

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Bid Protest filed by Island Peer Review Organization, Inc., with Respect to the Procurement of Professional Assistance for New York State's Medicaid Initiatives Conducted by the New York State Department of Health.

**Determination  
of Bid Protest**

**SF-20160231**

April 5, 2017

Contract Number – C031872

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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 professional staff to assist DOH with its responsibilities administering the Medicaid program. We have determined the grounds advanced by Island Peer Review Organization, Inc. (IPRO) 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 Public Consulting Group, Inc. (PCG) for such professional assistance services.

## **BACKGROUND**

### **Facts**

DOH's mission is to ensure high quality health services are available to all New Yorkers. As part of that mission, DOH coordinates comprehensive health care and long-term care coverage to low and middle income individuals and families through Medicaid and other New York State programs. On March 10, 2016, DOH issued Request for Proposals #16536 (RFP), seeking "professional staff to assist with tasks related to Medicaid initiatives and staff support in order to provide services as further detailed in [the RFP]" (RFP, Section 2, at pg. 4).

The RFP provided that the contract would be awarded on the basis of best value, as determined by the highest total score when technical and cost scores were combined (*see* RFP, Sections 8.1, 8.8, at pgs. 31, 33). The technical proposal and the cost proposal were worth 75 percent and 25 percent, respectively, of the total score (*see* RFP, Section 8.1, at pg. 32). A team of three evaluators reviewed the technical proposals in accordance with an evaluation tool created by DOH prior to receipt of proposals. Evaluators awarded scores ranging from 0-5 for each technical 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. The technical proposal with the highest raw score received 75 points and the other proposals received a proportionate score according to a formula established in the RFP (*see* RFP, Section 8.3, at pg. 32).

Offerors submitted cost proposals by completing the "Cost Proposal Form" attached to the RFP (*see* RFP, Section 6.3, at pg. 29; RFP, Attachment C). As was done with the technical

proposals, the highest scoring cost proposal (the proposal with the lowest annual price) received the maximum score of 25 points, with other cost proposals receiving a relative proportionate score (*see* RFP, Section 8.4, at pg. 33). The technical and cost scores for each offeror were combined to produce a total score (*see* RFP, Section 8.5, at pg. 33).

DOH received two proposals in response to the RFP, one from PCG and the other from IPRO, the incumbent contractor. After the evaluation process conducted by DOH, PCG received the highest total score and was awarded the contract. DOH provided debriefings to IPRO and PCG on October 27, 2016 and November 2, 2016, respectively.

IPRO filed a protest with this Office by letter dated October 24, 2016 (Protest), as supplemented on November 8, 2016 (Supplemental Protest). PCG responded to the Protest by letter dated November 2, 2016 (PCG Answer) and the Supplemental Protest by letter dated November 18, 2016 (PCG Supplemental Answer). IPRO filed a reply to the PCG Answer by letter dated November 14, 2016 (IPRO Reply). DOH filed an answer to the Protest and Supplemental Protest, by letter dated January 20, 2017 (DOH Answer). IPRO filed a reply to the DOH Answer and PCG Supplemental Answer by letter dated January 27, 2017 (IPRO Supplemental Reply).

### **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 prescribed 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. 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 Procedure.<sup>1</sup>

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 DOH/PCG contract;
2. The correspondence between this Office and DOH arising out of our review of the proposed DOH/PCG contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):

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<sup>1</sup> OSC Guide to Financial Operations, Chapter XI.17, <http://www.osc.state.ny.us/agencies/guide/MyWebHelp/>. During the pendency of this Protest, our Office formally promulgated regulations that update and codify the Contract Award Protest Procedure for contract awards subject to the Comptroller's approval (2 NYCRR part 24, effective January 25, 2017).

- a. IPRO's Protest dated October 24, 2016;
- b. PCG's Answer to the Protest dated November 2, 2016;
- c. IPRO's Supplemental Protest dated November 8, 2016;
- d. IPRO's Reply to PCG's Answer dated November 14, 2016;
- e. PCG's Supplemental Answer to the Supplemental Protest dated November 18, 2016;
- f. DOH's Answer to the Protest and Supplemental Protest dated January 20, 2017;  
and
- g. IPRO's Reply to DOH's Answer and PCG's Supplemental Answer to the Supplemental Protest dated January 27, 2017.

