

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Bid Protest filed by GCOM Software LLC with respect to the procurement of maintenance and operation services for management information systems and mobile applications to support the Special Supplemental Nutrition Program for Women, Infants and Children conducted by the New York State Department of Health.

**Determination  
of Bid Protest**

**SF-20220167**

June 9, 2023

Contract Number – C037938 \_\_\_\_\_

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The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Health (DOH) for maintenance and operation services for management information systems and mobile applications to support the Special Supplemental Nutrition Program for women, infants and children (WIC). We have determined the grounds advanced by GCOM Software LLC (GCOM) 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 Currier, McCabe and Associates, Inc. (CMA) for maintenance and operation services for management information systems and mobile applications to support WIC.

## **BACKGROUND**

### **Facts**

DOH issued a request for proposals (RFP) seeking proposals from qualified offerors to provide maintenance and operation services for management information systems and mobile applications to support WIC (RFP, Section 2.0, at p. 4). DOH is responsible for administering WIC which “provides breastfeeding support, nutrition counseling, health education, health care referrals, referrals to other services, and nutritious foods to approximately 370,000 women, infants and children each month through 90 local providers . . . at 400 service sites” (RFP, Section 2.1, at p. 4). WIC’s fundamental purpose “is to ensure the health and well-being of income eligible families with young children” (*Id.*).

The RFP specified that “[a]ll proposals deemed to be responsive to the requirements of [the] procurement [would] be evaluated and scored for technical qualities and cost” (RFP, Section 8.1, at p. 41). The RFP further specified that DOH would evaluate proposals based on best value, with technical proposals worth 70% and cost proposals worth 30% of an offeror’s final/composite score (RFP, Section 8.1, at p. 41; RFP, Section 8.3, at p. 41; RFP, Section 8.4, at p. 42). An offeror’s technical proposal score would be calculated by averaging the individual scores of the DOH evaluators (RFP, Section 8.3, at p. 41). The offeror with the lowest all-inclusive not-to-

exceed maximum price would receive the maximum cost score of 30 points and “[a]ll other responsive proposals [would] receive a proportionate score based on the relation of their Cost Proposal to the proposal[] offered at the lowest final cost, using [the formula set forth in the RFP]” (RFP, Section 8.4, at pp. 41–42). Contract award would be made to the offeror “with the highest composite score(s) whose experience and qualifications have been verified” (RFP, Section 8.8, at p. 42).

DOH received three proposals by the July 7, 2022, deadline, including proposals from GCOM and CMA. Following evaluation of proposals, DOH awarded the contract to CMA, the offeror with the highest composite score. Thereafter, on November 2, 2022, DOH provided a debriefing to GCOM. GCOM submitted a protest to this Office on November 10, 2022, as corrected by email on November 11, 2022 (collectively, Protest). DOH submitted an answer on March 14, 2023 (Answer) to which GCOM replied on March 17, 2023 (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.<sup>1</sup> 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. documentation contained in the procurement record forwarded to this Office by DOH with the DOH / CMA contract;
2. correspondence between this Office and DOH arising out of our review of the proposed DOH / CMA contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
  - a. Protest;
  - b. Answer; and
  - c. Reply.<sup>2</sup>

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<sup>1</sup> 2 NYCRR Part 24.

<sup>2</sup> GCOM submitted correspondence dated April 27, 2023 (Correspondence), after DOH replied to an audit question from this Office. In this Correspondence, GCOM states, “OSC should not approve the proposed contract without an audit of the procurement process and a transparent review of the entire procurement record” (Correspondence, at p. 2). Pursuant to its authority under SFL § 112, this Office conducts an audit of the entire procurement record, which

## **ANALYSIS OF THE PROTEST**

### **Protest to this Office**

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

1. DOH violated the New York State Procurement Guidelines when it required offerors to submit references in response to the RFP but failed to check such references to verify the experience and qualifications of the offerors;
2. CMA's proposal was not responsive because at the price proposed by CMA, CMA could not be offering to provide all of the services required by the RFP's scope of work; and,
3. CMA is not a responsible vendor because of CMA's lack of organizational capacity and CMA's poor past performance on government contracts involving the software used by DOH's management information system and mobile applications for WIC, specifically, in New Jersey.

