

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Franwell,
Inc. with respect to the procurement of a Medical
Marijuana Seed to Sale Tracking System conducted
by the New York State Department of Health

**Determination
of Bid Protest**

SF-20150153

Contract Number – C030471

October 26, 2015

The Office of the State Comptroller (Office) has reviewed the above-referenced procurement conducted by the New York State Department of Health (DOH) for a Medical Marijuana Seed to Sale Tracking System (Tracking System). We have determined the grounds advanced by Franwell, Inc. (Franwell) are insufficient to merit the overturning of the contract award made by DOH and, therefore, we deny the Protest. As a result, we are today approving the DOH contract with Bio-Tech Medical Software, Inc., DBA, BioTrackTHC, (BioTech) for the Tracking System.

BACKGROUND

Facts

On July 5, 2014, New York State enacted the Compassionate Care Act (Act), legalizing the cultivation and use of marijuana for certain medical purposes in New York State.¹ The Act requires DOH to implement a Medical Marijuana Program (MMP) and oversee the Tracking System² to be used by “registered organizations”³ in the cultivation, production and distribution of medical marijuana in the State (RFP, at § I – A[1]). The Tracking System will collect, maintain and process data from registered organizations and provide DOH with the ability to track the growth, distribution and dispensing of medical marijuana from seed to sale (RFP, at § I – A[1], § III). On January 9, 2015, DOH issued a Request for Proposal (RFP) seeking a contractor to provide technical services related to the acquisition, implementation and support of the Tracking System for the MMP.

Since this was a procurement for services, consistent with the requirements of State Finance Law (SFL) § 163, the method of award was based on best value. As described in the “Method of Award” section of the RFP, proposals were first reviewed to determine whether they met the mandatory requirements set out in the RFP (RFP, at § XIV – F[1]). Proposals meeting the mandatory requirements were then evaluated based on the following criteria and weighting:

¹ L. 2014 ch. 90, *codified as* Article 33, Title V-A, New York State Public Health Law.

² *Id.*

³ A registered organization is a “for-profit business entity or not-for-profit corporation organized for the purpose of acquiring, possessing, manufacturing, selling, delivering, transporting, distributing or dispensing marihuana for certified medical use.” New York State Public Health Law § 3364.

- Technical Evaluation (60 points) – based on the detailed technical specifications set forth in the RFP (RFP, at § XIV – C, F[2]);
- Cost Evaluation (30 points) – a normalized scoring of the total cost proposed, with the lowest cost proposal receiving all 30 points (RFP, at § XIV – F[3]); and
- Software-as-a-Service (SaaS) Demonstration (10 points) – a demonstration by bidders susceptible to award detailing the proposed system’s capabilities (RFP, at § XIV – E, F[3]).

The bidders’ technical and cost scores were combined to determine whether they were susceptible to award and invited to provide a SaaS Demonstration (RFP, at § XIV – E, F[4]; DOH Answer, at pg. 2). The combined cost and technical score was then added to the SaaS Demonstration score (if applicable) to come up with a final score for each proposal. The proposal receiving the highest final score was then considered for contract award (RFP, at § XIV – F[5]).

The deadline for submission of proposals was February 20, 2015. DOH received five proposals in response to the RFP. Two of the proposals did not meet the mandatory requirements and were not evaluated. The remaining three proposals went on to be evaluated according to the methodology set out in the RFP (DOH Answer, at pg. 2). BioTech’s proposal received the highest combined cost and technical score. Since the combined cost and technical scores of the other two proposals were not within 10 points of BioTech’s score, they were not invited to provide a SaaS Demonstration. On May 5, 2015, DOH awarded the Tracking System contract to BioTech.

Upon receiving notice of the award to BioTech, Franwell requested a debriefing from DOH pursuant to SFL § 163(9)(c). A debriefing was provided by way of conference call on May 20, 2015 (Protest, at pg. 4; DOH Answer, at pg. 3). On May 26, 2015, Franwell filed a protest with this Office challenging the award to BioTech (Protest). On August 17, 2015, DOH submitted the contract to this Office for review along with its response to the Protest (DOH Answer).

