generally alleges DOH's evaluators did not consistently score the technical proposals (*see* Protest, at pgs. 7-9). DOH replies that it established a protocol to examine scoring variances of greater than three points among evaluators for a particular criterion (*see* DOH Answer, at pg. 6). NYCHSRO suggests scoring differences of two points should be scrutinized and seeks "an in-depth review...with regard to scoring objective criteria and scoring overall" (NYCHSRO Reply, at pg. 9).<sup>11</sup> DOH states "[d]emanding that reviewers explain or reconsider a given score simply because it deviated from any other reviewer's score by more than one point would have a chilling effect on the process, and...would give the appearance that the Department was trying to direct a particular outcome" (DOH Answer, at pg. 7).

DOH developed a scoring tool for the evaluation of the technical proposals prior to the receipt of proposals and awarded points ranging from 0 to 5 for each evaluation criterion for each Component identified in the RFP. DOH assigned varying weights to the criteria, which, as discussed above, DOH was permitted to do. The evaluation instructions provided that the team leader and the individual evaluator would discuss any criterion with a rating deviation of more than three points among evaluators. DOH did not need to use such protocol, however, since no technical proposal received a final score for a criterion that deviated by more than three points from another score awarded for that same criterion.

We recognize that evaluators bring their own subjective views to the evaluation process and may interpret information in proposals differently. However, this Office will generally not disturb a rationally reached determination of a duly constituted evaluation committee (*see* SF0898058, found at [http://www.osc.state.ny.us/contracts/bidprotestdecisions/bpd\\_SF19980058.pdf](http://www.osc.state.ny.us/contracts/bidprotestdecisions/bpd_SF19980058.pdf)). "Only when scoring is clearly and demonstratively unreasonable will we overturn the actions of an evaluator or an evaluation committee" (*Id.*). Our review of the procurement record confirms the evaluators scored the proposals in a manner consistent with the evaluation/scoring instructions. Moreover, our review did not reveal contradictions between an evaluator's written comments and the score assigned by such evaluator to NYCHSRO's proposal for a Component. Thus, we are satisfied DOH properly instructed evaluators how to score the proposals and evaluators followed such instructions when scoring NYCHSRO's proposals.

#### **C. Purported Bias in Evaluation Process**

NYCHSRO alleges DOH failed to ensure that there was no bias in the evaluation process (*see* Protest, at pg. 10). NYCHSRO further asserts "[r]eviewers that worked closely with or were former employees of IPRO should have been disqualified from participating in the evaluation process" (*Id.*). DOH states that evaluators "were instructed to excuse themselves...if they believed they could not perform their evaluation without bias" and additionally required to execute Conflict of Interest Disclosure and Confidentiality Agreements prior to reviewing proposals (*see* DOH Answer, at pg. 7).

DOH chose evaluators from its staff that possessed experience with the services that were the subject of the RFP (*see* DOH Answer, at pg. 7). Three evaluators reviewed technical proposals submitted for a Component. A team leader assigned to that Component, who was an individual separate from the three evaluators, answered any questions raised by those evaluators. Two separate evaluators reviewed the cost proposals for all Components.

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<sup>11</sup> NYCHSRO specifically claims objective evaluation criteria were inconsistently scored (*see* Protest, at pg. 8). However, the only objective criteria listed in the technical proposal evaluation tool were the submission of references and certain eligibility requirements, neither of which received points in the evaluation process. Rather, these items were evaluated on a pass/fail basis.



As part of our review of the procurement record, we examined the Conflict of Interest Disclosure and Confidentiality Agreements signed by evaluators and team leaders. Under the terms of the Conflict of Interest Disclosure form, an evaluator was required to acknowledge and agree to “disclose any apparent or potential conflict of interest situation” and promptly notify the Procurement Coordinator upon becoming aware of any apparent or potential conflict situation. Moreover, this Office requested further information from DOH as to whether any evaluator or team leader had been previously employed by an offeror. DOH identified only one such individual and that individual was employed by an offeror prior to 2007. Additionally, the individual, while serving as a team leader for one Component, did not actually review or score proposals or answer questions from the evaluators for that Component. Nothing in the procurement record suggests evaluation of the proposals involved any bias towards a particular offeror, nor is there evidence of any improprieties in the selection of evaluators and team leaders. Thus, we find no evidence of the unsubstantiated suspicion of bias raised by NYSCHRO.

## **CONCLUSION**

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the contract awards by DOH. As a result, the Protest is denied and we are today approving the DOH/IPRO contracts for surveillance and investigation activities for Components A, C, D, and E.