

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Bid Protest filed by  
ACS State Healthcare, LLC with respect to the  
procurement conducted by the New York State  
Elderly Pharmaceutical Insurance Coverage Program  
Contract No. C019442

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Determination  
of Bid Protest  
SF- 20040068

March 2, 2004

This Office has completed its review of the above-referenced procurement conducted by the New York State Elderly Pharmaceutical Insurance Coverage Program ("EPIC Program")<sup>1</sup> and the bid protest filed by ACS State Healthcare, LLC ("ACS") with respect thereto. As outlined in further detail below, we have determined that the grounds advanced by the protestor are without sufficient merit to overturn the above procurement. As a result, we hereby deny the protest and are today approving the contract award by the EPIC Program to First Health Services Corporation ("First Health").

**Background**

On December 11, 2002, the EPIC Program issued a Request For Proposals ("RFP") to solicit proposals for the cost-effective operation of the EPIC Program (RFP Part I, I-2). The selected vendor was to contract with the EPIC Program to provide all necessary services set forth in the RFP, with emphasis on the determination of program eligibility, processing and reimbursement of pharmacy claims for dispensed prescription drugs, and therapeutic drug monitoring (Id). The requirements of the RFP were divided into five major components: (i) Base EPIC Operation; (ii) System Development Group; (iii) Outreach Group; (iv) Bidder's Suggested Alternatives ("BSAs"); and (v) American Indian Health Program Pharmacy Claims Processing (RFP Part I, I-2-3).

The RFP established January 10, 2003 as the deadline for entities to indicate their intention to bid on the procurement. Fourteen firms submitted a Letter of Intent to Bid, six of which withdrew their intent prior to the bid date. A Bidders Conference was held on January 7, 2003. Official answers to questions submitted by potential bidders

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<sup>1</sup> The EPIC Program was established pursuant to Chapter 913 of the Laws of 1986 to provide pharmaceutical support for elderly persons with low and moderate income living in New York State, who are not receiving Medicaid benefits (See Executive Law §§ 547 et al). The benefits under the EPIC Program include reduced costs for prescription drugs, insulin and insulin needles/syringes.

were issued on January 23, 2003, January 29, 2003, February 4, 2003 and February 6 2003 to all firms that submitted a Letter of Intent to Bid. Only two entities submitted proposals by the bid filing date of February 24, 2003 - ACS (the protestor) and First Health (the awardee under the procurement).

On April 9, 2003, the EPIC Program notified First Health that it was selected for contract award and also notified ACS that it was an unsuccessful bidder. On May 12, 2003, in response to a debriefing request by ACS, ACS was provided a high-level debriefing by teleconference. By letter dated June 6, 2003, ACS requested a full debriefing conference and that the EPIC Program reconsider its award to First Health on the ground that the manner in which the bids were scored was an arbitrary and capricious departure from the terms of the RFP, and the award to First Health would cost the taxpayers over \$6 million without any concomitant benefits. By letter dated July 9, 2003, the EPIC Program responded to the issues raised in the June 6, 2003 correspondence from ACS and advised ACS that a full debriefing, limited to the discussion of ACS' proposal, would be provided. The debriefing conference concerning ACS' proposal was conducted on July 29, 2003. At, or subsequent to, the debriefing conference, the EPIC Program requested that ACS provide a written statement outlining any perceived deficiencies in the RFP. By letter dated August 7, 2003, ACS identified three primary areas of the RFP which it claimed were vague or misleading: "(1) whether the RFP directed participants to bid the takeover of the existing Epic system and operations (with some State-specified enhancements) or whether it invited bidders to propose upgraded services in the core bid in order to receive more favorable consideration; (2) whether the RFP directed bidders to confine suggested enhancements to the Bidders' Suggested Alternatives section of the RFP - which was worth only a relatively small number of points in the scoring system - or whether enhancements were permitted to be placed in the more heavily weighted portion of the core bid; and (3) whether the Bidders Suggested Alternatives section of the RFP was restricted to enhancements that resulted in cost savings to the State." By letter dated August 5, 2003, the EPIC Program provided ACS with the Selection Committee Report to the EPIC Panel, the Evaluation Report to the Selection Committee, and the Technical Evaluation Worksheet.<sup>2</sup> By letter dated August 21, 2003, ACS responded to the evaluation materials provided by the EPIC Program.