Comptroller’s Authority and Procedures

Under SFL § 112(2), with certain limited exceptions, before any contract made for or by a state agency, which exceeds fifty thousand dollars, becomes effective it must be approved by the Comptroller.

In carrying out the contract approval responsibility prescribed by SFL § 112, this Office has issued a Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a state agency.⁴ This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Since this is an initial protest of an agency’s contract award, the Protest is governed by section 3 of the OSC Protest Procedure.

In the determination of the Protest, this Office considered:

⁴ OSC Guide to Financial Operations, Chapter XI.17, at <http://www.osc.state.ny.us/agencies/guide/MyWebHelp/>.

1. The documentation contained in the procurement record forwarded to this Office by DOH with the DOH/BioTech contract;
2. The correspondence between this Office and DOH arising out of our review of the DOH/BioTech contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
 - a. Franwell's Protest, dated May 26, 2015;
 - b. BioTech's Answer to the Protest, dated August 12, 2015;
 - c. DOH's Answer to the Protest, received on August 17, 2015; and
 - d. Franwell's Reply to DOH and BioTech's Answers, dated August 24, 2015.

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.⁵ Best value is defined as "the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers."⁶ For purposes of SFL § 163, "responsible" means the financial ability, legal capacity, integrity, and past performance of a business entity.⁷

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

SFL § 163(9)(c) provides that "A state agency shall, upon request, provide a debriefing to any unsuccessful offerer that responded to a request for proposal ... regarding the reasons that the proposal or bid submitted by the unsuccessful offerer was not selected for an award."

SFL § 163(9)(f) provides that "[p]rior to making an award of a contract, each state agency shall make a determination of responsibility of the proposed contractor ..."

ANALYSIS OF THE PROTEST

Protest to this Office

In the Protest, Franwell challenges the procurement conducted by DOH on the following grounds:

1. DOH improperly scored Franwell's technical proposal by:

⁵ SFL §163(10).

⁶ SFL §163(1)(j).

⁷ SFL §163(1)(c).

- a. Scoring technical components not identified in the RFP; and
 - b. Unfairly scoring Franwell's proposal in the following categories: Maintenance and Support, Testing, Training, Hosting, Security and Privacy, and Experience.
2. DOH inaccurately scored Franwell's cost proposal and advised Franwell not to submit an alternative pricing approach.
3. A reasonable evaluation of Franwell's cost and technical proposals would have entitled it to provide a SaaS Demonstration, an opportunity that bidders should have been provided regardless of score.
4. The integrity of BioTech should be carefully examined, due to its involvement with the National Cannabis Chamber of Commerce (NCCC) and IKUSH, INC. (iKush), to determine whether it is a responsible bidder.

DOH's Response to the Protest

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

1. Technical proposals were fairly evaluated in accordance with New York State Procurement Council Guidelines based upon the precise responses provided by bidders in their proposals. Franwell relied too strongly upon the opportunity to provide a SaaS Demonstration, failing to provide sufficient details in its proposal in response to the technical requirements.
2. The evaluation of cost proposals was accurate and equally applied to all bidders including Franwell. DOH did not advise Franwell against proposing an otherwise acceptable pricing approach.
3. Since Franwell's proposal was accurately scored and was not within 10 points of BioTech's score, Franwell was not susceptible to an award and, accordingly, not invited to provide a SaaS Demonstration.
4. BioTech's involvement with NCCC and iKush does not impact on its ability to provide the required services and DOH has determined BioTech is a responsible bidder.

BioTech's Response to the Protest

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

1. Franwell's proposal was incomplete and proposed an alternate price proposal that the RFP clearly indicated would not be evaluated.

2. The procurement record supports DOH's award to BioTech and deference should be given to DOH since the award is based on factual determinations within DOH's expertise.
3. BioTech is a responsible bidder as determined by DOH's vendor responsibility review. BioTech's involvement with the private sector marijuana industry does not impede its ability to perform on a State contract.

Franwell's Reply to the Answers

In its Reply, Franwell reiterates the arguments raised in the Protest and states that its ability to protest the award was severely disadvantaged by DOH's failure to respond to Franwell's Freedom of Information Law (FOIL) request.

