

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Island Peer Review Organization with respect to the procurement of Early Intervention Program Monitoring and Quality Improvement Services conducted by the New York State Department of Health.

**Determination
of Bid Protest**

SF-20200165

Contract Number – C036158

May 28, 2021

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Health (DOH) for Early Intervention Program Monitoring and Quality Improvement Services. We have determined the grounds advanced by Island Peer Review Organization (IPRO) are insufficient to merit overturning the contract award made by DOH and, therefore, we deny the Protest. As a result, we are today approving the DOH contract with Keystone Peer Review Organization, Inc. (KePRO) for Early Intervention Program Monitoring and Quality Improvement Services.

BACKGROUND

Facts

DOH is responsible for administering the State's Early Intervention Program (Program), which provides a range of therapeutic and supportive services for eligible children from birth to age three with disabilities and developmental delays, and their families (*see* RFP, Section 2.1, at p. 4). As part of its responsibility, DOH must monitor providers of early intervention services (*Id.*). To assist with carrying out its responsibility, on July 14, 2020, DOH issued a request for proposals (RFP) seeking offerors to provide monitoring and quality improvement services for the Program. DOH intended to award one contract to a responsive and responsible offeror on the basis of best value, with the technical proposal comprising 70% and the cost proposal comprising 30% of a proposal's total score (*see* RFP, Sections 2.0 and 8.0, at pp. 4, 46-47). The technical score and cost score were combined to yield a composite score and the offeror receiving the highest composite score would be awarded the contract (*see* RFP, Sections 8.5 and 8.8, at p. 48). The RFP set forth a detailed scope of work, minimum qualifications offerors had to satisfy to be responsive, and requirements for proposal submission (*see* RFP, Sections 3.1, 4.0, and 6.0, at pp. 6-22, 34-46). DOH provided prospective offerors with the opportunity to submit questions and requests for clarification regarding the RFP by July 28, 2020, and DOH posted responses on its website (*see* RFP, Sections 1.0 and 5.2, at pp. 4, 23).

DOH received three proposals by August 28, 2020, the due date, including those from IPRO (the incumbent contractor) and KePRO. Following DOH's evaluation of the proposals, DOH awarded the contract to KePRO, the offeror with the highest composite score, and all

offerors were notified of same on December 3, 2020. IPRO requested a debriefing, which was held on December 15, 2020. IPRO submitted a protest to this Office on December 22, 2020 (Protest). KePRO filed a response on January 4, 2021 (KePRO Answer), and DOH filed a response to the Protest by letter dated February 5, 2021 (DOH Answer) (collectively, the “Answers”). IPRO replied to the Answers on February 18, 2021 (IPRO 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 this contract approval responsibility, OSC has promulgated the Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency.¹ 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 the OSC Protest Procedure.

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DOH with the DOH / KePRO contract;
2. the correspondence between this Office and DOH arising out of our review of the proposed DOH / KePRO contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Protest, dated December 22, 2020;
 - b. KePRO Answer, dated January 4, 2021;
 - c. DOH Answer, dated February 5, 2021; and,
 - d. IPRO Reply, dated February 18, 2021.

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.² Best value is defined as “the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible

¹ 2 NYCRR Part 24.

² SFL § 163(10).

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

ANALYSIS OF THE PROTEST

Protest to this Office

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

1. The scope of the RFP, as compared to that of the prior contract, was misstated in the procurement documents, misleading non-incumbent bidders as to the projected gross level of effort and price.
2. Due to the deficiencies in the RFP scope, costs proposed were not an accurate representation of ultimate costs to the State. Specifically, the RFP misled non-incumbent offerors to believe that the level of effort was less than required, and to price their services lower, while the incumbent offeror IPRO priced its services in accordance with the present requirements of DOH under its current contract.
3. DOH did not properly assess the responsiveness of other offeror’s technical proposals, and the other, non-incumbent offerors were likely non-responsive since they lacked the knowledge and experience of IPRO.
4. The RFP did not provide for a sufficient means to assess offerors’ conflicts of interest and KePRO may have a conflict of interest.
5. DOH failed to provide a proper debriefing in that DOH did not provide sufficient information and documents relating to IPRO’s technical score, as well as the scores and proposal of the winning offeror.⁵

DOH Response to the Protest

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

1. The RFP contained a detailed description of the level of effort required to provide the services. Furthermore, the goals and expectations under the existing contract are not the same being procured pursuant to the RFP.
2. DOH conducted a fair, impartial, and competitive procurement.
3. IPRO did not formulate its cost proposal based on the express terms of the RFP, but instead relied on its own assumptions, which led to IPRO’s significantly higher pricing. Although IPRO received the maximum number of points for its technical proposal, the higher pricing cost IPRO the contract.

