STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by The Peebles Corporation, along with its development and healthcare partners, with respect to the procurement of healthcare services and the purchase of property at the Long Island College Hospital by the State University of New York.

Contract Number – X002654

Determination of Appeal

SF– 20140322

October 28, 2014

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

BACKGROUND

Facts

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

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

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

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

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

On February 26, 2014, SUNY issued Request for Proposal X002654 (RFP) with responses due by March 19th.[1] SUNY received nine qualifying proposals and, on April 3, 2014, SUNY announced an initial award to Brooklyn Health Partners Development Corporation, LLC (BHP). BHP's proposal offered to build a new full service hospital. However, SUNY and BHP were not able to reach an agreement within the 30-day period and, pursuant to the terms of the Stipulation, SUNY exercised its discretion to terminate negotiations with BHP and render a new award to Peebles whose proposal received the second highest score (Letter from Ruth Booher to R. Donahue Peebles, dated May 5, 2014). Peebles, in conjunction with its development and healthcare partners, proposed to build a new free-standing emergency department, an urgent care center and other primary, preventative and specialty health services, but it did not propose a full service hospital.

SUNY commenced formal negotiations with Peebles but, in the meantime, the Petitioners filed a motion in court asserting, among other things, that the scores resulting from the RFP were not in accord with the Stipulation and that certain of those scores should therefore be thrown out (*see* Decision and Order of Justice Baynes, dated June 13, 2014, in *Boerum Hill Ass'n, et al. v. SUNY, et al.,* Index No. 13007/13, at pg. 1). SUNY continued to defend itself on this motion and Peebles intervened by attempting to negotiate a resolution directly with the Petitioners. On May 22, 2014, Peebles entered into a Statement of Principles with the Petitioners whereby Peebles, along with its healthcare partner, North Shore-LIJ, agreed to provide healthcare services consistent with the community's needs and to avoid any break in service at the LICH Emergency Department upon SUNY's exit from the facility (*see* Statement of Principles, signed by the parties on May 22, 2014). However, following that progress in the litigation, negotiations began to break down between SUNY and Peebles in the days that followed. Having concluded that the parties had reached an impasse on certain critical issues, SUNY terminated negotiations with Peebles on May 28, 2014, several days before the 30-day timeframe would have elapsed on June 4th (Letter from Ruth Booher to Meredith Kane, dated May 28, 2014).

SUNY immediately offered Fortis, the third ranked offeror, the next opportunity to enter into a transaction with SUNY. By letters to SUNY dated June 3 and 6, 2014, Peebles protested the award to Fortis. SUNY issued an unfavorable determination on such protest to Peebles, and Peebles appealed that determination to this Office by letter dated July 22, 2014 (Appeal).

Procedures and Comptroller's Authority

Under Section 112(3) of the State Finance Law (SFL), before any revenue contract made for or by a state agency, which exceeds ten thousand dollars ($10,000) in amount, becomes effective it must be approved by the Comptroller. We consider the issues raised in this Appeal as part of the contract review function pursuant to such section of law.

---

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

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

In the determination of this Appeal, this Office considered:

1. The documentation forwarded to this Office by SUNY in connection with the transaction with Fortis.

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

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

    a. Peebles' Appeal of SUNY's protest determination, dated July 22, 2014;

    b. SUNY's Answer to the Appeal, dated July 25, 2014;

    c. Fortis' Answer to the Appeal, dated July 24, 2014;

    d. Peebles' letter dated July 24, 2014 (correspondence from Allan J. Arffa to Charlotte Breeyear);

    e. SUNY's letter, dated July 28, 2014 (correspondence from SUNY to Allan J. Arffa); and

    f. Peebles' submission, dated July 29, 2014 (correspondence from Allan J. Arffa to Charlotte Breeyear).

Applicable Statutes

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

---

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

In addition, in this instance, SUNY has been legally authorized to conduct this procurement by the Sustainability Plan that was approved pursuant to Chapter 56 of the Laws of 2013 (Part Q), discussed above. Finally, in conducting this sale, SUNY is further bound by the terms of the Stipulation and Proposed Order, Index Nos. 13007/2013, 5814/2013, 9188/2011, filed February 25, 2014. In light of these non-statutory standards, we will proceed to analyze the issues raised in this Appeal.

