STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Trindade Value Partners, Inc. with respect to the procurement of healthcare services and the purchase of property at the Long Island College Hospital by the State University of New York.

Contract Number – X002654

Determination of Appeal

SF– 20140369

October 28, 2014

The Office of the State Comptroller has completed its review of the above-referenced procurement conducted by the State University of New York (SUNY) seeking a qualified party to provide or arrange to provide health care services at the Long Island College Hospital (LICH) and to purchase the LICH property, plant and equipment. We have determined that the grounds advanced by Trindade Value Partners, Inc. (Trindade) are insufficient to merit the overturning of the award made by SUNY to the Fortis Property Group, LLC (Fortis) and, therefore, we deny the Appeal. As a result, we are today approving the agreement between Downstate at LICH Holding Company, Inc. (DLHC), Fortis, FPG Cobble Hill Acquisitions, LLC and NYU Hospitals Center to effectuate this transaction.

BACKGROUND

Facts

In early 2011, the State University Downstate Medical Center (SUNY Downstate) formed a not-for-profit corporation known as DLHC, for the purpose of acquiring LICH in the Cobble Hill neighborhood in Brooklyn, New York (*see* Laws of 2011, ch. 57, Part P). In May of that year, the sale was consummated and DLHC took title to the LICH real property containing the existing medical facilities. The acquisition required several governmental approvals as well as the approval of Supreme Court (*see* Not-For-Profit Corporation Law §§ 510, 511). To provide SUNY Downstate with the ability to run the hospital and to fund the debt obligations assumed by DLHC, SUNY Downstate entered into a long-term lease with DLHC and staffed the hospital through an agreement with another specially formed not-for-profit corporation, Staffco of Brooklyn, LLC, created for the purpose of privately employing the LICH staff.

In March 2013, the Legislature enacted Chapter 56 of the Laws of 2013 (Part Q) as part of the Budget Bill for Health and Mental Hygiene, which required SUNY to submit to the Executive and Legislature a Sustainability Plan to secure the ongoing fiscal viability of the Downstate Hospital enterprise. The finally approved Sustainability Plan, dated June 1, 2013, provides that "Downstate has determined that it must exit

from the operation of the LICH facility as soon as possible" (Sustainability Plan for SUNY Downstate Medical Center, dated June 1, 2013, at pg. 14 [as supplemented and approved on June 13, 2014]). To put this plan into effect, SUNY issued a Request for Proposals in July 2013 seeking a qualified party to provide or arrange to provide health care and purchase the LICH property, plant and equipment.

Shortly thereafter, community groups, current staff at LICH and the New York City Public Advocate (hereinafter collectively referred to as the Petitioners) began publicly expressing concerns over SUNY's plan to close, or substantially reduce services and staff at, LICH. This turned into formal litigation wherein the Petitioners sought to enjoin SUNY from closing LICH (*see Boerum Hill Association, et al. v. State University of New York, et al.,* Index No. 13007/2013; *New York State Nurses Association, et al. v. New York State Dep't of Health et al.*, Index No. 5814/2013; *In the Matter of the Application of The Long Island College Hospital,* Index No. 9188/2011, all in the Supreme Court of New York State, Kings County). In addition, the Supreme Court Justice who originally approved the sale of LICH to SUNY issued an opinion chastising SUNY for not following through on its previously stated intent of taking over and improving the quality of services offered at LICH (*see* Decision and Order of Justice Demarest, dated Aug. 20, 2013, *In the Matter of the Application of The Long Island College Hospital,* Index No. 9188/2011). In February 2014, SUNY entered into a Stipulation of Settlement with the Petitioners (Stipulation) wherein all the parties agreed to a specific process for the sale of LICH (*see* Stipulation and Proposed Order, Index Nos. 13007/2013, 5814/2013, 9188/2011, filed February 25, 2014).

