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May 20, 2019

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Re: Bio-Tech Medical Software, Inc.
Protest of Award for RFPT30034901901827

Dear Mr. Hatfield:

I received your April 18, 2019 protest letter, submitted to me on behalf of Bio-Tech Medical Software, Inc. ("BMS"), challenging the above-referenced award to Metrc LLC ("Metrc"). I have reviewed BMS's protest pursuant to 1 C.S.R. § 40-1.050(12)¹, and have considered the information and arguments presented therein. After having done so, **I deny BMS's protest**. Pursuant to 1 C.S.R. § 40-1.050(12), the Division of Purchasing ("Division") will take no further action on BMS's protest.

FACTS

"On November 6, 2018, Missouri voters approved Amendment 2 to permit state-licensed physicians to recommend marijuana for medical purposes to patients with

¹ Effective April 30, 2019, the Office of Administration ("OA") amended 1 C.S.R. § 40-1.050. The amendment did not result in any change to the above-referenced provision regarding protests, which provision was previously located at 1 C.S.R. § 40-1.050(9).

serious illnesses and medical conditions.” RFPT30034901901827 (“RFP”) § 1.4.1. The Department of Health and Senior Services (“Department”) “is . . . tasked with implementing the provisions of Amendment 2.” *Id.* In furtherance of that task, the Division issued the RFP in early March.² *See* RFP, p.1. The RFP sought proposals “for the provision of information technology solutions for the Medical Marijuana Program for the [Department].” RFP § 1.1.1. These solutions were to include the following: “(1) Patient Registry solution, (2) Facility Licensing Application (Cultivators, Dispensary, Testing, Transportation and Infused Product Manufacturers) solution and (3) Seed-to-Sale Tracking solution.” *Id.* at § 1.1.2.

The RFP required that “[t]he contractor . . . provide . . . Patient Registry AND Facility Licensing Application AND Seed-to-Sale Tracking solutions using commercially available off-the-shelf (COTS) software as a subscription model for the [Department].”³ RFP § 2.1.1. For the seed-to-sale solution, the RFP required that the contractor’s solution meet a host of criteria, including accessibility by licensees and the Department, “near real time . . . updating” for patient purchases, and “inventory control processes.” *Id.* at § 2.6.2. The RFP also required that “[t]he contractor . . . meet or exceed all specifications required herein to enable the solution to function as specified,” *id.* at § 2.1.2, and that “[u]nless otherwise specified herein, the contractor . . . furnish all material, labor, facilities, equipment, and supplies necessary to perform the services required herein,” *id.* at § 2.1.6. The RFP required that the vendor provide licenses to the Medical Marijuana Information Solution, on a subscription basis, to 55 internal state agency users and unlimited external users. *Id.* at Ex. A, pp.61–64. *See also id.* at §§ 2.9.1 and 2.9.1(a). The RFP defined “external user” as “Cultivators, Dispensary, Testing, Transportation and Infused Product Manufacturers, Qualifying Patient, Patient Minor, Patient Caregivers and/or Patient/Caregiver Cultivators.” *Id.* at § 2.1.5. Additionally, the RFP required that “the contractor’s proposed Patient Registry, Facility Licensing Application, and Seed-to-Sale Tracking solutions . . . be successfully implemented and operating in another state department.” *Id.* at § 2.2.3.

The RFP required vendors to provide firm, fixed pricing for the provision of the Medical Marijuana Information Solution, and for the implementation of the Medical Marijuana Information Solution, on the “Pricing Page,” Exhibit A. RFP Ex. A, pp.61–64. “The vendor shall provide firm, fixed pricing for the original contract period and maximum pricing for each potential renewal period for the Medical Marijuana Information Solution” *Id.* at p.61. *See also* RFP, p.83 (defining “Pricing Page(s)” as

² The Division issued three addenda to the RFP, one each on March 8th, 12th, and 13th.

³ The RFP called “[t]he combined solution” of these three solutions the “Medical Marijuana Information solution (solution).” RFP § 2.1.1(a).

