

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Mercer Health & Benefits, LLC with respect to the procurement of Rate and Fiscal Management Consulting Services conducted by the New York State Department of Health.

**Determination
of Bid Protest**

SF-201700297

Contract Number – C031882

July 11, 2017

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Health (DOH) for Rate and Fiscal Management Consultant Services. We have determined the grounds advanced by Mercer Health & Benefits, LLC (Mercer) 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 Deloitte Consulting LLP (Deloitte) for Rate and Fiscal Management Consulting Services.

BACKGROUND

Facts

DOH is primarily responsible for administering the State's Medicaid service programs. That responsibility includes undertaking an analysis of the populations served by the various programs, the nature and extent of the services that are needed and the rates at which providers are compensated. These functions support the larger goal of ensuring the availability and continuity of Medicaid coverage for eligible New York residents.

The complexity of the Federal Government's regulation of the State's Medicaid rate setting activities (and associated prognostication required to ensure the effectiveness of these large programs) necessitates that DOH procure outside consultants to support its in house efforts. With the existing contract for consultant services set to expire on December 31, 2016, DOH issued Request for Proposals #16501 (RFP) on February 26, 2016, soliciting proposals from qualified financial organizations to secure Medicaid rate, financial management and actuarial assistance in support of the State's existing Medicaid service programs (RFP, at § 2.0; 2.1). The RFP set forth a detailed scope of work (RFP, at § 3.0 - 3.2) and staffing requirements (RFP, at § 3.3), as well as minimum qualifications organizations had to satisfy to submit a proposal (RFP, at § 4.1).

The RFP provided that the contract would be awarded on the basis of best value, as determined by combining the scores of each offeror's technical and cost proposal. The technical proposal was weighted at 70% of the total score and the cost proposal at 30% of that total (RFP, at § 8.3 - 8.5). A team of evaluators awarded scores based on a predetermined range for each of the technical criteria established in the RFP. These scores were then averaged to produce a raw score for that particular

criterion. The raw scores for all criteria were combined to form a total raw technical score. The technical proposal with the highest raw score received 70 points and the other technical proposals received a proportionate score according to the formula set forth in the RFP (RFP, at § 8.3).

As was done with the technical proposals, the highest scoring cost proposal (the proposal with the lowest price) received the maximum score of 30 points, with the other cost proposals receiving a relative, proportionate score (RFP, at § 8.4). The technical and cost scores were then combined to produce a final composite score (RFP, at § 8.5).

Four proposals were received by April 20, 2016, the proposal due date. After a review conducted by the DOH technical evaluation team, Deloitte received the highest technical score and was awarded 70 points for its technical proposal. Deloitte also received the highest cost score and 30 points for its cost proposal. Since Deloitte received the most points in both categories, DOH conducted a vendor responsibility assessment and ultimately awarded the contract to Deloitte.

Mercer requested and was provided a formal debriefing, via teleconference, on January 25, 2017. On January 27, 2017, Mercer filed a protest with this Office (Protest). Deloitte filed a response to the Protest, dated March 22, 2017 (Deloitte Answer). Mercer filed a response to Deloitte's Answer, dated April 6, 2017 (Mercer-Deloitte Reply). DOH filed a response to the Protest, dated April 19, 2017 (DOH Answer). Finally, Mercer filed a response to the DOH Answer, dated May 12, 2017 (Mercer-DOH Reply).¹

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.² 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 24.4 of Title 2 of the Codes, Rules and Regulations of the State of New York.

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/Deloitte contract;

¹ Mercer requested that this protest determination be held in abeyance pending its receipt of materials pursuant to a Freedom of Information Law (FOIL) request directed to DOH. Consistent with the long standing policy of this Office, prior bid protest determinations, issues related to the procuring agency's action or inaction on a FOIL request do not directly relate to the procurement process and are not considered as part of our review of bid protests. Therefore, this Office did not grant Mercer's request.

² 2 NYCRR Part 24.

2. the correspondence between this Office and DOH arising out of our review of the proposed DOH/Deloitte contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. The Protest;
 - b. The Deloitte Answer;
 - c. The Mercer-Deloitte Reply;
 - d. The DOH Answer; and
 - e. The Mercer-DOH Reply.

