

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Bid Protest filed by Care to Care, LLC with respect to the procurement of a Radiology Management Contractor conducted by the New York State Department of Health

Determination  
of Bid Protest

SF-20100130

Contract Number – C025689

December 3, 2010

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This Office has completed its review of the above-referenced procurement conducted by the New York State Department of Health (hereinafter "DOH") and the bid protest filed by Care to Care, LLC (hereinafter "Care to Care") 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 DOH to HealthHelp, LLC (hereinafter "HealthHelp").

## BACKGROUND

### Facts

On July 13, 2009, DOH issued a Request for Proposals (hereinafter "RFP") to procure a radiology management contractor to implement a program to manage utilization of costly highly technical imaging studies. The selected contractor will develop, implement and operate a radiology management program for prior authorization of advanced medical imaging studies for Medicaid beneficiaries receiving services through the Fee for Service program and are not Medicare dual eligible, and/or enrolled in managed care.

Since this is a procurement for services, consistent with the requirements of Section 163 of the State Finance Law (hereinafter "SFL"), DOH selected best value as the basis for the award of the contract and provided for minimum specifications and requirements in the RFP. As such, each bidder was required to submit a technical proposal and a financial proposal. The technical proposal was worth 75 out of 100 total evaluation points and was broken down into two different sections: i) Organizational Background and Experience; and ii) Implementation and Administration. Each section contained numerous questions and requirements to be answered and satisfied by the bidders. The proposal receiving the highest technical score would be normalized and granted the full 75 points with every other proposal receiving an appropriate ratio of the 75 points based on its total technical score. The financial proposal was worth the remaining 25 out of 100 points and was also normalized with the proposal receiving the highest financial score receiving the full 25 points and every other proposal an appropriate ratio.

The financial proposal was based upon a monthly per Medicaid enrollee fee for all services described in the RFP. The bidder offering the lowest fee would receive the highest financial score. The bidder receiving the highest total combined technical proposal score and financial proposal score would be selected as the best value bidder.

Proposals were received from HealthHelp, Care to Care and MedSolutions by the September 2, 2009 proposal due date. During review of the proposals, DOH found MedSolutions to be nonresponsive and thus disqualified its proposal from consideration. Upon completing review of the two remaining proposals, DOH awarded the contract to HealthHelp upon determining that its proposal offered the best value. On March 4, 2010, DOH notified Care to Care of such selection. On March 14, 2010, Care to Care requested a debriefing and was provided one on March 16, 2010.

By correspondence dated March 18, 2010, Care to Care filed a protest (hereinafter "Protest") with this Office. On June 9, 2010, HealthHelp filed an answer to the Protest and on July 1, 2010, DOH filed an answer to the Protest. By correspondence dated July 6, 2010 Care to Care filed a supplemental protest with this Office (hereinafter "First Supplemental Protest"). On July 30, 2010, DOH filed an answer to the First Supplemental Protest and on August 6, 2010, HealthHelp filed an answer to the First Supplemental Protest. By correspondence dated July 29, 2010, Care to Care filed another supplemental protest with this Office (hereinafter "Second Supplemental Protest"). On September 3, 2010, DOH filed an answer with this Office to the Second Supplemental Protest. On September 22, 2010, Care to Care replied to DOH's answer to its Second Supplemental Protest and on October 26, 2010, DOH provided a sur-reply to Care to Care's September 22, 2010 reply.

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

Under Section 112(2) of the SFL, generally, 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.

In carrying out the aforementioned responsibilities prescribed 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.<sup>1</sup> These procedures govern initial protests to this Office of agency contract awards and contract awards made by this Office and appeals of agency protest determinations. Because there was no protest procedure at the agency, the Protest is governed by this Office's procedures for Initial Protests Filed with the Office of the State Comptroller (Section 3 of the OSC Contract Award Protest Procedures).

In the determination of this Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DOH with the DOH/HealthHelp contract;

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<sup>1</sup> Comptroller's G-Bulletin G-232.