“the form(s) on which the vendor must state the price(s) applicable for the equipment, supplies, and/or services required in the RFP”); and *id.* at p.85 (“By submitting a proposal, the vendor agrees to furnish any and all equipment, supplies and/or services specified in the RFP, at the prices quoted, pursuant to all requirements and specifications contained therein.”). Additionally, the RFP required that “[i]f the vendor indicates ‘Contractor Will Comply’ to a desirable attribute, then all costs associated with providing the desirable attribute must be included in the firm, fixed prices in Exhibit A.” *Id.* at § 2, p.2. The RFP also stated as follows: “All costs, if any, for proposed components, features, equipment, or other elements in excess of the minimum requirements stated herein must be included within the firm, fixed pricing in Exhibit A” *Id.* at § 2.1.2. Further, Exhibit A required that “[t]he vendor . . . indicate any other relevant information related to the pricing of their proposed products/services.” *Id.* at Ex. A, p.61. Finally, the RFP stated that, “[o]ther than the payments and reimbursements specified on Exhibit A, Pricing Page, no other payments or reimbursements shall be made to the contractor for any reason whatsoever.” *Id.* at § 2.16.3.

The RFP stated that “[a] binding contract shall consist of: (1) the RFP, addendums thereto, and any Best and Final Offer (BAFO) request(s) with RFP changes/additions, (2) the contractor’s proposal including any contractor BAFO response(s), (3) clarification of the proposal, if any, and (4) the [Division]’s acceptance of the proposal by ‘notice of award.’” RFP § 3.1.1. The RFP also “cautioned” that “any vendor . . . providing a response in conflict with mandatory requirements, terms, conditions or provisions of the RFP shall be eliminated from further consideration for award unless the state exercises its sole option to competitively negotiate the respective proposal(s) and the vendor resolves the noncompliant issue(s).” *Id.* at § 4.2.4. Given this potential outcome, the RFP recommended that, “[i]n order to ensure compliance with the RFP, the vendor should indicate agreement that, in the event of conflict between any of the vendor’s response and the RFP requirements, terms and conditions, the RFP shall govern.” *Id.* at § 4.2.4(b).

The RFP set forth proposal assessment criteria, RFP at §§ 4.6–4.12 and Attachment (“Att.”) 5, including categories to be determined by “both objective analysis and subjective judgment,” RFP at § 4.6.1. The RFP’s subjective categories, which were under the heading “Technical Proposal,” *id.*, included “Proposed Methodology and Approach,” *id.* at §§ 4.6.1 and 4.8 and Att. 5 pp.1–2, “Team Qualifications,” RFP at §§ 4.6.1 and 4.9 and Att. 5 p.2, and “Past Performance,” RFP at §§ 4.6.1 and 4.10 and Att. 5 pp.2–3. For each such category, the RFP contained two tables. Att. 5, pp.1–3. The first set forth five adjectival ratings and a corresponding definition for each rating. *Id.* The second identified specific aspects of the category, and the points that a vendor’s proposal would receive for the adjectival rating assigned to each aspect. *Id.* RFP § 4.6.1 stated that “the evaluator(s)” would “conduct[] an assessment of [each proposal satisfying mandatory requirements] in accordance with the evaluation criteria stated below and the

scoring details delineated in Attachment 5,” and that “[t]he contract” would “be awarded to the lowest and best proposal.”

RFP § 1.2.2 stated that:

[i]t is the vendor’s responsibility to ask questions, request changes or clarifications, or otherwise advise the [Division] if the vendor believes that any language, specifications, or requirements are: (1) ambiguous, (2) contradictory or arbitrary, (3) violate any state or federal law or regulation, (4) restrict or limit the requirements to a single source, or (5) restrict or limit the vendor’s ability to submit a proposal.

Vendors were to direct any such communication to the buyer. *Id.* at § 1.2.1. Any such communication was to “be submitted no later than five calendar days prior to the due date of the proposals.” *Id.* at § 1.2.3. Prior to award, BMS did not make any communication to the buyer under RFP § 1.2.2 concerning the legality of the RFP or any of its provisions. Nor did BMS, prior to award, make any communication to the buyer under RFP § 1.2.2 indicating that the RFP or any of its provisions restricted or limited BMS’s ability to submit a proposal or was ambiguous, contradictory, or arbitrary.

In response to the RFP, BMS and Metrc each submitted a proposal. Thereafter, the Division reviewed the proposals for responsiveness. For both proposals, this review led to “areas identified in [the respective vendor’s] proposal as concerns, areas requiring clarifications, and areas of deficiency which may not comply with the requirements of the RFP.” *See* March 25, 2019 Letters from Stacia Dawson to Cody Stiffler and Ernest Francise (“BAFO Requests”), p.1. BMS’s proposal brought forward, among other matters, a responsiveness concern regarding RFP § 2.2.3.⁴ *See* BAFO Request to BMS,