DISCUSSION

I. DOH's Scoring of Franwell's Technical Proposal

Franwell contends that DOH, when evaluating its technical proposal, unreasonably penalized Franwell for failing to address technical components not identified in the RFP, and unfairly scored Franwell's proposal with respect to the following technical categories: i) Maintenance and Support, ii) Testing, iii) Training, iv) Hosting, v) Security and Privacy, and vi) Experience (Protest, at pgs. 7-12).

We note, preliminarily, that notwithstanding the Comptroller's broad contract review authority under SFL § 112, this Office generally gives significant deference to factual determinations that are within the procuring agency's technical expertise, so long as such determinations are supported by the record. DOH, as the State agency responsible for the regulation of manufacturing, distribution and use of narcotics in New York State, as well as the administration and management of the MMP,⁸ possesses the expertise to determine the specific needs and requirements for carrying out its duties. Therefore, this Office will give significant deference to DOH with regard to its factual determinations in evaluating specifications drafted within its area of technical expertise.

Below, we will address the factual determinations made by DOH at issue in the Protest, and assess whether such determinations are sufficiently supported by the procurement record.

A. Scoring of Technical Components Not Referenced in the RFP

In a Debriefing Summary provided to Franwell, DOH indicated that Franwell lost points in the technical category of "Seed to Sale Tracking Solution - Business Requirements" because "[l]imited to no detail was provided about the ability to brand the system" (Protest, at Exh. C § 2). Franwell asserts that the RFP makes no reference to "branding" and, as such, it is unreasonable for Franwell to lose one-third of the available points in the Business Requirements section for its

⁸ New York State Public Health Law § 201(j) and Article 33, Title V-A.

failure to address a specification not identified in the RFP. Moreover, Franwell asserts that, even assuming the “ability to brand the system” was an RFP requirement, Franwell provided sufficient information to establish that ability (Protest, at pgs. 6-7).

DOH asserts that its reference in the Debriefing Summary to “brand[ing] the system” relates to Business Requirement 1.9 in Section IV(B) of the RFP which specifically required that bidders demonstrate “[t]he ability to transfer data from [DOH] to the registered organization in the event that ownership of the data changes” (DOH Answer, at pgs. 3-4). In its Answer, DOH acknowledges that the term “branding” is not specifically referenced in the RFP but indicates that the evaluation tool provided to the evaluation team defined “branding” as “adding banners to identify NYS MMP ...” and related to the identification of data ownership through banners, logos or other design features that would distinguish DOH’s ownership of the data (DOH Answer, at pgs. 3-4). DOH also asserts that Franwell’s loss of points in the Business Requirements category was not solely due to the limited detail related to “branding” in Business Requirement 1.9. In fact, Business Requirement 1.9 was only allotted .5 of the 11 technical points assigned to the Business Requirements section and Franwell received .133 of the .5 point available. DOH states that Franwell receiving 7 out of the 11 points assigned to the Business Requirements section was generally attributable to its average responses to the various Business Requirement specifications (DOH Answer, at pgs. 3-4). Moreover, even if Franwell received the full .5 point allotted to Business Requirement 1.9, its total score would have only been increased by .3667.

Since the weakness mentioned in the Debriefing Summary related to branding is supported by a specification expressed in the RFP, and DOH’s scoring of the Business Requirements category is supported by the procurement record, we find no reason to disturb DOH’s scoring in this category.

B. Scoring of Other Specific Categories in Franwell’s Technical Proposal

DOH states that Franwell’s technical proposal lost points because of its failure to provide detailed information regarding several specified technical categories of the RFP (Debriefing Summary, at § 2; DOH Answer, pgs. 3-7). Franwell contends that it did, in fact, provide sufficient detail to establish its ability to meet these requirements (Protest, at, pgs. 7-11). However, DOH asserts that Franwell offered only conclusory statements that it can meet the requirements, and failed to provide information as to *how* those requirements will be met. Additionally, DOH stresses that Franwell relied too heavily on the potential opportunity to provide a SaaS Demonstration to illustrate the manner in which its system would meet many of the technical requirements set forth in the RFP (DOH Answer, at pgs. 4-7).

