

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by First Hospital Laboratories, Inc. d/b/a FSSolutions with respect to the procurement of a Web-Based Case Management and Toxicology Testing System conducted by the New York State Education Department.

**Determination
of Appeal**

SF-20210006

Contract Number – C014177

April 30, 2021

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Education Department (NYSED) for a Web-Based Case Management and Toxicology Testing System. We have determined the grounds advanced by First Hospital Laboratories, Inc. d/b/a FSSolutions (FSSolutions) are insufficient to merit overturning the contract award made by NYSED and, therefore, we deny the Appeal. As a result, we are today approving the NYSED contract with Affinity eHealth, Inc. (Affinity) for a Web-Based Case Management and Toxicology Testing System.

BACKGROUND

Facts

NYSED issued a request for proposals (RFP) seeking proposals for a vendor to “provide a web-based case management system” and “establish and coordinate toxicology testing for participants throughout New York State” for its Professional Assistance Program, “which assists professionals licensed by the NYSED Office of Professions who have substance abuse problems, but who have not harmed patients or clients” (RFP, Section 1, at pp. 3-4). Proposals were due no later than August 27, 2020 (*see* RFP, at p. 2). The RFP provided that all eligible proposals received by the deadline would be reviewed by an evaluation committee using criteria set forth in the RFP (*see* RFP, Section 3, at p. 9). Proposals were scored on a 100-point scoring system, with the technical score worth a maximum of 70 points and the cost score worth a maximum of 30 points (*see* RFP, Sections 2 and 3, at pp. 7-9).¹ The RFP provided for the contract award to be made on a best value basis to the offeror with the highest aggregate technical and cost score (*see* RFP, Section 3, at p. 10).

¹ The potential 70 points were originally allocated among eight technical criteria, with specific point values for each criterion set forth in Section 2 of the RFP. NYSED issued a notice on August 6, 2020, prior to the proposal due date, stating that “bidders are required to submit a Data Security and Privacy Plan and NIST Cybersecurity Framework. The documents will be reviewed to determine adequacy, but no points will be awarded based on the quality of the plan.” NYSED explained that “[t]he 5 points assigned to this [criterion] will be re-allocated to other [criteria].”

Three offerors submitted responsive proposals by the deadline, including FSSolutions and Affinity. SED awarded the contract to Affinity, the offeror receiving the highest aggregate technical and cost score.

Following notice of non-award on November 10, 2020, FSSolutions requested a debriefing which was held on December 3, 2020. FSSolutions submitted a protest to NYSED on December 22, 2020 which NYSED denied on December 30, 2020. FSSolutions submitted an appeal to this Office on January 12, 2021, and supplemented this filing on March 2, 2021 (Appeal and Appeal Supplement, collectively referred to as Appeal).² NYSED filed an answer to the Appeal by letter dated February 26, 2021 (Answer).

Comptroller's Authority and Procedures

Under State Finance Law (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 this contract approval responsibility, OSC has promulgated 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.³ This procedure governs 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 section 24.5 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 NYSED with the NYSED / Affinity contract;
2. the correspondence between this Office and NYSED arising out of our review of the proposed NYSED / Affinity contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. FSSolutions' Protest to NYSED, received by NYSED on December 22, 2020 (Protest);
 - b. NYSED's Protest Determination, dated December 30, 2020 (NYSED Protest Determination);
 - c. FSSolutions' Appeal; and
 - d. NYSED's Answer.

² In its supplement, FSSolutions does not raise any new appeal grounds; rather, FSSolutions further expounds on the arguments contained in the January 12, 2021 filing.

³ 2 NYCRR Part 24.

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.⁴ 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” and “[s]uch basis shall reflect, wherever possible, objective and quantifiable analysis.”⁵

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, FSSolutions challenges the procurement conducted by NYSED on the following grounds:

1. FSSolutions alleges NYSED improperly denied the Protest without disclosing Affinity’s technical proposal and scores. As a result, NYSED failed to provide objective and quantifiable analysis as to why Affinity’s technical proposal merited a score higher than FSSolutions’ technical proposal.⁶
2. FSSolutions contends that NYSED made point deductions from FSSolutions’ technical proposal that are largely subjective, conclusory, or unexplained.

NYSED Response to the Appeal

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

1. NYSED contends that FSSolutions’ primary argument based on not having access to the procurement record under FOIL is misguided and moot because NYSED provided the majority of the requested documents to FSSolutions on February 23, 2021.⁷
2. NYSED asserts the technical scoring criteria in the evaluation instrument were objective, NYSED’s evaluation methodology was fair and balanced, and the evaluation committee evaluated each of the technical proposals against the technical criteria set forth in the RFP using a standardized score sheet.

⁴ SFL § 163(10).