### **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 offeror.<sup>2</sup> Best value is defined as "the basis for awarding contracts for services to the offeror which optimizes quality, cost and efficiency, among responsive and responsible offerors."<sup>3</sup> A "responsive" offeror is an "offeror meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."<sup>4</sup>

### **ANALYSIS OF THE PROTEST**

#### **Protest to this Office**

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

1. The RFP's conflict of interest disclosure requirement does not comply with applicable federal law (specifically, 45 CFR § 75.112) and this procurement is, therefore, materially defective.
2. PCG's embedded staff under this contract will be *de facto* DOH employees, thereby violating the terms of PCG's current contract with DOH to act as the Independent Assessor (IA) of the State's Delivery System Reform Incentive Payment (DSRIP) program. Also, *de facto* state employees are subject to Public Officers Law (POL) §§ 73 and 74, which contain provisions limiting the ability of PCG to perform under both contractual roles.

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<sup>2</sup> SFL § 163(10).

<sup>3</sup> SFL § 163(1)(j).

<sup>4</sup> SFL § 163(1)(d).

3. The RFP calls for work that is instrumental to the DSRIP program. The overlap between the responsibilities under this contract and the IA contract could compromise PCG's ability under the contracts to render impartial advice.
4. PCG is further precluded from simultaneously holding both contracts because PCG's oversight of its own employees may provide an opportunity for PCG to financially benefit by increasing the IA's scope of work or reviewing the IA's performance more favorably. This creates both an organizational and financial conflict of interest for PCG.

### **Supplemental Protest to this Office**

In its Supplemental Protest, IPRO further challenges the procurement conducted by DOH on the following additional grounds:

1. The RFP mandated offerors to make employment offers to current staff of the incumbent contractor and PCG's cost proposal was insufficient to comply with this requirement at the current salary/benefit levels enjoyed by such staff. DOH should have performed a more detailed analysis of PCG's cost proposal and, ultimately, rejected PCG's proposal as nonresponsive. Alternatively, since DOH did not reject PCG's proposal, DOH must have improperly waived a material specification of the RFP.
2. DOH's failure to consider IPRO's plan to transition current staff or the heightened experience level of IPRO's staff, when scoring IPRO's technical proposal, resulted in an underrating of the relative merit IPRO's bid. Additionally, the RFP's failure to align the experience requirements with the current experience levels of incumbent staff was incompatible with the requirement that an offeror transition current employees to the new contract.
3. The debriefing was defective and lacked detail as to evaluation criteria, scoring or weighting and failed to identify any of the specific reasons for IPRO's non-award.

### **DOH Response to the Protest and Supplemental Protest**

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

1. DOH complied with federal regulations applicable to this procurement and took appropriate measures to address any potential conflicts of interest.
2. IPRO's assertion that PCG staff will become *de facto* employees of DOH is erroneous and, in any event, IPRO is foreclosed from raising this issue since it essentially constitutes a challenge to the prior IA contract award and should not be raised via a protest of this contract award.

3. PCG, in acting as the IA, will not be evaluating another group of PCG employees performing these professional assistance services. Thus, no conflict of interest, or potential conflict of interest, arises from PCG holding this contract and serving as IA.
4. IPRO erroneously argues that this contract award would present an organizational or financial conflict of interest for PCG. The professional assistance vendor only provides assistance to DOH and does not provide technical assistance or oversight to the DSRIP program participants; DOH is responsible for implementing and overseeing the DSRIP program and the IA, and DOH cannot and will not delegate such authority to a contractor.
5. The RFP did not require a winning bidder to hire current contract staff at their current wages and benefits and, thus, IPRO's claim that PCG's cost was too low or DOH waived a material specification has no merit.
6. The RFP did not require bidders to submit a plan to transition incumbent staff or propose staff with qualifications higher than those identified in the RFP and, therefore, DOH was not required to score the plan or assign extra credit for qualifications in excess of the RFP's requirements.
7. IPRO's debriefing was conducted in accordance with the State Finance Law and was not defective.<sup>5</sup>