ANALYSIS OF BID PROTEST

Appeal to this Office

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

1. SUNY breached its obligation to negotiate with Peebles for 30 days;

2. SUNY failed to negotiate with Peebles in good faith; and

3. Fortis is not a responsible vendor.

Response to the Appeal

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

1. Neither the Stipulation nor the RFP created an obligation on the part of SUNY to negotiate with a successful offeror for a full 30 days;

2. SUNY's decision to terminate negotiations with Peebles was not in bad faith; and

3. There is no basis to find Fortis nonresponsible as a vendor.

In addition, in Fortis' Answer, Fortis contends that the allegations of wrongdoing made by Peebles against Fortis are false and do not warrant a finding of nonresponsibility.

DISCUSSION

SUNY Alleged Obligation to Negotiate with Peebles for 30 Days

As an initial matter, Peebles contends that SUNY breached an obligation to continue negotiations with Peebles for a full 30 days. In support of this proposition, Peebles relies on a term of the Stipulation that set forth the expectation for the negotiation process:

> "If SUNY and the Initial Successful Offeror are unable to enter into an agreement in accordance with the terms of the New RFP within thirty (30) days of such award (provided that SUNY must notify the Initial Successful Offeror of such thirty (30) day *limit* before commencing negotiations with such Initial Successful Offeror), then SUNY may, in its sole discretion, terminate such negotiation, and the qualified Offeror whose proposal meets all mandatory requirements in the New RFP and that receives the next highest final composite score (technical plus financial) will be awarded the next opportunity to enter into the transaction with SUNY with the same time constraints..." (Stipulation, at § [2][d][i] [emphasis added]).

In addition, Peebles points to similar language in the RFP and SUNY's award notification letter sent to Peebles on May 5, 2014 (*see* RFP, at Part 2, Section M, Phase 3).

With respect to the Stipulation, we do not believe that the cited language requires SUNY to continue negotiations with an offeror, regardless of how fruitless such negotiations are, for 30 days. The Stipulation was intended to settle the issues between SUNY and the Petitioners, not to create rights in a third-party future offeror (Stipulation, at § 10). The intent of the Stipulation was to find a compromise that allowed SUNY to exit operations as soon as possible and, at the same time, to provide the community with needed healthcare. A term that forced a stalemate between SUNY and a potential purchaser would not serve either of these interests, but only that of the offeror. We do not believe that the intent of the Stipulation was to require a thirty day waiting period before SUNY could negotiate with the next highest scoring offeror – since such an interpretation would have unnecessarily delayed the sale and construction of a new medical facility. Furthermore, Justice Baynes, who presided over this protracted litigation and signed the Stipulation, came to the same conclusion during oral arguments in court on June 10th when Peebles attempted to intervene on the Petitioners' motion and argue that SUNY failed to negotiate in good faith. In response to Peebles' argument, Justice Baynes said "SUNY had the right to walk away .... The 30 days – in my opinion it was a *maximum* of 30 days that SUNY could negotiate. If SUNY came to the conclusion that negotiations were going nowhere ... then SUNY could walk away" (Transcript of June 10, 2014 Proceedings in *Boerum Hill Ass'n, et al. v. SUNY, et al.*, Index No. 13007/13, attached as Exh. B to SUNY's Answer to the Appeal, at pgs. 14-15 [emphasis added]; *see also* Decision and Order of Justice Baynes, dated June 13, 2014, Index No. 13007/13, at pg. 3).[3] We agree with the court's interpretation and find that the Stipulation did not create an obligation whereby SUNY was prohibited from terminating negotiations with the successful offeror if, in fact, an impasse had been reached.

---

[3] We have reviewed the case cited by Peebles in its Appeal, *American Broadcasting Companies, Inc. v. Wolf*, 52 NY2d 394, 397, 400 (1981), and find that it is not on point here. In that case, it was uncontested that the employee was bound to negotiate in good faith with ABC for the 90-day period. Conversely, here, we find no such duty on the part of SUNY.

