

**STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER**

In the Matter of the Bid Protest
filed by MedRec Document Services, Inc.,
with respect to the procurement for Release
of Information Services conducted by the
Stony Brook University Hospital Purchasing
Contract Number C010853

**Determination
of Bid Protest**
SF-20080412

January 16, 2009

This Office has completed its review of the above-referenced procurement conducted by the Stony Brook University Hospital (hereinafter "Stony Brook") and the bid protest filed by MedRec Document Services, Inc. (hereinafter "MedRec") 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 contract award by Stony Brook. As a result, we hereby deny the protest and are today approving the Stony Brook contract award to InfoTrak Record Management, LLC (hereinafter "InfoTrak").

BACKGROUND

Facts

On February 27, 2008, Stony Brook issued a Request for Proposals (hereinafter "RFP") seeking competitive proposals to secure the services of a provider qualified to provide on-site Release of Information Services (hereinafter "ROI Services"). Under the terms of the RFP, the successful bidder's staff will work with Stony Brook to ensure that ROI Services to patients and the community are handled as accurately, quickly and efficiently as possible.

The RFP stated that the method of award would be based on a "Best Value Determination" taking into consideration the responsive and responsible offerer that has accumulated the highest Total Combined Score.¹ The RFP outlined the evaluation process to be followed to arrive at the Total Combined Score. First, the proposals underwent a technical evaluation worth forty-five (45) points.² The technical score was added to the cost score worth twenty-five (25) points. The three (3) bidders receiving the highest combined technical and cost score were brought in for oral presentations. Those three (3) bidders were then given a score based on said presentation worth thirty (30) points, which was added to the

¹ See State Finance Law §163(1)(j) (defining "best value" as the "basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers").

² Fifteen of the 45 technical points were based on the bidder's references.

combined technical and cost score,³ and the proposal with the highest Total Combined Score (technical score + cost score + presentation score) would be selected for award.

Prior to the proposal due date of March 28, 2008, Stony Brook received proposals in response to the RFP from the following entities: (i) InfoTrak; (ii) MedRec; (iii) Healthport; (iv) Midwest Med Record Association; (v) Universata, Inc.; and (vi) One Source Document Management, Inc. (hereinafter "One Source"). After the initial round of scoring, the three highest scored bidders, Healthport, InfoTrak and One Source advanced to the oral presentation stage, and after that stage was scored and the scores combined with the totals from the initial round of scoring, the bidder with the highest combined total was InfoTrak. As a result, Stony Brook notified InfoTrak that InfoTrak would be recommended for contract award.

By letter dated August 11, 2008, MedRec, filed a Protest with this Office. Subsequently, Stony Brook signed a contract with InfoTrak for the services required under the RFP and forwarded such contract to this Office for approval.

Procedures and Comptroller's Authority

Under Section 112 of the State Finance Law (hereinafter "SFL"), before any contract made for or by a state agency, which exceeds fifty thousand dollars (\$50,000) in amount, becomes effective it must be approved by the Comptroller.⁴ Because Stony Brook had already entered into a proposed contract with InfoTrak resulting from this procurement, the Comptroller has reviewed the Protest filed by MedRec as part of his review of the contract award to InfoTrak.

In determination of this Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by Stony Brook with the Stony Brook/InfoTrak contract;
2. the correspondence between this Office and Stony Brook arising out of our review of the proposed Stony Brook/InfoTrak contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - MedRec's letter to Charlotte Breeyear, Director of Bureau of Contracts within the OSC, dated August 11, 2008, protesting the contract award by Stony Brook;
 - Stony Brook's letter to Charlotte Breeyear, Director of Bureau of Contracts within the OSC, dated October 9, 2008, responding to the MedRec Protest;

³ While denominated as a separate category, the points awarded for the oral presentation are, in reality, part of the technical score.

⁴ SFL §112(2).

