

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by
Global Tel*Link Corporation with
respect to the procurement of an inmate telephone
system by the New York State Department of
Correctional Services Contract Number C160988

Determination
of Bid Protest
SF- 20080185

November, 2008

This Office has completed its review of the above-referenced contract awarded by the New York State Department of Correctional Services ("DOCS"), including the Request For Proposals ("RFP") issued by DOCS, the proposal submitted by Unisys Corporation ("Unisys"), and the bid protest filed by Global Tel*Link Corporation ("GTL"). As outlined in further detail below, we have determined that the grounds advanced by the protestor are without sufficient merit to overturn the contract award by DOCS. We hereby deny the protest and are today approving the DOCS contract award to Unisys.

BACKGROUND

Facts

On November 5, 2007, DOCS issued a Request For Proposals ("RFP") seeking competitive proposals to provide an Inmate Telephone System ("ITS"), either directly or in cooperation with subcontractors, offering telephone communication services for inmates and their friends and families. The RFP sought a comprehensive, full featured ITS serving all New York State Correctional facilities which offered the lowest possible rates for inmates and their families as well as the necessary services requested by DOCS.

Section 6 of the RFP is entitled "Vendor Qualifications."

Section 6.1 of the RFP entitled "Company Experience" provides that:

The bidder shall submit satisfactory evidence that, in the sole judgment of the DOCS, it has at least three (3) years current experience in providing ITS production systems and services¹ for commercial or government clients. The proposed system must be a commercially available system and have been in full production for at least one (1) year for at least three (3) customers and serve at least a total of 500 inmate telephones. (emphasis added)

Section 6.2 of the RFP, entitled "Past Performance," requires that bidders provide:

¹ The Services at issue are outlined in Section 1.4 of the RFP.

- (i) details of all incidents of security breaches, and lost or misused data in previous three years;
- (ii) detailed performance information for the three systems identified in Section 6.1 of the RFP; and
- (iii) documentation of the validity of its chain of evidence methodology and its acceptance in legal proceedings.

Section 6.3 of the RFP, entitled “Staff Qualifications,” requires the bidder to provide information regarding qualifications and experience of the primary points of contact for both customer and technical services.

Section 6.4 of the RFP, entitled “Vendor Responsibility,” requires the bidder to complete a Responsibility Questionnaire, demonstrate their Financial Stability, and provide their Complaint History.

Section 2.7 of the RFP, entitled “Prime Contractor Responsibility,” states that:

Bidders may submit a proposal utilizing the services of subcontractors for any aspects of this procurement; however, the prime contractor must assume complete responsibility and liability for the delivery of all services. Subcontractors may be used to meet the qualifications required herein; however, subcontractors must be fully disclosed in the same manner as required of the prime contractor and must provide the same information including Vendor Responsibility, company finances and staff qualifications. The roles and responsibilities of each proposed subcontractor must be clearly delineated.² (emphasis added)

DOCS received six proposals prior to the 2:00 pm January 4th deadline from the following entities:³ (i) EMBARQ; (ii) GTL; (iii) Inmate Calling Solutions, LLC; (iv) PCS; (v) Securus; and (vi) Unisys. After a review of the proposals, one bidder was deemed non-responsive and eliminated from further evaluation. DOCS evaluated the remaining five proposals, made an award to Unisys and notified the unsuccessful bidders. DOCS signed the contract with Unisys on March 31, 2008. It was approved as to form by the Attorney General’s Office on April 3, 2008 and forwarded to this Office. Prior to this Office’s receipt of said Contract, GTL requested a debriefing from DOCS.⁴ GTL also informed this Office it intended to file a protest in connection with this procurement. By teleconference with this Office on April 10, 2008, DOCS advised it would not provide

² By Modification dated December 12, 2007 the requirement that a subcontractor provide “staff qualifications” was removed.

³ This date was extended from the original submission date of December 27, 2007.