³ SFL § 163(1)(j).

⁴ SFL § 163(1)(d).

⁵ IPRO also asserts DOH improperly denied a Freedom of Information (FOIL) request seeking the technical and cost proposals of other offerors. Consistent with the long standing policy of this Office enunciated in prior bid protest determinations, issues related to a procuring agency’s action or inaction on a FOIL request does not impact our review of the contract award and are not considered as part of our review of a bid protest. Accordingly, the Determination will not specifically address this allegation.

4. Conflicts of interests were addressed in RFP Section 5.22 and Attachment 4.
5. The debriefing was conducted in accordance with the State Finance Law.

KePRO Response to the Protest

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

1. IPRO's protest regarding the content of the RFP is untimely and has been waived as a matter of law.⁶
2. IPRO focuses unreasonably on its own interpretations and assumptions of the RFP requirements, but the RFP, and not IPRO's interpretations, is what governs.
3. KePRO fully understands the level of effort involved in the RFP and there is simply no evidence to support IPRO's assertion that KePRO misunderstood the work required.
4. IPRO identifies no conflicts of interest but merely alleges that one could possibly exist.

IPRO Reply to the Answers

In its Reply, IPRO expounds upon the grounds set forth in the Protest and further argues that:

1. The minimum qualifications in the RFP are defective and do not require sufficient experience to perform the services, as compared to the minimum qualifications for the current contract, for which IPRO is the contract holder.
2. The RFP omitted or misstated some of the Program's statutory, regulatory, and departmental requirements.
3. The technical evaluation may not have been calculated in conformance with the RFP.

DISCUSSION

RFP Requirements/Scope of Work

1. Content of the RFP

IPRO claims that "[t]he RFP explicitly misstated the contract's overall scope and several key level-of-effort projections and failed to fully describe the required services in a number of key areas" (Protest, at p. 6). IPRO claims that some of the "Program's statutory, regulatory and Departmental requirements [] were missing, unstated or misstated" in the RFP (IPRO Reply, at

⁶ KePRO cites to "Section 4 of the adopted OSC Protest Rules" to support this position that protests of the RFP are required to be filed prior to submission of proposals or they are untimely and waived; however, this provision is part of this Office's agency-level protest procedure applicable to OSC procurements. The OSC Protest Procedure that applies in this instance provides that this Office "may summarily deny a protest that fails to contain specifically enumerated factual or legal allegations that set forth the basis on which the protesting party challenges the contract award, or where the protest raises only issues of law that have previously been decided by the courts or by [this Office]" (2 NYCRR § 24.4(h)). The OSC Protest Procedure does not prohibit a protesting party from raising issues relating to the RFP.

p. 10). IPRO further alleges that “[t]he RFP, by its very terms, did not require an experienced provider” in “sharp[] contrast” to the solicitation for the current contract, which IPRO holds (IPRO Reply, at pp. 8-9). To refute IPRO’s allegations, DOH maintains that “[t]he scope of work and the requirements needed by [DOH] to be fulfilled by the successful [offeror] were clearly outlined in [the] RFP” (DOH Answer, at p. 6). Further, DOH contends that “[t]he existing [c]ontract . . . and the goals and expectations thereunder, the deliverables, are not the same as under the current RFP” and “the current RFP [is] vastly more detailed in terms of the description of the level of effort required to provide the services” (DOH Answer, at p. 4). KePRO contends that “IPRO’s assertion that the scope of services in this RFP is identical to the prior contract is misleading and reflects IPRO’s expectations of the work and not the language of the RFP” (KePRO Answer, at p. 6).

SFL § 163(9)(a) requires a State agency to select a formal competitive procurement process which includes, among other things, a clear statement of need and a description of the required specifications governing performance. In addition, 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.”