By letter dated August 29, 2003, the EPIC Program advised ACS that, in accordance with guidelines and policy, the concerns raised by ACS had been elevated to the EPIC Panel for a complete review and consideration. On September 17, 2003, the EPIC Panel unanimously adopted a resolution rejecting the concerns raised by ACS and directing that EPIC Co-chairs proceed with the execution of the contract with First Health. By letter dated September 19, 2003, the EPIC Program advised ACS of the EPIC Panel's resolution.

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<sup>2</sup> All comments relating to the competing proposal submitted by First Health were redacted from these materials.

By letter dated November 10, 2003, ACS filed a protest with this Office ("ACS Protest"). In accordance with the requirements of Section 112 of the State Finance Law ("SFL"), on November 18, 2003, the EPIC Program submitted the contract awarded to First Health to this Office for approval.

### **Procedures and Comptroller's Authority**

The Comptroller is required by section 112 of the SFL to approve State agency procurement contracts which exceed \$15,000 in amount before such contracts become effective. The Comptroller reviewed the protest filed by ACS as part of his review of the contract award under section 112.

In addition to the documents ACS filed with the EPIC Program and the EPIC Program's responses thereto, this Office considered the following submissions: (i) correspondence from ACS to this Office dated November 10, 2003 and January 30, 2004; and (ii) correspondence from First Health to this Office dated January 15, 2004. We note that the EPIC Program was provided the opportunity to submit any additional materials to this Office concerning the protest, however, by letter dated December 23, 2003, the EPIC Program asserted the position that the grounds raised by the ACS Protest were previously raised by ACS prior to the contract award to First Health and adequately addressed by the agency. As a result, the EPIC Program chose to stand by the documentation contained in the procurement record.

### **Protesting Party**

The protestor, ACS, was one of the two bidders to submit a proposal in response to the RFP issued by the EPIC Program.

### **ANALYSIS OF BID PROTEST** **Protestor's position**

Similar to the concerns raised in its protest to the EPIC Program, in the ACS Protest filed with this Office, ACS protests the award to First Health on the following grounds:

- The RFP directed bidders to bid the takeover of EPIC's current operations and systems. As a result, it was arbitrary and capricious to penalize ACS for failing to propose the replacement of the EPIC system in its core bid, and will cost the State over \$6 million without any concomitant benefits;
- The RFP was itself unclear, misleading and ambiguous. Specifically, it directed bidders to propose enhancements to the EPIC system only in the bidders suggested alternatives section, and this caused ACS to bid its proposal in a manner that adversely and unfairly affected its scoring; and
- The EPIC Program fundamentally misunderstood several sections of ACS' bid, failed to seek clarification from ACS as it was required to do

under the RFP (and as it was directed to do by the Selection Committee evaluating ACS' bid), and instead chose to assign the lowest possible point score to ACS' proposals, resulting in an irrationally lower score to ACS.

### **Agency's response to protest**

In responding to the concerns raised by ACS prior to contract award, the EPIC Program asserted the position that

- The RFP was not ambiguous, the requirements were clear that the procurement was for a takeover of EPIC "operations" and not system;
- Even if ACS had proposed its own claim processing and participant systems in the operations section of its proposal (rather than the BSA section), the final outcome would not have changed; and
- The ACS proposal was evaluated pursuant to evaluation and selection methodology set forth in RFP and the detailed evaluation and selection procedures and criteria that were finalized prior to the receipt of proposals.

## **DISCUSSION**

### **I. Scope of the Procurement/Scoring of ACS' Proposal**

ACS argues that since the RFP directed bidders to bid the "takeover" of EPIC's current operations and systems, it was arbitrary and capricious for the EPIC Program to penalize ACS for failing to propose the replacement of the EPIC system in its core bid.

#### **A. ACS' interpretation of the language of the RFP**

In support of its position that the RFP directed bidders to bid only the "takeover" of the current EPIC operations and systems, ACS cites, among other things, the fact that the EPIC Program repeatedly used the term "takeover" throughout the RFP. In addition, ACS cites certain RFP language that, it asserts, makes it clear that bidders were being asked to take over the existing EPIC system rather than propose new systems (ACS Protest, pgs. 13-17). The specific language of the RFP cited by ACS reads as follows:

- "Base EPIC Operations - Proposals are being solicited for the takeover, operation, and turnover of the current EPIC operations" (RFP Part I B, I-2).
- "The successor contractor may elect to use software other than existing EPIC software for one or more functions, but prior written approval from the State is required" (RFP Part II B(4)(f), II-12).
- "The successor contractor must complete the process of review and acceptance of each computer program and operating procedure in the EPIC system

library(s), including software under development. It is expected that parallel testing of all computer production processing be performed during takeover to sufficiently ensure the entire system has been transitioned satisfactorily to the successor contractor's computer system" (RFP Part II B(5)(b), II-15).