⁴ The Division’s BAFO request to BMS noted the requirement found in RFP § 2.2.3 that “[t]he contractor’s proposed Patient Registry, Facility Licensing Application, and Seed-to-Sale Tracking solutions must currently be successfully implemented and operating in another state department.” BAFO Request to BMS, p.3. BMS’s proposal indicated that Veritek Solutions, LLC (“Veritek”), a proposed subcontractor, would provide BMS’s facility licensing application solution. BMS Proposal, pp.26–28. However, BMS’s proposal also indicated that Veritek’s successfully-implemented and currently-operating solution—employed by the State of Florida—is not being utilized at present as a facility licensing application solution by that state department. *Id.* at pp.103–04. “The proposed Medical Marijuana Information Solution will include a Modified-off-the-Shelf Solution that is configured from the subcontractor’s current program participant application.” *Id.* at p.104. “Since November of 2017, [Veritek] has been implementing and running the state of Florida’s Medical Marijuana Card Program.” *Id.* at p.103. *See also id.* at p.107.

p.3. Metrc's proposal brought forward, among other matters, a responsiveness concern regarding Exhibit A. *See* BAFO Request to Metrc, p.3. This concern focused on line items 11 and 15 of Metrc's proposal, both of which included variable, industry-paid pricing for services or equipment found in Metrc's proposal.⁵ *See id.* and Metrc Proposal, pp.14–15. After review of the proposals and identification of these and other matters, the Division requested best and final offers ("BAFOs") from both BMS and Metrc. *See* BAFO Requests generally.

The Division's BAFO request to Metrc noted that "Exhibit A . . . of the RFP require[d] the vendor to provide firm, fixed pricing for each of the line items specified." BAFO Request to Metrc, p.3. However, "[Metrc] failed to provide unit pricing as required by Exhibit A . . . for line items 11 and 15." *Id.* Instead, "[Metrc] provided per month, per licensed facility pricing for line item 11 and plant tag per plant grown pricing and package tag per case level package created pricing for line item 15, which does not comply." *Id.* The BAFO request went on to state that, "[i]n order for [Metrc]'s proposal to be considered responsive to the RFP requirements, [Metrc]" needed to propose "firm, fixed" pricing for line item 11 and "Firm, Fixed" pricing for line item 15. *Id.*

Metrc's BAFO included a revised Exhibit A. Metrc BAFO, pp.4–8. Per the Division's BAFO request to Metrc, Metrc's revised Exhibit A amended line items 11 and

The BAFO request asked that BMS "clarify whether [BMS] meets the requirement of paragraph 2.2.3 of the RFP regarding the vendor's proposed solutions being successfully implemented and operating in another state department." BAFO Request to BMS, p.3. BMS's BAFO response reiterated this dynamic of the Veritec facility licensing application solution found in BMS's proposal. BMS BAFO, p.3. "A configured variation of Veritec's solution, which is proposed for the Facility Licensing application, has been successfully implemented for one (1) state department Please see 'Past Performance' on page 107 of the original RFP response for further detail regarding this successfully implemented and currently operating instance." *Id.* The proposed Veritek solution would thus only serve as a facility licensing application solution after being "configured" from its "program participant application" orientation into a "Modified-off-the-Shelf Solution" that, in its modified form, neither the State of Florida's Department of Health nor any other State department has implemented or currently uses. *See* BMS Proposal, pp.26–28, 103–04, 107; and BMS BAFO, p.3.

⁵ As mentioned above, Metrc's proposal included several specific non-pricing references to the particular services and equipment identified in line items 11 and 15 of its Exhibit A. Metrc Proposal, pp.20, 33, 42, 47–52, 53, 57, 63, 68, 83, Ex. B pp.3, 5, 7, 9, 13. One such reference contemplated direct sale of that equipment to "the industry." *Id.* at Ex. B p.9.

15.⁶ *Id.* at pp.6–7. The revised Exhibit A did not include any “industry paid” notations, or otherwise indicate any fees, costs, prices, or other charges to be assessed against licensees or entities other than the State. *Id.* Nor did the revised Exhibit A provide for any prices to be paid by the State per facility, per plant, or per package. *Id.* The revised Exhibit A included the number 340 in the “Estimated Quantity” column for line item 11, along with an asterisk. *Id.* at p.6. The asterisk led to a note at the bottom of the pricing for the “Seed-to-Sale Tracking Solution” pricing table. *Id.* at pp.6–7. That note stated as follows: “The estimated unit total was derived from the state’s rules which, [sic] projected the total number of expected businesses to be licensed by the state at 340. Our per unit cost per licensed business is \$40 per month making our fixed monthly cost \$13,600.” *Id.* at p.7. After review of Metrc’s BAFO, the Division requested clarification of the amended line item 11’s pricing. March 29, 2019 Email from Stacia Dawson to Ernest Francise. Specifically, the Division asked “whether the pricing stated for the Original Contract Period, years 1 through 5, and the two renewal periods are firm, fixed prices or whether the pricing is dependent upon the number of businesses that will actually be licensed by the state.” *Id.* Metrc responded that “[t]he amount on Line Item 11 is our firm and fixed pricing. We utilized the state’s projection in regulation for total license numbers as a key variable in arriving at our firm and fixed pricing.” March 29, 2019 Email from Ernest Francise to Stacia Dawson.

