



STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

September 20, 2022

Susan Himmer, Esq.
Regional Associate General Counsel
Elekta
400 Perimeter Center Terrace, Suite 50
Atlanta, GA 30346

Re: **SF-20220091** – Determination of Bid
Protest filed by Elekta with respect to
SUNY CR 2088679 – Purchase of MRIdian
A3i Linac System from ViewRay
Technologies, Inc.

Dear Susan Himmer:

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the State University of New York Upstate Medical University (SUNY Upstate) for the single source procurement of a MRIdian MRI Linear Accelerator from ViewRay Technologies, Inc. (ViewRay). We have also reviewed the Protest submitted by Elekta, Inc. (Elekta), by e-mail dated July 14, 2022 (Protest) and the following correspondence/submissions from the parties: response dated August 2, 2022, submitted by SUNY Upstate (Answer); reply dated August 5, 2022 submitted by Elekta (Reply); response dated August 8, 2022 submitted by ViewRay (ViewRay Answer); and, letter dated August 25, 2022 from SUNY Upstate (Letter). As a result, we determined the grounds advanced by Elekta are insufficient to merit overturning the contract award made by SUNY Upstate and, therefore, we deny the Protest. Accordingly, we are today approving the SUNY Upstate contract with ViewRay for a MRIdian MRI Linear Accelerator.

Elekta asserts that “[a] sole source award is not justified, because at least two vendors can offer the equipment at issue” (Protest). SUNY Upstate responds that “OSC approved a single source exemption, not a sole source exemption (Answer, at p. 1). As this Office previously advised you in a letter dated July 25, 2022, and you acknowledged in your Reply, SUNY Upstate’s advertisement in the New York State Contract Reporter misstated the basis for this Office’s approval of SUNY Upstate’s exemption request. On June 3, 2022, OSC granted SUNY Upstate a single source exemption from advertising to purchase a replacement linear accelerator with adaptive radiotherapy using on-board MRI imaging (MRL), namely the MRIdian A3i Linac

System from ViewRay. A single source means “a procurement in which although two or more offerers can supply the required commodities or services, the commissioner or state agency, upon written findings setting forth the material and substantial reasons therefor, may award a contract...to one offerer over the other” (*see* State Finance Law § 163(1)(h)). Accordingly, we will not address whether a sole source award was justified and will instead discuss the basis for the single source award.

Elekta contends that in order for SUNY Upstate to seek a single source exemption, the “OSC must first ‘determine that it is in the best interest of the State to procure from a particular vendor’” (Protest, citing NYS Procurement Guidelines). Elekta asserts that “a single source award is not appropriate for Upstate’s purchase of [a MRIdian MRL], because [SUNY] Upstate did not conduct a full evaluation of currently available [MRL] options” (Reply, at p. 5). To support this assertion, Elekta claims “the reasons given in [the Answer] do not reflect an accurate comparison between the MRL offering from ViewRay and that available from Elekta” (Reply, at p. 2). Elekta elaborates on “product specifications that improve treatment outcomes or benefit clinical treatment” and provides additional “detailed benefits” of the Elekta Unity MRL over the ViewRay MRIdian MRL (Reply, at pp. 2-5).¹ SUNY Upstate contends that “both [Elekta and ViewRay] had the opportunity to fully present the benefits of their respective products” following which “a team from [SUNY] Upstate’s Radiation Oncology department [that included] Radiation Oncologists, Ph.D. holding Medical Physicists, and other professionals...concluded that the ViewRay product offered materially significant benefits over the Elekta product for [SUNY] Upstate and [SUNY] Upstate’s patients” (Answer, at p. 1). Thus, SUNY Upstate asserts the award to ViewRay is in the best interest of the State (*see* Answer, at p. 2).

SUNY Upstate is required to document in the procurement record submitted to this Office the bases for a determination to purchase from a single source (*see* State Finance Law § 163(10)(b)(i)). The procurement record must include “the material and substantial reasons why a formal competitive process is not feasible” and “the circumstances leading to the selection of the vendor, including the alternatives considered, the rationale for selecting the specific vendor and the basis upon which [the agency] determined the cost was reasonable” (State Finance Law §§ 163(10)(b)(ii), 163(1)(h)). Finally, the “term of a single source procurement contract shall be limited to the minimum period of time necessary to ameliorate the circumstances which created the material and substantial reasons for the single source award” (State Finance Law § 163(10)(b)(ii)).

Our review of the procurement record showed that SUNY Upstate included detailed rationale for its selection of ViewRay and its MRIdian MRL. The procurement record also showed that SUNY Upstate considered alternative vendors/products, including Elekta and its Unity MRL, and sets forth the reasons why SUNY Upstate determined ViewRay’s product uniquely meets its needs. SUNY Upstate identified three distinct factors in its Letter for selecting ViewRay’s product over Elekta’s product which, “combined with feedback from peer users of both MRIdian and Unity led [SUNY Upstate] to selection of the [MRIdian A3i Linac System] from ViewRay” (Letter, at

¹ In a letter dated August 12, 2022, this Office asked SUNY Upstate to explain whether SUNY Upstate’s award as a single source was still justified in light of the additional technical information provided by Elekta in the Reply and ViewRay in the ViewRay Answer, regarding each company’s respective machine. SUNY Upstate responded in the Letter.

p. 2). This Office generally defers to agency determinations where they are properly within the agency's expertise and supported by the procurement record, as in this case. Additionally, SUNY Upstate included a pricing analysis in the procurement record submitted to this Office which supports SUNY Upstate's determination that the cost of purchasing the MRIdian MRL by ViewRay is reasonable. Finally, the term of the single source procurement is appropriately limited in that it is a one-time only purchase, not a term contract. Thus, we are satisfied that SUNY Upstate met the requirements of the State Finance Law.

Accordingly, for the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the single source contract award by SUNY Upstate. As a result, the Protest is denied and we are today approving the SUNY Upstate / ViewRay contract for the MRIdian A3i Linac System.

Sincerely,

A handwritten signature in cursive script that reads "Brian J. Fuller".

Brian Fuller
Director of Contracts

cc: James Robinson, SUNY Upstate
Bob Norris, Elekta
Eduardo Da Silva, Elekta
AJ Cimino, Elekta
Chad Puckett, ViewRay