- MedRec's letter to Charlotte Breeyear, Director of Bureau of Contracts within the OSC, dated October 21, 2008, replying to the Stony Brook's Response;
- Charlotte Breeyear's, Director of Bureau of Contracts within the OSC, letter to Stony Brook dated December 8, 2008;
- Stony Brook's letter to Charlotte Breeyear, Director of Bureau of Contracts within the OSC, dated December 9, 2008, responding to OSC's letter dated December 8, 2008.

Protesting Party

The protestor, MedRec, is the incumbent and one of the entities that submitted a proposal in response to the RFP issued by Stony Brook.

Applicable Statutes

The requirements applicable to this procurement are set forth in SFL, Article 11 which provide that contracts for services shall be awarded on the basis of "best value" from a responsive and responsible offerer.⁵ 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."⁶ A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."⁷

SFL §163(9)(a) provides that the "The commissioner or a state agency shall select a formal competitive procurement process ... [which] shall include ... a reasonable process for ensuring a competitive field."

SFL §163(9)(b) provides that the "solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted."

SFL §163(9)(c) states that "[w]here provided in the solicitation, state agencies may require clarification from offerers for purposes of assuring a full understanding of responsiveness to the solicitation requirements. Where provided for in the solicitation, revisions may be permitted from all offerers determined to be susceptible of being selected for contract award, prior to award. Offerers shall be accorded fair and equal treatment with respect to their opportunity for discussion and revision of offers. A state agency shall, upon request, provide a debriefing to any unsuccessful offerer that responded to a

⁵ SFL §163(10).

⁶ SFL §163(1)(j).

⁷ SFL §163(1)(d).

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."

SFL §163(1)(e) defines a "specification" or "requirement" as "... any description of the work to be performed, the service or products to be provided, the necessary qualifications of the offerer, the capacity and capability of the offerer to successfully carry out the proposed contract, or the process for achieving specific results and/or anticipated outcomes or any other requirement necessary to perform the work. ... Specifications shall be designed to enhance competition, ensuring the commodities or services of any offerer are not given preference except where required by this article."

ANALYSIS OF BID PROTEST

MedRec's Protest to this Office

In its protest, MedRec asserts that the award made by Stony Brook was improper on the following grounds:

1. The three bidders advancing to the final round of the procurement process were unqualified because they lacked the requisite five (5) years of experience handling ROI Services.
2. The bidders advancing to the final round all submitted bids which will result in higher costs to Stony Brook than the costs resulting from the MedRec bid. Therefore, MedRec, as "the only bidder with proven capacity to handle the work," should have advanced to the final round.
3. One bidder advancing to the final round should have been rejected at the onset as said bidder submitted a "manifestly defective bid."
4. MedRec's positive reputation and experience, while working for Stony Brook, further demonstrates that the elimination of MedRec from the final round was irrational.

Stony Brook's Response to the Protest

Stony Brook has responded to the grounds advanced in the protest as follows:

1. All three bidders advancing to the final round of the procurement process had the requisite experience. Specifically:
 - a. The owner and president of One Source was one of two partners in the former Long Island Copy Service, which had been in business since 1995 and provided ROI Services. Upon dissolution of the partnership the partners divided both assets and clients. There was no break in services to clients that went with the partner