This Office generally defers to agency determinations where they are properly within the agency’s expertise and supported by the procurement record. DOH, as the State agency responsible for the administration of the Program, possesses the expertise to determine the specific needs and requirements for carrying out the Program, including compliance with any applicable statutory and regulatory requirements. Moreover, DOH is required to develop an RFP and evaluation instrument that effectively meets those needs. Our review of the procurement record confirms DOH complied with the statutory requirements in crafting the RFP and accordingly, we defer to DOH’s expertise and judgment in regards to this matter.

2. Interpretation of RFP Scope

As to IPRO’s allegation that the scope was somehow unclear, (1) DOH provided offerors with the opportunity to ask questions regarding the RFP before submitting a proposal; (2) all three offerors submitted responsive proposals; and, in fact, (3) IPRO itself received the maximum number of points available for the technical score. IPRO claims it relied on DOH’s answer to one of the pre-proposal submission questions, “The scope of services for the [Program] has not changed; however, the Department has incorporated different types of monitoring reviews in this RFP” in preparing its proposal and, as a result, was disadvantaged, relative to other offerors, as to its proposal and pricing (Protest, at pp. 14-15; IPRO Reply, at pp. 19, 24-25). IPRO interprets this statement by DOH to mean that “[DOH] wished those services that have historically been provided to continue to be provided at the same qualitative level of requirements” (Protest, at p. 15). DOH counters that its response was “not intended . . . [to] give [offerors] the permission to introduce personal or historical experience with the State (or any other Jurisdiction’s) [Program]” and this particular question referenced RFP Section 2.1 which

“provided a general background of the services sought to be procured and [DOH’s] response indicated the types of monitoring reviews incorporated therein” (DOH Answer, at p. 4).

Offerors must base their proposals on what is contained within the four corners of the solicitation, and not on any subjective knowledge or assumptions. The RFP set forth a detailed scope of work to guide offerors in the preparation of proposals (*see* RFP, Section 4.0, at pp. 6-22). Permitting an offeror to use knowledge gleaned outside of the RFP would improperly favor that offeror and discourage fair and open competition. Indeed, DOH observed “[i]t would be impossible for the Department to objectively and fairly compare and evaluate Proposals if incumbent bidders were allowed to make untested assumptions about the scope of work that are not stated in the RFP” (DOH Answer, at p. 4).

In sum, the RFP set forth, in detail, the scope of work required to provide DOH with the services it needed in connection with administering the Program. Accordingly, the RFP satisfied the statutory requirements and there is no evidence the RFP failed to accurately describe the scope of work sought by DOH for this procurement.

Technical Proposal Evaluation

I PRO questions whether the technical evaluation was done in conformance with the RFP and asks this Office to “verify that [the technical score] calculation was correctly applied” (*see* Protest, at p. 4; *see also* I PRO Reply, at p. 7). I PRO specifically wonders whether its raw technical score was capped and/or averaged, and, if such formula was likewise applied to the technical scores of the other offerors (*Id.*). DOH contends that it “conducted a fair, impartial, and competitive procurement” and “awarded the Contract to the [offeror] that offered the best value to the State” (DOH Answer, at p. 6). DOH also states that I PRO received the highest score for its technical proposal and was “awarded the maximum number of points” for same (*Id.*).

RFP Section 8.3 provides that evaluators will “independently score each Technical Proposal” and the “individual [] scores will be averaged to calculate the Technical Score for each responsive [offeror]” (RFP, at p. 47). The technical score is “up to 70 points” and comprises 70% of the final score (*Id.*). DOH’s Methodology Overview and Compliance Evaluation document⁷ provided additional detail regarding the technical proposal evaluation, indicating that “[f]or each evaluation item, [DOH] will aggregate the raw scores awarded by all evaluators, compute an average score and then multipl[y] the average by the assigned weighting factor . . . result[ing] in a final score for each evaluation item.” The instructions further provided:

[t]he proposal with the highest Technical Raw Score will receive a Final Technical Score of 70 points. Other bidders will receive a proportionate Final Technical Score according to the following formula:
(x/y) x 70 where:

⁷ I PRO acknowledges that DOH provided the Methodology Overview and Compliance Evaluation, the Technical Proposal Instructions & Evaluation Tool, and the Cost Evaluation Tabulation Tool at the debriefing (*see* Protest, at p. 4).

x = technical score for proposal being scored
y = technical score of the highest scoring proposal
70 = the total technical points available.