Turning to the RFP, we conclude that the intent of its drafters was to further the terms of the Stipulation which, as discussed above, do not prohibit SUNY from terminating negotiations prior to the expiration of the 30-day period. In addition, the RFP expressly reserved to SUNY the right to "[b]egin contract negotiations with another Offeror in order to serve the best interests of SUNY, should SUNY or Holding Company be unsuccessful in negotiating an Agreement with the Successful Offeror *within an acceptable time frame*" (RFP, at § 1.R.14 [emphasis added]) and "to waive any conditions or modify any provision of this RFP with respect to one or more Offerors, to negotiate with one or more of the Offerors with respect to all or any portion of the Property ... if in its judgment it is in the best interest of SUNY or Holding Company to do so" (RFP, at Exh. D, § D.4). The award letter mimics the language of the Stipulation and the RFP. Accordingly, we find that the same analysis applies to the award letter and, therefore, none of the three documents relied on by Peebles supports its position that Peebles had a guaranteed right to negotiate with SUNY for a period of 30 days. As such, Peebles' request for relief on the basis that SUNY breached such an obligation should be rejected.

SUNY's Basis for Terminating Negotiations with Peebles

Peebles also argues that SUNY failed to negotiate in good faith in the days leading up to its termination of negotiations. Specifically, Peebles alleges that, after Peebles entered into the Statement of Principles with the Petitioners on May 22nd (i.e., the side agreement that SUNY was not a party to), SUNY inexplicably began to take a hard-line and unreasonable negotiating positions that ultimately culminated in the deal with Peebles falling apart. SUNY, on the other hand, contests the facts as presented by Peebles and both parties have submitted sworn affidavits with conflicting factual recitations.

The only uncontested facts that we have before us are letters and emails between Peebles and SUNY in the final days of its negotiations and, based on this record before us, we do not find any factual basis to conclude that SUNY acted in bad faith or had ulterior motives to terminate negotiations with Peebles. Indeed, even assuming the facts in a light most favorable to Peebles, it appears that SUNY had a good faith basis for its determination that the parties had reached an impasse on at least one issue that was critical to the transaction. The RFP made clear that SUNY would require the "Successful Offeror" to provide a broad and uncapped indemnification to the State for any environmental liabilities (RFP, at Exh. D § C). SUNY's letter to Peebles on May 26th memorializes SUNY's understanding at that point that Peebles was not willing to meet this requirement (Letter from Ruth Booher, to Meredith Kane, dated May 26, 2014). Peebles responded the next day with its position that "the Buyer," to wit, the new special purpose entity that was formed to take title to the property and not The Peebles Corporation, as the parent, was willing to provide the requisite indemnification (Letter from Meredith Kane to Ruth Booher, dated May 27, 2014). Thus, a corporation with presumably no ascertainable assets besides the LICH property was the only entity providing the indemnification. Moreover, Peebles indicated in this letter

that if it was not permitted to conduct environmental testing prior to signing the sale agreement, the indemnification would be subject to a "mutually satisfactory cost-sharing arrangement to cover required remediation costs" (Letter from Meredith Kane to Ruth Booher, dated May 27, 2014). SUNY found this response, as well as Peebles' response on other outstanding issues, to be unsatisfactory and terminated negotiations the following day.

We find SUNY's actions in this regard not to be unreasonable. Clearly, the suggestion of "cost-sharing" does not meet the broad uncapped indemnification called for in the RFP. Moreover, we reject Peebles' argument on appeal that the term "Successful Offeror" as used in the RFP should be construed to mean a yet-to-be-formed special purpose subsidiary created to take title to the LICH property. We believe that "Successful Offeror" was intended to refer to the entity that submitted the proposal in response to the RFP, here, The Peebles Corporation along with its partners (*see* RFP, at pg. 6 [defining "Successful Offeror" as "the Offeror who is given the award"]; *see also* Peebles' Response to the RFP, Executive Summary at pg. 1; Peebles' Proposal, at § 1.A "Description of Offeror" [describing the Offeror as The Peebles Corporation, along with its named development and healthcare partners]). Agreeing to an indemnification only from the subsidiary would therefore be inconsistent with this material requirement of the RFP and, for obvious reasons, imprudent from a business standpoint.[4]