### **PCG Responses to the Protest and the Supplemental Protest**

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

1. The particular conflict of interest policy set forth in 45 CFR § 75.112 does not apply to DOH and is not required to be set forth in the RFP.<sup>6</sup>
2. PCG's embedded staff under this contract are not DOH employees. Even if the members of that staff were considered *de facto* employees, PCG itself is not a DOH employee nor are PCG's staff members performing duties under the RFP subject to the IA's oversight; thus, PCG is not precluded from holding both contracts.
3. No inherent conflict exists simply because staff under both contracts will be performing duties related to the DSRIP. IA staff assesses health care and social service provider networks and will not assess the embedded staff. If IPRO believed there was such an inherent conflict in holding both contracts at the same time, IPRO would not have bid

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<sup>5</sup> DOH asserts that complaints about the debriefing and DOH's processing of Freedom of Information Law (FOIL) requests are not appropriate bases for a bid protest (*see* DOH Answer, at pg. 10). While issues related to a procuring agency's disclosure of records under FOIL are generally not considered as part of our review of bid protests, the claims related to the debriefing provided by DOH are addressed in Section D of this determination.

<sup>6</sup> In Reply to PCG's Answer, IPRO asserts 45 CFR § 75.327 applies to the RFP.

on the IA RFP while IPRO was performing services under the Professional Assistance contract.

4. The RFP did not require the winning vendor to make employment offers to incumbent staff at their current wage and benefit levels. PCG submitted a responsive proposal and no requirements were waived in the evaluation of its proposal.
5. DOH is in the best position to determine the staffing level it requires and is not required to maintain the experience levels of current staff.
6. Based on IPRO's representations, the debriefing appears to have met the requirements of New York law. Even if the debriefing was defective, such procedural matter would not render the contract award to PCG invalid.

### **IPRO Reply and Supplemental Reply to the DOH Answer and the PCG Answer and Supplemental Answer**

In its Reply and Supplemental Reply, IPRO expounds on the arguments contained in the Protest and Supplemental Protest and further argues that this procurement is subject to 45 CFR § 75.327, which imposes a separate and more detailed conflict of interest standard on DOH.

## **DISCUSSION**

### **A. Sufficiency of Conflict of Interest Disclosure in RFP**

This contract is partially funded by an award from the Centers for Medicare and Medicaid Services (CMS) as an additional Medicaid waiver in connection with New York State's Medicaid Section 1115 Waiver Partnership Plan (Waiver Amendment) (*see* RFP, Section 2.1, at pg. 4).

IPRO asserts the RFP is defective because it failed to comply with the conflict of interest standards required by applicable federal law, specifically, 45 CFR § 75.112 and 45 CFR § 75.327 (*see* Protest, at pg. 3; IPRO Supplemental Reply, at pg. 5).<sup>7</sup> DOH avers that it complied with applicable Federal regulations and took appropriate and adequate measures to address any potential conflict of interest (*see* DOH Answer, at pg. 3). PCG responds that 45 CFR § 75.112 "does not place an obligation on DOH to include any particular conflicts of interest policy in every – or any – RFP" nor does 45 CFR § 75.327 apply, which pertains to internal conflict of interest policies for DOH employees that engage in procurement proceedings (*see* PCG Answer, at pg. 4; PCG Supplemental Answer, at pg. 9).

#### **1. Federal Conflict of Interest Requirements**

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<sup>7</sup> Part 75 of Title 45 of the Code of Federal Regulations sets forth the administrative requirements, cost principles and audit requirements for awards from the U.S. Department of Health and Human Services (*see* 45 CFR § 75.100 et seq.).

HHS awarding agencies,<sup>8</sup> including CMS, are required to establish conflict of interest policies for federal awards containing specifically enumerated elements (*see* 45 CFR § 75.112). While non-Federal entities<sup>9</sup> “must disclose in writing any potential conflict of interest to the respective HHS awarding agency,” non-Federal entities are not required to establish the same detailed conflict of interest policy as HHS awarding agencies (*Id.*). In addition, the regulation does not specify the manner by which a non-Federal entity must determine whether a conflict of interest exists. Thus, DOH, as a non-Federal entity, is required to provide written disclosure of potential conflicts of interest to CMS relating to the award, but DOH is not compelled to establish a particular policy under 45 CFR § 75.112.

