



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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September 16, 2016

Via Electronic Mail [christopher.frey@yahoo.com] and USPS Regular Mail

Christopher M. Frey
334 Santaluz Lane
Austin, TX 78732

RE: Protest of Notice of Intent to Award
RFP# 15-X-23249: Third Party Liability Services

Dear Mr. Frey:

This correspondence is in response to your September 7, 2016 letter to the Hearing Unit of the Division of Purchase and Property (Division). In that letter, you protest the September 1, 2016 Notice of Intent to Award (NOI) a contract for Solicitation RFP# 15-X-23249: Third Party Liability Services issued by the Division's Procurement Bureau (Bureau) which indicates that it is the Division's intent to award a contract to Health Management Systems (HMS) for the subject solicitation. In your September 7, 2016 letter, you allege as follows: (1) the intended awardee, HMS has an apparent monopoly, documented performance and quality assurance issues and predatory pricing; (2) the State auditor has determined that the State has been overcharged by HMS for services performed under the current contract; (3) that HMS and Public Consulting Group, Inc., (PCG) conspired to limit competition and keep prices high; and, (4) had the State engaged in limited negotiations with HMS it could have achieved a significant cost savings. You request that the Division reject all proposals and cancel this solicitation.

On September 8, 2016 a copy of the protest was forwarded to HMS, who was provided with the opportunity to respond to the allegations contained in the protest. On September 12, 2016, the Division received HMS' response to the protest.

At the outset, HMS states that Frey, a former employee of the company, does not have standing to challenge the Division's intent to award a contract to HMS. HMS points out that under New Jersey law, only taxpayers, bidders or prospective bidders may challenge the award of a contract. See, Jen Elec., Inc. v. Cnty. of Essex, 197 N.J. 627, 644 (2009); Waszen v. City of Atlantic City, 1 N.J. 272, 283-84 (1949); N.J.A.C. 17:12-3.3. The New Jersey Courts "have traditionally taken a generous view of standing in most contexts...In the context of public bidding, however, this State has adopted a considerably less generous standing rule. A prospective bidder may challenge the specifications of a public contract, but only taxpayers and bidders may challenge the award of the contract to a successful bidder." In the Matter of Protest of Award of New Jersey State Contract A71188 for Light Duty Automotive Parts, 422 N.J. Super. 275, 289 (App. Div. 2011). Here, Frey is neither a bidder nor a prospective bidder; nor does it appear that Frey is a taxpayer in the State of New Jersey. As a former employee of HMS, who resides in Texas, it is unlikely that he has standing to protest the Division's intent to award a contract to HMS. However, in the interest of transparency for the New Jersey taxpayers, the Division will address Frey's protest.

In consideration of this protest, I have reviewed the record of this procurement, including the Request for Proposal (RFP), the proposals submitted, Frey's protest, HIMS' response and the relevant statutes, regulations, and case law. This review of the record has provided me with the information necessary to determine the facts of this matter and to render an informed final agency decision on the merits of the protest submitted. I set forth herein the Division's final agency decision.

By way of background, the subject RFP was publicly advertised on March 23, 2015, by the Bureau on behalf of the Medicaid Fraud Division (MFD), Office of the State Comptroller (OSC) and the Division of Medical Assistance and Health Services (DMAHS) of the Department of Human Services (DHS) to solicit proposals for Third-Party Liability (TPL) services and the maximization of cost avoidance and recoveries of Medicaid payments in accordance with the Code of Federal Regulations and the New Jersey Administrative Code. (RFP § 1.1 *Purpose and Intent*.) The MFD detects, prevents and investigates waste, fraud and abuse in the New Jersey Family Care and Charity Care Assistance programs. MFD also recovers improperly expended Medicaid funds, reviews the quality of care given to Medicaid recipients and excludes or terminates providers from the Medicaid program when necessary. Ibid. DMAHS is responsible for administering the State and federally funded Medicaid program for certain groups of low to moderate-income people. Ibid.

In developing the specifications for the subject procurement, the Bureau and the using agencies reviewed the October 17, 2013 audit report issued by the Office of the State Auditor (OSA), in which the OSA made recommendations to DMAHS to improve cost avoidance, compliance and duplicate enrollments. In light of the OSA audit report, the scope of work for the subject solicitation was structured to address the OSA's findings. Specifically, the subject RFP expressly includes a payment line for re-verifications and RFP language was added and/or modified to address OSA's comments regarding perceived deficiencies in contractor performance, corrective action plan, submission of reports, and quality assurance. Accordingly, the current RFP was developed to address any prior performance and/or quality issues while creating a scope of work that would address the using agencies' needs while seeking competition from multiple vendors.

On April 28, 2015, two proposals received (from HMS and PCG) by the submission deadline were opened by the Division's Proposal Review Unit. The proposals were reviewed by the Evaluation Committee (Committee), comprised of the subject matter experts from MFD, OSC, DMAHS, DHS and the Office of Management and Budget (OMB) and the Bureau, who were responsible for performing a technical review of the proposals using the criteria set forth in RFP § 6.7.1 *Technical Evaluation Criteria*. The technical scores were based upon an independent reading of each proposal by each Committee member and the results of deliberations conducted by the Committee. Price was not a consideration in the technical evaluation and each proposal was scored by the Committee without knowledge of the proposed pricing. Based upon the Committee's review, both proposals were found to be responsive to the requirements of the solicitation. Once technical scoring was completed pricing was revealed and considered.

