STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by TouchNet Information Systems, Inc. with respect to the procurement of eCommerce Products and Services conducted by the State University of New York

Contract Number: C-1962

Determination of Bid Protest

SF-20090447

August 20, 2010

This Office has completed its review of the above-referenced procurement conducted by the State University of New York (hereinafter "SUNY") and the bid protest filed by TouchNet Information Systems, Inc. (hereinafter "TouchNet") 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 awards by SUNY. We, therefore, hereby deny the protest and are today approving the SUNY contracts with Sallie Mae Business Office Solutions (hereinafter "Sallie Mae"), Nelnet Business Solutions (hereinafter "Nelnet"), and CASHNet.

BACKGROUND

Facts

On August 31, 2009, SUNY issued a Request For Proposals (hereinafter "RFP") seeking proposals for products and services capable of handling the eCommerce needs of SUNY Participating Institutions (hereinafter "SUNY PIs"). As provided for in the RFP, the eCommerce needs include any activities that support accepting payments for products and services for SUNY PIs via the web. Many SUNY PIs developed and maintained their own web payment systems that served them well until recent changes were made in industry standards and regulations. Pursuant to the RFP, SUNY is seeking the services of vendors capable of fulfilling the needs of the SUNY PIs in compliance with the new industry standards and regulations.

By September 25, 2009, the proposal due date, TouchNet, Sallie Mae, Nelnet, CASHNet and two other nonresponsive bidders submitted proposals for providing eCommerce products and services to SUNY PIs. The RFP provided that SUNY would award up to three contracts. After reviewing the proposals, SUNY awarded contracts to three of the bidders, Sallie Mae, Nelnet and CASHNet, upon determining that they were the best value to the State. Subsequently, SUNY notified Sallie Mae, Nelnet and CASHNet that they were the successful proposers, and notified TouchNet that it was not a successful proposer.

By correspondence dated November 30, 2009, addressed to Charlotte Breeyear, Director of the Bureau of Contracts in this Office, Mr. I. Edward Marquette, on behalf of his client TouchNet, filed a summary protest and requested an extension of time to file a complete protest with this Office to challenge SUNY's contract awards. The extension request was granted, and by correspondence dated December 11, 2009, TouchNet filed the Initial Protest (hereinafter "Protest") with this Office. On January 22, 2010, Nelnet answered the Protest and on February 12, 2010, CASHNet answered the Protest. On April 9, 2010, this Office received SUNY's answer to the Protest. By correspondence dated April 26, 2010, TouchNet filed a reply to SUNY's answer and SUNY, by e-mail dated June 2, 2010, provided its sur-reply.

Procedures and Comptroller's Authority

Under Section 112(2) 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. However, under the authority of Section 355(5) of the Education Law, a higher threshold of two hundred and fifty thousand dollars ($250,000) has been established with respect to the Comptroller's approval of certain contracts let by SUNY, including the contract awards at issue in this protest. Because the value of these proposed contracts exceed $250,000, they are subject to the review and approval of this Office.

In carrying out the aforementioned responsibilities proscribed by SFL §112, this Office has issued Contract Award Protest Procedures that govern the process to be used when an interested party challenges a contract award by a state agency.[1] These procedures govern initial protests to this Office of agency contract awards, contract awards made by this Office and appeals of agency protest determinations. Because there was no procedure whereby a protest could be filed with SUNY, the Protest is governed by the procedures for filing an initial protest with this Office (Contract Award Protest Procedures Section 3).

In the determination of this protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by SUNY with the SUNY/Sallie Mae, SUNY/Nelnet and SUNY/CASHNet contracts;

2. the correspondence between this Office and SUNY arising out of our review of the proposed SUNY/Sallie Mae, SUNY/Nelnet and SUNY/CASHNet contracts; and

3. the following correspondence/submissions from the parties (including the attachments thereto):

[1] Comptroller's -Bulletin G-232.

a. Summary protest letter and extension request from I. Edward Marquette, Esq., dated November 30, 2009, filed on behalf of TouchNet;
b. TouchNet's protest letter dated December 11, 2009;
c. Nelnet's January 22, 2010 answer to the Protest;
d. CASHNet's February 12, 2010 answer to the Protest;
e. SUNY's April 7, 2010 answer to the Protest;
f. TouchNet's April 26, 2010 reply to SUNY's answer; and
g. SUNY's June 2, 2010 sur-reply to TouchNet's reply.

