

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Appeal filed by Netsmart Technologies, Inc. with respect to the procurement of an Electronic Health Record Software Application conducted by the New York State Office for People with Developmental Disabilities

**Determination  
of Appeal**

**SF-20150172**

February 18, 2015

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The Office of the State Comptroller (OSC) has reviewed the above-referenced procurement conducted by the New York State Office for People with Developmental Disabilities (OPWDD) for an Electronic Health Record Software Application (EHR Application). We have determined the grounds advanced by Netsmart Technologies, Inc. (Netsmart) are insufficient to merit the overturning of the contract award made by OPWDD and, therefore, we deny the Appeal. As a result, we are today approving the OPWDD contract with Foothold Technology (Foothold) for the EHR Application.

**BACKGROUND**

**Facts**

On September 18, 2014, OPWDD issued a Request for Proposal (RFP) for the procurement of a vendor-hosted electronic health record for OPWDD's state-run and operated residential, clinic, and day service systems (RFP, at § 1.1). The contractor will be required to customize software, convert existing data, provide software maintenance, and train OPWDD staff on use of the application (RFP, at § 1.1).

As a procurement for services, consistent with the requirements of State Finance Law (SFL) § 163, the basis for award was best value as determined after four "levels" of evaluation (RFP, at §§ 8.1 - 8.6). Level 1 consisted of a review of the proposals for responsiveness to mandatory bidder requirements. Proposals failing to meet all of the requirements listed in Sections 4.1 and 4.2 of the RFP were deemed non-responsive and removed from consideration (RFP, at § 4.3). Level 2 was worth 70 percent of the total composite score and consisted of an evaluation of the technical proposals submitted by responsive bidders. The RFP identified four distinct technical criteria and allocated a specific number of points to each (RFP, at § 8.4). Level 3, the Cost Evaluation, was worth 20 percent of the total composite score, with 20 points awarded to the proposal offering the lowest total cost (RFP, at § 8.5). Level 4, Oral Presentation, was worth 10 percent of the total composite score and was only available to bidders within 10 points of the highest scoring proposal after combination of technical and cost scores. The oral presentations were intended to assess the bidders' full understanding of the project requirements and the functionality of their proposed applications (RFP, at § 8.6). The bidder with the highest combined

technical, cost, and oral demonstration score was determined the best value proposer and awarded the contract (RFP, at § 8.2).

The deadline for submission of proposals was November 3, 2014. OPWDD received twelve proposals, but deemed seven of them non-responsive. After evaluating the remaining five proposals, OPWDD tentatively awarded the contract to Netsmart. Thereafter, on January 21, 2015, Foothold filed a bid protest with OPWDD in accordance with § 2.32 of the RFP challenging OPWDD's finding that Foothold's proposal was non-responsive. Foothold's protest asserted that its cost proposal was improperly rejected when OPWDD misinterpreted \$0s and certain blanks in Foothold's cost scoring sheet. Foothold averred that the grids left blank on the "Future Change Orders" cost sheet were intentionally left blank because there was no charge for those items as indicated by the \$0 proposed in the chart directly above. OPWDD considered the information provided by Foothold in its protest to be a clarification to its proposal and found the clarifying information sufficient to rescind its prior finding of non-responsiveness. As such, OPWDD evaluated Foothold's proposal and ultimately scored it higher than the proposal submitted by Netsmart. Accordingly, OPWDD rescinded the contract award to Netsmart and made a new award to Foothold (Appeal, at Exh. B, C).

On April 17, 2015, Netsmart filed a protest with OPWDD challenging OPWDD's rescission of the original contract award. OPWDD found that the protest was untimely and, furthermore, that the grounds advanced by Netsmart were unfounded (Appeal, at Exh. K). Thereafter, on June 15, 2015, Netsmart filed a letter with this Office appealing OPWDD's protest determination and followed up with a supplemental filing dated November 25, 2015 (collectively, the Appeal). On November 3, 2015, OPWDD submitted the contract to this Office for review.