### **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 Procurement Guidelines are guidelines and do not establish mandatory rules; furthermore, in the RFP, DOH reserved the right to check references at its discretion;
2. DOH evaluated CMA's proposal and found it to be sufficiently responsive to the requirements of the RFP; and,
3. DOH determined that CMA was a responsible vendor in accordance with the SFL, Procurement Guidelines, and the terms of the RFP.

### **GCOM Reply to the Answer**

In its Reply,<sup>3</sup> GCOM expounds upon the grounds set forth in the Protest and further asserts that:

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includes a review of the procurement process, regardless of the filing of a protest. While this Correspondence is outside the scope of submissions permitted as of right under 2 NYCRR Part 24, this additional Correspondence was considered in our review of the procurement but is not referenced or formally addressed in this Determination.

<sup>3</sup> GCOM's allegation that its verified protest "carries more weight than the DOH response, which is unsworn" demonstrates a misunderstanding of OSC's Bid Protest Procedures (Reply, at p. 1). OSC Bid Protest Procedures do not require verification of submissions. Moreover, it is this Office's role to independently review the procurement record and protest submissions to determine the merits of any protest.

1. DOH has failed to comply with New York’s Freedom of Information Law (FOIL) by not producing documents in response to GCOM’s request;<sup>4</sup>
2. DOH failed to disclose all the evaluation criteria in the RFP in violation of SFL § 163(9)(b);
3. DOH misunderstood the meaning of “best value” by making an award under the RFP to CMA, the offeror with the lowest cost, instead of to GCOM, the offeror with the highest technical score; and,
4. DOH violated the New York State Administrative Procedure Act (SAPA), and its award under the procurement is based on such violation, due to its use of an unpromulgated “rule.”<sup>5</sup>

## DISCUSSION

### Reference Check

GCOM asserts “DOH . . . did not check the references [submitted by CMA] to verify the experience and qualifications of CMA” even though the RFP “required that proposing vendors identify references in their proposals, an action that triggered DOH’s obligation to check the references, under the [New York State] Procurement Guidelines” (Protest, at p. 6). GCOM contends that, as such, DOH “violat[ed] the procedure governing this procurement” (*Id.*). In addition, GCOM states pursuant to Section 8.6 of the RFP, references were to be used to verify a bidder’s compliance with Section 3.0 of the RFP, and DOH’s failure to check references consequently violated RFP Section 8.8 which required DOH to verify the experience and qualifications of the awardee (Reply, at p. 4).

DOH responds “[t]he Procurement Guidelines do not constitute New York State Finance Law, nor do they establish in any other way mandatory rules applicable to every procurement by a New York State agency or authority” (Answer, at p. 4).<sup>6</sup> DOH further responds, “[i]n the RFP, [DOH] reserved the right to check references at its discretion [and] determined that each of the proposals submitted in response to the RFP, including, of course, the proposal submitted by CMA, sufficiently addressed the RFP requirements [such] that further verification or checking of bidders’ references were unnecessary during the evaluation process” (*Id.*).

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<sup>4</sup> Consistent with the longstanding policy of this Office enunciated in prior bid protest determinations, issues related to the procuring agency’s action or inaction on a FOIL request do not impact our review of the contract award and are not considered as part of our review of bid protests. Furthermore, in making this Determination, we have reviewed the entire procurement record, which includes any documentation related to the procurement that would have been within the scope of GCOM’s FOIL requests. Accordingly, the Determination will not address this allegation.

<sup>5</sup> GCOM contends that if it is DOH’s “established practice only to check references to confirm a bidder meets the minimum qualifications to bid set forth in the RFP,” as DOH claims, such practice “was a ‘rule’ under SAPA, and, in this case, void in light of DOH’s failure to follow SAPA’s procedures . . . [and] DOH’s selection of CMA was the product of that SAPA violation” (Reply, at p. 3). We find no merit to the contention that such an internal agency policy would be subject to SAPA and thus will not address further (*see* SAPA § 102(2)(b) (defining what does and does not constitute a “rule” under SAPA)).