Metrc’s original proposal included a signature page. Metrc Proposal, p.3. Over the signature of Metrc’s representative, Metrc “declare[d] understanding, agreement and certification of compliance to provide the items and/or services, at the prices quoted, in accordance with all terms and conditions, requirements, and specifications of the original RFP as modified by this and any previously issued RFP addendums.” *Id.* Metrc also “agree[d] that the language of the original RFP as modified by this and any previously issued RFP addendums shall govern in the event of a conflict with [its] proposal.” *Id.* Metrc’s BAFO also included a signature page. Metrc BAFO, p.1. Over the signature of Metrc’s representative, Metrc “declare[d] understanding, agreement and certification of compliance to provide the items and/or services, at the prices quoted, in accordance with all terms and conditions, requirements, and specifications of the original RFP as modified by any previously issued RFP addendums and by this and any previously issued BAFO requests.” *Id.* Metrc also “agree[d] that the language of the original RFP as modified by any previously issued RFP addendums and by this and any previously issued BAFO requests shall govern in the event of a conflict with [its] proposal.” *Id.*

Both Metrc and BMS submitted BAFOs. Thereafter, an evaluation committee (“Committee”) selected by the Department and approved by the Division worked to determine the appropriate subjective ratings for each of the two proposals as modified by

⁶ Metrc’s BAFO did not remove or amend any of the references cited in n.5 above.

its respective BAFO. *See* RFP § 4.6.3. The Committee, assisted by subject-matter experts, *see id.*, reviewed BMS's and Metrc's proposals and assigned each a rating for the three subjective categories set forth by the RFP. *See* Committee Evaluation Report Form and Committee Subjective Evaluation Narrative pp.2, 4–6, 8, 9–10, 11–14.

In the “Proposed Methodology and Approach” category, the Committee assigned to Metrc's proposal a “Distinctive” rating for the “Patient Registry Solution” aspect. Committee Subjective Evaluation Narrative p.5. The Committee's narrative noted that Metrc's proposal “allows for a physician once properly authenticated in the proposed solution to issue a certification associated with a patient's social security number,” that “the proposed solution can cap the number of patients associated with each caregiver and also has an embedded photo editor” which “will allow the state to save time in processing applications and ease of use by the patient with the submission of photos,” and that “Metrc's proposed Patient Registry Solution leverages security measures using CAPTCHA⁷ to prevent bots from registering.” *Id.* In the same category, the Committee assigned to Metrc's proposal a “Superior” rating for the “Facility Licensing Application Solution” aspect. *Id.* at pp.5–6. The Committee's narrative noted that Metrc's proposal “offers a built in email notification when deficiencies are found in an application so applicants can log back into the system to make necessary changes,” that “the solution can align with processes for scoring and ranking of various components,” that “the solution allows for automatic transition of application to inspection steps of approval process for Facility Licensing,” and that “Metrc's proposed Facility Licensing Application Solution leverages security measures using CAPTCHA to prevent bots from registering.” *Id.* The Committee assigned “Satisfactory” ratings to BMS's proposal for each of the above-referenced aspects in the “Proposed Methodology and Approach” category. Committee Subjective Evaluation Narrative p.4.

In the “Past Performance” category, the Committee assigned to BMS's proposal a “Marginal” rating for the “Overall Relevant Experience” aspect. Committee Subjective Evaluation Narrative p.12–13. The Committee's narrative noted that “[BMS] has ample experience operating large-scale IT systems and working with Medical Marijuana Programs in other states. Additionally, [BMS] identifies experience providing seed-to-sale systems and patient registry systems for many states.” *Id.* at p.12. “However,” observed the Committee's narrative, “[BMS]'s proposed subcontractor to provide Facility Licensing Application Solution, Veritec, has limited experience with Facility Licensing Application Solutions and [BMS] did not document [such experience].” *Id.* at pp.12–13.

⁷ “CAPTCHA” stands for “Completely Automated Public Turing test to tell Computers and Humans Apart.”