- forming One Source and, therefore, One Source had the requisite experience.
- b. Healthport is the resulting corporation created by the merger of Smart Document Solutions and Companion Technologies. Smart Document Solutions had thirty (30) years experience in the health information management and ROI field prior to the merger, and, at the time of Healthport's response, supported more than eight hundred hospitals as clients of its ROI Services.
 - c. InfoTrak has existed as a business enterprise since 2002. What is now called InfoTrak, started in 2002 as the formalized healthcare division of Syracuse, New York-based Avalon Copy Centers of America, Inc. (hereinafter "Avalon"). In January of 2003, as Avalon's business in this field expanded, Avalon began branding and promoting the business unit services, first, as Medquest Record Management, and then, in 2004, as InfoTrak Record Management. In 2005, Avalon made a business decision to separate InfoTrak into a wholly owned Limited Liability Company.
2. The procurement award was made on the basis of best value, which permits award of a contract to other than the low bidder. Furthermore, MedRec's was not the low cost proposal submitted. The proposed annual cost of the MedRec proposal is more than double the proposed annual cost of the lowest cost finalist.
 3. Healthport's failure to include an employee training manual with its original bid submission was a mere technical variation from the bid specifications. This omission neither advantaged Healthport nor disadvantaged any other bidder.
 4. MedRec's positive reputation and experience while working for Stony Brook were taken into account in the reference portion of the scoring. Any further benefit provided to MedRec would have resulted in giving the incumbent service provider an unfair advantage, contrary to the evaluation methodology set forth in the RFP and the requirements of SFL.

MedRec's Reply

In reply to Stony Brook's responses, MedRec set forth the following arguments and clarifications:

1. Pursuant to a mandatory requirement, which states "[b]idders must have a minimum of five (5) years documented prior experience in the Release of Information field," InfoTrak and One Source were not qualified.
2. The cost calculation was flawed because it used annual volumes more than double the historical annual volume and the figures do not give credit for recovered costs from third parties.

3. Healthport's proposal should not have been considered because they failed to include the Manual as required by the RFP, and consideration of Healthport's proposal in light of this fact suggests favoritism and thereby a tainted process.
4. The elimination of MedRec was not rational, and reflected a bias against MedRec, as evidenced by the plain implication in Stony Brook response that, MedRec's six (6) years experience was discounted because Stony Brook is MedRec's only large hospital client. MedRec further argues that the same factors needed to be weighed against InfoTrak's experience which is limited to Upstate Medical Center and Berkshire Medical Center, beginning in March of this year and July of this year respectively.

DISCUSSION

We now address the grounds raised in the protest *seriatim*.

1. Qualifications of Advancing Bidders

The three (3) bidders advancing to the final round over MedRec were One Source, Healthport, and InfoTrak. The RFP required that "[b]idders have a minimum of **five (5) years documented prior experience** in the Release of Information field." (emphasis in original) Stony Brook specifically requested both InfoTrak and One Source provide an explanation to substantiate the respective company's claim that it had the requisite experience.⁸

One Source, in reply to Stony Brook's request for clarification regarding its ROI Services experience, explained that its owner and president was one of two partners in the former Long Island Copy Service, which had been in business since 1995 and provided ROI Services. Upon dissolution of the partnership in September, 2003, the partners divided both assets and clients. There was no break in services to clients that went with the partner forming One Source. Stony Brook concluded, based upon this explanation, that One Source met the experience requirement of the RFP.

Stony Brook's response to the underlying protest indicates that it was satisfied that Healthport met the experience requirement of the RFP because Healthport is the resulting corporation created by the merger in June of 2007 of Smart Document Solutions and Companion Technologies, and Smart Document Solutions had, at the time of the merger, thirty years experience in the health information management and ROI field.

⁸ Presumably, Stony Brook did not request such an explanation from Healthport because either Stony Brook already knew Healthport had the requisite experience or the bid submission included such an explanation. In either event, Stony Brook does not appear to have requested such an explanation from Healthport.

InfoTrak, the conditional winner of the Stony Brook ROI Services contract, in reply to Stony Brook's request for an explanation as to why InfoTrak had the requisite ROI experience, indicated that what is now called InfoTrak, started in 2002 as the formalized healthcare division of Syracuse, New York based Avalon Copy Centers of America, Inc. (hereinafter "Avalon"). As Avalon's business in the ROI Services field expanded, Avalon began branding and promoting the business unit providing ROI services, first, as Medquest Record Management in 2003, and then, in 2004, as InfoTrak Record Management. In 2005, Avalon made a business decision to separate InfoTrak into a wholly-owned Limited Liability Company, providing clients with the ROI Services it had provided while a business unit of Avalon. Stony Brook concluded, based upon this explanation that InfoTrak met the experience requirement of the RFP.