⁴ Section (7)(VI)(A)(2) of the Procurement Guidelines issued by the New York state Procurement Council provide that debriefings “should be offered” after an agency makes an award. We also note that following the conduct of this procurement, the State Finance Law section 163(9)(c) was amended to state, in relevant part, “A state agency shall, upon request, provide a debriefing to any unsuccessful offerer that responded to a request for proposal or an invitation for bids, regarding the reasons that the proposal or bid submitted by the unsuccessful offerer was not selected for an award. The opportunity for an unsuccessful offerer to seek a debriefing shall be stated in the solicitation, which shall provide a reasonable time for requesting a debriefing.”

any debriefings until this Office approved the contract. By letter dated April 11, 2008, this Office informed DOCS that it would not approve the contract or require GLT to submit its protest, until all parties requesting debriefings (including GTL) were provided with a debriefing or failed to take advantage of a reasonable opportunity for a debriefing. On April 24 2008, GTL was provided a debriefing. By letter dated May 6, 2008, GTL filed a Protest with this Office.

Procedures and Comptroller's Authority

The Comptroller is required by Section 112 of the State Finance Law ("SFL") to approve State agency procurement contracts which exceed \$50,000 (SFL § 112[2]) and to approve State agency contracts where the State agency gives consideration other than the payment of money that exceeds \$10,000 (SFL §112[3]) before such contracts become effective. As a contract has already been signed by DOCS, the Comptroller has reviewed the bid protest by GTL as part of his review of the contract award.

In its determination of this protest, this Office considered the documentation contained in the procurement record forwarded to this Office by DOCS with the DOCS/Unisys contract and correspondence/submissions from the parties concerning the protest.

Protesting Party

The protestor, GTL, is one of the vendors who submitted a proposal in response to the RFP.⁵

SUMMARY OF BID PROTEST AND RESPONSES

Protestor's position

GTL protests the award made to Unisys on the following grounds:

- The mandatory experience requirements of the RFP must be satisfied by the prime contractor itself, and therefore Unisys' bid is non-responsive and should be rejected because it relies on the experience of its subcontractor VAC.
- Unisys and VAC together fail to meet the experience requirements of the RFP.
- DOCS failed to appropriately investigate, score and disqualify Unisys by not contacting references.
- The VAC system does not meet the mandatory requirements that search and retrieval of recorded conversations shall take no longer than 20 seconds and it does not provide for real time online notification of all systems alerts and alarms including the status of all incidents.
- Unisys' bid is non-responsive and/or it is non-responsible because it has not obtained a Certificate of Public Convenience and Necessity ("CPCN") from, or filed a tariff with, the New York State Public Service Commission ("NYSPSC")
- The financial condition of VAC renders the Unisys bid non-responsive or non-responsible.

⁵ GTL is the incumbent vendor providing ITS service to New York State Correctional Facilities.

- DOCS evaluation process was arbitrary because it failed to confirm compliance with the mandatory experience requirements resulting in arbitrary scoring for “Company Experience.” GTL exceeded the mandatory experience requirements of the RFP and should have received a score in excess of the “baseline score.”
- DOCS did not accurately evaluate costs because the RFP requested rates for domestic calls, international calls and storage, however, international calls and storage were not scored.
- Exclusion of international calls and storage from the cost evaluation undermines an award based on “best value.”
- DOCS failed to award the contract in accordance with “best value” principals, relying too heavily on cost and too little on technical criteria.

Agency’s response to protest

DOCS did not file a response to the protest. After review of the submission by GTL and Unisys, OSC made inquiry as to certain matters requiring a response from the procuring agency. DOCS responded to OSC’s inquiry as follows:

- DOCS’ technical evaluation team is satisfied that Unisys meets the mandatory technical requirements of providing (i) a retrieval system that is able to retrieve recorded conversation in 20 seconds or less; and (ii) software that meets the “real time online notification” requirement.
- DOCS appropriately chose not to contact the experience references of any bidders. The evaluation team determined that “applying a score based upon ad-hoc conversations or correspondence with customers would produce an arbitrary and possible unfair outcome that could not be substantiated. Consequently, if bidders met the requirement of Section 6.1 and provided the necessary references, they were uniformly awarded five points.”
- DOCS appropriately did not evaluate: (i) the cost proposed for additional storage because DOCS has no present plans to increase storage; and (ii) the cost proposed for international calling because DOCS does not currently provide this service and it is unknown whether they ever will. The costs were required by the RFP so that a rate would be in place in the unlikely event that either service was ever required from the winning proposer.
- Bidders were clearly advised that partnerships with subcontractors were allowed and that the subcontractors could be “used to meet the qualifications stated in the RFP.”
- “The intent of the RFP was to allow third parties to perform services such as installation or maintenance without having to satisfy the stringent requirements” of certain sections of the RFP including company experience, past performance and staff qualifications.
- Section 2.7 of the RFP allows “the prime to utilize sub contractors to meet the requirements in the RFP.”
- DOCS believes there is “no factual basis to the allegation” that its affirmative responses to questions concerning whether certain requirements were mandatory requirements discouraged other bidders from submitting proposals.
- Unisys, through its subcontractor, VAC, possesses the necessary CPNC required

by the NYSPSC. This is permitted by Section 2.7 of the RFP which allows the prime to utilize sub contractors to meet the requirements in the RFP.