I PRO claims that the provisions of 45 CFR § 75.101(b)(1) require DOH to be treated as if it were a HHS awarding agency and include in the RFP the same conflict of interest policy described in 45 CFR § 75.112 (*see* I PRO Reply, at pg. 2-5). While this section states that non-Federal entities “must comply with the requirements in this part,” we read this to mean that non-Federal entities are required to comply with the provisions, *as applicable to such entities*. Indeed, the language in this section goes on to expressly state that pass-through entities,<sup>10</sup> such as DOH, are not subject to “any requirements in this part [which includes 45 CFR § 75.112] directed towards Federal awarding agencies unless the requirements of this part or the terms and conditions of the Federal award indicate otherwise” (45 CFR § 75.101[b][1]).<sup>11</sup> Our reading of 45 CFR § 75.112 indicates that the HHS awarding agencies (not non-Federal entities) are subject to the particular conflict of interest policy therein described and we find nothing in the procurement record imposing this requirement on DOH.

Nevertheless, DOH must disclose any potential conflict of interest to CMS (*see* 45 CFR § 75.112). As discussed below, DOH established a procedure in the RFP for offerors to disclose potential conflicts of interest for purposes of compliance with this Federal regulation. I PRO’s claim that 45 CFR § 75.327 also requires DOH to include conflict of interest provisions in the RFP is without merit. That regulation is concerned with the procurement process used by non-Federal entities and generally calls for conflict of interest policies “governing the actions of [the non-Federal entity’s] employees engaged in the selection, award and administration of contracts.” We believe DOH satisfied the requirements of 45 CFR § 75.327 by including in the formal evaluation tool a “Conflict of Interest Disclosure and Confidentiality Agreement” that required each of the DOH evaluators for this procurement to disclose in writing any apparent or potential conflicts of interest and certify that there were no other potential conflict of interest situations. In every case, the DOH evaluator indicated that there were no conflicts of interest.

## 2. RFP Conflict of Interest Disclosure Requirements

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<sup>8</sup> An HHS awarding agency is “any organization component of [U.S. Department of Health and Human Services] that is authorized to make and administer [federal] awards” (45 CFR § 75.2). The HHS awarding agency for this procurement is CMS.

<sup>9</sup> A non-Federal entity is “a state, local government, Indian tribe, institution of higher education (IHE), or nonprofit organization that carries out a Federal award as a recipient or subrecipient” (45 CFR § 75.2). DOH is a non-Federal entity.

<sup>10</sup> A pass-through entity is “a non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program” (45 CFR § 75.2).

<sup>11</sup> 45 CFR § 75.101(b)(1) does apply certain provisions of Part 75, Subpart D (sections 75.351, 75.353) to pass-through entities; however, such provisions are not relevant to the conflict of interest requirements raised in this Protest.

The RFP required each offeror to submit various certified statements as part of its administrative proposal (*see* RFP, Section 6.1[E], at pg. 27). One statement requires that the offeror “certifies that either there is no conflict of interest or that there are business relationships and/or ownership interests . . . that may represent a conflict of interest for the organization as a bidder and attached to this form is a description of how the potential conflict of interest . . . relating to this contract will be avoided” (RFP, Attachment A, at pg. 35). Further, DOH states that the RFP complied with the Department’s policies and procedures related to the disclosure of conflicts of interest (*see* DOH Answer, pg. 3). Neither of the administrative proposals received by DOH identified a conflict of interest in connection with the award of the contract.

For the reasons discussed above, DOH was not subject to the requirements of 45 CFR § 75.112, and was not required to insert any specific conflict of interest language in the RFP. In our view, the language of the RFP requiring that offerors disclose any potential conflicts of interest satisfied all applicable legal requirements.

## **B. Contractor Simultaneously Holding This Contract and IA Contract**

I PRO asserts various reasons why PCG, who currently holds a contract with DOH to act as IA of the DSRIP program, is precluded from simultaneously holding this contract, each of which is discussed separately below.

### 1. De Facto Employees

I PRO claims PCG’s employees serving as embedded staff under this contract will be *de facto* DOH employees, thereby causing PCG to violate the terms of the IA contract (*see* Protest, at pg. 7).