The SFL provides that:

To promote purchasing from responsive and responsible offerers the procurement process is to be based on clearly articulated procedures which require a clear statement of product specifications, requirements or work to be formed (SFL §163(2)(b)).

Therefore, we must review the RFP issued by the EPIC Program against this standard.

First, we note our view that as used in the RFP the term "takeover" is meant in its temporal sense. The RFP is written in chronological terms of "takeover", "operations" and "turnover" at the end of the contract (See the language of the first provision cited by ACS above, RFP Part I B, I-2 and the Statement of Work, RFP Part II). While one could literally interpret the term "takeover" to limit the procurement to the replication of the current EPIC operation and system, nothing in the language of the RFP required such a narrow interpretation as to the scope of the procurement. Further, and more importantly, in our view, certain language of the RFP (including the second provision of the RFP cited above by ACS - authorizing the use of the contractor's own software) necessarily implied that the EPIC Program was soliciting proposals for more than a takeover of the existing EPIC operations and system. As a result, we are satisfied that the best reading of the RFP was that bidders could propose enhancements to the existing system in their core proposal.

Specifically, the cover letter accompanying the RFP advised potential bidders that the EPIC Program was "soliciting proposals from firms to provide broad-based support for operation of the program . . . Bidders have the option of using EPIC's current processing system software, using their own software, or using a combination thereof" (RFP Cover letter dated December 11, 2002). The RFP provided that

- "Describe in detail a proposed procedure for accepting **applicable** EPIC hardware and software from the current contractor . . . Describe in detail any processing to be established using software other than existing EPIC software . . ." (RFP Part IV D(3)(c), IV-16).
- "The successor contractor will be responsible for assuming the processing and development, or acquisition where appropriate of the computer files and systems software necessary for the contractor's functions" (RFP Part II, II-12).

Additionally, the written Questions and Answers dated January 23, 2003 provided

Question #22 states "If the winning vendor takes over the current claims system, will they still be expected to add claims sorting criteria during the 3-month turnover period?" The EPIC Program's response to this question was "Yes".

- Question #81 concerned the turnover of the claims processing system software to the State or a successor contractor. The EPIC Program's response to the question was "If the claims processing system software proposed is the contractor's proprietary software, as is the case with the current claims processing system, that software does not become public domain property. However, that proprietary software/source code must be made available at the end of the contract to the State or the successor contractor for use **only** in operating the EPIC program . . . Such proprietary software will not be turned over to a successor contractor, even under these limited conditions, if other software (e.g. successor contractor proprietary software) is being used instead."

In our view, the above-cited language of the RFP cover letter, the RFP, and the Questions and Answers #22 & #81, as well as the 25 additional requirements and 4 expanded requirements set forth in the Operations section of the RFP (discussed below, in Section II of this Determination) clearly indicate that the scope of the procurement conducted by the EPIC Program was not limited to a replication or "takeover" of the existing EPIC operation and system as argued by ACS. Rather, the RFP provided reasonable notice to bidders that they were free to replace or modify the current EPIC operation and system.

Additionally, we note that ACS' narrow interpretation of the scope of the procurement is contrary to reason in light of the weighting of the technical portion of a bidder's proposal. The technical portion of the proposal was weighted at 65% of the final score used to determine best value while cost was only weighted at 35% (RFP Part III C, III-4). Clearly, if the RFP so defined the requirements as to merely require the takeover and simple replication of the existing EPIC operation and system, the "best value" determination would either have been made on the basis of cost alone, as permitted by the Procurement Guidelines issued by the New York State Procurement Council;<sup>3</sup> or, at a minimum, cost would have more heavily weighted than 35% of the final score

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<sup>3</sup> Specifically, the Guidelines issued by the New York State Procurement Council provide: "it is expected that there will be occasions when it makes sense to boil down a best value award for services to be a lowest price determination. Specifically, best value can be equated to lowest price in those cases when: price is the only criterion for making the decision among responsive and responsible competing offers; "quality" and "efficiency" requirements have been fully defined in the specifications; and price equals cost. In these cases, while the award will still technically be made on the basis of best value, best value will be interpreted to mean the offer having the lowest price that meets the specifications among responsible offerers" (Procurement Guidelines, Section IV Procurement Techniques, IV-9).