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.³ 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.”⁴ A “responsive” offeror is an “offeror meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency.”⁵

SFL § 163(7) provides that “[w]here the basis for award is the best value offer, the state agency shall document, in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria, which whenever possible, shall be quantifiable, and the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted.”

SFL § 163(9)(a) provides that “[t]he commissioner or 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.”

SFL § 160(5) provides that “costs” as used in Article 11 “shall be quantifiable and may include, without limitation, the price of the given good or service being purchased; the administrative, training, storage, maintenance or other overhead associated with a given good or service; the value of warranties, delivery schedules, financing costs and foregone opportunity costs associated with a given good or service; and the life span and associated life cycle costs of the given good or service being purchased. Life cycle costs may include, but shall not be limited to, costs or savings associated with construction, energy use, maintenance, operation, and salvage or disposal.”

ANALYSIS OF THE PROTEST

³ SFL § 163(10).

⁴ SFL § 163(1)(j).

⁵ SFL § 163(1)(d).

Protest to this Office

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

1. The technical evaluation performed by DOH deviated from the established criteria by under-emphasizing Mercer's experience in performing the precise duties and functions outlined in the RFP, as well as the significance of Mercer's experienced employees, thereby diluting the "Organization and Personnel" component of Mercer's technical proposal.
2. DOH erred in accepting Deloitte's "unrealistically low" pricing proposal, which can only be the product of an underestimation of the level of effort required under the proposed contract, or an untenable reduction in labor rates, or both.
3. DOH failed to make a vendor responsibility determination prior to awarding the contract to Deloitte, which would have necessarily included an evaluation of past performance on prior government contracts.
4. The forgoing failures on the part of DOH resulted in an arbitrary and incomplete best value determination.

DOH Response to the Protest

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

1. DOH remained consistent with its pre-established evaluation methodology and properly allocated points to the five criteria set forth under the "Organization and Personnel" component of the RFP. Mercer has overly emphasized the third criterion which seeks a description of the bidders' relevant experience in conducting tasks associated with the RFP over the preceding five years. Mercer incorrectly asserts that it is the only qualified offeror to undertake and effectively perform the functions required under the proposed contract.
2. Mercer incorrectly assumes Deloitte's lower pricing means that Deloitte intends to reduce the required level of effort concomitantly. The detailed description of the contract requirements in the RFP was sufficient to communicate the resources needed to be devoted to the undertaking. DOH determined that Deloitte's pricing was not unreasonably low and that Mercer's was in fact, unreasonably high.
3. DOH properly conducted a Vendor Responsibility review of Deloitte. Contrary to Mercer's contention, Vendor Responsibility is a post-award determination that is not scored, but rather evaluated on a pass/fail basis to determine if there are any impediments to awarding the contract to the highest scoring offeror.
4. DOH's award to Deloitte properly arrived at the "best value" for the State.

Deloitte Response to the Protest

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

1. Deloitte possesses the relevant experience in the field of Medicaid rate and fiscal management consulting and appropriate staffing to meet the requirements of this contract.
2. Deloitte's cost proposal will allow it to meet or exceed the requirements set forth in the RFP, and Deloitte's combined proposal offers the best value to DOH.

Mercer Reply to DOH

In its Reply to DOH, Mercer reiterates its arguments raised in the Protest, and further contends that:

1. Its ability to effectively respond to Deloitte has been hampered by delays in responses to its FOIL requests.
2. Finally, Mercer concludes that its "proprietary efficiency adjustments" to Medicaid capitation rates, a skillset Mercer suggests Deloitte lacks, should have resulted in DOH finding that the Mercer proposal would bring the best value to the state.

Mercer Reply to Deloitte

In its Reply to Deloitte, Mercer reiterates its arguments raised in the Protest, and further contends that:

1. During the procurement's Question and Answer period, DOH stated that it anticipated the signing actuary for each annual Managed Care rate package and all rate package modifications to be an employee of the prime contractor, and that Deloitte plans to use subcontractors – not Deloitte employees – for this function.