Applicable Statutes

The requirements applicable to this procurement are set forth in SFL Article 11 which provides that contracts for services shall be awarded on the basis of "best value" to a responsive and responsible offerer.[2] 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."[3] A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."[4]

SFL §160(5) provides that "cost" as used in Article 11 "shall be quantifiable and may include, without limitation, the price of the given good or service being purchased; the administrative, training, storage, maintenance or other overhead associated with a given good or service; the value of warranties, delivery schedules, financing costs and foregone opportunity costs associated with a given good or service; and the life span and associated life cycle costs of the given good or service being purchased. Life cycle costs may include, but shall not be limited to, costs or savings associated with construction, energy use, maintenance, operation, and salvage or disposal."

SFL §163(7) provides 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 in which the evaluation process and selection shall be conducted."

SFL §163(9)(a) provides that "[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

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[2] SFL §163(10).

[3] SFL §163(1)(j).

[4] SFL §163(1)(d).

describe and disclose the general manner in which the evaluation and selection shall be conducted."

ANALYSIS OF BID PROTEST

TouchNet's Protest to this Office

In its Protest. TouchNet challenges the procurement conducted by SUNY on the following grounds:

1. The financial model used by SUNY to evaluate bids was flawed.
    a. The RFP included the acquisition cost of a full complement of software applications and failed to consider currently installed bases at the SUNY PIs. However, 14 SUNY PIs already have a license to the TouchNet Payment Gateway and would not be required to re-license the software.
    b. Bidders were required to submit the cost of acquiring the payment plan but not the cost of the additional fees commonly charged to students enrolled in the types of payment plans to be offered by the selected vendors. It is common that vendors will claim that their plan has zero cost to the institution. However, the students that enroll in the plan pay the enrollment fee to the vendor, not the school. These are hidden charges that the RFP ignores. A significant cost portion of the services to be acquired was not calculated by the RFP. These fees generate additional revenue collected by the vendor. If the RFP accounted for this revenue, the SUNY PIs could collect the revenue under their contracts with the vendors. TouchNet would disperse any such revenue collected to the SUNY PI.

2. Sallie Mae failed to meet the requirement in the RFP that its products and services have interoperability capability with SunGard Higher Education Banner software.
    a. SunGard announced it was changing how it supported payments from outside vendors to comply with the new PA-DSS requirements. Four emails were sent out to the public listserv describing the new SunGard path and mentioned the names of the vendors who were successfully tested to meet the new interoperability functionality and Sallie Mae was never listed.

3. Two successful bidders' products and services do not have the Payment Card Industry Data Security Standard Certifications (PA-DSS) as requested in the RFP.
    a. Two of the vendors were not PA-DSS certified.

4. SUNY failed to undertake an adequate vendor responsibility "FLIP" analysis of the bidders.[5]

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[5] In conducting a vendor responsibility review, this Office considers four primary factors, commonly referred to as a "FLIP" analysis. These factors are: 1) Financial and Organization Ability; 2) Legal Authority; 3) Integrity; and 4) Past Performance.

a. Two of the successful bidders have signed multi-million dollar settlements with the NYS Office of the Attorney General concerning student lending practices. Furthermore. all three successful vendors have been historically unprofitable. have substantial debt, and make a large part of their revenue by marketing additional services to the students of schools that use their software.