### **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.<sup>1</sup> This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Since this is an appeal of an agency protest determination, the Appeal is governed by Section 4 of the OSC Protest Procedure.

In the determination of the Appeal, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by OPWDD with the Foothold contract;

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<sup>1</sup> OSC Guide to Financial Operations, Chapter XI.17, <http://www.osc.state.ny.us/agencies/guide/MyWebHelp/>.

2. The correspondence between this Office and OPWDD arising out of our review of the proposed OPWDD/Foothold contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
  - a. Netsmart's Appeal dated June 15, 2015;
  - b. Foothold's Answer to the Appeal dated August 20, 2015;
  - c. OPWDD's Answer to the Appeal dated September 17, 2015;
  - d. Netsmart's supplemental filing to the Appeal dated November 25, 2015; and
  - e. Foothold's supplemental filing dated December 15, 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.<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 "a state agency shall select a formal competitive procurement process ... [which] shall include ... a reasonable process for ensuring a competitive field."

SFL § 163(9)(b) provides that the "solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall 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 of the SFL "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."

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<sup>2</sup> SFL § 163(10).

<sup>3</sup> SFL § 163(1)(j).

<sup>4</sup> SFL § 163(1)(d).

## **ANALYSIS OF THE APPEAL**

### **Appeal to this Office**

In its Appeal, Netsmart challenges the procurement conducted by OPWDD on the following grounds:

1. The cost section of the RFP relating to use connections, interfaces and user counts was ambiguous, resulting in bid manipulation and unreasonable discrepancies between cost proposals.
2. Netsmart's proposal was unfairly evaluated on standardization/simplification goals not clearly identified in the RFP.
3. OPWDD improperly denied access to information requested by Netsmart pursuant to the New York State Freedom of Information Law (FOIL).
4. OPWDD refused to grant any of the remedies requested by Netsmart: Allow Netsmart to resubmit its cost proposal; conduct a best and final offer process; or re-issue the RFP.

### **Response to the Appeal**

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

1. OPWDD provided estimates for certain specifications in the cost portion of the RFP and for specifications not completely quantifiable, further information was provided in the Questions and Answers. The same information was available to all bidders and, as such, all bidders were equally afforded the opportunity to bid according to that information along with their own financial strategy.
2. OPWDD did not provide information concerning standardization/simplification criteria in the RFP because there was no such criteria. The standardization/simplification process referred to at oral presentation was simply a reference to a process that occurs when automating a paper system.
3. OPWDD provided as much information to Netsmart through the debriefing and FOIL processes as it could pursuant to the law.
4. Changing the RFP requirements and/or the evaluation criteria is not permitted under the SFL, and nothing in the RFP or the SFL requires OPWDD to re-issue the RFP.

## **Response to the Appeal**

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

1. Foothold is a qualified vendor who submitted a proposal in good faith and, contrary to the assertions made by Netsmart, did not manipulate its bid or “game” the process.
2. Netsmart was not disadvantaged as the incumbent contractor with information concerning variable costs that may arise under the contract. In fact, bidders not subject to that information were disadvantaged by overcompensating for such variables. Further, variables impacting some bidders may not impact other due to the use of different systems, products and cost structures.
3. With EHR Applications, it is impossible to predict an exact number of users of the system, and user numbers are usually described as a range or best estimate. Additionally, a bidder’s cost structure doesn’t necessarily have to be based on an exact number of users.
4. Likewise, OPWDD’s goal to streamline its various assessment forms in the EHR Application should not have materially impacted Netsmart’s cost proposal. There are many ways to develop a software application where that uncertainty does not affect price.