For the foregoing reasons, in our view, the RFP provided a clear statement of product specifications, requirements or work to be formed and, therefore, complied with the requirements of the SFL.

**B. Scoring of ACS proposal/Award to First Health**

The requirements of competitive procurements are set forth in section 163 of the SFL, which provides that contracts for services shall be awarded on the basis of "best value" from a responsive and responsible offerer (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)). The objective of State procurement is to facilitate each State agency's mission while protecting the interests of the State and its taxpayers and promoting fairness in the contracting with the business community (SFL §163(2)).

Part III of the RFP sets forth the "Evaluation and Criteria for Selection". The stated objective of the evaluation approach was to "select the best value solution proposed by a responsive and responsible bidder which optimizes quality, cost and efficiency" (RFP Part III A, III-2). The evaluation process described in the RFP provided for a preliminary review of the bidder's financial strength and relevant experience to determine whether the bidder was "qualified" for further consideration and a review of the bidder's proposals for completeness (RFP Part III B, III-2). Qualified proposals then underwent separate cost and technical evaluations. The Technical Evaluation Committee ("TEC") evaluated and scored the technical proposals, on a weighted point system, based on the bidder's ability to deliver the services described in the RFP. The Cost Evaluation Committee ("CEC") evaluated each bidder's cost proposal. The gross technical scores calculated by the TEC and the gross cost scores calculated by the CEC were normalized to maintain a ratio of 65% technical and 35% cost. The Selection Committee reviewed and combined each bidder's normalized technical and cost scores to calculate each bidder's Total Combined Score (RFP Part III B, III-4). The Selection Committee then selected the bidder with the highest Total Combined Score whose technical proposal was rated satisfactory or better. The Selection Committee recommend the selected bidder to the EPIC Panel, who made the final selection and authorized the initiation of contract negotiations (RFP Part III C, III-4).

With regard to the scoring of the proposals, prior to the receipt of proposals, the EPIC Program developed its final evaluation procedures and selection criteria. Based on this evaluation instrument, the technical proposals were evaluated on eight major

areas with a total of 1000 potential points allotted.<sup>4</sup> The technical evaluation instructions provided that the various components of the technical proposals should be rated according to the following standard rating system:

- (i) Excellent (100%): - Bidder far exceeded the minimum criteria. Proposal reflects very high quality services and very proactive and innovative approach.
- (ii) Good (80%): - Bidder exceeded the minimum criteria for the item(s) being evaluated. Proposal reflects better than average services, demonstrating some innovative features not shown in typical proposals.
- (iii) Satisfactory (60%): - Bidder successfully passed the item(s) being evaluated, meeting, not exceeding, the minimum criteria.
- (iv) Poor (20%): - Bidder failed to meet the minimum criteria for the items being evaluated. The bidder may have misinterpreted the question, or did not clearly or fully address the question.
- (v) Fail (0%): - Non-responsive bid. Bidder does not answer the question, or refuses to meet the criteria.

Since, as we have discussed previously, the RFP issued by the EPIC Program did not limit the scope of the procurement to a replication or "takeover" of the existing EPIC operation and system (Section I.A of this Determination), to the extent that the ACS technical proposal merely satisfied the minimum criteria set forth in the RFP a "satisfactory" scoring was appropriate. Our review of the procurement record leads us to conclude that the evaluation of the ACS proposal did not vary from the terms of the RFP, which merely stated the relative weight of cost to technical, or the evaluation instrument developed by the EPIC Program prior to the receipt of proposals and, therefore, was in accordance with State law.<sup>5</sup>

With respect to the EPIC Program's award to First Health, as set forth above, the award was to be made to the "best value" as determined in accordance with the terms of the RFP and the evaluation instrument developed by the EPIC Program prior to the receipt of proposals - not lowest price. Based on the Evaluation Committee's review and scoring of the proposals, the proposal submitted by First Health was deemed to be the "best value". Accordingly, the contract award was made to First Health, even though the cost proposal of First Health exceeded the cost proposal submitted by ACS.

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<sup>4</sup> The eight major scoring areas were further broken down into various subcategories.