- The NYSPSC informed Unisys that it cannot file a tariff until the ITS contract is approved by OSC because the contract date must be included in the tariff.

The winning proposer's response to the protest

Unisys' response to the protest is as follows:

- Unisys, in collaboration with its subcontractor, VAC, meets the mandatory experience and reference requirements in the RFP.
- Unisys' bid meets the technical requirements of a 20 second download and real time management notification.
- Unisys' subcontractor, VAC, possesses the necessary NYSPSC authority to provide ITS and therefore Unisys is a responsible vendor.
- VAC is a responsible vendor. VAC's previous filing for bankruptcy protection which was terminated in 1999 does not render it non-responsible. Unisys, as the prime contractor, assumes full financial responsibility for the terms and conditions of the RFP.
- Unisys' bid is the "best value" for the state. The RFP clearly specified how technical and cost factor would be evaluated and DOCS heavy reliance on cost was made clear at the beginning of the procurement. There is no rational basis to support GTL's argument that its experiential advantage over Unisys should have caused DOCS to alter the bid evaluation procedures set forth in the RFP.
- There is no support for the argument that DOCS' actions with regard to experience requirements caused potential bidders to refrain from submitting bids.

Applicable Statutes and Guidelines

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".⁶ Best value is defined as the basis for awarding service contracts to the offerer which optimizes quality, cost and efficiency among responsive and responsible offerers.⁷ A responsive offerer is one who meets the "minimum specifications or requirements as prescribed in a solicitation for commodities or services by a state agency."⁸

The SFL also requires that "[w]here the basis for award is the best value offer, the state 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

⁶ SFL §163(10).

⁷ *Id.* §163(1)(j).

⁸ *Id.* §163(1)(d).

in which the evaluation process and selection shall be conducted.”⁹

ANALYSIS

The questions presented on this protest are:

- I. Did DOCS properly find Unisys to be a responsive bidder?
- II. Did DOCS properly find Unisys to be a responsible bidder?
- III. Did the evaluation methodology established by DOCS provide for the award to be made in a manner designed to measure best value, and did DOCS evaluate and score the proposals in a fair and systematic manner consistent with such award methodology?

I. Is Unisys a responsive bidder?

A. Could Unisys’ proposal utilize VAC’s experience to meet some or all of the mandatory company experience requirement in Section 6.1?

It is not disputed that Unisys by itself would fail to satisfy the experience requirements of Section 6.1. Therefore, this Office must be satisfied that the RFP allowed Unisys to utilize VAC’s experience to meet the experience requirement.

Both DOCS and Unisys assert that Unisys meets this requirement by utilizing the experience of its subcontractor VAC – as permitted by Section 2.7 of the RFP (Prime Contractor Responsibility), which, as modified states:

Bidders may submit a proposal utilizing the services of subcontractors for any aspects of this procurement . . . subcontractors may be used to meet the **qualifications** required herein; however, subcontractors must be fully disclosed in the same manner as required of the prime contractor and must provide the same information including Vendor Responsibility and company finances. (Emphasis supplied)¹⁰

Clearly, the language of Section 2.7 of the RFP, by itself, supports the position of DOCS and Unisys that it may utilize the experience of VAC to meet the requirements of any requirement of the RFP, including the requirements of Section 6 and its subsections. GTL argues throughout its protest submissions, however, that a plain reading of the RFP, as modified by the Questions and Answers, establishes that the experience requirement is “specific to the Prime Contractor” and therefore Unisys cannot utilize the reference(s) of

⁹ *Id.* §163(7).

¹⁰ In order to meet the qualifications of Section 6.1, Unisys submitted three references; one with Unisys as a Prime Contractor, one with VAC as a Prime Contractor, and one of with VAC as a subcontractor to another Prime.

a subcontractor (VAC) to meet the mandatory experience requirement.