5. CASHNet is not financially sound, and thus, not a responsible bidder.
   a. CASHNet was acquired by Higher One subsequent to its award and the financial condition of Higher One has not been evaluated.
   b. In other public RFP responses, CASHNet portrayed itself as being profitable, which is in contrast to public statements made in conjunction with its sale to Higher One.
   c. CASHNet took a loan of $1 million dollars from its parent company.

6. SUNY should waive the requirement of the RFP that contracts may be awarded to a maximum of three bidders because such requirement is immaterial.
   a. SUNY could have exercised its rights under the New York State Procurement Guidelines to waive immaterial irregularities and award a contract to TouchNet.
   b. In the RFP, SUNY reserved the right to change specifications and provisions of the RFP, change mandatory requirements, or waive any requirements that are not material. SUNY has the right to increase the number of awards from three to four. Doing so, would not prejudice SUNY or subject the State to additional costs. would correct any unfairness, and would put SUNY in a position to save significantly.

<u>SUNY's Response to the Protest</u>
In the Answer, SUNY contends the Protest should be rejected and the awards upheld on the following grounds:

1. The RFP was developed to evaluate the relative cost of each proposal and ensure fairness to all bidders that have varying numbers of contracts with SUNY PIs.
   a. TouchNet does not have an installed base of products and services in 14 SUNY PIs, but rather 7.
   b. The RFP was not structured using actual scenarios, but rather four hypothetical samples representing a fair array of SUNY campus sizes and needs in order to demonstrate the relative cost between the vendors submitting proposals.
   c. Even if the cost savings that TouchNet claims would have resulted if the RFP was scored taking the existing installed base of products into account, TouchNet would not have received enough points to come within 15% of the highest rated proposal to qualify for selection as required by the RFP.

d. In regards to the revenue that would be generated by the payment plan, imputing any revenue generating requirement into a payment plan is a creative invention of TouchNet and not a requirement of the RFP. The RFP was designed to determine the cost of the payment plans to SUNY PIs, not its potential revenue generating capabilities. If TouchNet's revenue generating hypothesis was taken to the logical extent, the RFP would have been overly complex and skewed to TouchNet's advantage.

2. The RFP required bidders to describe how their eCommerce solution integrates not only with SunGard Banner software, but also Oracle's PeopleSoft. In its proposal, Sallie Mae represented, and the same was verified by SUNY, that it was a recognized SunGard Banner Partner and its system was interoperable with the SunGard eCommerce software platform.
   a. Sallie Mae is also listed as a Collaborative Member of the SunGard 2010 catalogue.
   b. TouchNet confuses "certification" by SunGard with "interoperability" of a vendor's solution with SunGard Banner.
   c. The RFP only required bidders to describe how its solution integrates with SunGard Banner and Oracle's PeopleSoft. It did not require bidder's eCommerce solutions to be certified by SunGard.

3. The successful vendors developed their own applications which are not being sold to third parties and therefore are not subject to PCI DSS requirements.
   a. In-house payment applications developed by merchants or service providers that are not sold to third parties are not subject to the PA-DSS requirements, but must be secured in accordance with the PCI-DSS. PA-DSS applies to software vendors only, not service providers like Sallie Mae and Nelnet who would be providing eCommerce services to SUNY on their in-house systems and not selling the software being developed specifically for SUNY.

4. SUNY conducted a thorough vendor responsibility review of the vendors and such vendors met the criteria of the FLIP analysis.
   a. New York courts have consistently held that a government entity may establish any criteria to determine bidders' responsibility as long as such criteria are rational and the reliance on those criteria is essential to the good of the tax payers. Vendor responsibility is an elastic and flexible concept adaptable to the demands of an RFP.
   b. In the RFP, SUNY requested that bidders provide responses to a series of queries to enable SUNY to undertake a FLIP review. Sallie Mae and Nelnet answered all of the questions truthfully and there was no basis to find non-responsibility based on those responses.
   c. The New York Attorney General settlements referred to by TouchNet resulted from the Attorney General's findings of perceived industry-wide abuses by schools and lenders in the administration of student loans and was not related to eCommerce. The terms of settlement did not establish

guilt or liability on the part of Sallie Mae or NelNet nor did it result in their debarment from doing business with the State.