In the solicitation for an independent assessor of New York’s DSRIP program, DOH noted that the “[f]ederal waiver authorization requires the state to procure an ‘independent’ DSRIP assessor for purposes described in the [Funding Availability Solicitation]. Accordingly, the assessor must: Not be an employee or entity of the New York State Department of Health . . . ” (DOH FAS #15649, at pg. 5). I PRO alleges that awarding PCG this contract would result in a violation of that requirement and, furthermore, “holding a contract for *de facto* state employees with responsibility for the implementation of DSRIP at the same time as [PCG] holds the Independent Assessor contract violates the terms of the DSRIP Special Terms and Conditions based on any rational understanding of the term ‘independent’” (I PRO Reply, at pg. 9). PCG and DOH refute I PRO’s characterization of the embedded staff as *de facto* employees of DOH (*see* PCG Answer, at pg. 5; DOH Answer, at pg. 4). PCG also notes that under the terms of the RFP, PCG is responsible for hiring, maintaining and paying all embedded staff and, furthermore, PCG is required by the contract to expressly acknowledge that it is an independent contractor (*see* PCG Answer, at pg. 5).

I PRO cites various New York State Ethics Commission Advisory Opinions and cases to support its argument that PCG employees working on this contract will become *de facto* DOH employees (*see* Protest, at pg. 7). We conclude that the precedent on which I PRO relies relates to

particular factual circumstances that are not present here. PCG employs one group of staff to perform the IA duties and will employ a different group of individuals to assist DOH with the tasks described in the RFP. We are not persuaded that the status of PCG staff providing general assistance to DOH under this contract would transform PCG into an employee or entity of DOH for purposes of the IA contract. In addition, the executed contract between DOH and PCG contains a representation whereby the parties acknowledge and agree that PCG is to be an “independent contractor” and not a DOH employee (*see* Proposed DOH/PCG Contract, State of New York Agreement at § V.B). For these reasons, we see no basis to conclude PCG embedded staff will be *de facto* DOH employees.<sup>12</sup>

## 2. Organizational Conflict of Interest

IPRO asserts PCG simultaneously holding both this contract and the IA contract creates an organizational conflict of interest (*see* IPRO Supplemental Reply, at pg. 6). IPRO’s argument is that the embedded staff will be performing instrumental roles in DOH’s management of the DSRIP program, including establishing benchmarks for the performance of the Performing Provider Systems (PPS) under DSRIP, while PCG’s role as the IA is to oversee and evaluate the PPS in meeting such benchmarks (among other things), thereby compromising the IA’s impartiality in fulfilling these responsibilities (*see* Protest, at pg. 3, 12-17). As an illustration, IPRO hypothesizes that “[t]here is potential that the [IA] will not provide timely or full information [regarding performance of the PPS] if it discovers problems whose origin might be ‘blamed’ on the embedded staff provided by PCG” (Protest, at pg. 12). As part of our assessment of IPRO’s claim, we generally examined the potential opportunities for programmatic overlap within the functions and duties of PCG staff under this contract and the IA, and, to the extent such opportunities exist, the likelihood that either group of PCG employees will exercise supervisory authority over the other.

New York’s Medicaid program is the State’s largest health insurance program (*see* RFP, Section 2.1, at pg. 4). Each month, over six million individuals receive Medicaid-eligible services through a network of more than 60,000 health care providers and more than 16 managed care plans (*Id.*). The federal funding provided through the Waiver Amendment, as previously described, permits New York to “address critical issues throughout the state and allow for comprehensive reform through a [DSRIP] program” (RFP, Section 2.1, at pg. 4). The Waiver Amendment contains three parts: Managed Care, State Plan Amendment and DSRIP (*see* DOH FAS #15649, at pg. 70). The DSRIP program, while a “major policy and financing component of the [W]aiver [A]mendment,” is but one part of New York’s Medicaid program as a whole (*see* DOH FAS #15649, at pg. 3).

The embedded staff will “assist the DOH with activities related to the implementation of the [Waiver Amendment] and administering the Medicaid program by providing qualified contracted staff to implement and manage projects as requested” (RFP, Section 3.1, at pg. 7). The procurement record indicates the tasks to be performed by the embedded staff vary greatly, and encompass many different Medicaid programs and initiatives, possibly including the DSRIP program. For example, the RFP states the professional assistance contract staff will be helping

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<sup>12</sup> Additionally, IPRO argued, as a result of their *de facto* employment status, PCG employees are subject to Public Officers Law §§ 73 and 74, a requirement that was not disclosed in the RFP (*see* Protest, at pg. 8). Since the first argument fails, we need not address IPRO’s claim relating to the applicability of Public Officers Law §§ 73 and 74.