We do not agree with GTL. DOCS never altered the overarching statement in Section 2.7 that subcontractors could be utilized to meet any of the requirements of the RFP. While, undoubtedly DOCS could have been provided more direct responses to some of the questions, we believe that nothing in its answers could reasonably have been understood by a bidder or potential bidder to have altered the authorization for a bidder to utilize subcontractors to meet any requirement. Indeed, when, following the question and answer period, DOCS issued Modification 1, it retained the express authorization for the use of subcontractors to meet any requirement.

Furthermore, in light of the express authorization in Section 2.7, we do not believe it would be reasonable for a potential bidder to have refrained from bidding based solely upon what it apparently construed as an implied change to the RFP precluding the use of subcontractors to meet the experience requirements. Rather, a reasonable bidder in such situation would have taken advantage of the opportunity provided by DOCS for follow-up questions, and would have explicitly asked whether section 2.7 had been modified to preclude the use of subcontractors to meet the experience requirements. However, no bidder asked such a question.¹¹

We therefore agree with DOCS and Unisys that Unisys could utilize the experience of VAC to meet the requirements of Section 6.1. We must, however, still determine whether Unisys, in fact meets these requirements even with the inclusion of VAC's experience.

B. Does Unisys' proposal satisfy the vendor experience requirements in Section 6.1?

Section 6.1 of the RFP provides that:

The bidder shall submit satisfactory evidence that, in the sole judgment of the DOCS, it has at least three (3) years current experience in providing ITS production systems and services for commercial or government clients. The proposed system must be a commercially available system and have been in full production for at least one (1) year for at least three (3) customers and serve at least a total of 500 inmate telephones.

It is clear to this Office that Unisys, through VAC satisfies the requirement for three current years experience in providing ITS production systems and services. GTL asserts, however, that, even utilizing VAC's experience, Unisys and VAC do not meet the requirement that the "proposed system have been provided for at least one year to 3

¹¹ GTL submitted, as part of its protest, a letter from BestWeb to the effect that it refrained from bidding on this contract because it did not believe that it could utilize subcontractors to meet the experience requirements of the RFP. While BestWeb did submit a question to DOCS (Question 3), BestWeb did not ask whether it could utilize a subcontractor to meet the experience requirements of the RFP; rather, fairly read, it appeared to ask whether DOCS would waive the experience requirement. Under these circumstances, we do not believe that it was reasonable for BestWeb to refrain from bidding.

customers serving at least 500 inmates.”

By letter dated August 14, 2008, this Office sought clarification from DOCS concerning how Unisys’ proposed system satisfied this requirement. Specifically, we asked if a portion of the overall system being proposed by Unisys is to be provided by Unisys, then how could the VAC Focus system utilized in Colorado and Maricopa County satisfy this requirement when Unisys had no involvement.

While DOCS responded to this letter, and both Unisys and GTL also provided responses, none of these responses fully addressed our concern. Therefore, because this issue was critical to our resolution of this protest, this Office sent a follow-up letter on August 27, 2008 concerning the system, in which we indicated we were still unclear how the system met the vendor qualification; particularly, how the portion of the system located in the Unisys Salt Lake City Managed Service Center in Utah met the requirement, as it did not appear, through the references, that Unisys and VAC had utilized this overall system together. We indicated that, in order to insure that DOCS understood our questions, we would speak directly with DOCS on the issue to explain our specific question.¹² As summarized in a letter from this Office dated August 29, 2008, on August 28, 2008 this Office and DOCS had a conversation concerning this issue. DOCS stated that Unisys satisfied this requirement because the system referenced in this requirement was not the entire solution being proposed by the bidder, but, rather, was only the “telephone call processing system”, which had been provided by VAC for over one year to three customers serving more than 500 inmates. DOCS subsequently confirmed this position in a letter dated September 4, 2008.

DOCS statement concerning their intent regarding the requirements with respect to the “proposed system” led to a follow-up question from this Office in the telephone conversation of August 28. As indicated in our letter of August 29, 2008, we asked DOCS to document “why they are satisfied that bidders and potential bidders understood, or should reasonably have understood that the ‘proposed system’ referenced in this requirement, was only the ‘telephone call processing system’ not the entire solution to the RFP.” While not stated in our letter, we raised this issue so that we could determine whether any potential bidders might have been dissuaded from bidding on this contract based upon a misunderstanding of the scope of this requirement. DOCS indicated that it would reply to this question in their written response.