d. Prior to awarding the contracts, SUNY conducted an affirmative review of the financial soundness of the 3 successful vendors by reviewing their detailed financial statements from the years 2005 to 2008. The review found all 3 vendors to be financially capable.
e. The financial statements provided by the three successful bidders do not correspond with TouchNet's claims that none of the successful bidders were financially profitable in 2008 and had significant long-term and short-term debt.
f. Even if TouchNet's claims were true, they do not meet the threshold of adverse indicators meriting a finding of non-responsibility. There was no evidence from the bidders' questionnaires that any of them have failed to file or pay any federal, state or local taxes or filed for bankruptcy or have been indicted for criminal offenses.

5. CASHNet is financially sound and was not completely acquired by Higher One, thus making a financial review of Higher One unnecessary. The fact that CASHNet acquired a one million dollar loan from its parent company has no bearing on the cost evaluation of CASHNet and is therefore immaterial.
    a. Despite the acquisition of CASHNet by Higher One, the operations of CASHNet have not been merged into Higher One and for all intents and purposes, CASHNet is a stand-alone company. Therefore, a fresh bid evaluation of Higher One is unwarranted. However, SUNY demanded and was furnished with a summary of the financial condition of Higher One.

6. The RFP made it clear that up to 3 awards would be made and therefore accepting TouchNet's theory that SUNY could make an award to TouchNet ignores a material provision of the RFP.
    a. TouchNet's rationale disregards the inadequacies in its own proposal, especially its exorbitant cost. The total combined score attained by TouchNet was not within 15% of the top score and even if the three awardees limitation was waived, TouchNet still could not be awarded a contract.

DISCUSSION

1. Cost Calculation

Preliminarily, we note that this is a procurement for services, and therefore, under SFL §163(4), such contract must be awarded on the basis of best value, which, in most cases, involves a consideration of both cost and technical merit. Here, SUNY allocated 75 points to technical merit and 25 points to cost.

The 25 points allocated to cost were awarded using a methodology that assumed each campus would purchase a system at the outset of the contract and use that system for five years. SUNY utilized four model campus groupings ranging from a group representing smaller campuses to a group representing the largest campuses. The total cost score consisted of a combination of the purchase price of the product, monthly maintenance/support charges, installation costs, monthly license fees and other costs or credits.

Based upon this methodology, SUNY calculated TouchNet's cost proposal at an estimated total cost of two million four hundred and forty-four thousand thirteen dollars and twelve cents ($2,444,013.12) over the five year period. This cost was the highest cost of all four bidders. In accordance with the pre-established cost evaluation methodology, Sallie Mae, the lowest cost bidder at three hundred ninety-six thousand five hundred sixty four dollars and sixty-three cents ($396,564.63), was awarded 25 points for cost, while TouchNet was awarded 4.0565 points. It appears that TouchNet received the appropriate score for its cost proposal based upon the pre-established cost evaluation methodology established by SUNY.

TouchNet argues that the cost calculation methodology was flawed because: (i) it failed to consider the installed bases of TouchNet products in about 14 SUNY PIs; and (*ii*) it did not account for potential revenue to the State generated by the payment plans to be implemented by the vendors at the SUNY PIs by charging fees to enrolled students.

i) Existing Bases at SUNY PIs

The cost methodology was developed to evaluate the relative cost of each respective proposal and ensure fairness to all of the bidders who have varying numbers of contracts and existing bases at different SUNY PIs. Furthermore, even if SUNY erred in not considering the already existing bases at the SUNY PIs and the cost evaluation methodology was modified, TouchNet would have to yield enough points to come within 15% of the bidder with the highest total score, as required by the RFP, or else such error would be considered harmless error. In light of the considerable discrepancy between the cost score of TouchNet and the cost score of the highest total scoring bidder, Nelnet, modifying the cost evaluation methodology to consider existing bases would not likely impact TouchNet's cost score enough so that its total score would be within 15% of Nelnet's score.