2. the correspondence between this Office and DOH arising out of our review of the proposed DOH/HealthHelp contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
  - a. Care to Care's Protest, dated March 18, 2010;
  - b. HealthHelp's answer to the Protest, dated June 9, 2010;
  - c. DOH's answer to the Protest, dated July 1, 2010;
  - d. Care to Care's First Supplemental Protest, dated July 6, 2010;
  - e. DOH's answer to the First Supplemental Protest, dated July 30, 2010;
  - f. HealthHelp's answer to the First Supplemental Protest, dated August 6, 2010;
  - g. Care to Care's Second Supplemental Protest, dated July 29, 2010;
  - h. DOH's answer to the Second Supplemental Protest, dated September 3, 2010;
  - i. Care to Care's reply to DOH's September 3, 2010 answer, dated September 22, 2010.
  - j. DOH's sur-reply to Care to Care's September 22, 2010 reply, dated October 26, 2010.

### **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.<sup>2</sup> 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."<sup>3</sup> A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."<sup>4</sup>

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 "[t]he commissioner or a state agency shall select a formal competitive procurement process ... [which] shall include ... a reasonable process for ensuring a competitive field."

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<sup>2</sup> SFL §163(10).

<sup>3</sup> SFL §163(1)(j).

<sup>4</sup> SFL §163(1)(d).

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 §160(5) provides that “costs” 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.”

## **ANALYSIS OF BID PROTEST**

### **Protest to this Office**

In its Protest, Care to Care challenges the procurement conducted by DOH on the following grounds:

- Certain sections of the RFP that were less crucial to the determination of best value were over-emphasized while more crucial sections were under-emphasized.
- HealthHelp improperly reserved the right to charge extra fees for ad hoc reporting services when the RFP required a set fee for all services covered by the RFP.
- HealthHelp's bid was nonresponsive for the following reasons:
  - Its call center manager lacks the required prior authorization experience;
  - It did not provide the required information about call center capacity;
  - It did not provide adequate evidence of its medical director's qualifications and licensure in New York;
  - It did not include the required listing of HealthHelp's peer consultants;
  - Its clinical review plan does not meet the RFP specifications;
  - It did not contain the required explanation of how HealthHelp will comply with reporting timing requirements;
  - It did not include a plan to implement the project within forty-five days; and
  - It failed to contain required material concerning information technology security.

### **DOH Response to the Protest**

In its Answer, DOH contends that the Protest should be rejected and the award upheld on the following grounds:

- The RFP was designed in a manner that assigned weights to each section of the RFP that were appropriate and rationally related to the goals of the procurement.

- HealthHelp did not reserve the right to charge extra fees. HealthHelp, in fact, submitted a set price per enrollee as required by the RFP and is required to guarantee these prices for the contract period and the two-year extension period. Furthermore, the RFP becomes a part of the contract once the contract is executed. Therefore, even if HealthHelp actually intended to charge extra fees, DOH, under the terms of the contract, would not be bound to pay them.
- Despite Care to Care's claims, HealthHelp's bid was responsive because:
  - HealthHelp's Call Center Manager does possess the experience required by the RFP. Furthermore, the RFP did not specify that the Call Center Manager must have had experience with a "large" prior approval program, nor did it specify how much experience was required or what type. The type and extent of the Call Center Manager's previous experience were factors to be ranked by the evaluators. It was not the intent of the RFP that the Call Center Manager alone must fulfill the entirety of the general requirement of that experience.
  - HealthHelp did provide information about Call Center capacity. The adequacy of the description of the Call Center's capacity was a matter for the evaluators to determine, not an all-or-nothing requirement. HealthHelp's proposal provides a description of its current Call Center and indicates that they would open a similar facility near Albany for the purposes of the RFP. As such, HealthHelp's description of its Call Center capacity was adequate and responsive to the RFP.
  - HealthHelp did provide adequate evidence of its Medical Director's qualifications and New York State licensure.
  - HealthHelp's proposal identifies its peer consultants as the members of the Thomas Jefferson University's Department of radiology. The proposal then incorporates, by reference, the Thomas Jefferson University's Radiology department's faculty web page for a complete listing of all of its peer consultants. The RFP did not specify how the question must be answered but did indicate that "the bidder will be evaluated on how well the response demonstrates the ability to successfully meet the Implementation and Administration Performance Requirements." HealthHelp's proposal did not provide a descriptive listing of its peer consultants, name by name, and this was reflected in its score accordingly by the evaluators.
  - HealthHelp's Clinical Review Plan did meet the requirements of the RFP. Under its Review Plan, HealthHelp's Clinical Reviewers will be based at the Albany Call Center and will include licensed physicians, licensed radiologic technologists and licensed nurses, and the Medical Director who is a New York State licensed physician. HealthHelp's physician-reviewers are the peer consultants who are all licensed and based in the Albany Call Center in accordance with the requirements of the RFP.
  - HealthHelp's proposal indicates that it is fully capable and prepared to comply with the reporting requirements of the RFP. While there may not be an affirmative statement that HealthHelp will comply, the fact that HealthHelp already produces the required reports in the normal course of