<sup>6</sup> The Answer is not paginated. For purposes of this Determination, this Office includes page numbers as they would have appeared, if included.

The RFP required the Administrative Proposal to contain various items, including references “for three prior [alike or similar] projects [including] firm names, addresses, contact names, telephone numbers, and email addresses” (RFP, Section 6.1, at pp. 32-33). The RFP provided that “[a]t the **discretion** of the Evaluation Committee, references **may** be checked at any point during the process to verify bidder qualifications to propose [set forth in Section 3.0]” (RFP, Section 8.6, at p. 42 (emphases added)). The RFP also provided “[t]he purpose of the Technical Proposal is to demonstrate the qualifications, experience, competence, and capacity of the Bidder and the Bidder’s assigned staff to perform the services contained in this RFP” (RFP, Section 6.2, at p. 34). Accordingly, offerors were required to include in their technical proposals documentation sufficient to show the offerors’ experience and qualifications met the requirements set forth in Section 3.0 of the RFP (RFP, Section 6.2(C), at p. 34).

As an initial matter, the RFP provided DOH with the discretion to check references, and DOH opted not to do so. While the RFP required DOH to “award to the Finalist(s) with the highest composite score(s) whose experience and qualifications have been verified,” the RFP does not require that verification be done through a reference check (RFP, Section 8.8, at p. 42). As discussed above, offerors were required to include information evidencing compliance with the experience and qualification requirements of the RFP in their technical proposals. DOH “determined that CMA’s proposal contained adequate documentation to satisfy its qualifications to bid without additional reference checks” (Answer, at p. 5). Thus, DOH complied with Section 8.8 of the RFP.

Turning to GCOM’s assertion that the New York State Procurement Guidelines (Guidelines) mandate DOH to check references, the Procurement Guidelines provide “[i]f the agency requires a bidder to submit references as part of the response, the agency must, at a minimum, verify the references provided as part of its evaluation process” (New York State Procurement Guidelines (2014), at p. 31). Although 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,” they do not have the same legal authority as statutes, rules and regulations (*see* New York State Procurement Guidelines (2014), at p. 1). DOH reserved the right to check references but was not required to do so by either the RFP (for the reasons set forth above) or the Guidelines. Accordingly, there is no merit to this basis for protest.

### **Evaluation of CMA’s Technical Proposal**

GCOM asserts “DOH apparently only considered whether CMA met the Minimum Qualification Requirements set forth in Section 3.1 of the RFP, and in no way considered whether the CMA was offering to provide all of the services required by the RFP” (Protest, at p. 5). GCOM alleges “[u]nder any analysis, CMA’s proposal was non-responsive to the RFP because, at the price proposed by CMA: (i) CMA cannot be offering to supply all the FTEs contemplated by the RFP’s minimum staffing requirement; and (ii) CMA could not be offering to provide all of the services actually required by the RFP’s scope of work at the price it is offering” (*Id.*, at p. 11). GCOM further contends “[t]he extremely low price offered by CMA . . . can only mean that CMA’s proposal, if carefully read, did not meet the RFP’s scope of work specifications and requirements” (*Id.*, at p. 7).

DOH responds that “the Evaluators determined that CMA’s proposal was sufficiently responsive to each of the requirements applicable to bidders set forth in Section 3.0 (Bidders’ Qualifications to Propose), Section 4.0 (Scope of Work), Section 6.0 (Proposal Content), and Section 7.0 (Proposal Submission)” (Answer, at p. 5). Further, DOH states it found CMA’s cost proposal to be responsive and reasonable and CMA’s technical proposal to have met the requirements and specifications of the RFP (*Id.*). DOH also noted that “[a] lower price is not an automatic indicator that the chosen vendor cannot perform the services sought to be procured . . . [i]t is an indicator that the winning vendor may be willing to accept less profit or may be more efficient or capable, any and all of which are in the best interests of the People of the State” (Answer, at p. 6).