ii) Revenue Generation from Payment Plans

TouchNet challenges the cost evaluation methodology because it only evaluates the cost to acquire the payment plan services, but does not consider the revenue that could be generated by the payment plan. TouchNet claims that it is common industry practice for vendors providing these types of payment plan services to charge enrollment fees to students, and as such, these fees could generate revenue for the State that should be evaluated in the cost evaluation. TouchNet also asserts that any such fees collected by TouchNet would be turned over to SUNY and thus should be accounted for in the calculation of its total cost.

Pursuant to SFL §160(5), "[c]ost. . . shall be quantifiable and may include, without limitation, the price of the given good or service being purchased. . . ." In a previous protest determination[6], we concluded that SFL §163 "implicitly requires that the evaluation methodology used by the procuring agency in determining cost must have a reasonable relationship to the anticipated costs that will be incurred under the terms of the resulting contract. As a result, when scoring cost, we believe that all fees to be assessed by a proposer, as well as other variables that impact upon cost to the state, generally should be factored into the scoring of the cost proposal. Obviously, the various factors impacting on the total cost related to the procurement should be ascribed relative weights based upon the agency's expectations concerning the relative significance in amount of each factor. However, all fees or other elements that will impact on cost should be evaluated unless the impact of such fee or element on cost: (i) will be substantially identical for all providers; (ii) are difficult or impossible to estimate and therefore are speculative; or (iii) are unlikely to occur."

There is no dispute that to the extent that the purpose of the RFP was to generate revenue, the revenue generation resulting from additional fees would fall under the definition of "cost" in SFL §160. Generally, all costs must be assessed by a proposer unless the cost falls under one of the three exceptions noted above. Here, revenue generation was not the purpose of the RFP. Furthermore, even if the ancillary revenue generating services were to be considered, the additional fees charged would fall under the exception for speculative costs in that they are difficult or impossible to estimate. In order to calculate such costs, SUNY would need to know which revenue generating services the SUNY PIs would be utilizing and how many students would enroll in such services. Here, it is unknown which services will be utilized by the various SUNY PIs and if such services are utilized, the number of students that might participate. It also appears that not all of the vendors will be charging additional fees to the students for enrolling in or participating in the various payment plans. The payment plan services offered by the bidders are ancillary services that neither SUNY nor the student is required to utilize. Therefore, attempting to calculate the cost generated by additional revenue obtained from the ancillary payment plan services would be speculative.

Since the existing installed bases and possible revenue generation were not taken into account in any of the other bidders' cost calculations, TouchNet was not disadvantaged and this Office finds no flaw in the cost evaluation methodology.

2. SunGard Banner Integration Requirement

TouchNet asserts that Sallie Mae does not meet the new interoperability functionality of the new SunGard Banner supported payment interface. Specifically, TouchNet argues that Sallie Mae is not certified to the eCommerce SunGard interface and thus violated a mandatory requirement of the RFP. In the RFP, SUNY asks the bidders to ". . . describe

[6] In SF 20080408 we denied a protest that challenged a cost scoring methodology that did not consider certain costs and cost savings that impacted upon insurance claims costs to be borne by the State on the basis that the certain costs were substantially identical among all providers and other costs could not be quantified.

how the solution integrates with SunGard's Banner and Oracle's PeopleSoft Campus Solutions." The RFP simply requested that bidders describe how their solution integrates with SunGard Banner, and did not require any type of SunGard certification. Sallie Mae asserted in its proposal that its system was interoperable with SunGard Banner and this assertion was verified by SUNY. We have no basis to question SUNY's finding that Sallie Mae satisfied this requirement of the RFP.

3. Non Compliance with Payment Card Industry Rules and Regulations

TouchNet argues that the products and services of both NelNet and Sallie Mae do not have the Payment Application Data Security Standard (PA-DSS) certification that was required by the RFP.