its business and the assertion that it is fully capable of meeting DOH's requirements indicates its intent to do so. The lack of an explicit affirmative statement is a matter to be evaluated rather than cause for disqualification and does not make HealthHelp's proposal nonresponsive.

- The RFP did not require a separate Implementation Plan, rather, it required the bidder to provide details as to how it would implement the radiology management program. HealthHelp incorporated the elements of its Implementation Plan into various sections of the bid and the evaluators identified these components throughout their review of HealthHelp's proposal. This component of the RFP was evaluated accordingly.
- The Security Requirement Attachment was not a specific part of the RFP, but rather a generic attachment used in many different types of procurements. A bidder's ability to comply with the Security Attachment is an administrative issue to be evaluated by the Information Security Office after the winning bidder was selected. Furthermore, HealthHelp submitted its "Information Technology Security Policies and Procedures" with its proposal, however, that information was redacted when given to Care to Care in response to its FOIL request. While information in response to a question in the Security Attachment was not included with the initial submission of HealthHelp's bid, DOH subsequently requested that information and it was furnished by HealthHelp. HealthHelp's response to the request adequately addressed the issues DOH considered to be prerequisites before the work could commence. The materials submitted by HealthHelp did not supplement its bid. Any impact from the subsequent submission of materials was "de minimis" at best, since the materials submitted existed prior to the bid submission deadline and did not relate to the RFP requirements.

### **HealthHelp Response to the Protest**

In its Answer, HealthHelp contends that the Protest should be rejected and the award upheld on the following grounds:

- DOH properly exercised its discretion in choosing what financial criteria to evaluate under the Financial Proposal and how to weigh the Financial and Technical Proposals. DOH had a rational basis for its evaluation under the RFP. HealthHelp did not reserve the right to charge ad hoc fees. Rather, Care to Care misinterpreted a statement made by HealthHelp in its proposal as a reservation of rights to charge additional fees, when, in actuality, the bid price was not subject to adjustment.
- HealthHelp's bid was responsive to the RFP because:
  - The call center manager proposed by HealthHelp did possess prior authorization experience as required by the RFP. The resume was contained in HealthHelp's proposal but was redacted from the materials given to Care to Care in response to its FOIL request.
  - The required information on call center capacity was submitted with HealthHelp's proposal but was redacted from the materials given to Care to Care.

- The proposed Medical Director is highly qualified and is, in fact, licensed in New York. This information was contained in HealthHelp's proposal but was redacted from the materials given to Care to Care.
- A representation that HealthHelp's peer consultants are members of Thomas Jefferson University's Department of Radiology was made and HealthHelp further provided the names of two peer consultants and a URL link to a listing of other peer reviewers in its proposal.
- HealthHelp's clinical review plan meets all the required RFP specifications. HealthHelp's proposal included a clinical reviewer job description, however, this job description was redacted from the materials given to Care to Care. Furthermore, HealthHelp has physician reviewers that are licensed in New York for those instances where the physician reviewer will directly contact providers. Additionally, HealthHelp's clinical review plan using radiologic technologists conforms to the RFP specifications requiring that any professional medical staff directly in contact with provider clinicians be licensed in New York. New York law requires that radiologic technologists be licensed.
- HealthHelp's bid did not fail to address its ability to provide quarterly data reports within 30 days following each quarter. HealthHelp specifically states in its proposal that it "...will customize these reports as needed to meet the DoH's requirements..." HealthHelp also expressed, in the proposal, its capability and readiness to comply with the reporting requirements.
- The RFP did not require that a 45-day implementation plan be submitted with the proposals but, rather that it be submitted within 45 days of approval of the contract by the Office of the State Comptroller.
- HealthHelp did in fact submit security requirement materials that addressed the requirements of Section 2.3 of DOH's Security Attachment, although the submission of such materials may not have conformed exactly to the structure and organization of the Security Attachment. Furthermore, information technology security was not one of the required elements of the Initial Compliance Evaluation but rather was something to be evaluated during the technical evaluation process. Additionally, the security related materials submitted by HealthHelp were redacted from the materials given to Care to Care.