Notably, with respect to the technical proposal requirements, the RFP provides that “[P]roposals should be fully responsive to the requirements ... *Simply repeating a requirement statement may be considered nonresponsive*” (emphasis added) (RFP at § XIV – C[5]). The RFP also made clear that each proposal must “document their approach to meeting ... each requirement set forth in” the technical categories (RFP, at § XIV – C[5]). In its proposal, Franwell repeatedly responded to technical requirements by generally stating: “After a careful review by our staff of [the technical requirements of this category] we determined that our processes either meet or exceed (with little adapting) all of the standards and requirements. At the demo presentation, a

technical engineer [or training manager] will be present to answer any questions related to [this technical category]” (*see* Franwell Technical Proposal, at pgs. 39 [Hosting], 42 [Security and Privacy], 45 [Testing], 46 [Training], 47 [Maintenance and Support]).

As stated in the RFP, and emphasized by DOH in its Answer, the opportunity to provide a SaaS Demonstration was only available to “invited” or “eligible” bidders deemed “susceptible to award” (RFP, at § XIV – E, F[4], DOH Answer, at pgs. 2, 6). The Debriefing Summary provided to Franwell explained that, in order to be invited to provide a SaaS Demonstration, a bidder’s proposal must have either been the proposal with the highest combined technical and cost score, or within 10 points of the highest scoring proposal. Since the SaaS Demonstration was only worth a maximum of 10 points, it follows that only bidders within 10 points of the highest scoring proposal could be deemed “susceptible to award.” Accordingly, a bidder was required to adequately address the technical requirements of the RFP in its written technical proposals, as the SaaS Demonstration was not the place to provide initial responses to the technical categories of the RFP. It appears that Franwell relied heavily on the potential opportunity to provide a SaaS Demonstration of its proposed system to illustrate compliance with the technical requirements of the RFP and, consequently, its technical proposal lost points for not fully responding to the specifications.

Below, we will address each technical category at issue in the Protest.

i) Maintenance and Support

The RFP listed several Maintenance and Support capabilities required of the proposed Tracking System (RFP, at § X; Attachment 2). Franwell’s response initially stated, as noted above, that Franwell’s staff has reviewed all the requirements of this category, has determined that “all of its processes either meet or exceed” them, and that an engineer would be present at the SaaS Demonstration to answer any questions (Franwell Technical Proposal, at pg. 47). Franwell’s proposal then goes on to provide certain additional detailed information in response to the requirements of the Maintenance and Support category.

DOH asserts that much of the information provided by Franwell in this category was vague, conclusory and not linked to specifically numbered specifications set forth in the RFP. Since the scoring method was designed such that a score of 0 (Non-Responsive) to 5 (Excellent) was to be assigned to each specification, DOH states that Franwell’s scores reflect Franwell’s failure to address the specific requirements outlined in the RFP, or demonstrate how such requirements would be met (DOH Answer, at pg. 6). Ultimately, Franwell’s average score in this category was 2.4 based on the scale of 0 to 5 with a total weighted score of 4 out of the 8 points available for Maintenance and Support. Since our review of Franwell’s proposal confirms that it was vague in some areas and did not provide responsive information correlating to the requirements in this category as required by the RFP, we find DOH’s scoring of Franwell’s proposal with respect to the Maintenance and Support category is supported by the procurement record.

ii) Testing

The RFP summarized six types of system testing activities that the awarded contractor would be responsible for, and then numerically listed an additional 11 testing specifications (TE-1-TE-11; RFP, at § VII). In response to the Testing category requirements, Franwell again initially states: “After a careful review by our staff of all the testing requirements (TE1-TE11), we determined that our processes either meet or exceed (with little adapting) all the requirements. At the demo presentation a technical engineer will be present to answer any questions related to testing” (Franwell Technical Proposal, at pg. 45). Franwell’s proposal goes on to provide certain additional information about its testing strategies, but does not correlate this information to any specific requirement set forth in the RFP (Franwell Technical Proposal, at pg. 45).

