

**BEFORE THE DEPARTMENT OF GENERAL SERVICES
OF THE STATE OF CALIFORNIA**

In the Matter of the Protest of the Proposed
Award of RFP No. 14-001

PEER REVIEW SOLUTIONS,

Protestant,

vs.

DEPARTMENT OF INDUSTRIAL RELATIONS,

Awarding Agency

CASE NO. 14-063

STATEMENT OF DECISION

TO: Karl Olson, Esq.
Ram, Olson, Cereghino & Kopczynski LLP
Counsel for Peer Review Solutions, Protestant

Thomas McMorrow, Esq. and S. Nancy Whang, Esq.
Manatt, Phelps & Phillips, LLP
Counsel for Maximus Federal Services, Inc., Proposed Awardee

Jessica L. Pirrone, Staff Counsel
Department of Industrial Relations, Awarding Agency

This protest has been heard and decided pursuant to Public Contract Code section 10345 et seq. and California Code of Regulations, title 2, section 1195 et seq. through written submissions by Laurie Giberson who has delegated authority from Fred Klass, Director of the Department of General Services, to hear and decide this case. The written submissions from the Awarding Agency and the Proposed Awardee were due to be received by the Department of General Services at 707 Third Street,

Suite 7-330, West Sacramento, California 95605 by July 17, 2014. The Awarding Agency was also directed to provide copies of the Request for Proposal, evaluation documents, and each proposal at issue, by July 3, 2014. The Protestant was afforded an opportunity to submit a rebuttal by July 31, 2014.

RECORD

The following submittals were received from the parties:

From the Protestant, Peer Review Solutions ("Peer Review"): June 3, 2014 Notice of Protest with exhibits; June 9, 2014 email advising DGS that Peer Review would rely on its original submission (July 3, 2014 Notice of Protest) as its Detailed Statement.

From the Awarding Agency, Department of Industrial Relations ("DIR"): Response to protest dated July 16, 2014, with exhibits: Request for Proposal 14-001; Maximus Federal Services, Inc.'s redacted proposal¹; Peer Review's proposal; DIR's evaluation and scoring sheets, and scorers' notes; Notification of Intent to Award.

From the Proposed Awardee, Maximum Federal Services, Inc. ("Maximus"): Response to protest dated July 17, 2014, with exhibits.

LEGAL FRAMEWORK

The methods for soliciting formal bids for services contracts are set forth in Public Contract Code ("PCC") section 10335 et seq. The method used by DIR for the RFP is commonly referred to as an RFP Secondary, which involves scoring proposals based on various listed criteria, including contract price, with the award going to the highest-

¹ Portions of Maximus' proposal are redacted. No party has raised issues pertaining to specifics of Maximus' proposal or the redactions relative to this protest.

scored proposer. (See PCC section 10344(c); State Contracting Manual, volume I, chapter 5.)

California law limits the grounds that may be asserted in a bid protest. To succeed on a protest under an RFP Secondary, a protestant must establish at least one of the following:

- The state agency failed to follow the procedures specified in PCC section 10344(c) (requiring that state agencies include in an RFP a description of the work to be performed, the format for proposals and the elements they shall contain, the due date for proposals and a timetable for evaluating them, and a description of the standards and methods that will be used in evaluating and scoring proposals, giving substantial weight to contract price);
- The state agency failed to apply correctly the standards for reviewing the format requirements or evaluating the proposals as specified in the request for proposal;
- The state agency used the evaluation and selection procedures in PCC section 10344(c) but failed to follow the methods for evaluating and scoring the proposals specified in the RFP; or
- The state agency used the evaluation and selection procedure in PCC section 10344(c) but is proposing to award the contract to a bidder other than the bidder given the highest score by the state agency evaluation committee.

(See PCC §§ 10345(b)(2)(A),(B),(D), and (E).)

The protestant bears the burden of proof and must establish each fact essential to the claim of relief it is seeking. (Evid. Code § 500.) The standard of proof to be applied is a preponderance of the evidence. (Evid. Code § 115.)

FACTUAL BACKGROUND

On or about April 9, 2014, DIR issued a solicitation for proposals for Independent Medical Review services, RFP 14-001 ("the RFP.") The RFP was an RFP Secondary approach, with award going to the highest scored proposal. According to the RFP, the evaluation of proposals would proceed in two phases. Phase I would be the evaluation of minimum qualifications, and "A minimum of 85 points must be achieved in this phase

to be considered responsive.” (RFP page 21.) Phase I included four sections: 1) Response to requirements, part a) Understanding of Needs/Work Plan worth 20 points and part b) Methodology worth 30 points; 2) Experience and Expertise, Avoidance of Conflicts of Interest worth 25 points; 3) Quality of Proposal Response worth 5 points; and 4) Oral Presentation worth 20 points. Phase II would be the cost evaluation worth 100 points. (RFP pages 21-26.)