The Stipulation, which was approved and so ordered by the Supreme Court, provided for a new Request for Proposal process with explicit evaluation criteria and the following key points: (1) the technical evaluation team will be comprised of both members designated by SUNY, as well as members designated by the Petitioners (having agreed that the Petitioners' combined, weighted score shall equal 49% of the total technical score); (2) proposals that offer continuation of healthcare operations during the interim period prior to the closing of a transaction and/or a full service hospital or a teaching hospital, would be eligible for additional technical points over those proposals that did not offer such elements; (3) a minimum "non-contingent" purchase price of $210 million to go to SUNY; (4) if SUNY is unable to enter into an agreement with the Initial Successful Offeror within 30 days of making the award to such offeror, then SUNY may, in its sole discretion, terminate such negotiations and make a new award to the offeror whose proposal received the next highest score. This selection process would continue "with the same time constraints" until either an agreement is reached or SUNY determines, in its sole discretion, that it is not reasonable to make an award to any other offeror; and (5) deed restrictions shall be placed on any property to be used for medical services restricting the use of such property for health services for 20 years.

On February 26, 2014, SUNY issued Request for Proposal X002654 (RFP) with responses due by March 19th.[1] SUNY accepted nine proposals as having met the RFP's mandatory minimum qualifications. These nine proposals were then evaluated by both the SUNY evaluators as well as representatives of the Petitioners as contemplated in the Stipulation. On April 3, 2014, SUNY announced an initial award to Brooklyn Health Partners Development Corporation, LLC (BHP). BHP's proposal offered to build a new full service 300-400 bed hospital, along with a "bridge facility" that would house 150 hospital beds and other healthcare services for the interim period while the new facility is being constructed. On April 14, 2014, Trindade protested SUNY's award to BHP and, more generally, the procurement conducted by SUNY.

Next, in early May, after 30 days of negotiating with BHP, SUNY concluded that BHP had neither a viable healthcare provider nor the requisite financing in place. Thus, SUNY exercised its discretion to terminate negotiations with BHP and render a new award to The Peebles Corporation (Peebles) whose proposal received the second highest score (Letter from Ruth Booher to R. Donahue Peebles, dated May 5, 2014). Peebles, in conjunction with its development and healthcare partners, proposed to build a new free-standing emergency department, an urgent care center and other primary, preventative and specialty health services, but it did not propose a full service hospital.

SUNY commenced formal negotiations with Peebles but, in the meantime, the Petitioners filed a motion in court asserting, among other things, that the scores resulting from the RFP were not in accord with the Stipulation and that certain of those scores should therefore be thrown out. After several related court appearances, the court ultimately denied the motion and upheld the results of SUNY's procurement (*see* Decision and Order of Justice Baynes, dated June 13, 2014, in *Boerum Hill Ass'n, et al. v. SUNY, et al.*, Index No. 13007/13, at pg. 1). Meanwhile, negotiations began to break down between SUNY and Peebles. On May 28, 2014, SUNY concluded that the parties had reached an impasse on certain critical issues and terminated negotiations with Peebles (Letter from Ruth Booher to Meredith Kane, dated May 28, 2014).

SUNY immediately offered Fortis, the third ranked offeror, the next opportunity to enter into a transaction with SUNY. Fortis, like Peebles, did not propose to build a new full service hospital but, rather, a free-standing emergency department, urgent care center and an array of other primary and specialty health services. On June 16, 2014, SUNY issued a letter denying Trindade's protest that was filed in April. Trindade appealed that determination to SUNY's Appeals Officer. SUNY denied the appeal on July 22nd and Trindade thereafter submitted a timely appeal to our Office by letter dated July 24, 2014 (Appeal).

Procedures and Comptroller's Authority

Under Section 112(3) of the State Finance Law (SFL), before any revenue contract made for or by a state agency, which exceeds ten thousand dollars ($10,000)

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[1] While Holdco is the record owner of the LICH real property (and some of the furniture and equipment), SUNY, on behalf of Holdco, managed the entire RFP process.

in amount, becomes effective it must be approved by the Comptroller. We consider the issues raised in this Appeal as part of the contract review function pursuant to such section of law.