DISCUSSION

Experience Levels and the Evaluation Process

Mercer believes its experience, gained over many years as the incumbent contract holder, should have been a major discriminator in its favor and only a skewed or impermissibly altered evaluation process could have resulted in Deloitte receiving a higher technical score (*see* Protest, at pgs. 11-14).

While there is little question that Mercer, the long-term incumbent, has considerable experience in discharging the duties associated with the RFP, experience alone is not the sole deciding factor in the procurement undertaken by DOH. DOH developed a scoring tool for evaluation of each component of the RFP (*see* DOH Answer, at pg. 2). Scores ranging from zero to five were awarded based on the contents of the proposal and the judgments of the DOH evaluators, guided by the evaluation tool, as to each criterion's relative degree of merit, measured against the needs of the procuring agency.

Mercer argues, in various forms, that its experience in formulating Medicare capitation rates and the experience levels of its employees, should have resulted in its "Organization and Personnel" proposal prevailing above those of all other offerors (*see* Protest, at pgs. 12-13). However, as DOH points out, experience in performing the tasks associated with the RFP is but one of five sub-factors within the Organization and Personnel category (DOH Answer, at pg. 3). Nowhere in the RFP does it

state that any one of those sub-factors would carry more weight than any other. Moreover, it is incumbent upon DOH to assess its needs in light of the program goals and develop an RFP and scoring tool calculated to satisfy those needs to the maximum degree possible. In the present case, the evaluators scores, awarded in light of the evaluation tool with which they were provided, reflected their judgment that Deloitte's proposal, overall, more closely met the needs of DOH in this procurement.

Mercer also argues that the evaluators must have deviated from the terms of the RFP in order for Deloitte's score on its Organization and Personnel submission to have been as high as or higher than the score received by Mercer. However, Mercer offers no proof of this assertion. Our review of the procurement record indeed confirms DOH scored Deloitte's proposal very highly with respect to its experience in conducting the tasks associated with this RFP (RFP, at § 6.2 D.1[a][iii]).

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 that DOH developed the scoring tool for technical proposals, including the weighting of criteria, prior to receipt of proposals on April 20, 2016, and evaluated the technical proposals in accordance with the criteria listed in the RFP and the evaluation tool. 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. Inasmuch as DOH, as the agency responsible for meeting the Medicaid responsibilities of the State, was in the best position to evaluate the offeror's experience in this regard, we find no reason to question DOH's high technical score to Deloitte, or disturb the contract award based on an unsubstantiated suspicion that such score was erroneous.

Deloitte's Cost Proposal

Mercer argues that DOH should not have accepted what Mercer describes as Deloitte's "unrealistically low pricing" without further scrutiny (Protest, at pg. 14). Mercer also suggests that DOH should have used "data about historical contract hours for the purpose of establishing a level of effort baseline as part of the solicitation" (Protest, at pg.16). Mercer urges the conclusion that Deloitte's proposed cost savings could only be achieved by a significant misjudgment in the level of effort Deloitte needs to devote to the contract, or a radical reduction in labor costs via the use of inexperienced personnel (*see* Protest, at pgs. 15-18).

DOH responds that it did not consider the price submitted by Deloitte to be unreasonably low, and a bidder's decision to reduce profit margin is not necessarily an indication of a grievous error in judgment (*see* DOH Answer, pgs. 5-6). As to Mercer's suggestion that historical contract hours should have been provided in the RFP, DOH responds that to have done so would have established a minimum hours threshold and ensured that every offeror formulated their submissions with that threshold in mind, an effect that DOH did not intend for this procurement (DOH Answer, at pg. 5). Instead, DOH chose to provide detailed requirements in the RFP and left it to the offerors to formulate the solution. (DOH Answer, at pgs. 5-6; RFP, at pgs. 4-23). In its written Answer to this Office, Deloitte stated it is committed to its cost proposal, noting that Deloitte possesses the required level of skill and experience to perform the requested services at a reasonable price to DOH (Deloitte Answer, pg. 5).