DOH to analyze legislation, draft policies and recommend program improvement; prepare submissions to the Federal Government; develop enrollment processes; prepare data collection necessary to meet reporting requirements; develop quality metrics to be used by managed care plans and providers, among several other tasks (RFP, at pgs. 13-15). The tasks to be performed are wide ranging and general in nature and, notably, relate to the operation of DOH's Medicaid programs and not to the actual provision of health care services.

Turning to the existing role of PCG as the IA, within the DSRIP program, the IA is required to create "a process for a transparent and impartial review of all proposed project plans" submitted by PPS, make recommendations regarding the acceptance or rejection of each DSRIP project plan, assemble an independent review panel to consider such recommendations, conduct a mid-point assessment of PPS project performance, and "assist with ongoing monitoring of performance and reporting deliverables for the duration of the DSRIP program (DOH FAS #15649, at pgs. 4, 9). As a general matter, we are not persuaded that an organizational conflict of interest is presented by the fact that certain duties of the embedded staff may relate to the same Medicaid program associated with the IA's responsibilities. It is our clear understanding that the IA is tasked with overseeing and reporting on PPS -- outside health care providers -- who have contracts with DOH. The IA has no oversight role with respect to DOH itself, or the professional assistance contractor staff.

In addition, DOH has averred that "there is no circumstance in which one group of PCG employees would be evaluating another group of PCG employees" since the embedded staff provides assistance solely to DOH and oversees no one (*see* DOH Answer, at pgs. 5-6). Moreover, DOH has stated that "the responsibility for implementing and overseeing DSRIP and the IA rests squarely with [DOH], and [DOH] cannot and will not delegate such authority to a contractor" (DOH Answer, at pg. 6). Our review of the procurement record does not contradict these representations, and we view the fact that staff providing services under two distinct contracts will, at times, perform tasks related to the same program as insufficient to render PCG ineligible for contract award.

### 3. Financial Conflict of Interest

I PRO's final claim as to why PCG is precluded from simultaneously holding both contracts is that "PCG will have a strong secondary financial incentive to ensure that its embedded staff gives PCG as much work as possible under the Independent Assessor contract and provide[s] evaluations (or input to evaluations) for PCG's work on the [IA] contract" (I PRO Supplemental Reply, at pg. 7; *see* Protest, at pg. 17-19). In response, DOH states "the Department [will not] allow a contractor to expand the scope of the IA's work or increase the volume of work directed to the IA, nor will the Department delegate supervision or performance reviews to a contractor" (DOH Answer, at pg. 6). We find I PRO's assertion unpersuasive and note that there is no evidence in the record to support this claim.

### C. RFP Requirement Concerning Incumbent Staff and DOH's Evaluation and Scoring of I PRO's Proposal

In the Supplemental Protest IPRO raises issues with regard to the RFP's requirement to consider incumbent staff and DOH's scoring of IPRO's technical proposal.

1. RFP Requirement to First Consider Incumbent Staff

The RFP provided:

If requested by the DOH Contract Manager, the Contractor must first consider current qualified employees . . . employed by the incumbent. The Contractor has the right to screen the current qualified employees to ensure they meet all requirements as outlined in this RFP. If the current qualified employees meet all requirements and the Contractor's employment standards, Contractor must make employment offers. If the current qualified employees do not meet all requirements and the Contractor's employment standards, Contractor is not obligated to make employment offers but must document their employment standards and the incumbent's employee's deficiencies to the DOH Contract Manager (RFP, Section 3.2[B][6], at pg. 8).