<sup>5</sup> While Section 163(7) of the SFL requires that the state agency document in the procurement record before the initial receipt of offers the determination of the evaluation criteria and the process to be used in determination of best value and the manner in which the evaluation process and selection is to be conducted, Section 163(9)(b) of the SFL merely requires that the solicitation identify the relative importance and/or weight of cost to technical. Neither section requires that the RFP provide any detail concerning the weight ascribed to specific areas of the technical evaluation – although we generally encourage agencies to do so.



## II. Bidder's Selected Alternatives

ACS contends that the RFP directed bidders to propose enhancements to the EPIC System only in the BSA section of the RFP and, therefore, it was arbitrary and capricious for the EPIC Program to penalize ACS for complying with the RFP and restricting its recommendations to the BSA section.<sup>6</sup> ACS further argues that the RFP did not limit BSAs to enhancements that saved the State money and, therefore, the EPIC Program erroneously rejected many of ACS' suggested alternatives on this ground.

The requirements of the RFP are set forth in Part II of the RFP "Statement of Work" which sets forth contractor's responsibilities as they relate to seven major tasks: (i) Takeover; (ii) Operations; (iii) Outreach; (iv) Systems Development; (v) American Indian Health Program; (vi) BSA; and (vii) Turnover. Relevant to the issue raised by ACS is the language of the Statement of Work with respect to the tasks identified as Operations and BSAs.

One of the stated major objectives of the Operations task is to "**Establish** an operation that can be successfully turned over to a successor contractor or the State at the end of the contractual period" (RFP Part II, II-17, emphasis added). Additionally, the Operations task identified 25 new requirements and 4 expanded requirements. Further, in the subsection of the Operations section related to Participant Enrollment, bidders were advised in an "**Important Note**" (emphasis in original) that:

"several financial and accounting aspects of the current participant subsystem are considered by the State to be outdated and deficient. These include the inability to systematically account for all bank payment and refund activity, and incomplete accounts receivable and prepaid coverage reporting. In addition, the EPIC on-line inquiry and update system has evolved over the years into a system that is not conducive to easy, efficient access and interpretation of complete participant data by State and contractor staff. While the existing software will be available to the successful bidder, bidders may propose the use of software other than the existing EPIC software for one or more of the functions" (RFP Part II, II-20).

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<sup>6</sup> ACS contends that since the point allocation in the BSA section was limited to 75 points (7.5% of the technical scoring) while the core bid section was allotted 600 points (60% of the technical scoring) ACS' decision to confine its suggested alternatives to the BSA section adversely impacted the scoring of its proposal.

In the "Description" of the BSA task, the RFP stated that

"The State strongly encourages bidders to propose **additional** changes to current operations that will result in the net State cost savings in administrative and/or benefit expenditures . . . There are several areas in which the State is especially interested in pursuing options for **cost savings alternatives**" (RFP Part II, II-68, emphasis added).

As we read the above language of the RFP, the Operations task required that bidders establish an operation for the EPIC Program that included various new requirements and enhancements of the existing EPIC operation and systems. The Operations task is the essence of the procurement conducted by the EPIC Program, the services that a successful bidder would have to provide . The BSA task, on the other hand (as its name "Bidder's Suggested Alternatives" implies) merely encouraged a bidder to propose additional optional changes to its core technical proposal that would result in net cost savings to the State. The BSA portion of a proposal was not fundamental to the bid and, in fact, a bidder could have submitted a proposal that did not contain any BSAs and still have been deemed responsive to the RFP.

With respect to the evaluation and scoring of proposed BSAs, the RFP provides that:

"Only proposals determined to be technically acceptable to the State will be factored into the technical and cost evaluations . . . For technically acceptable suggested alternatives, the cost proposal and projected benefit savings will be reviewed and analyzed during the cost evaluation. For cost evaluation purposes, if the proposal lowers the bidder's overall bid price, that decrease will be factored into the bid price. If the proposal increases the bidder's overall bid price, that increase will not be factored into the bid price to the extent that the bidder demonstrates (and the state can reasonably confirm) offsetting State benefit and/or administrative savings will be realized by implementing the proposal" (RFP Part II, II-69, emphasis in original).