In its written response dated September 4, 2008, DOCS declined to speculate as to “what a **non-responder** may or may not have understood”, but stated “without equivocation, that it is standard practice and customary in the trade for non-processing features to be considered separately from processing features” DOCS further noted that consistent with this standard practice and custom, only two of the 120 questions were related to system architecture.

¹² As indicated in our letter of August 27, 2008, we did not include either Unisys or GTL in this conversation because of concerns relating to the restrictions of the Procurement Lobbying Law on non-written communications from bidders with this Office.

With respect to DOCS position that it was its intent in imposing these requirements for the “proposed system”, that the “system” was only the “telephone call processing system”, we have no basis to question DOCS statement concerning its intent. Indeed, it would seem reasonable that this would have been DOCS’ intent since, if DOCS had intended that the proposed system was the entire solution, then competition would have been restricted to those bidders, if any, that have provided substantially the same solution as that required by DOCS, to at least 3 customers, serving at least 500 inmate telephones, for at least one year. It would have been very difficult for DOCS to justify such a restrictive requirement to this Office.

We must still consider, however, whether potential bidders should have understood that this was DOCS intent. While DOCS has declined to speculate concerning the understanding of potential bidders, upon considering this issue, for the reasons outlined below, we are satisfied that a reasonable bidder should have understood that the “proposed system” was simply the telephone call processing system, not the entire solution being proposed by the bidder.

In its final letter, GTL points to a number of services and functions that it states are part of “the system” but are performed outside of the call processing system. However, based upon our review of the RFP, it appears that the RFP imposed certain requirements for “the system,” other requirements for “the vendor,” and still other requirements for “the solution.” To illustrate; Section 3.4, “Mandatory Features” contains 17 subparts. Each of the 17 subparts states whether the feature is mandatory for: (i) the system, (the system shall allow authorized system users to instantly terminate a call in progress. . . the system shall provide the ability to restrict inmate calling to a pre-approved list; (ii) the vendor, (the vendor shall provide the ability to allow the DOCS on-site staff to test telephones. . . the vendor shall test all inmate telephones); or (iii) the solution, (the solution shall allow the DOCS to set parameters that determine the hours of operations for inmate phone services). The RFP is generally consistent throughout the 107 sections and sub-sections in detailing whether it is a system, vendor or solution requirement, and, generally, when the RFP refers to the “system”, it is referring to the telephone call processing system.¹³

In light of the fact that the RFP generally differentiated between the system, the solution and the vendor, we believe that a reasonable vendor should have understood that the requirements of section 6.1 imposing the experience requirement of one year for at least three customers and serving at least 500 inmate telephones applied to the phone processing system.

Furthermore, even if this was not entirely clear, assuming that a potential bidder had been confused regarding what DOCS intended by “the system,” given the multi-million dollar value of this contract it would have been reasonable for a bidder to seek clarification by asking the question: what constitutes the system? Indeed, as pointed to by DOCS, no one asked this question and only two questions were received on system architecture.

¹³ There are a few sub-sections, such as section 3.8.2 which sets out the call recording migration whereby the proposed system is referred to and does not appear to be speaking of the phone call processing system; however, these few examples do not alter the overall theme of the RFP.

In light of the foregoing, we are satisfied that Unisys satisfies the requirements of Section 6.1 of the RFP, and that potential bidders should have understood the requirements of such section.

C. Was Unisys' proposal responsive to the mandatory technical requirements of a retrieval system that can retrieve recorded conversation in 20 seconds or less and software that meets the "real time online notification" requirement?

In response to this Office's letter of June 17, 2008, DOCS has indicated that its technical evaluation team is satisfied that Unisys met both these requirements. Additionally, Unisys stated in its proposal and in response to the protest that its proposal meets both these requirements. This Office does not generally have the necessary technical expertise to determine whether a bidder meets this type of technical specification or requirement. Therefore, this Office will give significant deference to the determination of the procuring agency that imposed such technical requirements and presumably is better suited to judge whether a proposal satisfies such requirements. Accordingly, in this case, this Office will accept the procuring agency's determinations with respect to this type of technical requirement.

D. Is Unisys in compliance with the requirements of the Public Service Law with respect to the approval of a CPCN and the filing of a tariff?