The RFP experience specification requires that the entity submitting the bid have five (5) years experience in the ROI Services Field. While none of the three bidders in question had been providing these services under its current name for the requisite five (5) year period, Healthport is the current iteration of an entity that clearly meets the five (5) year requirement and InfoTrak is the corporate subsidiary and successor of its parent corporation that clearly meets the five (5) year requirement. While One Source is not a subsidiary or corporate successor of Long Island Copy Service, it appears that it is a functional successor to such firm and succeeded to its interests in a number of business relationships in the ROI services field. Under these circumstances, we are satisfied that since Long Island Copy Service and One Source together meet the five (5) year requirement, One Source meets such requirement. Therefore, we agree with Stony Brook's determination that One Source, Healthport and InfoTrak satisfied the experience requirements of the RFP.

2. Cost Calculation

Preliminarily, we note that this is a procurement for services, and therefore under section 163(4) of the State Finance Law such contract must be awarded on the basis of best value, which, in most cases, involves a consideration of both cost and technical merit. That is what Stony Brook did in this case, allocating, in the first round of the evaluation, 45 points to technical merit and 25 points to cost; with an additional 30 points being allocated for the scores of the finalists based upon their oral presentations.⁹

The 25 points allocated to costs were awarded using a methodology that ultimately depended upon two variables bid by the bidders, the charges by the bidder for non-billable pages,¹⁰ and the number of non-billable pages for which

⁹ Ultimately, the contract was, as required by section 163 awarded to InfoTrak as the bidder determined, based upon this scoring system, to provide best value.

¹⁰ The non-billable requests are those requests for which Stony Brook will not recover the costs from third parties; and therefore represent the actual costs ultimately borne by Stony Brook under the contract.

the bidder would not assess a charge. Specifically, the evaluation methodology assumed, based upon prior experience, that the total monthly volume of non-billable pages would be 215,000 pages for all bidders. This assumed volume was then reduced for each bidder by the number of no charge monthly pages bid by that bidder, and the resulting number of net pages (for which Stony Brook would ultimately be liable) was then multiplied by the cost per page bid by that bidder to produce the total estimated costs to Stony Brook for non-billable pages. This estimated cost to Stony Brook for non-billable pages for each bidder was then increased by the assumed charges for billable requests of \$20,000 (based upon historic levels) and then multiplied by 12 (for annualization purposes) to produce the assumed cost for each bidder. The bidder with the lowest assumed cost was then awarded 25 points, and the other bidders a proportion of 25 points based upon the relationship of their assumed cost to that of the lowest assumed cost.¹¹

Based upon this methodology, Stony Brook calculated MedRec's cost proposal as an estimated annual total cost of five hundred ninety-one thousand dollars (\$591,000). This cost was less than that of InfoTrak, but more than double that of the low cost bidder, Healthport.¹² In accordance with the pre-established cost evaluation methodology, Healthport was awarded the full 25 points for its cost proposal, while InfoTrak and MedRec were each awarded a proportionate number of points. As a result, it appears that MedRec received the proper score for its cost proposal based upon the pre-established cost evaluation methodology.¹³

MedRec asserts, however, that the cost calculation methodology was flawed because; (i) it used an annual volume in the amount of two hundred fifteen thousand (215,000) non-billable pages, which was more than double the historical annual volume; and (ii) the methodology does not give credit for costs recovered from third parties.

¹¹ We have some concern as to whether it is generally appropriate to add uniform fixed costs, not under the control of the bidders, into the costs of each bidder before comparing and awarding cost points. In this case, however, we need not decide whether such an approach is appropriate, either generally or in this case, since even if the cost comparison had been done without including the estimated annual cost for billable pages, there would have been no change in the bidders that advanced to the oral presentation stage or in the ultimate award of the contract.