In carrying out the aforementioned responsibilities proscribed by SFL §112, this Office has issued a Contract Award Protest Procedure that governs the process to be used when an interested party challenges a contract award by a State agency.[2] These procedures govern initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because this is an appeal of an agency protest decision, the Appeal is governed by this Office's procedures for protest appeals.

In the determination of this Appeal, this Office considered:

1. The documentation forwarded to this Office by SUNY in connection with the transaction with Fortis (including Trindade's protest submissions to SUNY, SUNY's responses and Fortis' response).

2. The correspondence between this Office and SUNY arising out of our review of the transaction with Fortis.

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

    a. Trindade's Appeal of SUNY's protest determination, dated July 24, 2014;

    b. SUNY's Answer to the Appeal, dated July 28, 2014;

    c. Trindade's letters to OSC dated April 14, 2014, April 30, 2014, June 11, 2014 and July 29, 2014, respectively (all correspondence from Derek Oubre to Charlotte Breeyear);

Applicable Statutes

This procurement is not subject to the competitive bidding requirements of State Finance Law § 163, as this is not an expenditure contract but is rather a revenue contract, i.e. a contract which generates revenue for the State without any expenditure of state funds. This Office has consistently taken the position that the competitive bidding requirements of State Finance Law § 163 do not apply to revenue contracts, since such transactions do not involve the purchase of commodities or services. That being said, in fulfilling this Office's statutory duty under SFL §112, we generally require that revenue contracts be let pursuant to a reasonable procurement process.

In addition, in this instance, SUNY has been legally authorized to conduct this procurement by the Sustainability Plan that was approved pursuant to Chapter 56 of the

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[2] OSC Guide to Financial Operations, Chapter XI.17.

Laws of 2013 (Part Q), discussed above. Finally, in conducting this sale, SUNY is further bound by the terms of the Stipulation and Proposed Order, Index Nos. 13007/2013, 5814/2013, 9188/2011, filed February 25, 2014. In light of these non-statutory standards, we will proceed to analyze the issues raised in this Appeal.

ANALYSIS OF BID PROTEST

Appeal to this Office

In its Appeal, Trindade challenges the procurement conducted by SUNY on the following grounds:

1. SUNY's evaluation and scoring methodology violated the terms of the Stipulation; and

2. SUNY improperly considered certain proposals that should have been disqualified under the RFP.

Response to the Appeal

In its Answer, SUNY contends the Appeal should be rejected and the award upheld on the following grounds:

1. SUNY's evaluation and scoring methodology complied with the requirements of the Stipulation; and

2. SUNY correctly determined that all nine proposals it considered and scored had met the mandatory minimum requirements of the RFP.

DISCUSSION

The Propriety of SUNY's Scoring Methodology

Trindade contends that SUNY's method for calculating the scores violated the terms of the Stipulation. As is relevant to this issue, the Stipulation required that:

> "Petitioners shall be entitled to designate members of the Technical Evaluation Committee such that their combined, weighted score shall equal 49% of the total score of such Committee, irrespective of the number of serving members..." (Stipulation, at pg. 10).

In determining the final score of each proposal, the Stipulation stated that "[t]he technical score for any Offer shall have a maximum of 70 points, and the financial score for any Offer shall have a maximum of 30 points" (Stipulation, at pg. 10).

SUNY attempted to comply with these mandates by providing in the RFP that:

> "Qualified proposals will be evaluated by a committee consisting of members designated by SUNY and members designated by the [Petitioners]. The scores determined by members of the Technical Review Subcommittee designated by the [Petitioners] will be weighted as forty-nine percent (49%) of the total technical score. The scores determined by the balance of the Technical Review Subcommittee will be weighted as fifty-one percent (51%) of the total technical score" (RFP, Part 2 Section K "Review and Evaluation of Proposals" at pg. 23).