It is undisputed that Unisys does not itself possess the required CPCN from the NYSPSC, nor has it filed a tariff with NYSPSC. It is also undisputed that VAC does possess a valid CPCN from the NYSPSC. This Office has confirmed with staff of the NYS Department of Public Service that, because Unisys is the contractor and VAC provides the service, there is no requirement that Unisys itself possess a CPCN or obtain approval of a tariff. It is sufficient that VAC is certified to provide telecommunications service and obtains NYSPSC approval of a tariff containing the rates, terms, and conditions of the service. Therefore, the assertion by GTL with respect to the CPCN is without merit.¹⁴

The staff of the NYS Department of Public Service has also confirmed that there is no requirement that a tariff be filed prior to the implementation of the contract. After OSC approves the contract, it is expected that VAC will file with the NYSPSC a tariff for the service that includes the rates, terms, and conditions contained in the contract.

In light of the foregoing, this argument by GTL is without merit.

II. Did DOCS properly find Unisys and VAC to be a responsible bidder?

¹⁴ We note that GTL's argument that Unisys' bid should be disqualified because Unisys failed to "clearly delineate" that the required NYSPSC approval was obtained by VAC is likewise unpersuasive.

SFL §163 requires that “(s)ervice contracts shall be awarded...to a...responsible offerer....” This Office, as part of its review and approval of contracts under SFL §112, generally requires that a state agency make a responsibility determination concerning the proposed contractor.¹⁵ An agency’s determination that a vendor is responsible is one part of the procurement record that is forwarded to OSC for review as part of the contract approval process pursuant to SFL §112, and OSC will not approve the contract unless it is satisfied that the contractor is responsible.

In this case, DOCS determined that Unisys is a responsible vendor. GTL asserts, however, that Unisys is not a responsible vendor because its subcontractor, VAC, has an “uncertain” financial situation. GTL argues that VAC’s financial history, which includes a bankruptcy filing and the discontinuation of ITS services after sale of the New York State ITS contract in the bankruptcy proceeding, renders VAC non-responsible, which in turn requires a finding that Unisys’ bid is non-responsive or non-responsible.

We disagree. While a prior bankruptcy filing and performance under prior ITS contracts are matters that may be relevant to a vendor’s responsibility determination, they are not dispositive. In this regard, we note Comptroller’s Bulletin G-221 refers to “recent” bankruptcies as a factor in considering a business’ financial capacity to perform. The VAC bankruptcy petition was filed in 1995 and the bankruptcy proceeding was closed in 1999. Furthermore, the fact that a prior ITS contract was sold as part of this bankruptcy proceeding does not, in our view warrant a finding of non-responsibility in this case.

Additionally, OSC’s vendor responsibility unit undertook an independent review of vendor submissions, which included a review of VAC’s bankruptcy filing and the financial status of VAC.¹⁶ Based upon this review, we do not believe that either VAC’s current financial situation, or its prior bankruptcy, warrant a finding that VAC, and thus Unisys, is non-responsible.

III. Did the evaluation methodology established by DOCS provide for the award to be made in a manner designed to measure best value, and did DOCS evaluate and score the proposals in a fair and systematic manner consistent with such award methodology?

A. Did DOCS heavy reliance on cost result in failure to award the contract based on “best value”?

As required by Section 163 of the SFL, the RFP provides that the contract resulting from this RFP will be awarded to the qualified Bidder whose proposal is determined to provide

¹⁵ See Comptroller’s Bulletin G-221.

¹⁶ The review included, but was not limited to, a review of: (i) Dunn & Bradstreet report; (ii) Hoover’s; (iii) Lexus/Nexis; (iv) Better Business Bureau; (v) tax liens; (vi) debarment for insurance or labor issues; and (vii) internet searches.

the best value to the State.¹⁷ For purposes of the RFP, the best value was the Bidder whose proposal received the highest total combined score for the categories of Cost Evaluation (70 Points), Technical Evaluation (20 points) and Vendor Responsiveness Evaluation (10 Points).¹⁸ GTL asserts that by placing such a high value on the cost component of the proposals, DOCS did not make an award on the basis of best value.

