

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by
Computer Aid, Inc. with
respect to the procurement of Services for
Enterprise IT Staff Augmentation
Management conducted by the New York
State Chief Information Officer/Office For
Technology

**Determination
of Bid Protest**

SF-20100156

October 21, 2010

Contract Number – C000249

This Office has completed its review of the above-referenced procurement conducted by the New York State Chief Information Officer/Office For Technology (hereinafter "CIO/OFT") and the bid protest filed by Computer Aid, Inc. (hereinafter "CAI"), with respect thereto. As outlined in further detail below, we determine that the grounds advanced by the protestor, together with deficiencies discovered as part of our review of the contract, are sufficient to justify this Office withholding its approval of the contract. We therefore hereby uphold the protest and are today returning the CIO/OFT contract with TAPFIN Process Solutions (hereinafter "TAPFIN") not approved.

BACKGROUND

Facts

On September 7, 2009 CIO/OFT issued a Request for Proposals for Enterprise IT Staff Augmentation Management (hereinafter "RFP"). The purpose of the procurement was to award a contract to a single vendor to manage a network of subcontractor IT consulting service providers and to deliver IT consulting services for staff augmentation to New York State agencies (hereinafter "state agencies"). The ultimate goal of the procurement was to eliminate redundant efforts made by state agencies and lead to substantial cost savings through the aggregation of service and management overhead and profit. CIO/OFT proposes this approach to staff augmentation management as a groundbreaking model that will save the State millions of dollars on IT consultants while improving opportunities for minority and women-owned businesses in New York.

Since this is a procurement for services, consistent with the requirements of Section 163 of the State Finance Law (hereinafter "SFL"), CIO/OFT selected best

value as the basis for the award of the contract and provided for minimum specifications and requirements in the RFP for a bidder to be considered responsive. The RFP outlined the required cost structure of the proposals but did not disclose the manner in which cost proposals would be evaluated and scored. As indicated in the RFP, the technical proposal value was weighted at sixty percent (60%) and the cost value at forty percent (40%) of the total value available under the established evaluation methodology.

Proposals were due on October 30, 2009. CIO/OFT received three proposals, one from TAPFIN, one from CAI and one from Guidant Group, Inc. (hereinafter "Guidant"). After reviewing the proposals, CIO/OFT selected TAPFIN's proposal as the best value proposal and on January 26, 2010 notified CAI and Guidant of such selection. CAI then requested a debriefing, which was provided on February 5, 2010.

On February 12, 2010, CAI filed a protest with CIO/OFT asserting that the award process was flawed because: i) CIO/OFT failed to follow clear and rational standards in evaluating prices; and ii) CIO/OFT arbitrarily ignored certain technical criteria. On March 15, 2010, CIO/OFT denied the protest and responded that: i) the cost evaluation methodology was fair and rational because each bidder was asked to provide the same three quantifiable elements in their cost proposals and were subject to the same analysis; and ii) no bidder's technical score was inappropriately inflated because CIO/OFT followed the evaluation process as published in the RFP.

On March 29, 2010, this Office received a letter of protest (hereinafter "Protest") filed on behalf of CAI challenging the CIO/OFT award of the contract to TAPFIN for the services sought by the RFP. TAPFIN and CIO/OFT also received a copy of the Protest. On August 23, 2010, this office received a letter from CIO/OFT answering the allegations of the Protest (hereinafter "CIO/OFT Answer"). TAPFIN did not file any response to the Protest.

Comptroller's Authority and Procedures

Under SFL §112(2), 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.¹ 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 this is an appeal of an agency Protest determination, the Protest is governed by Section 4 of this Office's procedures for an appeal of agency protest determination.

In the determination of this Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by CIO/OFT with the CIO/OFT/TAPFIN contract;
2. the correspondence between this Office and CIO/OFT arising out of our review of the proposed CIO/OFT/TAPFIN contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. CAI's February 12, 2010 Agency Protest to CIO/OFT;
 - b. CIO/OFT's March 15, 2010 Answer to the Agency Protest;
 - c. CAI's March 29, 2010 Protest; and
 - d. CIO/OFT's August 20, 2010 Answer to the Protest.

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 §163(7) provides, "[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."

¹ Comptroller's G-Bulletin G-232.

² SFL §163(10).

³ SFL §163(1)(j).

⁴ SFL §163(1)(d).

SFL §163(9)(a) provides, “[t]he commissioner or a state agency shall select a formal competitive procurement process ... [that] 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 §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

CAI’s Protest to this Office

In its Protest, CAI challenges the procurement conducted by CIO/OFT on the following grounds:

1. CIO/OFT failed to appropriately consider bidder assumptions when reviewing the bidders’ transaction fees because the RFP required the bidders to make a crucial assumption on the average length (anywhere between two and twenty-four months) of IT staff assignments in determining how to price the contract; and
2. CIO/OFT’s cost evaluation methodology was flawed because, based on the rates that were submitted by CAI, the disparity between the cost score of CAI and that of TAPFIN is inconceivable.

