

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Public Consulting Group, Inc., with Respect to the Procurement of Medicaid Third Party Liability Match and Recovery Services Conducted by the New York State Office of the Medicaid Inspector General

Contract Number C201501

Determination of Bid Protest

SF-20150275

March 17, 2016

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Office of the Medicaid Inspector General (OMIG) for Medicaid Third Party Liability Match and Recovery Services (TPL Services). We have determined the grounds advanced by Public Consulting Group, Inc. (PCG) are insufficient to merit the overturning of the contract award made by OMIG and, therefore, we deny the Protest. As a result, we are today approving the OMIG contract with Health Management Systems, Inc. (HMS) for TPL Services.

BACKGROUND

Facts

OMIG is a separate, independent entity within the New York State Department of Health (*see* RFP, Section I[B], at pg. 7, Public Health Law § 30). OMIG's mission is to "enhance the integrity of the New York State Medicaid program by preventing and detecting fraudulent, abusive and wasteful practices within the Medicaid program and recovering improperly expended Medicaid funds..." (OMIG's 2014 Annual Report, at pg. 7; *see also* Public Health Law § 31). To support its mission, OMIG issued Request for Proposal for Medicaid Third Party Liability Match and Recovery Services, Solicitation Number OMIG 15-01 (RFP), "seeking proposals from Offerors who will identify, verify, and recover Medicaid overpayments from liable Third Parties for cost savings and recovery purposes" (RFP, Section I[F], at pg. 12). Only PCG and HMS submitted proposals in response to the RFP, although OMIG sent the RFP to numerous companies it identified as potential offerors.

The RFP provided the contract would be awarded on the basis of best value (*see* RFP, Section VI[A], at pg. 46). The technical proposal and the financial proposal were worth 75 percent and 25 percent, respectively, of the total score. The technical proposal was comprised of three main sections, Scope of Work (45 points), Third Party Liability Match and Recovery Experience (15 points) and Staffing Requirements (15 points) (*see* RFP, Section VI[D], at pgs. 47-48). The Scope of Work section was further divided into three project modules (*see* RFP, Section II[B], at pgs. 20-36). The Third Party Liability Match and Recovery Experience section (Experience section) was comprised of two separately scored parts: three references and up to five contracts currently held by the offeror (*see* RFP, Section III, at pg. 39). The Staffing section was scored

based on organizational charts submitted by each offeror that detailed all positions and full-time equivalents (FTEs) assigned to each project module, along with resumes for the Key Personnel (*see* RFP, Section IV, at pgs. 39-40).

The RFP described in detail the mandatory components and the desirable components for each of the three main sections of the technical proposal. Four evaluators first confirmed offerors met the mandatory components for each section on a pass/fail basis and then scored the Scope of Work and Staffing components of the technical proposals. Another individual, the committee chairperson, separately scored the Third Party Liability Match and Recovery Experience section. A separate committee evaluated the financial proposals (*see* RFP, Section VI, at pgs. 46-49).

HMS received the highest total combined score and OMIG awarded the contract to HMS. OMIG provided PCG a debriefing on September 9, 2015.

PCG filed a protest with this Office by letter dated September 23, 2015 (Protest) and OMIG filed an answer to the Protest, received by our Office on October 2, 2015 (OMIG Answer). PCG filed a reply to OMIG's Answer by letter dated October 7, 2015 (PCG Reply). HMS filed a response to the Protest by letter dated October 8, 2015 (HMS Answer).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 proscribed by SFL § 112, this Office has issued a Contract Award Protest Procedure (OSC 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 3 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 OMIG with the OMIG/HMS contract;
2. The correspondence between this Office and OMIG arising out of our review of the proposed OMIG/HMS contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):

¹ PCG supplemented the Protest on December 9, 2015 and both HMS and OMIG subsequently filed a response to PCG's supplement. As neither the supplement nor the responses raise any new issues relating to the Protest, we will not formally address them in this determination.

² OSC Guide to Financial Operations, Chapter XI.17, <http://www.osc.state.ny.us/agencies/guide/MyWebHelp/>.