## DISCUSSION

### Point Allocation in the RFP

Care to Care argues that certain sections of the RFP were overemphasized because those sections were less crucial to the determination of best value but given the same weight or more weight than sections having more significance to the determination of best value. Additionally, Care to Care argues that other sections of the RFP were, in contrast, underemphasized because those sections were crucial to the determination of best value, yet given the same weight as or less weight than certain sections that were less significant to determining 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."

This Office generally gives significant deference to an agency's determination of point allocations with respect to the scoring of a proposal, except where the point allocation results in an award that fails to achieve best value, or is so distorted as to cause the procurement to lack fairness. Here, it appears that DOH prescribed weights to different sections of the RFP in a manner reasonably designed to achieve the purpose of the procurement. However, as detailed below, we need not conclusively resolve this issue, since even if we were to accept Care to Care's argument, any error would have been harmless error.

DOH, in its answer to the Protest, hypothetically re-allocated points in the RFP based on the suggestions made by Care to Care in the Protest. Pursuant to that demonstration, it appears that, if the sections of the RFP were weighted the way that Care to Care suggested they be, the difference between Care to Care's normalized technical score and the normalized technical score of HealthHelp would increase but not enough to alter the outcome of the procurement because of HealthHelp's substantial lead on the financial proposal. HealthHelp would remain the best value proposal based upon its combined score.<sup>5</sup> As a result, even if, assuming arguendo, we were to conclude that the point allocation was not appropriate, such error would be harmless error.

### Reservation of Right to Charge Additional Fees

The RFP asked for each bidder to submit a flat rate for each Medicaid enrollee participating in the Fee for Service program. No other costs or fees were requested or taken into account. Therefore, to determine the lowest cost bidder, the rates submitted by each bidder were compared and the bidder that submitted the lowest rate/enrollee was awarded the highest score on the financial proposal. In the Protest, Care to Care

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<sup>5</sup> HealthHelp lends further support to this argument in its answer to the Protest where it demonstrates the extent of the reallocation of points that would be necessary to alter the result of the procurement.



argues that HealthHelp reserved the right to charge additional fees beyond that of the flat fee it submitted.

In its technical proposal HealthHelp discusses how it will meet the reporting requirements of the contract. Specifically, HealthHelp states that most of the required reports are "already a part of HealthHelp's standard reporting package" so it can provide "the majority of ad hoc reporting requests at no charge." Care to Care construes this statement as a reservation of rights to charge ad hoc fees, and as such, argues that HealthHelp's proposal is nonresponsive to the RFP. In its answer to the First Supplemental Protest, HealthHelp asserts that this statement (contained in its technical proposal) was not a reservation of rights, but rather was simply intended to highlight the breadth of HealthHelp's reporting package. It further notes, as does DOH, that, in any event, the RFP makes it clear that the only fee that can be charged under the contract is the fee per enrollee contained in the bidder's cost proposal. We agree with these assertions by HealthHelp and DOH and therefore find no merit in Care to Care's argument.

### **Responsiveness of HealthHelp's Bid**

In the Protest and First and Second Supplemental Protests, Care to Care raises numerous arguments going to the responsiveness of HealthHelp's proposal. It should be noted, however, that Care to Care bases many of its arguments on materials obtained from DOH under the New York State Freedom of Information Law (Public Officers Law Article 6, hereinafter "FOIL").<sup>6</sup> Many of the documents disclosed in response to the FOIL request appear to have been redacted in whole or in part, and therefore, Care to Care did not have full and complete disclosure of the proposal materials submitted by HealthHelp. Several of Care to Care's arguments concerned matters that were disclosed or addressed in the proposal documents but were redacted before being issued to Care to Care. Therefore, many of the issues raised may be easily addressed because the information is readily available and clear in the unredacted proposal documents.