I PRO received a Technical Raw Score of 81.54, for a Final Technical Score of 70 points. KePRO received a Technical Raw Score of 69.22, for a Final Technical Score of 59 points.

Our review of the procurement record indicates that DOH evaluated technical proposals according to the criteria set forth in the RFP, the evaluation instructions and scoring tool.

Evaluation of KePRO's Proposal

1. Responsiveness

I PRO alleges “[DOH] may have effectively waived full or partial compliance with material specifications” and that “[t]he bids by non-incumbents . . . would not and could not be inclusive of all expected and required services . . .” (Protest, at pp. 16-17).⁸ I PRO also claims “[KePRO] likely missed somewhere in the neighborhood of 21% of the available Technical Points” and so “by definition [KePRO] failed to fully or correctly demonstrate the qualifications, competence and capacity and the failure appears to be material, and that degree of a miss necessarily should lead to an assessment as to whether [KePRO] has capacity and the bid was responsive to the RFP” (I PRO Reply, at p. 8).⁹ DOH asserts it “delineated in the RFP the minimum specifications and requirements for a[n] [offeror] to be considered responsive as defined in SFL section 163(1)(d)” and that there were “three, competitive, responsive and responsible [offerors],” including KePRO (DOH Answer, at pp. 2-3). KePRO confirms it is aware of the level of effort needed and, furthermore, “[t]here is simply no evidence that KePRO misunderstood the work required in any aspect of the RFP” (KePRO Answer, at p. 5).

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.” A “responsive” offeror is an “offeror meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency” (SFL § 163(1)(d)). The RFP provides that “[p]roposals will undergo a preliminary evaluation to verify Minimum Qualifications to propose” (RFP, Section 8.3, at p. 47).

DOH conducted a “compliance evaluation” on all proposals prior to the technical and cost evaluations being conducted, to determine whether the proposals met the minimum requirements of the RFP and found all three offerors to be responsive.

⁸ I PRO appears to posit that only the incumbent contractor is qualified to continue providing services for the Program. This notion is contrary to the spirit of competitive bidding.

⁹ I PRO appears to be conflating the concepts of responsiveness to minimum qualifications and evaluation/scoring of a technical proposal. The RFP set forth minimum qualifications to be met by offerors to be responsive, which DOH reviewed on a pass/fail basis, and determined that all three offerors met same (*see* RFP, Section 3.1, at p. 6). In addition, we determined above that DOH evaluated the technical proposals according to the RFP and scoring tool.

Our review of the procurement record supports DOH's determination that KePRO was responsive to the RFP, as written. Furthermore, there is no evidence that DOH waived any material specifications in the RFP. Accordingly, there is no basis to disturb DOH's award of the contract to KePRO.

2. Cost Proposal

I PRO alleges, with respect to various aspects of the scope of services for the RFP, "a non-incumbent [offeror], [like KePRO,] reasonably relying solely on [DOH's] representations [in the RFP] would not and could not have encompassed the full extent of [costs] in their proposal, leading to an underbid and probable request for additional compensation during contract performance" (Protest, at p. 9; *see* Protest, at pp. 10-14; *see also* I PRO Reply, at pp. 11-19). I PRO also contends that the lack of "experience[] in performance of the current contract" of the other two offerors "explains the wide gap in pricing as between those [offerors] and I PRO" (Protest, at p. 8). DOH responds the "Cost Proposals [of the two non-incumbent offerors] were comparable and consistent with [DOH's] prior cost projections for the new [Program] procurement" (DOH Answer, at p. 3). DOH also asserts that "[a] lower price is not an automatic indicator that the chosen vendor cannot perform the services sought to be procured, or is ignorant of the facts, or unqualified by lack of knowledge or experience to understand the scope of work or the terms of [DOH's] RFP" (DOH Answer, at p. 7). KePRO disputes I PRO's claim that the RFP misled non-incumbent offerors thereby "[driving] down non-incumbent pricing to make it lower than I PRO's excessive price" and reiterates it "fully understands the level of effort involved" (KePRO Answer, at pp. 4-5 (emphasis omitted)).