In addition, the RFP stated that both the technical and financial scoring would be assigned "a relative weight in the total evaluation" and, further, specified that the technical portion would be worth 70 points and the financial component would be worth 30 points (RFP, Part 2 Section M "Evaluation Methodology" and Section L "Selection Criteria" at pgs. 24-25).

Ultimately, the Technical Review Committee consisted of 13 evaluators, seven designated by the Petitioners and six designated by SUNY. In order to execute the evaluation methodology as stated in the RFP, SUNY assigned a range of points to each technical criterion, with the maximum allowable score being 70 points. After the Technical Review Committee completed its evaluations, SUNY combined the scores of the evaluators designated by the Petitioners and divided that sum by seven to arrive at an average Petitioner-designated score. Similarly, SUNY combined the scores of the SUNY-designated evaluators and divided that sum by six to arrive at SUNY-designated average score. The average score of the Petitioners was then multiplied by .49 and the average score of the SUNY evaluators was multiplied by .51. The two resulting figures were then added together to arrive at a final technical score. It is uncontested that SUNY applied this methodology consistently to all qualifying proposals.

Contrary to Trindade's argument, we do not believe that this methodology violated the aforementioned terms of the Stipulation. Trindade seems to focus on the wording of the Stipulation that Petitioners' "combined, weighted score shall equal 49% of the total [technical] score" as a basis for its argument that SUNY was required to apply "an absolute weight" of 49% to the Petitioners' scores, regardless of how many evaluators were appointed and the resulting impact on the weight afforded to SUNY. We disagree. Although the Stipulation does not expressly state that the 49% weight afforded to the Petitioners was to be a relative weight (thus affording SUNY a 51% share of the technical scoring), we find that SUNY's interpretation of the Stipulation in this manner was reasonable. Indeed, the Stipulation further provides that the 49% weight shall be applied "irrespective of the number of [Petitioners'] serving members" (Stipulation, at pg. 10). Thus, SUNY agreed to allow Petitioners to insert as many evaluators into the process as Petitioners saw fit. While this provided a benefit to the Petitioners, we read the inclusion of the language "irrespective" to mean that if Petitioners designated more evaluators than SUNY, SUNY is entitled to calculate the Petitioners' scores in such a manner as to afford them an overall 49% (i.e. slight

minority) share in the technical scoring. To read the Stipulation as Trindade asserts would result in the potential for the Petitioners to obtain a much larger, and potentially controlling, share of the final technical score. We do not believe that this is what was intended by the Stipulation. Instead, the RFP merely clarified what the parties had bargained for – that the Petitioners' scoring would have a 49% influence on the technical score and SUNY's scoring would have a 51% influence on the technical score.

Further, we do not read the Stipulation as prohibiting SUNY from taking the technical scores and averaging them before applying the weight factors. While neither the Stipulation nor the RFP, for that matter, mentioned use of an "average" score from each subcommittee, the Stipulation stated that Petitioners' "combined" score would get the 49% weight. We do not believe that SUNY's scoring methodology, which totaled the scores from each subcommittee and then averaged them, conflicted with this language. In addition, we note that the RFP was slightly clearer than the Stipulation in that it specified the relative weight among the scoring of the two technical subcommittees. Importantly, the RFP was approved by the Petitioners, the court and SUNY as part and parcel of the final Stipulation. Thus, Trindade's other argument that SUNY violated the Stipulation by specifying in the RFP that a "relative weight" of 70 and 30 points would be assigned to the total technical and financial scores, respectively, also fails. To the contrary, we view this approach to the final composite score as consistent with the requirements of the Stipulation.