## **DISCUSSION**

### **A. OPWDD’s Cost Evaluation**

In the Appeal, Netsmart asserts that the “estimated specifications” provided by OPWDD and the lack of clarity with respect to use connections, interfaces and user counts unfairly allowed for great discrepancies in the costs proposed by bidders. Netsmart essentially argues that the estimates provided resulted in a cost evaluation methodology that did not realistically anticipate all of the costs that would be incurred under the contract. Netsmart contends that bidders without historical experience on this contract, or similar State contracts, were able to submit low-ball, but unrealistic cost proposals that did not accurately consider or reflect all of the costs to be incurred. Netsmart further argues that as the incumbent service provider, it was aware of the true potential costs involved and, accordingly, proposed higher, but more realistic costs. Netsmart contends that upon implementation of the EHR Application, other, unanticipated costs not considered by less experienced bidders, like Foothold, would accrue and as a result, such bidders would seek additional payments from OPWDD for those costs (Appeal, at pgs. 5-6).

In its Answer, Foothold affirms that its cost proposal was well considered and submitted in good faith. Foothold asserts that with respect to EHR Applications, it is difficult to predict exactly how many people will use the system in the future and the number of users to base cost on reflects a bidder’s best estimate. Foothold contends that, as a result, many vendors do not price their software based on a precise number of users. Notably, Foothold further contends that

unknown and unanticipated cost variables impact bidders differently depending on the bidder's product and cost structure. Foothold states that with respect to OPWDD's goal to streamline the various assessment forms required by the EHR Application, the number of assessments *could* impact cost, but only if the software being offered has costs associated with implementing those assessments. However, Foothold asserts that there are many ways to develop a software application that implements such a variable with little or no additional costs (Foothold Answer, pgs. 1-2).

OPWDD states that, where it could, it provided estimates for specifications in the RFP, and for those specifications that were not precisely quantifiable, it provided further information in the Questions and Answers, and all bidders were required to propose a cost based on the same estimates (OPWDD Answer, at pg. 1). Therefore, OPWDD asserts that all bidders had an equal opportunity to structure their bids based upon those uniform estimates and its own pricing strategy (OPWDD Answer, at pgs. 1-2). OPWDD contends, and Netsmart does not dispute, that Netsmart chose to employ a more cautious approach in preparing its cost proposal and thus proposed a higher total cost than the awarded bidder (OPWDD Answer, at pgs. 1-2). Furthermore, OPWDD notes that bidders had the opportunity to request additional information relating to cost components by submitting questions to OPWDD by September 26, 2014 (RFP, at § 2.4).

During this Office's review of the contract, we confirmed that the cost proposal schedules (RFP, Attachment 5) did not specifically reference "use connections" or "interfaces." However, with respect to user counts, the RFP did provide that OPWDD anticipates as many as 5,000 concurrent users of the fully implemented solution (RFP, at § 3.2.11). Additionally, Questions 1, 3 and 58 asked during the Question and Answer period (Q&A) provided information on estimated user counts and indicated that exact figures were not available. During the Q&A, several questions were asked about interfaces (Questions 9, 22, 33, 37, 38, 39, 40, 43 and 44) and OPWDD provided answers to those questions.

To properly determine "best value," 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 contract. As a result, when scoring cost, all fees to be incurred under the contract should be factored into the scoring unless the impact of such a fee is: (i) substantially identical for all providers; (ii) difficult or impossible to estimate and therefore, speculative; or (iii) unlikely to occur. Here, OPWDD asserted that in providing a technical solution of this nature, it is not possible to exactly quantify the number of use connections, interfaces and user counts in advance of contract performance. Further, Foothold's submission supports OPWDD's view. Since we have been provided with no evidence to the contrary, we find that OPWDD structured its cost evaluation methodology as precisely as it could have under these circumstances. In light of the foregoing, we believe that the technical information provided to the bidders by OPWDD was sufficient under the circumstances and the cost evaluation methodology used by OPWDD was reasonably related to the anticipated costs to be incurred under the contract.