- a. PCG's Protest dated September 23, 2015;³
- b. OMIG's Answer to the Protest received October 2, 2015;
- c. PCG's reply to OMIG's Answer dated October 7, 2015; and
- d. HMS' Answer to the Protest dated October 8, 2015.

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 offerer.⁴ Best value is defined as "the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers."⁵ A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."⁶

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, PCG challenges the procurement conducted by OMIG on the following grounds:

1. The evaluation methodology improperly provided a substantial advantage to one offeror since only that offeror could obtain the maximum points for the references submitted and contracts held under the Experience section of the technical proposal.
2. OMIG did not fairly consider PCG's technical proposal and should have sought clarification from PCG if its proposal lacked detail, or if the evaluation team was confused or unfamiliar with PCG's proposed solutions.
3. OMIG improperly scored the Staffing section based on the number of FTEs offered.
4. The RFP did not specify that the list of five contracts submitted, as part of the Experience section, were to be held by the offeror itself, rather than a partner. Therefore, OMIG improperly disregarded the three contracts on the list that were held by PCG's partners.
5. Because of the flawed evaluation methodology, the resulting contract award does not represent the best value to New York taxpayers.

³ OSC Protest Procedure section 3(c) requires an initial protest to be filed with this Office within ten business days of notice of contract award. In the instant protest, that date would have been September 8, 2015. Instead, PCG filed the Protest within 10 days of their debriefing, or September 23, 2015. This Office has discretion to waive any filing deadline and, in this case, we deem it appropriate to waive the filing deadline (OSC Protest Procedure section 3[i]).

⁴ SFL § 163(10).

⁵ SFL § 163(1)(j).

⁶ SFL § 163(1)(d).

Response to the Protest

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

1. The RFP process was competitive and open to all offerors meeting the minimum requirements, including PCG. The fact that only those offerors with State and/or Federal Government contract experience could obtain the full 15 points for the Experience section did not render the evaluation methodology flawed.
2. OMIG took appropriate steps to ensure the procurement was competitive and removed restrictions that would have prevented offerors without State and/or Federal Government contract experience from submitting proposals. OMIG was not required to seek additional information through a Request for Information or Request for Comment prior to issuing the RFP.
3. OMIG sought clarification of PCG's technical proposal when necessary and understood the TPL Services being proposed by PCG. PCG's technical proposal received a lower score because of an overall lack of detail, not because OMIG misunderstood PCG's proposal.
4. The State Procurement Guidelines permit OMIG to score the Staffing section based upon the number of FTEs. The RFP clearly stated the scoring methodology for the Staffing section, thereby permitting offerors to obtain full point value for that section.
5. PCG ultimately lost points on its technical proposal because PCG did not demonstrate it possessed actual experience providing the proposed services, or sufficiently describe how it would provide those services in lieu of such experience.

Response to the Protest

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

1. Possessing extensive experience in the TPL market does not make HMS a monopoly and did not prevent other vendors from submitting proposals in response to the RFP.
2. PCG was not awarded the contract because PCG failed to adequately demonstrate its capability to provide the TPL Services, not because the evaluation methodology was flawed.
3. OMIG complied with the State Finance Law procurement requirements, properly evaluated the proposals and concluded HMS' proposal represented the best value.

4. PCG failed to follow the OSC Protest Procedure and thus OSC should reject the Protest.⁷

DISCUSSION

In general, PCG's Protest makes two broad categories of arguments: the methodology OMIG used to evaluate proposals provided a substantial advantage to one offeror, and the procurement process was so flawed that it did not result in a contract award on the basis of best value.

Evaluation Methodology

1. Scoring of Experience Section

PCG asserts "OMIG issued a flawed RFP that tilted the award process towards a single vendor" (Protest, at pg. 1). PCG claims the two components of the Experience section, worth 15 of the 75 total available technical points, provided a substantial advantage to one offeror, since only that offeror could potentially be awarded all 15 points.