On July 17, 2015, after the evaluation of the submitted proposals was complete, the Division issued the first Notice of Intent to Award letter advising that it was the State's intent to award a contract to PCG for TPL services.

Prior to and during the procurement process, HMS and PCG were engaged in litigation in Texas and New York regarding various aspects of the TPL business. The State of New Jersey was not a party to either action. As a result of that litigation, HMS and PCG entered into a court approved settlement agreement. On April 28, 2016, PCG wrote the Division stating that it wished to withdraw its proposal for the subject solicitation pursuant to N.J.A.C. 17:12-2.11 and RFP § 1.4.7. Based upon PCG's request and the court approved settlement agreement, on May 11, 2016 the Bureau wrote to HMS and PCG advising that the Division's July 17, 2015 NOI was being rescinded.

Thereafter, the Bureau determined that it was necessary to enter into negotiations with HMS regarding its proposal pricing. With respect to advertised procurements, the New Jersey Legislature has granted the Division the authority to negotiate with bidders the final terms and conditions of the procurement, including price. N.J.S.A. 52:34-12(a)(f). In pertinent part, the statute states:

(f) for any procurement, the State Treasurer or the director may negotiate with bidders the final terms and conditions of any procurement, including price; such ability to so negotiate must be expressly set forth in the applicable invitation to bid and such bids shall not be publicly accessible until after negotiations have been completed and the notice of intent to award the contract has been issued;

Here, RFP § 6.8 *Negotiation and Best and Final Offer (BAFO)* states in pertinent part:

The Division may also enter into negotiations with one bidder or multiple bidders. The primary purpose of negotiations is to maximize the State's ability to obtain the best value based on the mandatory requirements, evaluation criteria, and cost. Multiple rounds of negotiations may be conducted with one bidder or multiple bidders. Negotiations will be structured by the Division to safeguard information and ensure that all bidders are treated fairly.

Accordingly, as permitted by the RFP and the Division's governing laws, on June 21, 2016 and July 18, 2016 the Division and HMS conducted two rounds of negotiations. The first round of negotiations was to discuss lower pricing for Categories 1-3 of TPL services.¹ The second round of negotiations was to discuss lower pricing for the minor categories included under lines 1A for Identification and 2A Re-verification of Prescription Coverage, Minor Medical Coverage, and Medicare Supplemental. As a result of those negotiations, HMS reduced its original proposal pricing of \$109 million to \$56.8 million. The projected annual cost of this contract is \$14.8 million which represents a cost savings over the historical annual expenditures on the existing contract. We are aware of no indication or evidence that HMS and PCG have colluded to limit competition and keep the prices high.

With respect to prior performance issues, the Bureau is aware of a 2014 complaint filed against HMS by DMAHS with the Division's Contract Compliance and Audit Unit (CCAU). That complaint was settled between HMS and DMAHS, with CCAU issuing a finding against HMS noting that HMS should only receive its contingency fee based upon the amounts it collected and not on the amounts DMAHS collected.² This one resolved complaint, without further recurrence, does not preclude the awarding of a contract to this vendor.

In response to the advertised solicitation, the Division received two responsive proposals. I cannot rely upon the unsupported statements in this protest that HMS has a monopoly, or the existence collusion between HMS and PCG with respect to price, without more, to overturn an intended award. Rather, the record reflects that as result of a litigation settlement, PCG chose to withdraw its proposal submitted for this procurement leaving the State with the remaining proposal submitted by HMS which had already been deemed responsive to the specifications after a thorough review by the Committee. The

¹ Category 1: TPL Services: RFP §§ 3.1 and 3.2; Category 2: Specific TPL Services-Tort: RFP §§ 3.1, 3.3, and 3.4; Category 3: Specific TPL Services-Casualty Insurance: RFP §§ 3.1, 3.3, and 3.5.

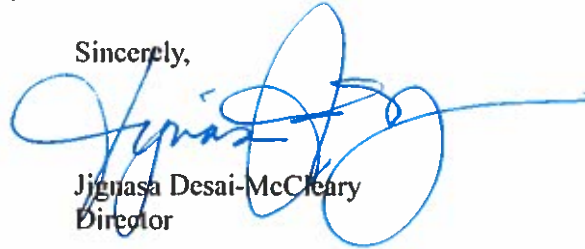
² Following CCAU's decision, as corrective action HMS issued a credit to DMAHS. No other complaints have been filed with CCAU.

record also reflects that the Bureau diligently conducted a pricing analysis and significantly negotiated down HMS' proposal price.³

Based upon HMS' proposal, which the subject matter experts from MFD, OSC, DMAHS, DHS, OMB and the Bureau had deemed to be responsive to the specifications, and as a result of the subsequent negotiations, on September 1, 2016, the Bureau issued an Amended NOI stating the Division's intent to award a contract to HMS for the subject solicitation.

In light of the findings set forth above, I must sustain the Bureau's NOI. This is my final agency decision with respect to the protest you have submitted.

Sincerely,



Jignasa Desai-McCleary
Director

JDM: RUD

c: P. Michaels
L. Spildener
S. Fletcher

³ This analysis resulted in the Bureau's negotiations with HMS leading to a reduction of the original proposal pricing by almost 50% from \$109 million to \$56.8 million resulting in a projected annual cost savings over the current contract.