In-house payment applications developed by merchants or service providers that are not sold to a third party are not subject to the PA-DSS requirements, but must be secured in accordance with the Payment Card Industry Data Security Standard (PCI DSS). NelNet and Sallie Mae have developed their own applications to be used in-house at SUNY and will not be selling to a third party and therefore, are not subject to PA-DSS requirements, but only the PCI DSS. Both vendors are PCI DSS compliant. Furthermore, PA-DSS applies to software vendors only, not service providers like NelNet and Sallie Mae.

Additionally, we note that while the RFP requires the bidders to comply with all applicable Federal laws, rules, regulations, policies, and pertinent industry standards, the PA-DSS was not specifically referenced in the RFP and has no application to these providers.[7] .

Since it appears that NelNet and Sallie Mae are PCI DSS compliant and are not required to be PA-DSS certified, we are satisfied that they meet the requirements of the RFP.

4. Vendor Responsibility FLIP Analysis

TouchNet asserts that an adequate vendor responsibility FLIP analysis of the bidders was not conducted because Sallie Mae and NelNet entered into settlements with the New York State Attorney General in 2007 regarding student loan lending practices. The RFP required each bidder to submit a vendor responsibility questionnaire. Taking the settlements into account, among other information collected from Sallie Mae and NelNet, SUNY found both bidders to be responsible.

After receiving the SUNY/Sallie Mae, SUNY/Nelnet and SUNY/CASHNet contracts, this Office conducted its own vendor responsibility review of each bidder awarded a contract. We reviewed the financial and organizational ability of each vendor, legal authority, integrity and past performance. This Office found each vendor to be responsible.

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[7] RFP Section 5.2.8.1.

Therefore, we are satisfied that Sallie Mae, NelNet and CASHNet are responsible bidders as required by SFL §163.

5. Financial Viability of CASHNet

In its protest, TouchNet indicates that CASHNet was acquired by Higher One soon after being awarded the contract by SUNY and that Higher One's financial viability was not reviewed. SUNY asserts that CASHNet was not fully acquired by Higher One and thus, financial review of Higher One is not necessary. In any event, SUNY did review the financial condition of Higher One. Additionally, as stated above, this Office conducted a vendor responsibility review of Higher One including a review of Higher One's financial viability. Our review found Higher One to be financially viable and responsible.

We are satisfied that Higher One, as a party to the acquisition of the selected bidder CASHNet, is financially viable and responsible

6. Waiving the Three Awardees Requirement

In its protest, TouchNet asserts that SUNY could waive the requirement of the RFP that three bidders be awarded the contract because such requirement is immaterial.

SFL §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 methodology in the procurement record prior to the initial receipt of offers is a requirement that agencies are precluded from adopting varying evaluation methodology subsequent to the receipt of offers and making an award on that basis. Therefore, SUNY properly denied TouchNet's request to modify the selection methodology set forth in the RFP.

Furthermore, even if SUNY decided to waive the three awardees requirement, TouchNet would fail to meet another requirement to be awarded the contract under the RFP. Section 1.3.3. of the RFP, titled "Multiple Awards" states:

> "SUNY intends to award up to (3) contracts for eCommerce products and services. This award shall be from vendor proposals submitted that meet all mandatory requirements that provide the best value for the PI models in Appendix C, Financial Evaluation Model (FEM). . . .The award will be up

to three vendors that ***total scores are within fifteen percent (15%) of the top score***." (Emphasis added)

Here, even if the three awardees requirement was waived, TouchNet would be precluded from being awarded a contract because its total score does not fall within 15% of the top score.

CONCLUSION

We find that the issues raised in the protest are not of sufficient merit to overturn the awards by SUNY to Sallie Mae, Nelnet and CASHNet and, therefore, the protest is denied and we are today approving the SUNY/Sallie Mae, SUNY/Nelnet and SUNY/CASHNet contracts.

OFFICE OF THE STATE COMPTROLLER
110 STATE STREET
ALBANY, NY 12236