I PRO's argument is based on conclusory assumptions with respect to KePRO's experience and understanding of the scope of services for the RFP. Based on our review of the procurement record, DOH reviewed KePRO's cost proposal according to the evaluation methodology set forth in the RFP. A competitive process is created to ensure fair pricing, and a lower price does not de facto indicate inability to perform. Additionally, DOH specifically determined KePRO's cost proposal was consistent with DOH's cost projections for the Program as described in the RFP and deemed it reasonable (*see* DOH Answer, at p. 3). This Office will generally give deference to an agency's determinations as to the substantive criteria to be evaluated in order to best meet its needs, and we see no reason to depart from such deference here (*see* OSC Bid Protest Determination SF-201700297, at pp. 6-7). Based on the foregoing and our review of the procurement record, we find no reason to question DOH's determination that KePRO can perform the contract at the price it bid.

3. Conflicts of Interest

I PRO alleges that DOH did not evaluate potential conflicts of interest of offerors as a minimum requirement under the RFP and that KePRO may have a conflict of interest in providing services under the Program as it "appears to be owned by a hedge fund that in turn appears to own facilities at which children may be receiving Early Intervention Services" (I PRO Reply, at p. 4). DOH contends that "[c]onflicts of interest were addressed in Section 5.22 of [the RFP] and Attachment 4" (DOH Answer, at p. 6). KePRO asserts that "I PRO identifies no

alleged conflict at all” but “vaguely surmises that one *could possibly exist*” (KePRO Answer, at p. 8).

RFP Section 5.22 provides, “All [offerors] responding to this solicitation should submit Attachment 4 to attest that their performance of the services outlined in this RFP does not create a conflict of interest and that the [offeror] will not act in any manner that is detrimental to any other State project on which they are rendering services.” RFP Attachment 4 requires all offerors to, among other things, “disclose any existing or contemplated relationship with any other person or entity . . . which would constitute an actual or potential conflict of interest or appearance of impropriety . . . in connection with your rendering services.” Our review of the procurement record shows that DOH adhered to the provisions of the RFP and reviewed each offeror’s Attachment 4 submission as part of its initial compliance evaluation. DOH’s review of KePRO, as documented in the procurement record, revealed no conflicts of interest for performing the services under the RFP. IPRO failed to provide any information substantiating this allegation of a conflict. Thus, we find no merit to IPRO’s assertion.

IPRO’s Debriefing

IPRO alleges that DOH failed to comply with SFL requirements for its debriefing as “[n]o specific scoring of IPRO’s own technical proposal, including per-question weighting, or on anything other than a general level as to the Technical proposal, was revealed by [DOH]” and DOH “refused to discuss *anything* with regard to [KePRO’s] proposals, inclusive of raw scores and weighted scores” (Protest, at p. 4). DOH contends that “[t]he debriefing was conducted in accordance with the State Finance Law . . . and was not defective in any respect” (DOH Answer, at p. 6).

SFL § 163(9)(c)(iv) sets forth the minimum information that must be provided in a debriefing: “(A) the reasons that the proposal, bid or offer submitted by the unsuccessful offerer 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 offerer’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 offerer concerning potential ways that their future proposals, bids or offers could be more responsive.”

The procurement record submitted to this Office by DOH contained a debriefing agenda, which was provided to IPRO in advance of/at the debriefing, which indicated that the debriefing would be limited to IPRO’s proposal, but also included the following topics: general evaluation considerations, technical proposal evaluation, and cost proposal evaluation. The debriefing agenda also included IPRO’s technical and cost scores and rankings.

The debriefing provided by DOH was consistent with guidance from the New York State Procurement Council which directs agencies conducting debriefings to provide “at a minimum, the strengths and weaknesses of a vendor’s bid/proposal and...information as to the relative ranking of that bidder’s bid/proposal in each of the major evaluation categories as provided for in

a bid solicitation document” (NYS Procurement Bulletin Debriefing Guidelines, effective January 30, 2019).

I PRO asserts that DOH should have provided more information regarding per-question technical scoring for its proposal as well as information regarding KePRO’s technical and cost scores. However, SFL § 163(9)(c)(iv) does not specifically require agencies to disclose technical scores to that level of detail, nor does it require agencies to provide competitors’ scores during a debriefing. Based on our review of the procurement record, we conclude that the debriefing provided to I PRO 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 / KePRO contract for Early Intervention Program Monitoring and Quality Improvement Services.