#### **1. Call Center Manager Required Experience**

The RFP required that the Call Center Manager proposed by the bidder possess experience working in a prior authorization Call Center. In the First Supplemental

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<sup>6</sup> In the Supplemental Protest, Care to Care raises an issue about the heavily redacted materials provided in response to their FOIL request claiming that the redactions impaired its ability to assess appropriate protest grounds. However, consistent with prior determinations of this Office, FOIL issues are not considered as part of this Office's review of bid protests. This Office does, however, as part of our review process, review allegations that a protester might assert, based on documentation in the procurement record, whether or not that documentation was made available to the protester.

Additionally, on November 22, 2010, Care to Care submitted a FOIL request to this Office requesting documents and electronic files attached to an e-mail transmitted to Charlotte Breeyear of this Office by Cynthia Beaudoin of DOH on November 22, 2010. The FOIL request will not be addressed in this protest determination but will be handled through this Office's FOIL process.

Protest, Care to Care asserts that the Call Center Manager proposed by HealthHelp does not possess the experience with a prior authorization Call Center that it claims is required by the RFP. DOH, in its answer to the First Supplemental Protest, asserts that HealthHelp's Call Center Manager "does meet the requirement for previous experience with a prior authorization call center", but does not explain the basis for this assertion. HealthHelp, in its answer to the First Supplemental Protest, also asserts that the proposed Call Center Manager possesses the required prior authorization experience, and further notes that the resume of the proposed Call Center Manager was attached to its proposal, but was redacted in the materials provided by DOH in response to Care to Care's FOIL request.

The proposed Call Center Manager's resume submitted to this Office together with the DOH/HealthHelp contract reflected experience at two separate Call Centers, but nothing in the resume indicates that either or both of these facilities were prior authorization Call Centers. Therefore, in an e-mail to the attorney for DOH, dated November 19, 2010, with copies to the attorneys for the protester and winning bidder, this Office requested that DOH advise, and document, whether either or both of the Call Centers identified in the resume are, in fact, prior authorization Call Centers or whether the proposed Call Center Manager possesses experience at some other prior authorization Call Center.

DOH replied by e-mail to this Office on November 22, 2010 and attached a letter from HealthHelp dated November 22, 2010 containing additional information regarding the proposed Call Center Manager's prior work experience as well as a new resume reflecting her work experience. The November 22 letter from HealthHelp and the new resume demonstrate that the proposed Call Center Manager has been working at a prior authorization call center since December of 2007, and does in fact possess the experience required by the RFP. Therefore, HealthHelp was responsive to that bid specification.

## **2. Call Center Capacity Information**

The RFP, as a part of a larger paragraph, asked for bidders to "[p]rovide a description of Call Center capacity including capacity of volume of reviews on a weekly basis and total number of covered lives handled by Call Center." Care to Care argues that HealthHelp's bid should have been disqualified because it did not provide the required information about Call Center capacity. Care to Care asserts that HealthHelp's bid does not contain this information or any information about call volume capacity. DOH in its answer to the First Supplemental Protest correctly notes that HealthHelp in its proposal at page 28 described its current Call Center and indicated that the facility it would provide in Albany would be designed and staffed at an appropriate scale to serve the 1.2 million lives to be covered under the procurement. We agree with DOH that such response meets the requirements of the RFP and therefore, find HealthHelp responsive to that bid specification.

### **3. Medical Director Qualifications and Licensure**

The RFP required that the medical director proposed by the bidder be licensed in New York. Care to Care argues that HealthHelp did not provide adequate evidence of its proposed medical director's qualifications and licensure in New York and should be found nonresponsive. Information regarding the medical director's qualifications and licensure was, in fact, provided but redacted from the materials given to Care to Care in response to its FOIL request. The medical director is licensed in New York, and therefore, HealthHelp is responsive on this point.