⁵ SFL § 163(1)(j).

⁶ FSSolutions’ allegation is based on NYSED’s failure to timely comply with a Freedom of Information (FOIL) request relating to the procurement record, specifically, Affinity’s technical proposal, overall scoring of technical proposals and score sheets of individual evaluators. Consistent with the long standing policy of this Office enunciated in prior bid protest determinations, issues related to a procuring agency’s action or inaction on a FOIL request does not impact our review of the contract award and are not considered as part of our review of an appeal of an agency bid protest determination (*See* OSC Bid Protest Determinations SF-20200069, at fn. 5; SF-20180263, at fn. 5). In any event, this argument is now moot as FSSolutions concedes that records were produced by NYSED in response to FSSolutions’ FOIL request on February 23, 2021 which prompted FSSolutions to file a supplement on March 2, 2021 to the Appeal. Accordingly, the Determination will not specifically address this allegation.

⁷ *See* fn. 6, *supra*.

DISCUSSION

Evaluation and Scoring of the Technical Proposals

FSSolutions asserts NYSED made point deductions from FSSolutions' technical proposal that were "largely subjective, conclusory, or unexplained" (Appeal, at p. 6). NYSED counters that technical scoring criteria were objective, the evaluation methodology was fair and balanced, and the evaluators used a standardized score sheet to evaluate each proposal against the technical criteria in the RFP (*see Answer*, at p. 2). Since the grounds for the Appeal solely relate to NYSED's scoring of technical proposals, we will initially determine whether the evaluation methodology for the technical proposals set forth in the RFP satisfied the applicable legal requirements and then assess whether NYSED followed that methodology in its evaluation of the technical proposals.⁸

1. Evaluation Methodology for Technical Proposals

NYSED awarded the contract under the RFP on the basis of best value which "optimizes quality, cost and efficiency, among responsive and responsible offerers" and "[s]uch basis shall reflect, wherever possible, objective and quantifiable analysis" (SFL § 163(1)(j)). A "best value" determination shall "be based on clearly articulated procedures which require . . . a balanced and fair method, established in advance of the receipt of offers, for evaluating offers and awarding contracts" (SFL § 163(2)(b)). Further, SFL § 163(7) provides "[w]here the basis for award is the best value offer, the state agency shall document, in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria, which whenever possible, shall be quantifiable, and the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted."

The RFP set forth specific criteria required to be addressed in the technical proposal and the maximum number of points assigned to each evaluation criterion (*see RFP*, Section 2, at p. 7, and Section 3, at p. 9).⁹ A committee of three individuals evaluated the technical proposals, each of whom "applied a standardized and pre-defined set of evaluation criteria in order to generate and submit an independent score for each proposal he or she evaluated" (NYSED Protest Determination, at p. 1). The technical scores of the three evaluators were then averaged to arrive at a final technical score for each offeror (*see Answer*, at p. 2).

NYSED submitted the technical evaluation instructions as part of the procurement record to this Office. The instructions provided that once the evaluators turned in their score sheets, they would "meet as a group to discuss the strengths and weaknesses of each [technical] proposal" but that "no numerical scores can be discussed." Following this meeting, the

⁸ Neither party disputes that FSSolutions' financial proposal represented the lowest overall cost. However, NYSED notes that "while FSSolutions' proposal did receive the highest financial score, this was not the sole factor in selecting the successful bidder. The award for this RFP was made on a 'best value' basis, and accordingly, the RFP advised bidders that, 'the contract...will be awarded to the vendor whose aggregate technical and cost score is the highest among all the proposals rated'" (*see Answer*, at p. 2).

⁹ *See* fn. 1, *supra*.

evaluators would have the opportunity to reevaluate each proposal and original score. The instructions advised that “[r]ater comments are required for each component” and “[c]hanges in a score between rounds one and two must be explained.” After the second round of scoring was submitted and the technical scoring completed, NYSED would then score the cost proposals to arrive at a combined technical and cost score for each offeror and award the contract to the offeror with the highest aggregate technical and cost score (*see* RFP, Section 3, at p. 10).

Our review of the procurement record confirmed that NYSED evaluators used a pre-established evaluation instrument to score technical proposals in accordance with the evaluation methodology set forth in the RFP. Thus, we are satisfied the RFP, with respect to the evaluation of the technical proposals, met the applicable legal requirements.