ACS argues that the above-cited language implies that a BSA may be scored even if that BSA does not reduce costs. However, in our view, the above language cannot be read in isolation, but must be read in context of the entire BSA section including the RFP description of this task which requested additional changes to current operations that will result in "net State cost savings". When read in context, we are satisfied that the RFP required that BSAs produce net cost savings. The cited language merely advises bidders that accepted BSAs would be scored as follows: (i) if the proposed BSA would result in a reduction of the bid price, such reduction would be factored into the bidder's cost proposal; and (ii) if the proposed BSA would increase the bid price, but the bidder demonstrated (and the State confirmed) that implementation of the BSA would

result in offsetting cost savings, the bidder's cost proposal would not be increased by the cost of the proposed BSA. Therefore, we are satisfied that the evaluation of the BSAs was consistent with both the evaluation instrument and the RFP.

### III. Clarification of Proposals

ACS asserts that the EPIC Program fundamentally misunderstood important parts of ACS' bid and failed to seek clarification from ACS as it was required to do under the RFP and directed to do by the Selection Committee evaluating ACS's bid. Instead, ACS contends, the EPIC Program chose to assign the lowest possible point score to ACS's proposal,<sup>7</sup> resulting in an irrationally lower score to ACS.

Section 163(9)(c) of the SFL provides that:

Where provided in the solicitation, state agencies may require clarification from offerers for purposes of assuring a full understanding of responsiveness to the solicitation requirements.

Part III B(3) of the RFP provides that the State reserves the right to "[s]eek additional clarifying information from bidders before scoring proposals" (RFP Part III, III-2).<sup>8</sup> Therefore, since the RFP reserved the right to seek clarification from bidders, the EPIC Program could have requested clarifying information from ACS concerning its proposal. However, contrary to the assertion of ACS, neither Section 163(9)(c) of the SFL, nor the language of the RFP, required the EPIC Program to do so. Further, while the Evaluation Committee [recommended] that clarification be sought concerning [a certain aspect of the proposal], the selection committee was not bound to follow this [recommendation] and we do not believe that their failure to do so (which presumably reflected their judgment) warrants the disapproval of the contract.

A procuring State agency's treatment of ambiguous bid in a bidder's proposal was addressed by the Appellate Division, Third Department, in Promissor v New York State Insurance Department, 307 AD2d 460, 762 NYS2d 445 [2003]. In Promissor, the Court reviewed a procurement conducted by the New York State Insurance Department for the administration of licensing examinations. The solicitation issued by the Insurance Department provided that the bidder's proposal was to state the "cost or fee charges for providing test center photo of candidates". The proposal submitted by Promissor stated that the photograph fee would be "\$0 or \$8" with certain explanatory

<sup>7</sup> We note that while ACS asserts that the EPIC Program assigned its proposal the "lowest" possible point score, in fact in the Operations Section of its proposal the EPIC Program scored the ACS proposal as "Satisfactory", or better, in all areas except "Banking Services". In the Banking Services section the ACS proposal was assigned a "Poor" score, not the lowest score of "Fail".

<sup>8</sup> We also note that Section III B(3)(a) of the RFP provided that "responses to clarifying questions" would be considered in the technical evaluation of the proposal.

information concerning the situations in which the \$8 photograph fee would be applicable. In reviewing the Promissor proposal, the Insurance Department found certain statements regarding the circumstances under which each the \$0 or \$8 cost would be applicable ambiguous and, as a result, construed the costs proposed to include \$8 fee in all instances. In addressing the Insurance Department's actions the Court held that given the particular facts of the case, the Insurance Department had not "abused its discretion in interpreting the ambiguity in [Promissor's] proposal by assuming the 'worst case' as to photograph costs" (307 AD2d at 462, 762 NYS2d at 446). Accordingly, a procuring State agency has wide discretion in interpreting ambiguous bid language and, in exercising such discretion, may interpret ambiguous language utilizing a "worst case" scenario basis.

Having determined that the EPIC Program was not required to seek clarification from ACS with respect to ambiguous language of its proposal and had wide discretion in resolving any ambiguity in the ACS proposal, we will now review the specific instances cited by ACS where it claims that the EPIC Program misunderstood its proposal and unfairly penalized ACS.

- "ACS was penalized for proposing three fewer staff members in its proposal compared to current staffing levels."