The Experience section is divided into two distinct submissions, worth 10 and 5 points, respectively: (i) three references for whom the offeror currently provides TPL Services similar to those described in the RFP's Scope of Work; and (ii) a listing of five contracts for TPL Services currently held by the offeror. The RFP provides that "maximum points per reference may only be achieved for references where all three (3) modules are being performed and are being done so for a state/federal-administered Medicaid program" (RFP, at pg. 19). The RFP contains the same language for evaluation of the contracts (*Id.*). PCG contends that in light of the requirement related to government Medicaid program experience, "only [one] offeror could obtain the maximum points for governmental references and current Medicaid TPL contracts" (Protest, at pg. 3).

PCG asserts HMS has a monopoly with states for TPL Services and supports its statement with a listing of current HMS TPL Services contracts with 39 States and the District of Columbia (*see* Protest, pg.4 and Attachment 3). HMS dismisses the idea that its predominant presence in the state government TPL Services market bars other vendors from competing for such business (*see* HMS Answer, at pg. 6). HMS

⁷ HMS asserts that the Protest should have been filed in this Office by September 8, 2015, ten business days of PCG receiving the non-award notification. However, OMIG did not hold a debriefing until September 9 and PCG filed the Protest within ten business days thereafter. While the Protest was not filed with this Office within ten days of notice of award, in an appropriate exercise of our discretion, this Office waived this filing (*see* Section 3(i), OSC Protest Procedure). In granting such a waiver, this Office considered, among other things, the date of the debriefing and when the interested party had access to the facts giving rise to the protest, whether the protest raises potentially meritorious issues, and whether a waiver would result in unnecessary or harmful delays in our review of the contract.

HMS also urges us to reject the Protest because PCG failed to provide a copy of the Protest to HMS, at a time when HMS claims PCG was aware that OMIG awarded the contract to HMS. This Office sent a copy of the Protest to HMS and, at HMS' request, approved an extension of the time period for HMS to file an answer to the Protest. In its Answer, HMS does not claim it was harmed by the delay in receiving the Protest. Thus, we again conclude it was appropriate to exercise our discretion and waive such irregularity without needing to determine whether PCG in fact knew HMS was the successful offeror.

maintains it “did not acquire its TPL contracts and subcontracts with more than 40 states because it is the only player in the market but because its solution versus its costs has consistently proven to be the best” (HMS Answer, at pg. 7).

OMIG rejects PCG’s contention that the RFP limited competition and states “any Offeror with basic recovery and cost avoidance experience may have submitted a qualifying proposal” (OMIG Answer, at pg. 5).⁸ The RFP did emphasize the importance of State/Federal Government experience, providing that only offerors with such experience could earn the maximum points for each component of the Experience section. OMIG created a tiered scoring system to implement this requirement. Offerors were eligible to receive 100 percent of the available points for a State/Federal program while those offerors with non-State/Federal program were only eligible for 50 percent of the available points (*see* OMIG Answer, at pg. 2).⁹ In addition, offerors who demonstrated experience in all three project modules received the maximum eligible points.

On its face, the RFP was open to all offerors with TPL Services experience. The issue is whether the tiered scoring methodology OMIG used to score the Experience section had the effect of providing one vendor with an unfair advantage.

References – Component 1. As summarized above, OMIG awarded maximum points only for a State/Federal reference encompassing all three work modules. Thus, even an offeror with three State/Federal references could not obtain maximum points if the work performed for those references did not cover all three modules.¹⁰ Furthermore, even offerors that satisfied all of the criteria previously described could still lose points based on references’ responses to the questionnaire. Although a lack of State/Federal Government experience affects the maximum score an offeror could potentially achieve on a particular reference, OMIG’s tiered methodology requires consideration of other factors, such as the actual work performed, when determining the actual reference score received.