## **B. Standardization/Simplification Goals**

Netsmart asserts that its proposal was unfairly evaluated on standardization/simplification criteria not identified, or provided for, in the RFP (Appeal, at pg. 8). Both in the Appeal to this

Office as well as its protest to OPWDD, Netsmart states that during its oral presentation, OPWDD emphasized the importance of standardization and simplification across all regions for the EHR Application's processes and forms. Netsmart asserts that its proposal reflected the level of effort required to address the regional variability and complexity identified in the RFP and had it been aware of the standardization and simplification sought by OPWDD, Netsmart would have been able to reduce its costs (Protest, at pg. 3, Appeal, at pg. 8). Netsmart states that this standardization/simplification criteria was "buried" in the language in Section 1.2 of the RFP, but was not actually articulated as a required component by OPWDD until the oral presentation.<sup>5</sup>

In response to this argument, OPWDD avers that it did not include "concrete, quantifiable standardization/simplification criteria" in the RFP because there wasn't any such criteria (OPWDD Answer, at pg. 3). OPWDD states that the standardization/simplification process referenced at the oral presentation merely related to the simplification that naturally results from the conversion of a paper system into an automated electronic system. In order to obtain further information on issues raised in the Appeal, including OPWDD's expectations on streamlining and standardization, this Office issued questions to OPWDD on November 6, 2015. Question # 2 from this Office inquired as to where the requirements or expectations related to streamlining and standardization could be found in the RFP and Evaluation Plan. In its response, OPWDD stated that standardization and streamlining was not considered as part of the evaluation. Specifically, OPWDD indicated that:

"[t]he evaluators scored the proposals based on the proposed system's ability to meet the requirements of the RFP, not on whether or not the system 'streamlines geographic variability....' Our assumption was that if a bidder met the minimum requirements of offering a federally certified system, had experience hosting an EHR, has implemented the EHR in an organization serving the DD population, and a system that can be accessed by employees and individuals receiving services (see RFP section 1.1), then the system would be able to be used consistently statewide.

RFP section 1.2 contains general introductory language about using the EHR to streamline service provision. In section 3.2.2 of the RFP titled 'Assessments,' it is stated that 'Bidders are not expected to modify their software to include these specific OPWDD forms but are expected to provide a comprehensive set of assessment tools that maintains similar data elements and complies with required assessment functionality' (emphasis added, RFP section 3.2.2.a). The evaluation tool used to score the proposals only referenced the RFP. Scoring was completed considering the proposal submitted by the vendor and the ability of the proposed solution to fulfill the requirements of the RFP, which did not include the 'surprise' referenced by Netsmart. The 'standardization and elimination of commonly used forms' was not considered as part of the evaluation.

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<sup>5</sup> The language in Section 1.2 of the RFP provides: "...OPWDD is committed to transformational goals designed to make its outcomes, supports and services, business processes, administrative structure, and decision-making capabilities more person-centric and streamlined."

Bidder's experience, business line applicability, and application capabilities (all clearly stated in Attachments 2 and 3) were considered."

(OPWDD's Response to OSC Question # 2).

In Question # 5, this Office also asked OPWDD "[h]ow...the statements made at the oral presentation by OPWDD regarding streamlining of business processes contribute[d] to the determination of best value by OPWDD" and to "...explain if the comments had a material effect on cost." In its response, OPWDD again stated that "streamlining was not an itemized goal of the RFP nor of the responses, therefore it would not have had a material effect on cost" (OPWDD Response to Question # 5). In its response, OPWDD provided a summary of the manner in which six of the bidders (including Foothold and Netsmart) addressed forms in their technical proposals to demonstrate that there was no widespread confusion among bidders regarding OPWDD's expectations with respect to EHR forms.

Based on the information provided in OPWDD's Answer, OPWDD's responses to the November 6, 2015 questions from this Office, and the information contained in the procurement record, we do not believe that Netsmart's bid was unfairly evaluated based on unspecified streamlining/standardization criteria.

### **C. Netsmart's FOIL Request**

In its Appeal, Netsmart asserts that its ability to protest the contract award to Foothold was severely disadvantaged because OPWDD failed to comply with Netsmart's FOIL request (Appeal, at pgs. 9-10). Netsmart alleges that OPWDD's refusal to respond to its FOIL request violates both the SFL and New York Public Officers Law. 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, 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 related the procurement that would have been within the scope of Netsmart's FOIL request.