#### 1. Responsiveness under SFL

State Finance Law provides that contracts for services shall be awarded on the basis of best value to a responsive and responsible offeror (SFL § 163(4)(d); § 163(10)). 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 specifically prescribed the minimum qualifications required to submit a proposal, including required types and levels of experience, and stated that the “[f]ailure to meet these Minimum Qualifications will result in a proposal being found non-responsive and eliminated from consideration” (RFP, Section 3.1, at p. 7).<sup>7</sup>

The procurement record reflects that DOH conducted a review of each offerors’ proposal to determine whether an offeror met the minimum qualifications of the RFP and concluded CMA was responsive as required by the applicable statutory provision.

#### 2. RFP’s Scope of Work

In addition to the minimum qualifications discussed above that an offeror must meet in order to be responsive pursuant to SFL § 163, the RFP sets forth the scope of work, including the maintenance and operation services, that the awarded offeror will be required to provide (*see* RFP, Section 4.0, at p. 8; *also see* RFP, Sections 4.1.3, 4.2.3, 4.3.3, 4.4.3, 4.5.1, 4.6, 4.7, 4.8, 4.9, 4.10, 4.11, 4.12, and 4.13 for specific requirements). Each offeror was required to “provide responses that address all of the requirements of this RFP as part of its Technical Proposal” which DOH would evaluate and score (RFP, Section 4.0, at p. 8).

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<sup>7</sup> These minimum qualifications are distinguishable from other RFP requirements applicable to technical proposals which “demonstrate the qualifications, experience, competence, and capacity of the [offeror] to perform the services contained in [the] RFP,” and are evaluated and scored pursuant to the RFP (RFP, Section 6.2, at p. 34; *see* RFP, Section 6.2(D), at pp. 35-39).

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). OSC "will generally not disturb a rationally reached determination of a duly constituted evaluation committee unless scoring is clearly and demonstratively unreasonable" (*see* OSC Bid Protest Determination SF-20210164, at p. 5 (*citing* OSC Bid Protest Determination SF-20160188, at p. 8)).

The procurement record shows, prior to the receipt of proposals, DOH developed an evaluation tool consistent with the evaluation criteria relating to the scope of work described in the RFP. Based on our review of the procurement record, DOH evaluated CMA's technical proposal according to the clearly articulated criteria set forth in the RFP and consistent with the evaluation instructions/instrument and determined CMA's technical proposal met the requirements of the RFP. Additionally, DOH concluded CMA's cost proposal was reasonable (Answer, at p. 5).<sup>8</sup>

For the reasons set forth above, we will not disturb DOH's determination.

### **Vendor Responsibility**

GCOM contends that CMA is "not a 'responsible contractor' for this project" due to its "technical and staffing inadequacies" (Protest, at p. 23). GCOM further contends that CMA is not responsible due to its "history of underperformance on WIC technology contracts in other states" (*Id.*, at p. 23). More specifically, GCOM contends that "CMA has no track record of successfully managing a system like New York's and thus cannot be considered a responsible contractor under New York State law and the New York State Procurement Guidelines" (*Id.*, at p. 25). GCOM asserts that CMA only has experience managing a WIC on the Web system like New York's in the State of New Jersey and "[w]hile CMA could only be proven to be a responsible contractor by stellar performance in New Jersey, it has demonstrated the opposite" (*Id.*, at pp. 24-25).

DOH responds it determined CMA was a responsible contractor after considering various factors, including the Vendor Responsibility Questionnaire, Prior Non-Responsibility Determinations and Bidder's Certified Statements completed by CMA as required by the RFP (Answer, at p. 6).

As stated above, SFL provides that "[s]ervice contracts shall be awarded on the basis of best value to a responsive and responsible offerer" (SFL § 163(4)(d); § 163(10)). "Prior to making an award of contract, each state agency shall make a determination of responsibility of the proposed contractor" (SFL § 163(9)(f)). For purposes of SFL § 163, "'[r]esponsible' or 'responsibility' means the financial ability, legal capacity, integrity, and past performance of a business entity" (SFL § 163(1)(c)).

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<sup>8</sup> This Office, as part of our review of the procurement record, confirmed with DOH that DOH was confident that CMA could fulfill the contract obligations at the price bid and nothing has come to our attention during our review that would cast doubt on DOH's affirmation.