DOH avers that “Franwell’s proposal did not reflect a sound approach and/or failed to provide enough information to adequately address performance” and “failed to reference anything about Regression Tests or Parallel Tests,” two of the six testing types required by the RFP (DOH Answer, at pg. 5). Franwell received an average score of 1.9 out of 5 in the Testing category. Since our review of the procurement record supports DOH’s scoring of Franwell’s proposal in this category, we find no reason to disturb it.

iii) Training

Similar to its response in the Maintenance and Support and Testing categories, Franwell indicated that it could meet or exceed the requirements of this section and would answer any questions related to training at the SaaS Demonstration (Franwell Technical Proposal, at pg. 46). Franwell’s proposal went on to provide certain general information about its training program without reference to the nine specific RFP requirements for Training. In this category, DOH found that Franwell responded to most of the requirements, but did not provide enough detail to establish its ability to adequately perform such requirements. Additionally, Franwell did not address each of the training topics required in T-5, or describe how it would track training enrollment and completion as required in T-6 (Franwell Technical Proposal, at pgs. 46-47; DOH Debriefing Summary, at § 2). Franwell received an average score of 2.6 out of the 5 points available in this category, which we find to be supported by the procurement record.

iv) Hosting

Again, in response to the Hosting category, Franwell provided an almost identical response to those provided in the other technical categories stating generally that it could meet or exceed all 39 of the requirements and would answer questions relating to Hosting at the SaaS Demonstration (Franwell Technical Proposal, at pg. 39). Franwell’s proposal in this category goes on to provide considerable additional information on its hosting solution and disaster recovery plan, but does not correlate this information to any of the 39 specific RFP requirements of the Hosting category (Franwell Technical Proposal, at pgs. 39-42). DOH found that Franwell failed to provide sufficient details to establish its capability to meet the hosting requirements. Additionally, requirement H-6 mandated that bidders meet a Recovery Time Objective (RTO) of four hours (RFP, at Attachment 1, pg. 2), but Franwell’s RTO is six hours (Franwell Technical Proposal, at pg. 41). Franwell

received an average score of 2.7 out of 5 in this category which, again, we find to be supported by the procurement record.

v) Security and Privacy

Franwell again provided an almost identical general response in this category, claiming that it could meet or exceed all of the Security and Privacy requirements, but failing to provide detailed information as to how such requirements would be met. Franwell did provide information about its risk assessment plan and management, but failed to provide specific responses to each of the 10 requirements listed in the RFP (Franwell Technical Proposal, at pgs. 42-43). DOH found Franwell's response made no mention of other security and privacy requirements such as a comprehensive information security plan, or security review meetings with NYS ITS Health Cluster CISO (DOH Debriefing Summary, at § 2). In addition, DOH evaluators found there was limited detail in other required areas, such as: "managing all systems in accordance with NYS policies; ensuring all system accesses are compliant with NYS Identity Assurance Policy; supporting all necessary incident response efforts per the NYS Cyber Incident Response standard; documenting and managing all system implementation and developing in compliance with NYS Secure System Development Life Cycle standards; and evidence of security testing of solutions prior to their release for use" (DOH Debriefing Summary, at § 2). As a result, DOH awarded Franwell only one out of the eight available points in this category (DOH Answer, at pg. 7).

Franwell asserts that the reason it did not provide more detailed information on its Security and Privacy plan was because of the risk of such sensitive information being made public (Protest, at pg. 10). However, Section XV(O) of the RFP provided:

"Disclosure of information related to this procurement and the resulting contract shall be permitted consistent with the laws of the State of New York and specifically the Freedom of Information Law (FOIL) contained in Article 6 of the Public Officers Law. The State shall take reasonable steps to protect from public disclosure any of the records relating to this procurement that are exempt from disclosure. Information constituting trade secrets or critical infrastructure information for purposes of FOIL shall be clearly marked and identified as such by the Contractor upon submission. Determinations as to whether the materials or information may be withheld from disclosure will be made in accordance with FOIL at the time a request from such information is received by the State."