### **D. Remedies Requested by Netsmart**

Netsmart's final argument in the Appeal is that OPWDD improperly refused to implement various remedies suggested by Netsmart, including: allowing Netsmart the opportunity to resubmit its cost proposal; conducting a Best and Final Offer process; or re-issuing the RFP (Appeal, at pgs. 10-11).

SFL § 163(9)(c) states that "[w]here provided in the solicitation, state agencies may require clarification from offerers for purposes of assuring a full understanding of responsiveness to the solicitation requirements." Section 8.1 of the RFP provided OPWDD with this ability, stating that: "[u]pon review of a Bidder's submitted proposal, OPWDD may, at its discretion, submit to the Bidder a request for clarification relating to its Cover Letter, Technical, and/or Cost Proposal ....



Other than to provide clarifying information as may be requested by OPWDD, no Bidder will be allowed to alter its proposal.” Based on information provided in the context of Foothold’s protest to OPWDD, the agency determined that it improperly found Foothold nonresponsive and, therefore, an evaluation of Foothold’s proposal was required.<sup>6</sup> After re-opening the evaluation process, Foothold’s cost proposal turned out to be significantly lower than Netsmart’s, rendering Foothold the highest scoring cost proposal and ultimately the highest scoring bidder (i.e., the best value to the State). We believe that OPWDD properly allowed a clarification from Foothold for the purpose of assuring a full understanding of Foothold’s responsiveness to the RFP, as permitted by SFL § 163(9)(c). Conversely, there was no ambiguity with respect to Netsmart’s proposal and, therefore, no basis to allow a clarification from Netsmart.

As to Netsmart’s request that OPWDD conduct a Best and Final Offer process, we agree with OPWDD’s assessment that such action is contrary to the RFP as well as the requirements of the SFL (*see* SFL §§ 163[7], 9[b]; OPWDD Answer, at pg. 4). Finally, with respect to Netsmart’s request that OPWDD re-issue the RFP, we note that while an agency has broad discretion to reject all bids and conduct a re-bid, the agency must have a reasonable basis to do so (*see Patrick R. Brereton & Associates., Inc. v Regan*, 94 AD2d 886, 887 [3d Dept 1983]). In this instance, we do not believe such an action by OPWDD would be supported by the procurement record. More importantly, however, we note that the central purpose of the competitive bidding statutes is to: (i) protect the public fisc and (ii) prevent favoritism, improvidence, fraud and corruption in the awarding of public contracts (*see Matter of New York State Ch., Inc., Associated Gen. Contrs. v New York State Thruway Auth.*, 88 NY2d 56, 68 [1996]). It is also clear that bidding statutes are intended for the benefit of the taxpayers, not for the benefit or enrichment of the bidders, and should be construed and administered so as to accomplish that purpose fairly and reasonably (*see Acme Bus v Board of Education*, 91 NY2d 51, 54-55 [1997]). Therefore, a procuring state agency is not required to take action to upset a completed procurement process for the purpose of benefiting a bidder.

Since the procurement record and the provisions of the SFL support OPWDD’s determination to deny the relief requested by Netsmart, we have no reason to disturb it.

## CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the contract award by OPWDD. As a result, the Appeal is denied and we are today approving the OPWDD/Foothold contract for an EHR Application.

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<sup>6</sup> In the “Future Change Order” section of the cost proposal, two tables were provided. The first table required bidders to fill in hourly rates for specific job titles for years 1 and 2. The second table provided required bidders to list the total costs for those job titles for year 1 and 2. In the first table, Foothold proposed costs of \$0 for all job titles except Programmer and Trainer. In the second table, for the job titles where Foothold was not charging an hourly rate (i.e. \$0/hour), it left the boxes blank. In its protest to OPWDD, Foothold clarified that it intentionally left the boxes blank to indicate that there was no charge for those job categories and thus, no total cost.