SFL Section 163(1)(j) defines best value as “the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers. Such basis shall reflect, wherever possible, objective and quantifiable analysis.” The leading case interpreting these requirements is Transactive Corporation v. New York State Department of Social Services, 236 A.D.2d 48, 53 (1997); *aff’d on other grnds*, 92 N.Y.2d 579 (1998). In that case, the Appellate Division, Third Department reviewed a procurement of a complex electronic benefit transfer system. The procuring agency determined to award the contract using a competitive range methodology whereby the cost proposals of all responsive proposers would first be evaluated and scored and the technical scores would only be considered for those proposers with a cost within 10% of the lowest cost proposer. Since no other responsive proposer had a cost within 10% of that of the lowest cost proposer, the award was ultimately made without considering the technical scores. One of the grounds asserted in the challenge to the award was that this methodology did not constitute a best value award as required by Section 163.

The Appellate Division in addressing this issue first stated “[i]n awarding a contract for services, a State agency **generally** cannot rely solely on price as the determinative factor but must engage in a cost-benefit analysis since State Finance Law § 163(10) provides that such a contract must...be awarded on the basis of best value...”¹⁹ (emphasis added). The court noted, however, that the agency had issued an RFP with extensive technical requirements, and had established criteria for the evaluation of both the technical and cost proposals. Therefore, the court upheld the award methodology and the award. In reaching this conclusion, the court stated,

Given the fact that DSS subjected the proposals to technical and financial evaluations, we find that it engaged in the requisite cost-benefit analysis. Further, DSS’ reliance on a competitive range was permissible because such procedure embodies a cost-benefit analysis as it reflects a determination that where a price proposed by a responsive and responsible bidder is lower than a price offered by another bidder by a stated percentage, any increase in value embodied in the higher price will be offset by the cost savings of the lower priced proposal.²⁰

¹⁷ RFP page 5.

¹⁸ Based upon our review, it appears that the 10 points assigned to “Vendor Responsiveness” actually constituted simply a separate component of the technical evaluation. Ultimately, this is simply a semantic distinction.

¹⁹ Transactive 236 A.D.2d 48, 53.

²⁰ Transactive 236 A.D.2d 48, 53-54.

Therefore, what is required by Section 163 is that an agency undertake a cost benefit analysis in determining best value. OSC, in applying the rationale in Transactive and consistent with the Procurement Guidelines issued by the New York State Procurement Council,²¹ has determined a number of bid protests where it was asserted that an award had not been made on the basis of “best value” because either cost alone was used as the basis for an award,²² or cost was afforded most of the weight in determining best value.²³ Most relevant to the present situation is SF 20060333 where we considered whether an evaluation methodology that ascribed a relatively low value to technical constituted an appropriate cost/benefit analysis and therefore a best value award. In our determination of that protest, we stated:

Preliminarily, we note that it is clear that agencies are not required to ascribe equal weights, or any other fixed weights, to cost and technical. Rather, section 163(9) provides for such determination to be made in each procurement. Consistent with the decision in Transactive, and our prior protest determinations, it is our view that an agency may utilize an award methodology in a service procurement which awards most of the weight to cost where, based upon the established bidder qualifications and other technical requirements, there is either little likelihood that there will be significant variances in the quality of the technical proposals or any variances will have only a somewhat limited impact upon the value of such services to the State.

Here, in light of the extensive mandatory technical requirements, we are satisfied that any increase in value resulting from greater technical merit will have only a limited value to the State, and therefore that the 20% weight given to technical and 10% to vendor responsiveness is consistent with SFL Section 163.

B. Was DOCS’s evaluation arbitrary because DOCS failed to contact any of the mandatory references and gave all bidders the same score for this item?

The evaluation methodology/instrument established prior to the initial receipt of offers provided that references would be scored on a 10 point scale. According to DOCS, the evaluation “determined that applying a score based upon ad-hoc conversations or correspondence with customers of the bidders would produce an arbitrary and possibly

21 The Procurement Guidelines, state there are “occasions when it makes sense to boil down a best value award for services to a lowest price determination” (Section IV-9). The Procurement Guidelines explain that the IFB methodology, which is the method used where cost is the only consideration:

“is appropriate for those situations where the needed . . . services and/or technology can be translated into exact specifications and the award can be made on the **basis of lowest price, or best value**, when the best value determination can be made on price alone, among responsive and responsible offerers . . . **In the case of services**, an IFB may be used to acquire services and technology when the agency determines that price is the principal award criteria” (Section VI-1, emphasis in original).

22 See, SF-20010084, SF-20020035 and 20070299. In such cases, we have upheld the award where we were satisfied that any qualitative differences between proposals would not substantially affect the value provided to the state, but rejected the contract where this was not the case.