### **4. Listing of Peer Consultants**

The RFP asked the bidders to "[p]rovide current listing of peer consultants..." Care to Care argues that HealthHelp did not include a listing of its peer consultants as requested by the RFP and thus should be found nonresponsive. HealthHelp's proposal identifies its peer consultants as the members of the Thomas Jefferson University's Department of Radiology and then incorporates the Thomas Jefferson University's Radiology Department's faculty web page for a complete listing of all of the peer consultants. We agree with DOH that HealthHelp's response meets this requirement of the RFP.

### **5. Clinical Review Plan Requirements**

Care to Care argues that HealthHelp's proposal may not have included required information about its clinical review plan, and, therefore, was nonresponsive to the RFP. Specifically, Care to Care argues that: (1) HealthHelp's proposal may not have included job descriptions of the Clinical Reviewers as required by the RFP; (2) the proposed Clinical Review Team on-site in the Call Center may not have included New York State licensed physicians as required by the RFP; and (3) HealthHelp's use of radiologic technologists as part of the Clinical Review violates the requirements of the RFP because radiologic technologists are not required to have medical or nursing degrees.

We find these assertions without merit for the following reasons:

1. HealthHelp's proposal did, in fact, include the required job descriptions, but such job descriptions were redacted from the materials disclosed to Care to Care in response to its FOIL request.
2. As noted by DOH, HealthHelp's proposal, in fact, did meet the requirements of the RFP. Page 28 of HealthHelp's proposal states that the Clinical Reviewers will be based at the Albany Call Center and will include registered nurses and licensed physicians. Additionally, HealthHelp provided information showing that its Medical Director is a New York State licensed physician.
3. New York State law requires licensure of radiologic technologists and therefore, such individuals would be licensed as required by the specification in the RFP.

## 6. Explanation of Compliance with Reporting Requirements

Section C.2.P. of the RFP contains information about the due dates of data reports and asked bidders to "[describe] how the bidder will meet the Department's reporting requirements as outlined in Section C.2.P." Care to Care argues that HealthHelp's bid did not contain required information on how HealthHelp will comply with reporting timing requirements and, thus, was nonresponsive.

HealthHelp notes in its proposal that it already produces most of the required reports as part of its normal course of business and that it will customize these reports as needed. HealthHelp further indicates in its proposal that it is fully capable and prepared to comply with the reporting requirements of the RFP. DOH, in its answer to the First Supplemental Protest, asserts that these statements and disclosures satisfy this requirement of the RFP. We agree and therefore, find HealthHelp's bid is responsive on this point.

## 7. Plan to Implement Project Within Forty-Five Days

The RFP stated:

The bidder's responses must include a detailed description of how the Contractor would meet each of the following Performance Requirements.

The RFP then listed twenty-one specific performance requirements, including requirement (xviii) that related to "Implementation and Administration" and asked that the bidders "[p]rovide a detailed work plan for the implementation of the radiology management program within 45 days of approval by the Office of the State Comptroller." Care to Care argues that HealthHelp's bid contained no such work plan and therefore was not responsive to the RFP.

As Care to Care recognizes in its Protest, there is some ambiguity in this requirement, specifically whether the plan was required to be submitted with the bid or only within 45 days of the approval of the contract by the Comptroller. However, based upon DOH's response to Questions 11-14 posed by the bidders, it is clear to this Office that the bidders were not required to submit the actual plan at the time of their bids.<sup>7</sup> Therefore, HealthHelp was not required to submit a detailed work plan with its proposal.

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<sup>7</sup> We note that the RFP could, literally, be read to require that bidders provide "a detailed description" of how they will develop a complete plan within 45 days of the approval of the contract by the Office of the State Comptroller. However, we do not believe that this is the appropriate reading of the provision, particularly in light of the response to questions 11-14. In this regard, we note that each of the twenty-one performance requirements listed in this part of the RFP, other than the one at issue (and requirement xxi that bidders provide certain job descriptions and resumes), required that the bidder "describe" something. It would be reasonable to conclude that the introductory sentence quoted above was intended to relate to all of the items that required that the bidder describe something (i.e. all of the items other than items xviii and xxi). In this regard we note that it is hard to see why DOH would require that a bidder describe in detail how it would satisfy requirement (xxi) that simply required that they provide resumes for certain key personnel. Furthermore, we note that, in their answer to questions 11-14, where DOH made it clear that

## 8. Information Technology Security Material

Bidders were required to demonstrate that their information technology tools were compliant with DOH's security requirements. To make such a showing, the bidder was asked to submit, as a part of its proposal, certain information regarding the bidder's information technology security capabilities and standards. Care to Care argues that HealthHelp failed to submit information in response to several different sections of the "Security" portion of the RFP, even after DOH followed up with a request for the information.