IPRO asserts the RFP language mandates that, if required by DOH, the successful bidder make employment offers to incumbent staff at their current levels of wages and benefits and only IPRO included the cost associated with this requirement in its proposal (*see* Supplemental Protest, at pgs. 3- 5). IPRO further asserts that "an award to PCG, whose bid amount is plainly insufficient to provide for the transition of staff, will necessarily result in a waiver of the RFP requirement . . ." and, thus, PCG's proposal was nonresponsive and should have been rejected (*Id.* at pgs. 4-5).<sup>13</sup>

DOH contends that the RFP did not require bidders to hire incumbent employees at their current wages and benefits (*see* DOH Answer, at pgs. 8 and 9). Specifically, DOH states "[t]here is absolutely no such requirement in the RFP" (DOH Answer, at pg. 8). DOH further explains that "[i]t would have been unreasonable and irresponsible to dictate to bidders what salaries they must pay their employees" and although DOH "would like to . . . keep the current contract staff in place . . . that preference takes a distant second place to [DOH's] interest in obtaining best value and in avoiding overpaying for services" (DOH Answer, at pgs. 8 and 9). Finally, DOH argues that "[i]f, indeed, there had been any requirement that the successful bidder must in all cases hire all IPRO employees and meet their current wages and benefits, the RFP would have had to state that, and the wage and benefit information would have had to be included in the RFP" (DOH Answer, at pg. 8).

The parties do not dispute that the RFP provided that, if requested by the DOH Contract Manager, the current qualified employees be considered for continuing employment with PCG and that, in fact, the DOH Contract Manager has requested that all current staff be considered for continued employment. Nor do the parties challenge that the RFP required that the successful bidder make employment offers "if [such incumbent employees] meet all [RFP] requirements and the Contractor's employment standards" (*see* RFP, Section 3.2[B][6], at pg. 8). The only issue in

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<sup>13</sup> 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."

dispute is whether the employment offer by the successful bidder had to be at the incumbent employees' current salary and benefits level.<sup>14</sup>

In our view, a plain reading of RFP § 3.2(b)(6) indicates that the contract awardee would be required, if requested by the DOH Contract Manager, to make employment offers to incumbent staff meeting both the RFP requirements and the awardee's employment standards (*see* RFP, Section 3.2[B][6], at pg. 8). The RFP did not dictate the terms of such employment offers, or provide any wage or benefit information to prospective bidders that would support a finding that such employment offers need to be at the incumbent employees' current salary and benefits level. The RFP also set forth the anticipated staffing requirements DOH deemed necessary to perform the procured services, including the title, minimum qualifications and preferred qualifications for each staff position (*see* RFP, Section 3.3[A], at pgs. 11-13). The fact that the minimum qualifications and experience requirements were, in certain cases, less than those of the incumbent employees, supports the view that the successful bidder would not necessarily be at the current salary and wage levels. Finally, we agree that if there was such a mandatory requirement, such requirement would have had to be clearly stated in the RFP – which, here, did not occur (*see* SFL § 163[9][b]).

## 2. Evaluation and Scoring of IPRO's Transition Plan and Staffing Qualifications

IPRO alleges DOH's failure to score IPRO's plan and ability to transition incumbent staff to the new contract and its staff experience beyond the threshold level required by the RFP unfairly resulted in a lower technical proposal score (*see* Supplemental Protest, at pg. 6). IPRO also asserts that including staffing positions with experience levels lower than those of the incumbent staff in the RFP is inconsistent with the requirement to make employment offers to incumbent staff (*Id.*). DOH responds that the RFP did not require that an offeror submit a transition plan, or provide for additional credit for proposals that offered staff experience levels beyond those stated in the RFP (*see* DOH Answer, at pg. 10). Accordingly, DOH states that “[t]he Department did not score anything that was not a stated requirement in the RFP” (*Id.*).

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.” As an initial matter, the procurement record shows DOH met this statutory standard. Indeed, DOH prepared a technical evaluation tool prior to receipt of proposals which conforms to the technical requirements set forth in the RFP and provides for each evaluation item to be scored on a 0-5 point scale (*see* RFP, Section 6.2, at pgs. 28-29). The RFP did not require the submission of a transition plan or suggest that staffing qualifications

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<sup>14</sup> As to IPRO's assertion that the cost proposal submitted by PCG is “grossly insufficient” (Supplemental Protest, at pg. 5), that argument is based entirely upon the idea that the winning bidder must meet current salary and benefits of the incumbent staff. Since we have found that no such requirement existed in the RFP, IPRO's argument regarding the insufficiency of PCG's cost proposal also fails. Moreover, contrary to IPRO's assertions on the Supplemental Protest, State Finance Law § 163(11) only requires the head of each state agency to “periodically sample the results of the procurement process to test for reasonableness” and does not impose a duty on DOH to conduct an assessment of PCG's cost proposal beyond that which was provided for in DOH's predetermined evaluation tool (Supplemental Protest, at pg. 4).

exceeding the stated minimums would receive higher scores. Consistent with the RFP, the technical evaluation tool used by DOH to score the technical proposals did not allocate points to a transition plan or provide additional points for proposals exceeding the minimum staffing qualifications stated in the RFP. Our review of the procurement record indicates DOH scored IPRO's technical proposals in accordance with the RFP and the predetermined technical evaluation tool.