2. Application of Evaluation Criteria to Technical Proposals

In its protest of NYSED’s scoring of the technical proposals, FSSolutions disputes most of the point deductions NYSED made in scoring FSSolutions’ technical proposal, and generally asserts the record does not support the scores awarded to FSSolutions’ technical proposal (*see* Protest, at pp. 4-10).¹⁰ To bolster its claims, FSSolutions points to specific instances where evaluators, allegedly without justification or explanation, scored Affinity higher than FSSolutions with respect to a particular technical criterion or changed a technical score for FSSolutions with respect to a particular technical criterion following the evaluators’ meeting after the first round of scoring.¹¹ NYSED avers that “[e]ach reviewer brings to the process their own perspective and NYSED accounts for that by averaging the scores of the three reviewers from the Evaluation Committee” (Answer, at p. 2).

As an example, FSSolutions states “[t]here is simply nothing here that justifies Evaluator 2’s [] scoring variance between [Affinity and FSSolutions]” and “[t]here is nothing in Evaluator 2’s notes explaining the difference [in scores]” (Appeal Supplement, at pp. 3-4).¹² With respect to an unsupported score change after the first round of scoring, FSSolutions cites to “a very significant change in Evaluator 2’s scores to FSSolutions from Rounds (sic) 1 to Round 2, specifically in [criteria] #2 and 3” (Appeal Supplement, at p. 4).¹³ Our review of the procurement record found Evaluator 2’s evaluation instrument for FSSolutions’ technical

¹⁰ In its Appeal, FSSolutions incorporates by reference specific assertions for all but one of the technical criteria advanced in its Protest (*see* Appeal, at p. 6). In resolving this Appeal, we have considered FSSolutions’ assertions relating to each criterion score although not individually discussed in this Determination.

¹¹ FSSolutions contends its technical proposal scored higher than Affinity’s technical proposal after round 1 and the procurement record fails to explain the change to second place of FSSolutions’s technical proposal after the second round of scoring (*see* Appeal Supplement, fn. 3, at p. 2). However, our review of the procurement record shows FSSolutions’s overall technical score was lower than Affinity’s technical score after round 1 scoring.

¹² In this instance, FSSolutions seems to be claiming that Evaluator 2 should have scored the proposals of different offerors relative to each other and then provided a written justification for the difference in scores, rather than simply scoring proposals individually based on the standards set forth in the SFL as embodied by the technical evaluation criteria of the RFP. This type of comparative evaluation between offerors’ technical proposals, using one offeror’s technical proposal to score another offeror’s technical proposal, does not constitute an objective analysis. Moreover, the technical evaluation instructions required evaluators to independently read and score each proposal.

¹³ With respect to criterion # 2, Evaluator 2 changed FSSolutions’ score from an 8 to a 6, out of 10 possible points. With respect to RFP Requirement # 3, Evaluator 2 changed FSSolutions’ score from a 7 to a 5, out of 11 possible points.

proposal contained comments for every score Evaluator 2 awarded in each of the seven technical criteria. Furthermore, the same evaluator's final Round 2 score sheet contained additional comments to support score changes in both criteria # 2 and 3.¹⁴

Generally, this Office gives significant deference to a State agency in matters within that agency's expertise (*see* OSC Bid Protest Determination SF-20170192, at p. 7). It is incumbent upon the agency to assess its needs in relation to a particular program and develop an RFP and evaluation instrument that effectively meets those needs which, as discussed above, NYSED has done (*see* OSC Bid Protest Determination SF-201700297, at p. 6). Furthermore, this Office is unwilling to substitute its judgment for that of an agency in matters within an agency's realm of expertise where the agency scored technical proposals "according to the pre-established technical proposal evaluation tool" (*see* OSC Bid Protest Determination SF-20170192, at p. 7).

We have long recognized that evaluators bring their own subjective views to the evaluation process and may interpret information in proposals differently. However, this Office "will generally not disturb a rationally reached determination of a duly constituted evaluation committee" unless "scoring is clearly and demonstratively unreasonable" (OSC Bid Protest Determination SF-20160188, at p. 8 (upholding evaluation committee's technical scores where "review of the procurement record confirms the evaluators scored the proposals in a manner consistent with the evaluation/scoring instructions" and "[there were no] contradictions between an evaluator's written comments and the score assigned by such evaluator to [the technical] proposal."); *see also* OSC Bid Protest Determination SF-20200069, at p. 6).

Based on our review of the procurement record, NYSED evaluated technical proposals according to the clearly articulated criteria set forth in the RFP and consistent with the evaluation instructions/instrument. Our review did not reveal any contradictions between an evaluator's written comments and the scores assigned by such evaluator to FSSolutions' technical proposal. Thus, we are satisfied evaluators scored FSSolutions' technical proposal in a manner consistent with the RFP and evaluation instrument and will not disturb the technical scores awarded by NYSED.

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 NYSED. As a result, the Appeal is denied and we are today approving the NYSED / Affinity contract for a Web-Based Case Management and Toxicology Testing System.

¹⁴ At this Office's request, NYSED provided further clarification of the evaluator's comment supporting the score change for category #2.