¹² MedRec appears to assert that its bid could not have been more than double that of the low cost proposal because this could only be the case if the low cost proposal was \$.021 per page or less, which it does not believe is possible. However, in fact, the low cost proposal from Healthport proposed a charge of zero for non-billable pages – presumably on the premise that it could generate sufficient revenues from the billable pages to cover its total costs and generate a profit.

¹³ It should also be noted that had MedRec advanced to the final round and received the highest possible score from the final round, InfoTrak would nonetheless still have had the highest Total Combined Score.

With respect to the proper annual volume, Stony Brook has indicated, in response to an inquiry made by OSC in the course of the contract audit, that contrary to MedRec's assertion regarding the volume of non-billable pages, the volume utilized in the cost evaluation was, in fact, based on actual volume of non-billable requests for the previous year. Furthermore, even if we were to accept MedRec's assertion as to the appropriate volume, if such volume had been utilized, it would not have caused a change in the bidders who advanced, or in the ultimate determination of the bidder providing best value and would, therefore be considered harmless error.

With respect to the recoverable fees, MedRec appears to be asserting that it was disadvantaged because its cost proposal was evaluated based upon the total costs for both billable and non-billable pages, rather than on the basis of only the costs for non-billable pages, which would be borne by the State. While MedRec is correct that the cost attributed to MedRec of \$591,000 included \$240,000 for billable pages, it was not disadvantaged because the same \$240,000 cost for billable pages was also attributed to each of the other bidders in evaluating its costs.¹⁴

3. Omission of Employee Training Manual

MedRec argues in its protest that Healthport should have been deemed non-responsive, and, therefore should not have advanced to the final round, since Healthport submitted a "manifestly defective bid." Specifically, the Healthport proposal did not include the complete employee training manual as required by the terms of the RFP. While it is clear that the Healthport proposal did not contain a complete employee training manual (hereinafter "Manual"), Stony Brook contends that the omission of the complete Manual, was a minor variance, correctable pursuant to the RFP.

It is well-settled law that a procuring agency may waive a technical noncompliance with bid specifications if the defect is a mere irregularity and it is in the best interest of the State to do so. However, an agency may not waive noncompliance if it is material or substantial. Noncompliance is material or substantial when it would impair the interests of the public entity, place the successful bidder in a position of unfair economic advantage or place some of the bidders at a competitive disadvantage. *Cataract Disposal, Inc. v. Town Bd. of Newfane*, 53 N.Y.2d 266 (1981); see also *Le Cesse Bros. Contr. V. Town Bd. Of Town of Williamson*, 62 A.D.2d 28, 403 N.Y.S.2d 950 (4th Dep't 1978).

¹⁴ As noted in footnote.11, because the adjustments here represent uniform fixed costs not under the control of the bidders, we have some concerns with the fact that the costs points were prorated utilizing the adjusted costs. However, as noted, even if the cost comparison had been done without including this uniform adjustment, there would have been no change in the bidders that advanced to the oral presentation stage or in the ultimate award of the contract.

Based on the foregoing, allowing Healthport to advance to the final round after correcting its original submission would be permissible only if its failure to include the Manual was not a material variance. The variance is material if it advantaged Healthport or disadvantaged one or more of the other bidders. We find that the omission was not material based on the following.

Clearly, if Healthport had not created the Manual at the time of its bid submission, it would have gained an advantage over the other bidders, since it would have been afforded additional time, which was not afforded to other bidders, to create the document. Here, however, we are satisfied that the complete Manual submitted by Healthport upon request, was the company's standard training manual, in existence at the time of the bid submission.¹⁵ This conclusion is supported by the fact that Healthport did include with its proposal the Manual's detailed table of contents labeled "Version 2.2 01/01/08." The page references contained in this table of contents are entirely consistent with the location of materials in the complete Manual ultimately provided by Healthport, thus strongly suggesting that the complete one hundred seventy-three (173) page Manual (also labeled "Version 2.2 01/01/08") that was submitted, was in existence on the date the proposal was submitted.¹⁶ Therefore, it appears that Healthport's failure to submit the complete manual with its proposal was not an attempt to gain a time advantage over other bidders, but rather, was the result of the company's position that the Manual was a proprietary document and the company's standard practice prohibiting release of said document to non-employees.