As for the staffing qualifications set forth in the RFP, this Office generally defers to agency determinations where they are properly within the agency's expertise and supported by the procurement record. DOH decided lower levels were sufficient to perform the required services and such determination is within DOH's expertise.

IPRO also asserts that “[t]he failure of the RFP to align its experience requirements with present experience levels of incumbent employees, while simultaneously mandating that those employees be transitioned to the new contract, is a fatal inconsistency” (Supplemental Protest, at pg. 6, emphasis in original). In the previous section, we determined that the RFP did not dictate what salaries were to be paid to transitioned employees. Consequently, we do not find the RFP to be inherently inconsistent in this respect.

#### **D. IPRO's Debriefing**

In the Supplemental Protest, IPRO contends that its debriefing was defective because the debriefing lacked detail as to evaluation criteria, scoring or weighting and failed to identify the specific reasons for IPRO's non award of the contract (*see* Supplemental Protest, at pg. 7). DOH responded stating “the debriefing was conducted in accordance with the State Finance Law provisions in effect at the time and was not defective” (DOH Answer, at pg. 10). DOH and PCG also suggests that even if IPRO's debriefing were defective, the debriefing is not part of the award process and would not invalidate DOH's award of the contract to PCG (*see* PCG Supplemental Answer, at pg. 6, DOH Answer, at pg. 10-11).

SFL § 163(9)(c), which defines the legal requirements of a debriefing, was amended in 2016 to require debriefings to include: “(A) the reasons that the proposal, bid or offer submitted by the unsuccessful offeror was not selected for award; (B) the qualitative and quantitative analysis employed by the agency in assessing the relative merits of the proposals, bids or offers; (C) the application of the selection criteria to the unsuccessful offeror's proposal; and (D) when the debriefing is held after the final award, the reasons for the selection of the winning proposal, bid or offer. The debriefing shall also provide, to the extent practicable, general advice and guidance to the unsuccessful offeror concerning potential ways that their future proposals, bids or offers could be more responsive” (L. 2016, ch 57). These current requirements are applicable to procurements initiated on or after April 1, 2016 (*Id.*). However, since the RFP was issued on March 10, 2016, the prior, less specific language of section 163(9)(c) applies, which stated that “[a] state agency shall, upon request, provide a debriefing to any unsuccessful offeror that responded to a [RFP] . . . regarding the reasons that the proposal or bid submitted by the unsuccessful offeror was not selected for an award.” The New York State Procurement Council has interpreted the prior language finding that “agencies should be prepared to review, at a minimum, the strengths and weaknesses of a vendor's proposal and to provide information as to

the relative ranking of that vendor's proposal in each of the major evaluation categories as provided for in the solicitation document" (New York State Procurement Council Debriefing Language Bulletin, [https://ogs.ny.gov/procurecounc/pdfdoc/PC\\_DebriefingLanguageBulletin.pdf](https://ogs.ny.gov/procurecounc/pdfdoc/PC_DebriefingLanguageBulletin.pdf)). Consistent with this, the RFP advised bidders that a "debriefing will be limited only to the strengths and weaknesses of the bidder's proposal, and will not include any discussion of other proposals" (RFP, Section 5.14, at pg. 25).

DOH established a debriefing agenda, including the technical and cost scores for IPRO and PCG. The procurement record submitted to this Office, also contained a summary of the debriefing prepared by DOH which indicates that the following topics were addressed: the proposal evaluation process; IPRO's technical, costs and overall rankings; the strengths and weaknesses of IPRO's technical and cost proposals; and responding to IPRO's questions.

Based on our review of the procurement record, we conclude that the debriefing provided to IPRO was sufficient to satisfy the applicable statutory standard.

## **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/PCG contract for professional assistance services in connection with the New York State Medicaid program.