

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Softheon, Inc. with respect to the procurement of an Asset Verification System conducted by the New York State Department of Health.

**Determination
of Bid Protest**

SF-20210101

Contract Number – C036155

December 1, 2021

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Health (DOH) for a web-based Asset Verification System (System). We have determined the grounds advanced by Softheon, Inc. (Softheon) 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 Public Consulting Group, LLC (formerly known as Public Consulting Group, Inc.) (PCG) for the System.

BACKGROUND

Facts

DOH is responsible for overseeing the New York State Medicaid Program, the State's largest payer of health care and long-term care (*see* Request for Proposals (RFP), Section 2.1, at pp. 4-5). To assist with this responsibility, DOH is also tasked with verifying Medicaid Program eligibility, which includes asset and real property verification (*Id.*). On February 10, 2020, DOH issued an RFP seeking to award one contract to a vendor to develop, implement, and operate the System for the New York State Medicaid Program which would search for and provide verification of assets and real property owned by Medicaid applicants and recipients and/or their spouses (*see* RFP, Section 4.1, at p.7).

The RFP provided that the contract would be awarded on the basis of best value, with the technical proposal worth 70% of the offeror's total score and the cost proposal worth 30% of the offeror's total score (*see* RFP, Section 8.1, at pp. 30-31). A Technical Evaluation Committee would score all responsive proposals, and each individual Committee member's scores would be averaged to calculate the technical score for each offeror (*see* RFP, Section 8.3, at p. 31). A Cost Evaluation Committee would score cost proposals based on a maximum of 30 points, with the maximum number of points (30) given to the proposal with the lowest all-inclusive not-to-exceed maximum price (*see* RFP, Section 8.4, at p. 31). Other responsive cost proposals would receive a proportionate cost score based on their relation to the lowest priced cost proposal, using a predefined formula provided in the RFP (*Id.*). The offeror with the highest composite score, a

combination of the technical and cost scores, would be awarded the contract (*see* RFP, Sections 8.5 and 8.9, at pp. 31-32).

DOH received responsive proposals from Softheon and PCG prior to the proposal due date of May 7, 2020. DOH awarded the contract for the System to PCG, the offeror receiving the highest composite score.

Softheon requested a debriefing which DOH provided on June 18, 2021. On June 25, 2021, Softheon filed a protest with this Office (Protest) and on October 1, 2021, DOH responded to the Protest (Answer).

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/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):
 - a. Softheon's Protest; and
 - b. DOH's Answer.

¹ 2 NYCRR Part 24.

ANALYSIS OF THE PROTEST

Protest to this Office

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

1. PCG is not a sole source provider of Asset Verification System services and, therefore, this contract award should be the result of an open bid;²
2. The RFP did not comply with New York State Procurement Guidelines because DOH did not conduct a service demonstration and presentation, reference check, vendor site inspection or interview with Softheon, and, as a result, Softheon did not have the opportunity to fully present its products and services to DOH;
3. PCG received an unfair advantage since PCG, as incumbent, had full opportunity to present its services while working with DOH under the current contract; and,
4. In its Protest, Softheon provides detailed responses to feedback DOH provided at the debriefing, and requests that its technical proposal be rescored.

DOH's Response to the Protest

In its Answer, DOH contends the Protest should be rejected and the award upheld on the following grounds:³

1. DOH awarded the contract based on best value with allocations of 70% for the technical score and 30% for the cost score in accordance with the RFP;
2. DOH's prior contract extension with PCG for Asset Verification Services was not protested and is not related to this current procurement;⁴
3. New York State Procurement Guidelines do not require DOH to provide bidders in any procurement with an opportunity for a demonstration and DOH was able to successfully evaluate written technical proposals without a presentation or interview;

² Softheon contends that it had recently "unsuccessfully protested the 'sole source' of AVS services award made previously to [PCG by DOH]" and that "[f]ar from being a single viable source, PCG is simply a competitor of Softheon" (Protest, at p. 2). While this Office has not granted a sole source exemption for PCG to contract with DOH for AVS services, this Office did approve an extensions of DOH's current contract with PCG on a single source basis to allow DOH additional time to conduct a competitive procurement pursuant to the RFP. Furthermore, no protest was filed with this Office in connection with the approval of the extension, and, in any event, approval to extend the current contract is outside the scope of this Protest. Since the contract under the RFP that is the subject of the current Protest was awarded pursuant to a competitive process, this claim will not be addressed herein.