Next, we note that the Petitioners, who are the only other party that the Stipulation was intended to benefit (*see* Stipulation, at § 10), have not to our knowledge complained about the mathematical approach applied by SUNY. Although not dispositive, we believe that Petitioners' failure to speak on this issue (when Petitioners did in fact file a motion challenging certain of the scores on different grounds) does provide some insight into how the Petitioners interpret the Stipulation and the resulting RFP. Based on all of the foregoing, we do not believe that SUNY's evaluation and scoring methodology under the RFP violated the terms of the Stipulation. Finally, we have performed a calculation of the technical scores by applying an "absolute weight" of 49% as proffered by Trindade and have concluded that even if SUNY had calculated the scores in this manner, the top four ranked proposals – BHP, Peebles, Fortis and Prime Healthcare Foundation – would have remained in the same order. Therefore, since SUNY has not moved beyond the top four ranked proposals, it appears that use of the alternate calculation methodology asserted by Trindade would not have changed the outcome of the award.

SUNY's Qualification of Proposals During Phase I

Trindade also contends that SUNY accepted proposals from offerors that were unqualified. To support this argument, Trindade asserts that certain offerors who proposed full-service hospitals (not including the current awardee, Fortis) failed to accurately reflect the financing that would be necessary to meet this goal and, therefore, they should have been disqualified on this basis.

The RFP set forth three phases of the evaluation process. During Phase I, each proposal was reviewed to determine whether it met SUNY's minimum mandatory requirements (RFP, Part 2 Section M "Evaluation Methodology" pg. 24). Proposals that were deemed to have met such requirements were then evaluated and scored under Phase II. The minimum mandatory requirements were dispersed throughout the RFP. We have reviewed the provisions of the RFP that required evidence of financial resources at the time of a proposal's submission, and find that evidence as to the sufficiency of proposed financing for the construction of a new hospital was not a minimum mandatory requirement that would invoke a disqualification at the Phase I stage. In general, SUNY required offerors to submit letters of intent or other proof of availability of funds sufficient to cover the costs as contemplated in the proposal (*see* RFP, Part 1 Section B Item 11; Part 2 Section A; Exhibit C Section G.2*)*. The RFP did not require, as a condition of moving on to the second phase of the evaluation that SUNY evaluate the *sufficiency* of such proposed financing. Consideration of whether an offeror had proposed adequate financing to complete its proposal was done during the technical evaluations and/or later, when SUNY was in negotiations with a proposed awardee and the construction plans had been finalized. We offer no opinion on whether or not this was the best approach, and are only concluding that sufficiency of the proposed financing was not a mandatory minimum requirement. In any event, the current awardee, Fortis, did not propose a full-service hospital. Therefore, even assuming Trindade was correct in its argument, once again, this would not affect the current award to Fortis.

The Results of The Technical Evaluation

Next, to the extent that Trindade also argues that the results of the procurement should be thrown out because certain offerors who proposed full-service hospitals received lower scores than offerors who did not propose full-service hospitals, this issue was addressed by Supreme Court in a Decision and Order dated June 13, 2014. There, the court denied Petitioners' motion to disqualify certain scores on the basis that such scores did not comply with the objectives of the Stipulation. Specifically, Justice Baynes expressly declined to "substitute [his] judgment for that of the evaluators" (Decision and Order of Justice Baynes, dated June 13, 2014, in *Boerum Hill Ass'n, et al. v. SUNY, et al.,* Index No. 13007/13, at pg. 4). Moreover, Justice Baynes held that it was "within the evaluators' discretion to consider non-technical reasons for the scores they give" (*id.*). Like the court, we do not see any showing of malfeasance on the part of the technical evaluators such that would form a basis for overturning the results of the procurement. Under the terms of the Stipulation, SUNY and the Petitioners designated 13 different people who were given broad discretion in scoring the proposals based on the evaluators' subjective opinion and assessment of the viability of each proposal. Trindade has not provided sufficient evidence that this agreed upon process was not followed during the evaluation phase of the RFP process.

CONCLUSION

For the reasons outlined above, we have determined that the issues raised in the Appeal are not of sufficient merit to overturn the award by SUNY to Fortis. As a result, the Appeal is denied and we are today approving the agreement between DLHC, Fortis, FPG Cobble Hill Acquisitions, LLC and NYU Hospitals Center to effectuate this transaction.