As to DOH's decision not to include information in the RFP related to historical contract hours, this Office will generally give deference an agency's determinations as to the substantive criteria to be evaluated in order to best meet its needs. Here, we see no reason to depart from such deference. Moreover, Mercer's argument in this regard is based on conclusory assumptions with respect to the capabilities of the winning offeror. Cost savings are only achieved through a competitive process. Based on the procurement record, it is clear that DOH reviewed the Deloitte proposal and proposed staffing against the RFP and evaluation methodology it established, and found it to be consistent with both the letter and purpose of the procurement.

Vendor Responsibility

Mercer asserts that DOH failed to perform the responsibility determination of offerors because past performance on prior government contracts was not considered, and DOH did not check references of the offerors (*see* Protest, pgs. 19-20). Mercer suggests that it was prejudiced by this failure since its own past performance was extremely strong, while Deloitte had little or no relevant experience (*Id.*).

DOH replies that the vendor responsibility determination is a mandatory step in DOH's *post-award* process, and DOH did conduct this review for Deloitte prior to making an award (DOH Response, at pg. 7). DOH further notes that the review is not scored, but conducted on a pass/fail basis, to determine whether there are any impediments to making a final contract award to the apparent winner (*Id.*).

Pursuant to SFL § 163, DOH was obliged to make a determination as to whether or not Deloitte was in fact a responsible offeror prior to making a contract award (*see* SFL § 163[4][d], [9][f]). In making such determination, the factors to be considered include: Financial and organizational capacity; Legal authority to do business in this state; Integrity of the owners/officers/principals/members and contract managers; and Past performance of the offeror on prior government contracts (New York State Procurement Guidelines, at pg. 18). DOH is correct in that the required review of these elements (including past performance) are not part of the competitive process and do not affect the technical evaluation of an offeror's experience conducted pursuant to the RFP and scoring tools.

We find that DOH engaged in an appropriate review of Deloitte pursuant to established procedures and criteria, prior to reaching its determination that Deloitte was a responsible offeror. Therefore, Mercer's argument in this regard is without merit.

Best Value Determination

Mercer contends that DOH conducted an "Arbitrary and Incomplete Best Value Determination" (Protest, at pg. 20). This contention is primarily supported by the arguments previously discussed, including that DOH made an award based on a skewed evaluation process which did not reward Deloitte's past contractual performance, experience and personnel. DOH responds that accepting Mercer's position and all of its implications would eliminate competition and all but ensure a permanent incumbency (*see* DOH Answer, at pg. 7).

As stated above, SFL § 163(1)(j) defines best value as "the basis for awarding contracts for services to the offeror 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 [3d Dept 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).

The statutory definition of “best value” 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” (*see* SF20120233; SF20120281, found at http://www.osc.state.ny.us/contracts/bidprotestdecisions/bpd_SF20120233_SF20120281.pdf).

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.” Further, based on our review of the procurement record, we conclude that DOH conducted the evaluation of proposals consistent with its pre-determined evaluation criteria and evaluation tool and, therefore, DOH’s award to Deloitte was based on best value.

Staffing and Subcontractors

In its Reply papers, Mercer challenges Deloitte’s staffing plan based on the DOH response to Question #6 on the post-RFP Q&A (Mercer-Deloitte Reply, at pgs. 1-2). In that response, DOH states that “the Department anticipates that the signing actuary(ies) for each annual Managed Care rate package and all rate package modifications be an employee(s) of the prime contractor.”⁶ Mercer states that one actuary, identified by Deloitte as a member of its team, is a subcontractor and not a Deloitte employee.

While this is true, it is insufficient to call Deloitte’s staffing proposal into question for a number of reasons. First, the language of the DOH response itself expresses a preference, not a mandatory requirement. Secondly, the RFP itself generally authorizes the use of subcontractors and holds the prime contractor responsible for assuring that all requirements are met. (RFP, at pg. 30). Finally, Mercer’s contention supposes that this particular actuary is the only actuary Deloitte has to perform this function. This is not the case. Deloitte’s proposal contains seven additional, credentialed actuaries who will be assigned to the team, all of whom are employees of Deloitte.

⁶ See https://www.health.ny.gov/funding/rfp/inactive/16501/questions_and_answers.pdf.

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/Deloitte contract for Rate and Fiscal Management Consultant Services.