³ DOH also alleges Softheon submitted additional documentation with its Protest in violation of SFL § 139-j ("Procurement Lobbying Law"), including a marketing document entitled "Softheon -We Are New York" and a letter from New York State Assemblyman Steven Englebright (*see* Answer, at p. 7). However, such items are not violations of Procurement Lobbying Law. Softheon's marketing document is exempt from the requirements of the Procurement Lobbying Law because it was submitted to OSC with a protest, pursuant to the exemption set forth in SFL § 139-j (3)(a)(7)(c). Likewise, the requirements of the Procurement Lobbying Law do not apply to the Assemblyman's letter per SFL § 139-j(4). In any event, DOH's allegations of violations of SFL § 139-j against Softheon do not impact our review of Softheon's Protest grounds in this determination.

⁴ *See* fn. 2, *supra*.

4. DOH scored technical proposals solely on the information provided therein, a fair opportunity was provided to all offerors, and PCG did not have an unfair advantage; and,
5. Softheon may not submit a revised proposal to DOH using feedback DOH provided at the debriefing.

DISCUSSION

RFP Compliance with SFL

Softheon “request[s] a re-review” of its proposal alleging that “[a] second review may easily change the outcome of the bid, particularly since **Softheon submitted the lower cost bid**” (Protest, at p. 1 (emphasis in original)). DOH asserts that “the award from this procurement was based on best value[,]” “consistent with New York State Procurement Guidelines and State Finance Law[,]” and “with allocations of 70% [for] [t]echnical [scoring] and 30% [for] [c]ost [scoring]” (Answer, at p. 5). DOH notes that “[b]est value . . . is [] not solely based on price” and therefore, “just because a lower priced proposal is received [] does not indicate the proposal will be awarded the contract” (*Id.*).

SFL § 163(10) requires that service contracts be awarded on the basis of best value. SFL § 163(1)(j) defines best value as “the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerors” and “[s]uch basis shall reflect, wherever possible, objective and quantifiable analysis.” Thus, best value does not require a contract be awarded to the lowest-priced offeror even though cost is considered as part of the evaluation process.

A best value determination shall “be based on clearly articulated procedures which require . . . a balanced and fair method, established in advance of the receipt of offers, for evaluating offers and awarding contracts” (SFL § 163(2)(b)). Furthermore, [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(7)).

Here, the RFP provided for the contract to be awarded on the basis of best value pursuant to the requirements of the SFL (*see* RFP, Section 8.1, at p. 30). In addition, the RFP issued by DOH clearly sets forth the evaluation criteria for the cost and technical components, and the relative scoring weight of each of these components, with 70% for technical and 30% for cost (*see* RFP, Sections 6.2, 6.3 and 8.1, at pp. 24-29, 30-31).

Our review of the procurement record confirms that DOH evaluated the proposals in accordance with the criteria set forth in the RFP and, as required by the RFP, awarded the contract to PCG, the offeror submitting the proposal receiving the highest composite score. Based on the above, the RFP met the applicable statutory requirements.

RFP Compliance with New York State Procurement Guidelines

Softheon “protests the fact that standard NYS procurement guidelines [for evaluating technical proposals] have not been met [by the RFP]” because Softheon was not permitted “product or service demonstrations and presentations . . . and interviews of key proposed managers and technical experts” (Protest, at p. 2). As a result, Softheon claims it “was not granted the opportunity to fully present its products and services to the procurement team” (*Id.*). In response, DOH asserts it “is not required to allow bidders, in any procurement, to provide a demonstration of the organization’s ideas and/or, in this case, software/technology products or solutions” (Answer, at p. 6). DOH further contends that “[it was] able to successfully evaluate and grasp all bidders’ written proposals without a need for a presentation or interview” (*Id.*).⁵

The New York State Procurement Guidelines state:

As a preliminary step, proposals should be reviewed for compliance with the minimum mandatory technical requirements set forth in the RFP. After the preliminary review, the technical proposal evaluation must be conducted as documented in the RFP and the evaluation instrument. The evaluation team members apply scores to the pre-determined criteria and subcriteria if applicable. Scoring is based on information provided in the submitted proposal. However, additional factors, as established in the RFP and/or the evaluation instrument, *may* be considered. Examples include:

- Product or service demonstrations and presentations;
- Reference checks (staff and/or company performance);
- Vendor site inspections;
- Interviews of key proposed managers and technical experts;
- Written proposal clarifications; and
- Rating services (such as Moody’s or Dun & Bradstreet)

(see New York State Procurement Guidelines, at pp. 36-37 (emphasis added)).