Franwell failed to mark any information contained in its proposal as trade secrets or critical infrastructure information in need of protection from disclosure under FOIL. Moreover, Franwell failed to specify in its Protest any particular requirement under this section that would have jeopardized its company's security and privacy; instead, only generally stating that "[n]othing would compromise the privacy and security of this highly sensitive project more than a detailed public blueprint of its security components" (Protest, at pg. 10). In our view, the RFP did not require the disclosure of such a "blueprint and provided bidders reasonable assurance that sensitive information would be afforded every possible protection from disclosure pursuant to FOIL. Accordingly, we find no reason to disturb DOH's scoring in the Security and Privacy category.

vi) Experience

As a minimum requirement of the RFP, bidders were required to “[c]urrently own a Medical Marijuana Seed to Sale Tracking Software Solution, and have at least one client who has been utilizing this software for a period of at least 12 months ...” (RFP, at § I[C]). A bidder’s experience was also a component of the technical proposal that was evaluated and scored (RFP, at § XIV[C][6][b]).

In its proposal, Franwell indicated that it was awarded a Medical Marijuana seed to sale tracking system by the State of Colorado in 2010 but due to the project being put on hold by Colorado, the system did not become operational until December 2013 (a little over a year prior to the proposal due date for the New York Tracking System) (Franwell Technical Proposal, at pgs. 47-48). Although Franwell met the minimum requirement of having at least one client utilizing its seed to sale software for a period of at least 12 months, DOH only awarded Franwell two out of the four points allocated to the Experience category (DOH Answer at, pg. 7), stating in the Debriefing Summary that Franwell “has limited experience with operating Seed to Sale solution” (Debriefing Summary, at § 2). In the Protest, Franwell indicates that DOH criticized Franwell for only having seed to sale experience in one state (Protest, at pg. 11). DOH states, however, that Franwell did not lose points for having experience in only one state, but rather for the limited duration of its experience. As a result, Franwell was not awarded the entire four points allocated to Experience. Since DOH’s scoring of Franwell’s experience is supported by the procurement record, we find no reason to upset it.

II. DOH’s Scoring of Franwell’s Cost Proposal

Franwell contends that DOH arbitrarily and inaccurately scored its cost proposal. Franwell further asserts that a fair calculation of its proposal would have resulted in Franwell being the lowest cost bidder (Protest, at pgs. 12-13). DOH argues that its cost evaluation methodology was rational and applied equally and accurately to all bidders. DOH further states that Franwell’s analysis of its cost proposal as presented in the Protest is incorrectly based on a three-year contract term, while DOH calculated cost based on the potential full term of the contract which is seven years (DOH Answer, at pg. 11).

Section XV(G) of the RFP clearly defines the term of the contract as “five (5) years, with the option of up to a two (2) year extension.” Furthermore, the RFP provided a Fee Schedule that was to be completed by the bidders and form the basis for their cost score (RFP, at § XIV[D]; Attachment 9). The Fee Schedule was broken down into five components:

1. Fee Schedule A-1: Fixed Initial Setup Fee – a fixed one-time fee for providing initial setup of the Tracking System;
2. Fee Schedule A-2: SaaS Subscription Fee – a monthly subscription fee for access to the system based on the volume of users. As part of the evaluation methodology, DOH used a weighted average of the bidder’s four different tiers of pricing for this component, and then multiplied that weighted average by an estimated number of subscribers over the term of the contract. DOH also added an assumed three percent

increase in the fee after Years 3 and 5 of the contract term based on the National Consumer Price Index (CPI).

3. Fee Schedule A-3: System Change Management Project Staff Fee – a blended hourly rate representing the costs of all staff provided, as well as overhead, travel, profit, equipment usage, and other miscellaneous costs. While the Fee Schedule provided in the RFP identified an estimated number of billable hours over the first three years of the contract, the actual cost evaluation performed by DOH also took into account an anticipated number of billable hours through the remaining term of the contract and added a CPI increase after Years 3 and 5. Notably, it was this cost component that accounts for the majority of the difference between the amount Franwell calculated for its cost proposal in the Protest, and how DOH actually calculated the cost proposals during the evaluation. Specifically, Franwell calculated this component by only multiplying its blended rate by the estimated number of hours for the first three years of the contract (1550, as referenced in the RFP at Attachment 9). Conversely, DOH multiplied the proposed blended rates by the number of billable hours it anticipated over the potential seven-year term.
4. Fee Schedule A-4: Onboarding and/or Off-Boarding Registered Organization Fee – the cost each time a new Registered Organization is brought into the Tracking System after the initial launch of the program, or when an existing Registered Organization is removed from the system. DOH’s cost evaluation took into account a CPI increase after Years 3 and 5 for this fee as well.
5. Fee Schedule A-5: Fixed Transition Fee – a fixed price for the services that would be necessary to transition the Tracking System at the end of the contract term. DOH added a one-time assumed CPI increase after Year 3 for this proposed fee.