The RFP includes details about the scope of services (RFP page 3-6.) The RFP states “The Contractor shall submit a detailed description of methodologies to accomplish the scope of the services as outlined above. Proposals will be evaluated on how well they would accomplish the scope of the service.” (RFP page 6.) The RFP also identifies contract deliverables and minimum qualifications (RFP pages 6-16) as well as additional information to be included in proposals (RFP pages 17-19). The RFP lists Key Action Dates for the solicitation, including a proposal due date of May 12, 2014, and that oral presentations would occur between May 19-22, 2014. (RFP pages 16-17.) The Key Action Dates also reference a deadline for submitting written questions (April 25, 2014) and the date on which DIR would provide answers (May 1, 2014). (RFP page 16.) The record indicates DIR posted written question-and-answers on or around May 1, 2014, including question-and-answers issued as Addendum 1 to the RFP.

DIR received six proposals to the RFP. Two proposals, ExamWorks and Maximus, received 85 or more points in Phase I and advanced to the Phase II cost evaluation. The other four proposals, including Peer Review's, did not receive the requisite minimum 85 points in Phase I and therefore did not advance to the Phase II cost evaluation. Peer Review's Phase I score was 60, the second-lowest score of the six proposals. (See DIR Evaluation Summary Worksheet.) Following Phase II, DIR issued an intent to award the agreement to Maximus as the overall highest scored proposal.

ANALYSIS & FINDINGS

1. Peer Review alleges that DIR repeatedly failed to produce proposals and evaluation documents in violation of Public Contract Code section 10344(c)(2).

Peer Review alleges DIR failed to promptly make available public documents with respect to the RFP, "thereby significantly prejudicing Peer Review with respect to this protest." (Peer Review protest, page 1.) Peer Review correctly cites Public Contract Code section 10344(c)(2) which states "[a]ll proposals and all evaluation and scoring sheets shall be available for public inspection at the conclusion of the committee scoring process."² Peer Review does provide evidence of correspondence with DIR regarding obtaining documents, and it appears there may have been some confusion regarding specifically which documents were requested, and possibly some delay by DIR in providing all requested documents to Peer Review. (Peer Review protest, Exhibits A, B, C.) Nevertheless, Peer Review ultimately acknowledges receiving "belatedly produced documents" and reserved the right to augment its protest submission as necessary. Peer Review was afforded the opportunity to provide a detailed statement and a rebuttal in support of its initial filing, which Peer Review opted not to do. There is no evidence any delay in receiving documents resulted in any prejudice to Peer Review in presenting its protest.

2. Peer Review alleges DIR breached the oral presentation requirements of the RFP and the requirements of Public Contract Code section 10344(c)(2).

² State agencies are also governed by the California Public Records Act (Govt. Code section 6250 et seq.).

According to Peer Review, DIR did not provide any scheduling information with respect to oral presentations and therefore Peer Review's counsel contacted DIR to inquire why Peer Review had not been granted an oral presentation. (Peer Review protest, page 3.) According to Peer Review, DIR's chief counsel replied at 7:20 pm on May 21, 2014, the night before the final day for oral presentations, and stated only that Peer Review would be allowed to make a presentation the following morning at 9 am. (Peer Review Protest, Exhibit D.) Peer Review negotiated a five hour extension of the presentation, therefore making its presentation with less than 19 hours' notice, but receiving no explanation "for its exclusion" from the oral presentation process. (Peer Review protest, page 3.) Peer Review concludes that "The DIR's conduct with respect to mandatory oral presentations significantly prejudiced Peer Review in competing in the RFP process and raises serious questions about whether DIR ever intended to give, or gave, Peer Review's proposal serious consideration." (Peer Review protest, page 3.)

DIR responds that the RFP provided all bidders advance notice of the oral presentation dates, listed in the Key Action dates as May 19-22, and that the RFP did not require that DIR give bidders supplemental notice as Peer Review implies. (DIR response, page 10.) Oddly, DIR does not explain how bidders were supposed to know when and where to appear for their oral presentation, and DIR's apparent lack of contact with Peer Review regarding oral presentations prior to May 21, 2014 pm is cause for concern. Nevertheless, DIR notes, and Peer Review acknowledges, that Peer Review did participate in the oral presentation stage, and DIR asserts that it adhered to the evaluation and scoring criteria relative to that stage. DIR also notes that even if Peer Review had received the maximum points available for their oral

presentation (20 instead of 14.33), their Phase I score still would not have reached the 85 point minimum necessary to proceed to Phase II. (Peer Review's score would only have been 65.33 instead of 60 in Phase I.) (See DIR response, page 10.)

In sum, while DIR's apparent lack of contact with Peer Review regarding details of scheduling for the oral presentations raises concern--and DIR should take note with regard to how it proceeds on future solicitations--Peer Review has not demonstrated it was prejudiced in the oral presentation process nor has Peer Review met its burden of proof establishing that DIR failed to adhere to the solicitation procedures required by law or as described in the RFP.

3. Peer Review alleges DIR changed the pricing for the contracted service after bids were tendered, thereby giving the incumbent an improper advantage.