OMIG indicated that while it determined that a vendor with non-government experience could provide a viable solution to the State, OMIG preferred a vendor with State/Federal program experience that performed all work modules required by the RFP. This Office generally defers to agency determinations concerning the agency’s programmatic and technical needs, the structuring of the procurement to ensure those needs are met, and the appropriate weights allocated for the scoring of proposals. Here, in our view, OMIG’s determination of the importance of providing similar services to clients with similar programs and assigning a higher point value to reflect such determinations are matters properly within OMIG’s expertise. Additionally, our

⁸ Notably, OMIG cancelled the prior request for proposals for TPL Services (#OMIG 14-04), which required that a responsive offeror have three governmental references, after determining that allowing for comparable non-government experience would increase the level of competition (*see* OMIG Answer, at pg. 1).

⁹ The Experience section was worth 15 points so an offeror without State/Federal experience could obtain a maximum of 7.5 points. We note that OMIG only used this tiered scoring methodology for the Experience section of the RFP.

¹⁰ For example, PCG submitted one reference for a State/Federal program; however, PCG (as a subcontractor) only performed one work module for such reference resulting in a lower score for that reference.

review of the procurement record did not reveal evidence OMIG structured the procurement's evaluation process to steer the award to one offeror. Thus, we find no basis to disturb its scoring methodology.

Contracts – Component 2. The second component of the Experience section requires an offeror to submit a list of up to five TPL Services contracts. OMIG again used the tiered scoring methodology described above. Likewise, the procurement record does not indicate OMIG's scoring methodology improperly favored one offeror.

Three of the five contracts PCG submitted were held by its partners and OMIG did not score those contracts. PCG asserts the RFP did not indicate that only contracts held by the offeror itself would be evaluated. The RFP required contracts “for which the *Offeror is currently engaged*” including information specifying “which scope of service(s)/module(s) are being *performed by your company*” (RFP, at pg. 39, emphasis added). OMIG further described this criteria, stating “[p]oints will also be awarded for Medicaid TPL Match and/or Recovery Contracts, *currently held by the Offeror ...*” (RFP, at pg. 48, emphasis added). In our opinion, the RFP is not ambiguous and we find no reason to upset OMIG's interpretation of its own specification, i.e., that the Offeror should be engaged as the prime contractor to meet this requirement. Moreover, this section is intended to help OMIG assess whether the experience an offeror possesses is adequate, not the experience of another party with which OMIG will not be contractually related. Thus, we find OMIG's decision to consider only those contracts where PCG itself is performing in conformance with the RFP.¹¹

2. OMIG's Evaluation of PCG's Technical Proposal

PCG claims OMIG did not properly consider PCG's technical proposal. PCG asserts OMIG's evaluators should have sought clarification when the proposal lacked detail, confused evaluators or contained unfamiliar solutions (*see* Protest, at pg. 5). SFL § 163(9)(c) authorizes an agency to seek clarifications “for purposes of assuring a full understanding of responsiveness to the solicitation requirements.” Implicit in this authorization is that a portion of the proposal is unclear; this authorization may not be used in order to allow for revisions (or additional details) to a proposal. OMIG states it sought clarification as needed and denies there was any confusion among the evaluators regarding PCG's proposal (*see* OMIG Answer, at pg. 4). Rather, OMIG asserts “it was PCG's lack of detail, not confusion about what was written, that negatively affected their score” (OMIG Answer, at pg. 4). The procurement record supports OMIG's contention and does not provide any evidence that OMIG did not fairly review PCG's technical proposal according to the evaluation criteria set forth in the RFP and the parameters of the SFL.

¹¹ We note the work performed for the references PCG submitted were, in reality, being done by a PCG subcontractor. The RFP contained a provision for the references similar to that for the contracts, requiring the submission to be “for which you (the Offeror) currently perform TPL Match and/or Recovery Services” (RFP, at pg. 18). Since the RFP required both Experience section submissions to relate to work “the Offeror” performed, it seems inconsistent that OMIG chose to score the PCG subcontractor references. We do not need to address this inconsistency, however, as OMIG's scoring of PCG's references is favorable to PCG's position.