As DOH pointed out in its answer to the Second Supplemental Protest, the "Security Requirement Attachment" (hereinafter "Security Attachment") was not contained in the RFP itself, but rather was an attachment to the RFP. The Security Attachment is a generic attachment used in many different DOH procurements and was not specifically designed for this RFP. DOH indicates that it does not address compliance with the "Security Attachment" until after an award of the contract is made, similar to review of the vendor responsibility questionnaire required to be submitted by each bidder.

DOH agrees that HealthHelp did not submit individual responses to each and every security requirement but instead submitted its "Information Technology Security Policies and Procedures", which were redacted from the materials given to Care to Care in response to its FOIL request. Because of this, DOH requested additional information and, in response, HealthHelp provided two other pre-existing policy documents. DOH determined that HealthHelp's submission adequately addressed the security requirements that DOH deemed necessary in order to begin commencement of the contract.

Based upon our review, it does appear that the RFP required in Section 1.1 of Attachment 13 that each bidder submit with its bid a security plan that satisfies the requirements of such attachment and the RFP. It also appears that one of the components of the security plan related to application security requirements, set forth in Section 2.3 of Attachment 13. HealthHelp did, in fact, submit a significant amount of materials related to security matters as part of its bid, however, DOH determined, as part of its review, that the materials submitted did not adequately demonstrate HealthHelp's ability to meet the requirements of Section 2.3. As a result, DOH requested further materials from HealthHelp. HealthHelp provided DOH with two other

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it did not require that the plan required by item (xviii) be submitted with the proposals, DOH did not in any way suggest that the bidders would, nonetheless, still be required to submit a description of how it would meet the requirement to submit such plan within 45 days of approval of the contract by this Office.

Furthermore, even if one were to conclude that, in fact, the RFP did require the submission of a description of how a bidder would satisfy the requirement to submit an Implementation Plan within 45 days, we do not believe that such requirement should be considered a material part of the RFP since any such submission would seem a minor portion of any proposal that could be satisfied by conclusory general statements. As a result, DOH could waive the failure to provide such submission.

pre-existing policy documents, and DOH determined that these materials demonstrated that HealthHelp would be in compliance with Section 2.3.

It is clear that agencies can waive a bidder's failure to provide required materials with its bid (and thereafter supply such materials) where the submission of such additional materials is not a material change to the bid.<sup>8</sup> In determining whether an omission is material, a key factor is whether the bidder gains any advantage over other bidders (or non-bidders).<sup>9</sup> Here, because the materials provided were existing documents, not prepared for this solicitation, we are satisfied that DOH was within its discretion to waive the failure to submit such materials as part of the original bid, and permit HealthHelp to supply such materials after the opening of proposals.<sup>10</sup>

## Conclusion

We find that the issues raised in the Protests are not of sufficient merit to overturn the award by DOH to HealthHelp and, therefore, the protest is denied.

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<sup>8</sup>Sinram-Marnis Oil Company, Inc. v. City of New York, 74 N.Y.2d 13, Le Cesse Bros. Contracting, Inc. v. Town Board of the Town of Williamson, 62 A.D.2d 28, In the Matter of Tony's Barge Service v. Town Board of Town of Brookhaven, 210 A.D.2d 234.

<sup>9</sup> Sinram-Marnis Oil Company at 339.

<sup>10</sup> Additionally, we note that DOH stated in its answer to the Second Supplemental Protest that it requested "clarification" from HealthHelp. Section 163(9) of the SFL provides that agencies may seek clarification from bidders, where provided in the solicitation. It appears that, on page 20 of the RFP, DOH reserved the right to request additional information in conducting the Compliance Evaluation and also reserved the right to ask clarifying questions in completing its evaluation of the technical proposals. Therefore, to the extent that the submission of the additional pre-existing materials by HealthHelp constituted a "clarification" within the meaning of Section 163(9), it would, in any event, be permissible under Section 163(9).