GCOM makes multiple allegations relating to CMA's organizational capacity (specifically staffing inadequacies attributable to CMA's low bid) and underperformance maintaining another state's WIC system but fails to substantiate those allegations. Our review of the procurement record confirms DOH conducted a vendor responsibility review of CMA and reviewed CMA's financial ability, legal capacity, integrity, and past performance, as statutorily required. As documented in the procurement record, DOH determined CMA to be a responsible offeror that can successfully perform the services under the contract for the prices submitted in CMA's cost proposal. Moreover, as part of our review of the DOH / CMA contract, this Office examined and assessed the information provided in the procurement record and conducted an independent vendor responsibility review of CMA. Our review did not provide any basis to overturn DOH's responsibility determination.

### **Best Value Determination**

GCOM alleges that "DOH has displayed a misunderstanding of 'best value'" (Reply, at p. 3). To support this allegation, GCOM contends that despite DOH admitting that GCOM received the highest technical proposal score, "[DOH] claims that CMA offered a better value because its price was purportedly lower" (*Id.*). GCOM further asserts that DOH "violated [SFL] Section 163(9)(b)" because "[DOH] evaluators relied on 'evaluation criteria' that the 'Department did not disclose to any bidder'" (Reply, at p. 3 (*citing* Answer, at pp. 2-3).

DOH asserts that it "selected 'best value', as defined in [SFL §] 163(1)(j), as the basis for the award . . . [and] quantif[ied] in the RFP the percentage weighting of the Technical (70%) and Cost (30%)" (Answer, at p. 2). DOH further asserts that it "conducted a fair, impartial and competitive procurement . . . and awarded the contract pursuant to the RFP to the bidder that offered the best value to the State" (*Id.*, at p. 6). DOH notes that GCOM, although "awarded the maximum number of points for its Technical Proposal," ranked second as "CMA's significantly lower Cost Proposal created a scoring differential that was great enough to place CMA in first place" (*Id.*, at pp. 3, 6). DOH refutes GCOM's allegation that DOH violated SFL § 163(9)(b), contending the RFP "described in general terms the manner in which bidders' proposals would be evaluated and selected, as required by SFL section 163(9)(b), and the Procurement Guidelines, by quantifying in the RFP the percentage weighting of the Technical (70%) and Cost (30%) Proposals of each bidder" (*Id.*, at p. 2).

State agencies are required to award service contracts based on best value (SFL § 163(10)). 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" (SFL § 163(1)(j)). SFL requires the solicitation issued by the procuring State agency to "describe and disclose the general manner in which the evaluation and selection shall be conducted" (SFL § 163(9)(b)). Notably, it does not require the State agency to specifically disclose the allocation of points amongst all criteria in the solicitation. Additionally, a "[S]tate 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)). In sum, a best value award is a flexible concept based on a balancing



of the cost and the technical benefits that turns on the particular circumstances of a given procurement.

Here, DOH defined “best value” for purposes of this procurement as the proposal receiving the highest composite score, consisting of 70% from technical proposals and 30% from cost (RFP, Section, 8.1, at p. 41; RFP, Section 8.3, at 41; RFP, Section 8.4, at pp. 41-42; RFP, Section 8.5, at p. 42). This general description of the evaluation and selection process set forth in the RFP satisfied the statutory requirement of SFL § 163(9)(b). The RFP also sets forth the general evaluation criteria for the cost and technical proposals and the formula to be used to award points to cost proposals (RFP, Section 6.2, at pp. 34-39, RFP, Section 6.3, at pp. 39-40, RFP, Section 8.3, at p. 41, RFP, Section 8.4, at pp. 41-42). In addition, the procurement record reflects that prior to the receipt of proposals, DOH developed a technical evaluation instrument that defined and detailed the evaluation process for technical proposals, and DOH subsequently scored proposals consistently and in accordance with the technical evaluation instrument and RFP. Therefore, DOH’s evaluation and selection process met the requirements of the SFL, and the award made to CMA was based on a best value determination.

## **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 / CMA contract for maintenance and operation services for management information systems and mobile applications to support WIC.