Initially, we note that this does not appear to be a misunderstanding of the ACS proposal. The ACS proposal clearly provides for a staff reduction of three full time employees, with helpline and enrollment operations primarily absorbing the cuts. The Evaluation Committee found that, "This is a significant concern giving the continued high operation volumes coupled with the more stringent helpline performance standard" (Evaluation Report to the Selection Committee, pg. 8). While ACS argues that since it was committed to all deliverables and production standards and fully expected to achieve this production staffing through productivity gains, clearly the EPIC Program could reasonably conclude that a reduction in staffing should be considered in the evaluation of the ACS proposal.

"ACS did not describe deductible processing in its PEERS (eligibility, enrollment, document control system) so that EPIC erroneously concluded it did not perform the function."

The Evaluation Committee found that the BSA proposal "does not address how the Deductible program would be incorporated" (Evaluation Report to the Selection Committee, pg. 23). Additionally, we note that the failure to address deductible processing was not the only concern identified by the Evaluation Committee in reviewing this BSA. The Evaluation Committee also found that the BSA proposal did

not address: how PEERS would integrate with the Rx95 claim processing system; track participant savings; fees, deductibles, and co-payment maximums; and enrollment reports. Further, the Evaluation Committee found that the degree of difficulty and extent of resources required to successfully integrate PEERS into the incumbent's Rx95 system was not addressed (Id.). Based on all these factors, the BSA proposal was rejected.

- "EPIC explained that ACS' Operations scores were (for the most part) only "Satisfactory" because ACS proposed taking over the existing systems - enhanced processing or operations were required for a higher score."

To the extent that the ACS proposal represented a takeover of most of the current EPIC processing systems, with the exception of a new rebate system, making necessary modifications to meet several enhancements required under the terms of the RFP, its proposal passed, but did not exceed the requirements that had been evaluated and, therefore, was properly deemed "satisfactory" and scored accordingly (see the discussion of the scoring of the ACS in Section I. B of this Determination).

The remaining three instances wherein ACS contends that the EPIC Program misunderstood its proposal are:

- "The EPIC evaluators questioned ACS' ability to install and maintain EPIC software (particularly Rx95) due to alleged lack of experience with the system."<sup>9</sup>
- "EPIC thought that since ACS sought its review and approval before purchasing replacement office equipment, ACS expected EPIC to pay for it".<sup>10</sup>
- "EPIC concluded that ACS was relying on Albany-based Systems Development staff to maintain the First IQ reporting system - and that such staff does not currently have some of the skills and/or training required for this function."<sup>11</sup>

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9 In addressing the Operations portion of ACS' proposal the Evaluation Committee stated, "ACS' successful takeover and modification of [the Rx95 claims processing system, the participant system, and FirstIQ] would satisfactorily meet EPIC requirements, but the complexities and resources required to take over, modify, implement, utilize, maintain and support the systems are not readily apparent in ACS' proposal (Evaluation Report to the Selection Committee, pg. 8)

10 The Evaluation Committee found that the ACS proposal does not specify any plans to replace or upgrade equipment, including computers. "In fact, it appears that ACS does not understand the responsibility for equipment and upgrade is with the contractor, rather than the State" (Evaluation Report to the Selection Committee, pgs. 8-9).

11 In evaluating the Systems Development portion of the ACS proposal, the Evaluation Committee found that ACS proposed hiring the incumbent's existing system development personnel to staff the system development function, and questioned the individuals familiarity and expertise on First IQ client server applications. The Evaluation Committee also noted that ACS' proposal made no mention of corporate training and/or support for any of the systems staff and activities and, as a result, the Evaluation Committee concluded that ACS was relying to heavily on them with no provision for contingencies (Evaluation Report to the Selection Committee, pg. 9).

While recognizing that this Office is not required to defer to agency determinations of fact (see, Konski v Levitt, 69 AD2d 940 [3rd Dept, 1979], aff'd 49 NY2d 850, cert den 449 US 840), as a matter of policy we generally give deference to agency factual determinations which are reasonably supported by the record, particularly with respect to matters within the expertise of the agency. This is especially true with respect to the scoring of technical proposals in areas where the procuring agency has expertise. Our review of the procurement record concerning the scoring of the above-cited instances of ACS' technical proposal does not provide any basis for this agency to disturb the findings of the EPIC Program.

## **CONCLUSION**

Based on the foregoing, this Office has determined that the procurement conducted by the EPIC Program for the administration of the EPIC Program was conducted in a manner consistent with the requirements of State law. Accordingly, we are denying the protest file by ACS and are today approving the contract award to First Health.

**OFFICE OF THE STATE COMPTROLLER**