While we believe that this issue alone could form a good faith basis for SUNY to have terminated negotiations on May 28th, there were additional issues that thwarted the deal. For instance, in continuing to operate the Emergency Department at the Downstate at LICH campus pursuant to the Statement of Principles, North Shore-LIJ was not able to take over such operations under its own operating certificate. Thus, in order to comply with the agreement reached on May 22nd (to which SUNY was not a party), SUNY would be required to allow North Shore-LIJ to staff and manage operations under SUNY's existing operating certificate. As SUNY has explained, this came with a number of complex issues for resolution, including who would ultimately bear the costs of such operation prior to closing and the potential risk for medical malpractice liability. SUNY felt strongly that it should be immediately relieved from all such costs and liabilities for the deal with Peebles to move forward. However, the record indicates that Peebles was not able to agree to such relief, absent a signed agreement for sale, nor was it able to confirm that North Shore-LIJ would step in and run the Emergency Department immediately so as to allow SUNY to exit operations (Letter from Meredith Kane to Ruth Booher, dated May 27, 2014, at pg. 3). These additional open issues also provide a basis for SUNY's conclusion that the parties had reached an impasse.

While SUNY had a duty to negotiate with Peebles in good faith, we see no reason to conclude that SUNY has breached such obligation. As recently stated by the

---

[4] We note that under the current transaction before this Office, Fortis Property Group, LLC, as the parent company, has agreed to guarantee the indemnification provided by FPG Cobble Hill Acquisitions, LLC under the Purchase and Sale Agreement (First Amended and Restated Purchase and Sale Agreement § 19.2).

Court of Appeals, "Parties who agree to negotiate are not bound to negotiate forever .... Parties are obliged to negotiate in good faith. But that obligation can come to an end without a breach by either party. There is such a thing as a good faith impasse; not every good faith negotiation bears fruit" (*IDT Corp. v Tyco Group, S.A.R.L.,* 2014 NY Slip Op 4044, at **3-**5). Based on all of the foregoing, we conclude that SUNY reasonably determined on May 28, 2014, that an acceptable agreement with Peebles could not be reached. Therefore, we decline to overturn the award to Fortis on the basis that SUNY failed to negotiate in good faith.

Vendor Responsibility of Fortis

In its supplemental filing with SUNY and in its Appeal, Peebles raises "serious concerns regarding Fortis's integrity and consequently its capacity to fulfill the requirements of the RFP" (Peebles' Letter to SUNY, dated June 6, 2014). In short, the State only conducts business with responsible vendors (see, e.g., State Finance Law § 163[9][f] which requires that, "[p]rior to making an award of contract, each state agency shall make a determination of responsibility of the proposed contractor").[5] Furthermore, the RFP issued by SUNY expressly stated that SUNY would conduct an affirmative review of the proposers' responsibility and would require that "Offerors, including any subcontractors, partners and collaborators of Offeror who will be involved in effectuating the Proposal, are required to provide a copy of their Vendor Responsibility Questionnaire with their proposals ..." (RFP, pg. 10). While the agency's determination in this regard is subject to the Comptroller's review under State Finance Law § 112 (*see Konski Engineers, P. C. v. Levitt,* 69 A.D.2d 940, 942 [3d Dept 1979]), we find nothing raised in Peebles' protest or Appeal that provides a basis for overturning SUNY's determination that Fortis is a responsible vendor. SUNY provided our Office with the required vendor responsibility documentation and we find that Fortis' Response to the Appeal, dated July 24, 2014, sufficiently disposes of the concerns alleged by Peebles. In addition, this Office has conducted its own review of Fortis and has found Fortis to be a responsible vendor. Accordingly, we also decline to overturn the award to Fortis on the basis that it is not a responsible vendor.

CONCLUSION

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

---

[5] While, as noted above, this revenue contract is not technically subject to State Finance Law § 163, we still require as a condition of our approval that the contracting agency make the requisite determination of vendor responsibility and document such determination in the procurement record.