We believe this situation is analogous to the situation where a bidder fails to submit the statutorily required non-collusive bidding certificate with its initial bid. The courts have held on a number of occasions that the bidding agency can, but is not required to, permit the bidder to correct this failure on the theory that late filing of a non-collusive bidding certificate is not a material variance, and therefore can be waived by the awarding agency.¹⁷

¹⁵ Indeed, one of the Stony Brook evaluators stated that Healthport's "Manual does not cover NYS laws," and then cited specific incongruities between the Manual and NYS law. This supports the view that the manual actually submitted was the Company's pre-existing standard manual, not a manual created for purposes of submission with the proposal.

¹⁶ If Healthport had been the winning bidder, we would require an affidavit to this effect from an appropriate official of the company.

¹⁷ In the *A.J. Beaudette Constr. Co. v. City of Syracuse*, 62 Misc 2d 564, *aff'd* 34 AD 2d 734 (4th Dept' 1970), the bidder failed to include a non-collusive certificate as required by the bid specifications and by SFL §139-d. The next low bidder initiated a court proceeding, urging the court to set aside the bid and award it the contract because of the winning bidder's omission of the non-collusive bid certification. The court concluded that the failure to execute the certification at the time of submitting its bid was due to inadvertence. The court observed that there were no allegations of collusion or any other illegality or irregularity, and suggested that the issues of a financial savings to the city and the possible loss of the city's baseball franchise were more important than what the court deemed a technical, de minimis irregularity.

Under these circumstances, we are satisfied that Healthport did not gain an advantage over the other bidders, and, therefore, that the omission was not a material omission, and accordingly that Stony Brook could permit Healthport to correct the omission. We also find no evidence to suggest any bidder or potential bidder was disadvantaged by Stony Brook's determination to permit Healthport to submit its complete Manual after the proposal due date.

4. Evidence of Bias

We find no support for MedRec's claim that Stony Brook's evaluation was biased.¹⁸ Stony Brook developed an evaluation methodology which factored in references and the evaluators appear to have complied with the evaluation methodology's reference scoring procedures. Furthermore, contrary to MedRec's assertion that InfoTrak received a higher reference score than MedRec despite InfoTrak's more limited experience, InfoTrak's reference score was 2 points lower than MedRec's score.¹⁹

CONCLUSION

In light of the foregoing, we have determined that the grounds advanced by the Protestor are without sufficient merit to overturn the contract award by Stony Brook.

Also, in *Matter of Consolidated Sheet Metal Works, Inc. v. Board of Educ.*, 62 Misc. 2d 445 (N.Y. Sup. Ct. 1970), the Court held that late submission of a non-collusive certification was non-material variance. In that matter, the architect, acting as agent for the Board, upon realizing the non-collusive bid certification was not included in the low cost bidders bid submission, requested and received the non-collusive bid certification from the low cost bidder. Initially the Board believed it had to reject the low cost bidder because of the omission, and the low cost bidder sued. The Court held that the architect had the authority, acting as agent for the Board, to waive the variance since there was no prejudice to the other bidders, and no unfair advantage to the contractor.

¹⁸ Stony Brook stated that MedRec's positive reputation and experience while working for Stony Brook were taken into account in the reference portion of the scoring and any further benefit provided to MedRec based on its Stony Brook experience would have been giving the incumbent an unfair advantage, contrary to the requirements of State Finance Law.

¹⁹ InfoTrak received scores of 10 – 8 – 7 – 9 (out of a possible 15) for an average of 8.5, while MedRec received scores of 10 – 10 – 12 – 10 for an average of 10.5.