Response to the Protest

In the Answer, CIO/OFT contends that the Protest should be rejected and the award upheld on the following grounds:

1. The assumptions of the bidders could not be taken into consideration because:
 - a. assumptions are not quantifiable and therefore cannot be evaluated in the manner required by the SFL;

- b. if CIO/OFT accommodated each bidder's assumptions, it could lead to favoritism of one bid over another;
 - c. under the cost evaluation methodology, each bidder's cost proposal was evaluated against exactly the same evaluation criteria established in advance of the bid opening for the procurement; and
 - d. bidders could make assumptions and evaluate risks in a manner most favorable to their proposal.
2. The cost evaluation methodology was not flawed because:
- a. all bidders were asked to provide the same three quantifiable elements in their cost proposals which were subjected to the same analysis for each bidder, thus creating a true "apples to apples" comparison; and
 - b. relatively slight differences between CAI's and other bidders' resource rates would have a ripple effect when those rates were run through the market basket that was deployed by CIO/OFT in its cost evaluations.

DISCUSSION

While CAI's Protest contains two separate arguments, ultimately, both arguments assert that CIO/OFT's cost evaluation methodology was flawed and, therefore, we will address the Protest on the basis of that single issue.

As CAI correctly notes, this Office has, on a number of occasions in prior bid protests, held that a state agency, in making an award under SFL §163 on the basis of best value, must, in the evaluation and scoring of cost, evaluate all fees or other elements that will impact on cost 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. Thus, in SF 20080408, we indicated:

We believe 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 agencies expectations concerning the relative significance in amount of each factor.

Similarly, in SF 20080185 we stated:

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

Thus, in summary, it is our opinion that a state agency, in evaluating cost, must generally consider all expected costs and must weigh such costs in a manner reasonably designed to predict actual costs under the contract. Here, as outlined below, the cost evaluation methodology designed and implemented by CIO/OFT did not give appropriate weight to the various cost components and, therefore, the cost scoring methodology did not necessarily award the greatest number of points to the bidder whose proposal was likely to provide the lowest cost to the State. Furthermore, and even more problematic as further detailed below, the implementation of such cost evaluation methodology appears to have provided the maximum number of points to TAPFIN, despite the fact that it appears likely that CAI would provide these services at a lower price. This defect is further accentuated by the fact that if a more reasonable scoring methodology had been adopted, CAI, which received the highest technical score, would have been determined the best value proposal.

The RFP required each bidder to submit three different rates that were used in the calculation of cost: 1) hourly rates for each skill set provided for in the RFP; 2) the subcontractor percentage of overhead costs; and 3) a transaction fee. The cost evaluation methodology adopted by CIO/OFT used these rates to calculate two different components of cost: 1) the Total Rate; and 2) the Total Transaction Fee. These two components were then combined to come up with the total cost, which, in turn, was used to calculate the cost score for each proposal.

CIO/OFT calculated the Total Rate component of cost by: (1) computing the sum of 5,458 hourly rates for each bidder;⁵ and (2) multiplying such sum by the subcontractor's proposed percentage of overhead costs. CIO/OFT calculated the Total Transaction Fee component of the cost score by multiplying the

⁵ The RFP required that each bidder submit 4,587 hourly rates, one for each different skill set at every different level in all eleven regions. In calculating the hourly rate, as outlined in the text, CIO/OFT summed these 4,587 separate rates, and then added in the hourly rate for each of the 871 placements identified by CIO/OFT.

bidders' proposed transaction fee⁶ by 871.2, which represented CIO/OFT's estimated number of anticipated placements under the contract.⁷ The Total Rate was then added to the Total Transaction Fee to come up with the total cost for each bidder, which became the basis for the cost scores.

In our view, this cost evaluation methodology was not reasonable or appropriate because it does not approximate the costs that can be reasonably anticipated to be incurred under the contract. Specifically, it is our conclusion that, while the methodology may reasonably project the Total Transaction Fee that would be incurred, it does not reasonably project the Total Rate costs that would be incurred and, indeed, substantially underestimates the Total Rate costs that will be incurred.

The transaction fee will be incurred only once with respect to each individual placed by the contractor. As a result, utilizing CIO/OFT's anticipated estimate of 871.2 placements,⁸ if a contractor proposes a transaction fee of \$5,000, it would be reasonable to assume that the Total Transaction Fee under the contract would be \$4,356,000 and, indeed, this would be the Total Transaction Fee for such bidder under CIO/OFT's cost evaluation methodology. We agree that this is a reasonable way to measure the total cost the State will incur for transaction fees under the contract.⁹

However, the calculation of the Total Rate does not reasonably measure the cost that the State will incur under the contract. Each individual placed will, on average, work thousands of hours that will be billed under the contract. As a result, the reasonably expected cost to the State for each individual placed will be the hourly rate proposed by the contractor for the skill set that the individual is

⁶ The transaction fee is a one-time fee, similar to a placement fee, paid to the successful bidder upon placement in a skill set.