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unfair outcome that could not be substantiated . . . [and therefore] if the bidders met the requirement of section 6.1 and provided the necessary references, they were uniformly awarded five points”²⁴

State Finance Law §163(7) requires that:

Where the basis for award is the best value offer, the state 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.

Implicit in the requirement that agencies establish and document the evaluation instrument/methodology in the procurement record prior to the initial receipt of offers, is a requirement that agencies must follow the procedures so established. Therefore, the technical evaluation committee was obligated to follow the pre-established evaluation methodology, contact the references, and then score this component based upon the responses received from the references. While, nominally, the technical evaluation committee did assign a score to each proposal, the committee did not contact the references, and it is therefore clear to us that, with respect to this component, they failed in any meaningful sense to score the proposals, and therefore improperly failed to follow the evaluation methodology.²⁵

In most cases, when confronted by such a failure, we would either reject the contract and require that the agency undertake a new procurement, or, if we were satisfied that the committee could fairly and impartially correct its omission, return the contract to the agency for rescoring in accordance with the pre-established evaluation methodology. In this instance, however, for the reasons outlined below, we do not believe this is necessary.

Here, the weight ascribed to reference checks was only 0.68 point out of a total of 30 technical points and 100 total points.²⁶ The winning bidder Unisys received a total score of 87.163 points out of 100 points, while GTL, the second place bidder received a total of 83.83. Therefore, even if the evaluation committee had scored the proposals and given GTL a 10 for its references and given Unisys a 0, Unisys would still have been the best value offerer with a score of 86.823 and GTL would still have been second with a score of 84.17. As a result, in this limited case, it is our view the failure of the evaluation

24 See DOCS response to correspondence from this Office dated July 2, 2008.

25 This is not to say that it is not possible that an evaluation team could not, after reviewing a component, assign the same score to each proposal – if such scoring reflected a judgment that the proposals were essentially equal with respect to that component. Here, however, the scoring apparently reflected an impermissible determination by the committee that such component should not be scored.

26 While the scoring sheet provided for the references to be scored on a 1-10 basis, this raw score was then adjusted based upon the weighting factors, with the result that the score for the references would only account for 0.68 point out of a total of 100 points.

committee to properly score the references was harmless error, and accordingly, we will not overturn the award on that ground.²⁷

C. Did the exclusion of international call rates and storage from the cost evaluation undermine an award based on best value?

DOCS requested fees for domestic and international calls, as well as a monthly storage rate for data stored for more than six months. The evaluation methodology established by DOCS did not, however, include such costs in the evaluation of costs. GTL asserts that this was improper.

Generally, we believe that an agency, in evaluating costs, should provide for the evaluation of all costs, fees and other charges that bidders are required or permitted to propose that the agency reasonably believes are likely to be actually incurred in the administration of the contract. Obviously, where some fees are incurred with less frequently than others, the cost scoring should be weighted based upon historic or expected frequency. We therefore asked DOCS for further information concerning these charges.

In response to inquiries by OSC, DOCS advised it has not provided international calling in the past through the ITS and it is unknown if it ever will. The intent of DOCS in requiring international calling rates was to put in place a contract pricing mechanism should it ever should ever be required to incorporate international dialing into the system.²⁸

Similarly, DOCS has indicated that it required a price for additional storage only so that it would have a contract vehicle in place whereby DOCS can increase capacity beyond the six month requirement should the need arise; but that it has no present plans to increase storage.

In light of DOCS representations, we are satisfied that DOCS' cost evaluation was appropriate, since it does not appear that DOCS reasonably anticipated that it would actually incur costs under this contract for international calls or additional storage.²⁹

CONCLUSION

We find that the issues raised in the protest are not of sufficient merit to overturn the award by DOCS to Unisys and, therefore the protest is denied. We are, therefore, today approving the DOCS/Unisys contract.

²⁷ We note that this Office required DOCS to contact the references in Unisys' proposal and DOCS did in fact contact the references, who in turn, confirmed the experience requirements.

²⁸ DOCS Response to Questions Posed By OSC Dated July 2, 2008. DOCS Clarification to Question 6.

²⁹ We would further note with respect to the additional storage costs, that if these costs had been factored into the cost evaluation, it would only have increased the winning margin of Unisys, since Unisys did not propose a charge for additional storage whereas all other bidders, including GTL did.