To make a true “best value” determination, SFL § 163 implicitly requires that the cost evaluation methodology have a reasonable relationship to the anticipated *actual* costs to be incurred by the State under the terms of the contract. Here, DOH asserts that its cost evaluation methodology relied on its best estimates of the number of fee generating occurrences over the life of the contract (DOH Answer, at pg. 11). In this instance, the term of the contract could potentially be seven years. Therefore, we believe that the cost evaluation methodology used by DOH was reasonably related to the anticipated actual costs to be incurred under the contract. Furthermore, our detailed review of the procurement record leads us to conclude that DOH applied this cost evaluation accurately and equally to all responsive proposals. Moreover, we have determined that, even if cost was calculated based on the initial five-year term of the contract (or even the three-year term used by Franwell in the Protest), BioTech would still have been the lowest cost bidder and would have received the full 30 points allocated to cost.

Franwell also argues that it was advised by DOH that Franwell’s alternative no-cost to the State approach (whereby fees would be passed on to the licensees), would not be permitted, but during the debriefing was informed by DOH that such a proposal would have been allowed (Protest, at pgs. 12-13). In response, DOH states that, contrary to the requirements of the RFP, Franwell submitted two cost proposals – a standard Fee Schedule A approach and an alternative

approach. In light of Franwell's cost submission, DOH states that it requested clarification from Franwell and in responding to the clarification, Franwell withdrew its alternate cost proposal. As to the discussion at the debriefing, DOH states that in response to a specific question asked by Franwell, DOH advised that it would have been permissible for Franwell to submit zero dollars (\$0) in an individual line item on the Fee Schedule A.

While there is disagreement as to the precise discussion that occurred between Franwell and DOH at the debriefing, we need not resolve that issue. The RFP clearly provides that "should any alternative proposals or extraneous terms be submitted with the proposal, such alternate proposals or extraneous terms will not be evaluated by the State" (RFP, at XIV[C][2][k]). Furthermore, the RFP explicitly required the cost proposal to be submitted in the format provided in Attachment 9, filling in the individual line items on the Fee Schedule. Therefore, the submission of an alternative cost approach not using the format required in the RFP would have been impermissible. As a result, it was proper for DOH to request clarification from Franwell during the evaluation process. In response to DOH's request for clarification, Franwell did, in fact, affirm that it intended to offer the fees as proposed in Fee Schedule A.

III. Opportunity to Provide a SaaS Demonstration

Franwell argues that a reasonable rescoring of its proposal would have resulted in Franwell receiving a score high enough to be eligible to provide a SaaS Demonstration (Protest, at pg. 13). Franwell further argues that regardless of a proposal's score, every bidder should have had the opportunity to provide a SaaS Demonstration.

First, for the reasons provided above in Sections I and II of this Determination, we disagree with Franwell's contention that its proposal should be rescored. Second, since the SaaS Demonstration was only worth a total of 10 points, providing a demonstration would serve no benefit to bidders that did not score within 10 points of the highest bidder. Based on the clear language of the RFP, bidders were directed to provide detailed responses illustrating their Tracking System's capabilities in their technical proposals, and were advised that not all bidders were guaranteed the opportunity to provide a SaaS Demonstration. In our view, it was within DOH's discretion to allocate 10 points to the SaaS Demonstration and limit the opportunity to provide such a demonstration to those bidders within 10 points of the highest scoring proposal.

IV. BioTech's Responsibility

Franwell states that the integrity of BioTech should be carefully examined, due to its involvement with the NCCC and iKush, to determine whether it is a responsible bidder (Protest, at pgs. 14-16). Franwell makes this assessment based on the following relationships and business dealings of BioTech:

1. BioTech Products

Franwell asserts that BioTech owns Medical Marijuana Dispensary Software and a Point of Sale System that are both used by private marijuana organizations, and, as a result, questions BioTech's ability to impartially take part in regulating that industry

(Protest, at pg. 14). DOH states that while it will be using BioTech's seed to sale software to regulate compliance with the MMP, it will be DOH and not BioTech monitoring compliance (DOH Answer, at pg. 12).