⁷ The Total Transaction Fee calculations were based upon a specific number of estimated placements, while the calculation of the Total Rate was based upon rates for every single one of the 4,587 skill sets that bidders submitted hourly rates for, whether or not there were any anticipated placements in that skill set. Since, obviously 871.2 placements cannot be made into 4,587 positions, this is an additional defect in the evaluation methodology. The calculation of the Total Rate should (assuming the reasonableness of the 871.2 placement estimate) have been based upon the sum of the hourly rates for the 871.2 positions identified by CIO/OFT. However, based upon our calculations, even if this defect was corrected, the CIO/OFT cost evaluation methodology still, under any plausible projection of total hours per placement, would have underestimated the projected cost to the State of the hourly rates.

⁸ It is not clear how there can be a fractional placement.

⁹ We note that 871.2 is an appropriate multiplier to calculate the Total Transaction Fee assuming it represents a reasonable estimate of the placements under this contract. However, since it appears that the 871.2 figure is based on agency survey responses, it may have been more appropriate to use historic numbers based on similar contracts if those numbers were available.

being placed in multiplied by the average number of hours anticipated to be worked by individuals in that skill set multiplied by the subcontractor's percentage of overhead costs. The cost evaluation methodology utilized by CIO/OFT, however, effectively presumes that each individual placed will work only one hour. Since it is clear that each individual will work far more than one hour, the cost evaluation methodology, in our view, substantially underestimates the actual costs the State will incur for the sum of the hourly rates for the approximately 871 individuals to be placed under the contract. As a result, we are constrained to conclude that the cost methodology adopted by CIO/OFT was not designed in a manner that could reasonably be expected to project total costs under the contract.

Furthermore, this defect appears to have materially altered the outcome of the procurement. When the CIO/OFT cost evaluation methodology was applied to the bids submitted by the three bidders, TAPFIN received the maximum total of 40 points, Guidant received 24 points and the protester CAI received 12 points. These totals were based upon the following:

	TOTAL COST	COST SCORE
TAPFIN	\$1,982,124.75	40.00
Guidant	\$3,263,634.46	24.29
CAI	\$6,266,629.36	12.65

A review of the components of the cost proposals from each bidder shows that TAPFIN appears to have received the maximum cost score, and far more points than the other bidders, primarily based upon the fact that it proposed a very low transaction fee, despite the fact that its Total Rate was substantially higher than that of CAI, although somewhat lower than that of Guidant. However, if the CIO/OFT cost evaluation methodology had taken into account a conservatively estimated number of hours worked in each placement, we have determined that CAI would have been the low cost proposal and, since it offered the highest ranked technical proposal, would have been awarded the procurement. Specifically, if it is assumed that each individual placed will work an average of 2,000 hours (approximately one year) over the life of the contract,¹⁰ the results would have varied greatly, as outlined below:

¹⁰ Based upon our experience with these types of "body shop" contracts, we believe that 2,000 hours (or one year) is a conservative estimate of the average duration of each placement under these contracts. However, even if a far smaller, and in our view unreasonable, estimate of 70 hours were utilized, CAI would still have been the low cost proposal (and therefore necessarily the winning bidder). Indeed, even if an absurdly low estimate of 20 hours were utilized, CAI would still have been the best value proposal (although not the low cost proposal) and therefore the winning bidder

	TOTAL COST	COST SCORE
TAPFIN	\$655,344,774	31.54
Guidant	\$711,366,804	29.05
CAI	\$516,709,996	40.00

Since CAI received the highest technical score, if CIO/OFT had adopted a cost evaluation methodology that factored reasonably estimated hours into the calculation of Total Rate, and thereby gave proper weight to the Total Rate, TAPFIN would not have been the winning bidder.¹¹ Rather, CAI would have been the winning bidder. As a result, we have no choice other than to return the contract without our approval.

Finally, because SFL §163(7) requires that the evaluation methodology be fixed prior to the initial receipt of offers, the statute precludes CIO/OFT from now adopting a more appropriate evaluation methodology for the current procurement (i.e., on e affording appropriate weight to the hourly rates and transaction fees) and making an award on such basis. Accordingly, should CIO/OFT wish to move forward with a procurement for these services, it will be required to rebid.

¹¹ As noted in Footnote 7, the calculation of Total Rate under the CIO/OFT cost evaluation methodology erroneously includes hourly rates for positions that are not projected to be filled (assuming the accuracy of CIO/OFT's projection of 871.2 placements), and therefore overstates the Total Rate. However, based upon our calculations even if this error was corrected, once the adjusted Total Rate is multiplied by any reasonable projection of hours per placement, CAI, not TAPFIN, would have been the winning bidder.