Contrary to Softheon’s claim, the New York State Procurement Guidelines do not require that the listed opportunities (including product/service demonstrations or presentations, and interviews) be provided to bidders. Moreover, the Guidelines “are designed to assist State agencies in making procurements efficiently and effectively by providing agency program and fiscal staff with a source of basic, systematic guidance about State procurement policies and practices” and do not have the same legal authority as statutes, rules and regulations (see New York State Procurement Guidelines, at p. 1). As determined above, the RFP met all applicable statutory requirements. Consequently, there is no merit to this claim.

⁵ DOH did, in fact, reserve the right “to interview proposed project participants...to allow evaluators to validate the Bidder’s experience and qualifications” although whether to conduct such interviews was entirely within DOH’s discretion (RFP, Section 8.6, at p. 31).

Unfair Advantage

Softheon further alleges that unlike Softheon, “PCG would have had full opportunity to present its version of [the System] while interacting with NYS on other projects” (Protest, at p. 2). In response, DOH contends that it “provided a fair opportunity to all bidders, and rejects the allegation that PCG had an unfair advantage” (Answer, at p. 7). DOH asserts that “evaluators review[ed] and score[d] written technical proposals based solely on the information provided in those proposals and no other outside information or knowledge [was] considered during this process” (*Id.*).

There is no evidence in the procurement record, nor has Softheon provided any evidence, to indicate that the awardee, PCG, had any additional opportunity to present its version of the System to DOH while working on other projects. As stated above, System demonstrations were not required by the RFP. Furthermore, review of the procurement record indicates that all offerors’ technical proposals were scored using the same criteria as outlined in the RFP and DOH’s Technical Proposal Instructions, all offerors’ technical proposals were scored using the same technical evaluation tool, none of the offerors had any additional opportunity to present their version of the System to DOH outside of the procurement process, and evaluators did not consider any outside criteria in their evaluations. Therefore, there is no evidence to support Softheon’s claim that PCG received an unfair advantage in the evaluation process.

Technical Proposal Evaluation

Softheon devotes the majority of the Protest to providing detailed responses to DOH’s debriefing feedback and further requests a “re-review and re-scoring of [its proposal]” (*Id.*, at pp. 2-6). In response, DOH contends that “[u]sing [DOH evaluator] feedback, . . . Softheon attempts to submit a revised proposal for reconsideration” (Answer, at p. 7). DOH further contends that it “would be flatly prohibited from considering a proposal that has been revised based on [DOH’s] feedback” and doing so would “violate the letter and intent of [State Finance Law §] 163” (*Id.*).

First and foremost, Softheon’s request for a re-review and re-scoring of its proposal, to the extent Softheon has submitted additional technical proposal information in the Protest, is inconsistent with the competitive bidding requirements of SFL § 163 as well as the explicit terms of the RFP.⁶

Next, we turn to whether DOH properly scored Softheon’s technical proposal. As we have enunciated in prior bid protest determinations, this Office is unwilling to substitute its judgment for that of an agency in matters within an agency’s realm of expertise where the agency scored technical proposals “according to the pre-established technical proposal evaluation tool” (see OSC Bid Protest Determination SF-20170192, at p. 7). We have long recognized that evaluators bring their own subjective views to the evaluation process and may interpret information in proposals differently. However, this Office “will generally not disturb a

⁶ The RFP directs that “**The proposal must be received by [DOH] no later than [May 7, 2020]. Late bids will not be considered**” (RFP, Section 7.0, at p. 30). The RFP also indicates “ . . . no Bidder will be allowed to alter its proposal or add information after [May 7, 2020]” (RFP, Section 8.1, at p. 30).

rationality reached determination of a duly constituted evaluation committee” unless “scoring is clearly and demonstratively unreasonable” (OSC Bid Protest Determination SF-20160188, at p. 8 (upholding evaluation committee’s technical scores where “review of the procurement record confirms the evaluators scored the proposals in a manner consistent with the evaluation/scoring instructions”); *see* OSC Bid Protest Determination SF-20200069, at p. 6; *see also* OSC Bid Protest Determination SF-20210006, at p. 6).

The RFP sets forth specific criteria to be scored in technical proposals (*see* RFP, Section 6, at pp. 24-29). DOH crafted detailed technical proposal evaluation instructions and an evaluation tool, including a scoring rubric, prior to receipt of proposals. DOH, as the State agency responsible for the administration and management of the Medicaid Program for which the System is needed, possesses the expertise to score proposals submitted in response to the RFP. Our review of the procurement record indicates that DOH scored Softheon’s technical proposal according to the clearly articulated criteria set forth in the RFP and consistent with DOH’s Technical Proposal Instructions & Evaluation Tool. Therefore, this Office will defer to DOH regarding its scoring of Softheon’s technical proposal and we will not disturb the technical scores DOH awarded to Softheon.

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 the System.