Peer Review alleges that on May 19, 2014, after RFP bids were due on May 14, 2014, DIR issued a press release announcing that it was reducing its fees for independent medical review and independent bill reviews by 25%. Peer Review alleges that "[g]iven the timing of the announcement, the only reasonable inference is that the incumbent [Maximus] was aware of this impending fee change when bids were submitted, and therefore had an unfair opportunity to incorporate this impending change into its costing offer." (Peer Review protest, page 3.)

Peer Review does not specify how this allegation falls within the statutory grounds for protest, and in any case, Peer Review offers no evidence to support its assertion that Maximus had advance notice or any unfair advantage. All bidders including Peer Review had an opportunity to bid whatever cost they could afford which

they thought might win them the award; bid costs should not be based simply on what the State may have paid contractors previously. As DIR notes: "Peer Review's assertion that it was somehow prejudiced because it miscalculated what would be the lowest bid and therefore did not bid low enough shows that Peer Review does not understand the purpose of competitive procurements. ... [A] bidder's goal should be to offer the best work at the lowest price practicable." (DIR response, pages 11-12.) Moreover, Peer Review's proposal did not reach the Phase II cost evaluation, so its costs were not evaluated, and therefore issues regarding cost are irrelevant to its position in this protest.

Peer Review also asserts that during the bid evaluation process, Maximus announced it would retroactively reimburse DIR for work already performed and paid under the existing contract, which, Peer Review alleges, "raises serious questions about the fairness of the evaluation process." (Peer Review protest, page 4.) Maximus disputes this assertion. (Maximus response, page 14.) Peer Review offers no evidence to support this assertion, nor any evidence that any alleged reimbursement from Maximus under a prior contract had any effect on DIR's evaluation of proposals under the current RFP.

4. Peer Review alleges Maximus has not successfully performed on the current contract and concludes DIR's evaluation of proposals must be fatally flawed.

Peer Review alleges that "the incumbent and now successful bidder [Maximus] has simply not successfully performed the work contracted, and the DIR is well aware of that fact. During the incumbent's tenure, there have been delays of many months in

processing reviews and appeals, and there is currently a troubling backlog of incomplete work." (Peer Review protest, page 4.) Peer Review suggests this may be due to Maximus not having computerized their systems, whereas Peer Review asserts its systems are fully automated. Peer Review states "it simply defies belief that Maximus' new bid, correctly evaluated would prevail such that none of the five other bidders received any portion of the work to be performed." (Peer Review protest, page 4.) Maximus disputes Peer Review's allegations regarding its performance. (Maximus response, pages 14-15.)

Peer Review offers no evidence to support its assertions regarding Maximus's past performance, nor how that is relevant to the current RFP or permissible grounds for protest. Peer Review provides no evidence that Maximus failed to meet the requirements of the RFP, nor that DIR failed to adhere to the law or RFP requirements in evaluating the RFP.

DECISION

Based on the foregoing, Peer Review's protest is denied.

8/29/2014

Date



Laurie Giberson
Hearing Officer

DECLARATION OF SERVICE

I, Beverly W. Brown, declare as follows:

I am employed in the County of Yolo, State of California; I am over the age of eighteen years and am not a party to this action; my business address is Department of General Services, Office of Legal Services, 707 Third Street, Suite 7-330, West Sacramento, in said County and State. On September 3, 2014 I served the within document:

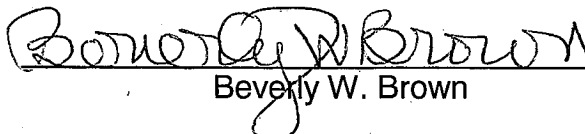
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by placing a true copy thereof in an envelope addressed to each of the persons named below at the address shown in the following manner:

SEE ATTACHED SERVICE LIST

- X** **BY MAIL:** On September 3, 2014 I placed a true and complete copy of the above- referenced document(s) in a sealed envelope addressed to each person specifying service by U.S. Mail at the address(es) shown. I am familiar with the office's practice of collection and the processing correspondence for my mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- **BY FACSIMILE:** On _____, 2014 from facsimile machine telephone number (916) 376-5088, I served a full and complete copy of the above-referenced document(s) to the person(s) and facsimile telephone number(s) indicated.
- **BY ELECTRONIC MAIL:** On _____, I sent true and complete copy PDF versions of the above-referenced document(s) to the e-mail address(es) of each party indicated.
- **BY OVERNIGHT DELIVERY:** On _____, I placed a true and complete copy of the above-referenced document(s) in a sealed envelope and addressed to each person and specifying service by overnight delivery at the address(es) shown. I am familiar with the Department of General Services' practice in its above-described West Sacramento office for the collection and processing of correspondence for distribution by Golden State Overnight Express, Federal Express, UPS, On Trac, and/or U.S. Postal Service Overnight Mail; pursuant to that practice, envelopes placed for collection at designated locations during designated hours are deposited at the respective office that same day in the ordinary course of business.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that the foregoing document(s) were printed on recycled paper, and that this Declaration of Service was executed by me on September 3, 2014, at West Sacramento, California.


Beverly W. Brown

SERVICE LIST

Protest No.: 14-063

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