2. BioTech's Involvement with the National Cannabis Chamber of Commerce

Franwell contends that BioTech and its senior managers formed, control and operate the NCCC, a Nevada organization active in the marijuana industry. Franwell asserts that BioTech's senior managers are leaders at the NCCC and use the NCCC to post public notices (Protest, at pgs. 15-16). DOH and BioTech acknowledge that a few of BioTech's executives sit on the NCCC's Board of Directors, but state that they do so without any involvement in the NCCC's day to day operations and management. Rather, the NCCC employs sales and administration personnel who have no involvement with BioTech (DOH Answer, at pg. 13 and BioTech Answer, at pg. 7).

3. BioTech's Involvement with IKUSH, INC.

Franwell also asserts that BioTech is very involved with iKush, a networking service provider for the medical and recreational marijuana industry. Franwell maintains that BioTech shares an office with iKush, has senior managers working for both organizations, and uses iKush to provide services that allow retailers, dispensaries and other interested parties to connect with one another for the purchase and sale of marijuana products. This relationship, Franwell argues, makes available sensitive information derived from the New York Reporting System to iKush for commercial purposes (Protest, at pgs. 14-16). In response, DOH states that BioTech's involvement with iKush does not implicate its ability to provide the services required under the RFP (DOH Answer, at pg. 14). BioTech advises that in addition to its Traceability System, used for government agency oversight, it has a business level seed to sale software application and other ancillary products under development to address the needs of the emerging cannabis industry (BioTech Answer, at pg. 9). As part of its corporate structure, BioTech forms wholly owned subsidiaries, such as iKush, for the operational separation of these new product lines (Id).

SFL § 163(9)(f) provides that "[p]rior to making an award of a contract, each state agency shall make a determination of responsibility of the proposed contractor" Per the definition contained in SFL § 163(1)(c), responsibility of a state contractor depends on "the financial ability, legal capacity, integrity, and past performance of a business entity ...". As documented in the procurement record, prior to making an award to BioTech, DOH conducted a vendor responsibility review of BioTech. Based on its review, DOH found that BioTech's involvement in the marijuana industry does not negatively impact its ability to perform responsibly under its contract with the State. In conducting our review of the contract award, this Office also reviewed BioTech's responsibility and did not uncover any information that would lead us to disturb DOH's responsibility determination.

Furthermore, we note the RFP, and the resulting DOH/BioTech contract, protect the confidential nature of the information derived from the MMP:

- (i) The contractor shall treat all information obtained by virtue of the contract as confidential information (RFP, at Attachment 5, Appendix D, at [Y][5] [General Specifications]);
- (ii) Information generated under the Tracking System will be the sole and exclusive property of DOH, and disclosure by BioTech would require DOH's prior written approval (*see* RFP, at Attachment 5, Appendix D, at [Y][4] [General Specifications]); and
- (iii) "[T]he Contractor, and any associated subcontractors, may be required to have all employees with access to the STS Solution data center or data to sign a data confidentiality statement attesting that they will keep any STS Solution information viewed during the course of their employment, private and safe" (RFP, at § VI[A]).

V. Franwell's FOIL Request

In its Reply, Franwell asserts that its ability to protest the contract award to BioTech is severely disadvantaged because DOH has failed to comply with Franwell's FOIL request. Consistent with our prior determinations, since issues raised in the FOIL process do not directly relate to the procurement process, we generally do not consider an agency's actions on a FOIL request as part of our review of bid protests. This Office does, however, as a part of its review of the contract and in accordance with Section 3(l) of the OSC Protest Procedure, review allegations a protester might assert, based on the documentation in the procurement record, whether or not that documentation was made available to the protester under FOIL. Accordingly, in making this determination, we have reviewed the entire procurement record which includes any documents pertaining to the procurement that would have been subject to Franwell's FOIL request.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the contract award by DOH. As a result, the Protest is denied and we are today approving the DOH/BioTech contract for an MMP Tracking System.