3. Scoring of Staffing Section

PCG asserts OMIG improperly scored the Staffing section based on the number of FTEs offered. PCG claims “there was no consideration in the evaluation and review process for an offeror that accomplishes the required services in an innovative manner that would require fewer FTEs than is standard practice today under the incumbent’s business model” (Protest, at pg. 5). OMIG counters that the New York State Procurement Guidelines permit OMIG to score proposals based on staffing levels and the RFP made clear that the Organizational Chart portion of the Staffing section would be scored based on the *quantity* of FTEs assigned to each module (*see* OMIG Answer, at pg. 4; RFP, at pgs. 19 and 48).¹² Since each offeror could potentially obtain full points for that section, OMIG asserts PCG was not disadvantaged (*see* OMIG Answer, at pg. 4). Indeed, PCG acknowledges it was aware how OMIG planned to score the Organizational Chart (*see* Protest, at pg. 5).

The State Procurement Council issued the New York State Procurement Guidelines (Guidelines) to give agencies guidance on properly conducting a procurement process, including conducting the technical evaluation. Specifically, the Guidelines provide that “[t]he technical evaluation measures the extent by which a proposal will meet the agency’s needs and relies upon the evaluators’ expertise in assessing the strengths and weaknesses of each response” (Guidelines, Section V.H., <http://www.ogs.ny.gov/bu/pc/Docs/Guidelines.pdf>, Revised May 2014). The Guidelines describe three typical methods for assigning values to technical evaluation criteria and one example explicitly allocates points based on the number of positions proposed for the staffing plan (*see* Guidelines, Section V.H., Assignment of Values to Technical Evaluation Criteria, Example 2, at pg. 35). Clearly OMIG’s decision to assign points based on the number of FTEs is permitted by the Guidelines and was clearly stated in the RFP. We are satisfied that OMIG complied with all legal requirements and adhered to the Guidelines while establishing its scoring methodology for the Staffing section.

Requirement for a “Best Value” Award

PCG asserts the RFP “unduly favored the incumbent, HMS, and deprived the State of New York of a process which would result in its obtaining ‘best value’” (PCG’s reply to OMIG’s Answer, at pg. 2). Specifically, PCG maintains OMIG should have conducted a Request for Information or Request for Comment prior to issuing the RFP which would have “given OMIG the information needed to decide whether to modify their pre-ordained reliance on only state Medicaid experience to the exclusion of any relevant experience” (Protest, at pg. 4).

¹² The Organizational Chart was worth 9 of the 15 available points for the Staffing section of the RFP. Offerors submitted an organizational chart for each of the three modules of work and could earn up to 3 points for each chart. OMIG awarded PCG the maximum point value for 2 of the 3 organizational charts. Evaluators assigned one point to the Module 1 Scope of Work organizational chart resulting in an aggregate score of 7 for PCG for this component.

As stated above, SFL § 163(1)(j) defines best value as “the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers. Such basis shall reflect, wherever possible, objective and quantifiable analysis.” Before rendering such an award, the agency must undertake a cost-benefit analysis and adopt an evaluation methodology reasonably designed to accomplish this result (*see Transactive Corporation v New York State Department of Social Services*, 236 AD2d 48 [1997]; *aff’d* 92 NY2d 579 [1998]).

Based on its prior experience in TPL Services, OMIG constructed a procurement process that assigned relative weights to both the costs proposed as well as the technical quality of the proposals. The separate technical and cost evaluations produced a result that, in our opinion, reflects an objective assessment of which proposal was the best overall value to the State.¹³ As part of its cost-benefit analysis, OMIG was not required to engage in any of the actions endorsed by PCG. Thus, PCG’s assertion that OMIG’s failure to conduct such pre-bid activities resulted in an award that did not comply with SFL § 163 is incorrect.

We conclude that the analysis undertaken by OMIG 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.” Moreover, based on our review of the procurement record, we are satisfied that OMIG’s award represents the best value based on the submissions it received.

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 OMIG. As a result, the Protest is denied and we are today approving the OMIG/HMS contract for TPL Services.

¹³ We note PCG’s cost proposal earned the highest score, therefore representing the lowest cost. However, as stated above, cost is not the only factor an agency must consider when awarding a contract based on best value.