Once the Committee and Division completed their respective scoring, the Division compiled the scores for the objective and subjective areas of the solicitation and calculated the proposals' respective total points. *See* RFP § 4.6.1 and Committee Evaluation Report Form. BMS's proposal received 139 total points. *See* Committee Evaluation Report Form. Metrc's proposal received 143 total points. *See id.* Because Metrc's proposal received the most total points of any proposal, the Committee recommended it as the lowest and best proposal. *See id.* The Department approved of this recommendation. April 4, 2019 Email from Lyndall Fraker to Stacia Dawson. On April 5, 2019, the Division awarded the contract to Metrc. Notice of Award for RFPT30034901827. BMS's April 18, 2019 protest followed.

ANALYSIS

I. BMS's protest fails to establish that the proposal accepted by the Division violated the RFP's pricing provisions.

BMS's protest claims that Metrc's proposal violated numerous provisions of the RFP regarding pricing, and was therefore nonresponsive. BMS Protest, pp.3–8. This claim focuses on the prospect of variable prices, to be paid by licensees, in the form of monthly subscription charges for access to the seed-to-sale solution's software component and per-item charges for that solution's equipment in the form of RFID⁸ tags. *See id.* The protest does not challenge the propriety of the decision to engage in competitive negotiations with Metrc. *See id.* at pp.6, 8. Nor does the protest challenge the propriety of the clarification communication following Metrc's BAFO. *See id.* at pp.6–7. Therefore, the relevant responsiveness inquiry concerns Metrc's proposal as modified by its BAFO and clarified by the post-BAFO email exchange between the Division and Metrc (*i.e.*, the proposal accepted by the Division, *see* Notice of Award). *See* 1 C.S.R. §§ 40-1.050(12), (19), (22)(A), (22)(B).⁹

The RFP required that all prices to be charged by the vendor for its contractual obligations be included in the proposal's Exhibit A. The proposal accepted by the Division did not include variable prices in its Exhibit A. That proposal, therefore, did not propose to authorize Metrc to charge variable prices—to licensees or to the State—for the vendor's contractual obligations. And the resulting contract between Metrc and the State does not authorize Metrc to do so. The first point in BMS's protest fails.

⁸ "RFID" stands for "Radio Frequency Identification."

⁹ These authorities in the current rule are the same, or substantively the same, as those found in the prior rule at 1 C.S.R. §§ 40-1.050(9), (16), (19)(A), and (19)(B), respectively. *See* n.1 above.

The RFP required that the vendor disclose, in the proposal's Exhibit A, all prices to be charged for provision of the contractual solution, including all prices to be charged for provision of any services or goods required or contemplated by the contract to effectuate provision of that solution. RFP Ex. A, pp.61–64, 83, 85, § 2, p.2, § 2.1.2, § 2.16.3. These requirements were not confined to prices to be charged to the State. *Id.* These requirements included prices to be charged to a licensee for access to the seed-to-sale solution's software component, as that software was proposed by the vendor to meet or exceed the RFP's requirements. *Id. See also id.* at §§ 2.9.1 and 2.9.1(a). These requirements also included prices to be charged to a licensee for that solution's equipment in the form of RFID tags, as that equipment was proposed by the vendor to meet or exceed the RFP's requirements. RFP Ex. A, pp.61–64, 83, 85 § 2, p.2, § 2.1.2, § 2.16.3. *See also id.* at §§ 2.6.1–2.6.3. Furthermore, the RFP required that the vendor's proposal express these charges as firm and fixed prices in the proposal's Exhibit A. *Id.* at § 2, p.2, § 2.1.2, Ex. A, pp.61–64.

Metrc's proposal and BAFO display an understanding of the RFP pricing provisions' proper scope. In Exhibit A of its initial proposal, Metrc disclosed prices to be charged to licensees for access to the seed-to-sale solution's software component and for that solution's equipment in the form of RFID tags. Metrc Proposal, pp.14–15. However, that initial proposal expressed these prices as variable. *Id.* In response, the Division's BAFO request to Metrc noted the need for firm, fixed pricing in order to comply with the RFP's requirements. BAFO Request to Metrc, p.3. Metrc adjusted accordingly. Its BAFO converted the previously-variable pricing of industry-paid subscriptions for access to the seed-to-sale solution's software component, *see* Metrc Proposal at p.14, into firm and fixed State-paid pricing for subscriptions to the same, *see* Metrc BAFO at p.6. Metrc's BAFO replaced, with zero dollar figures, its previously-variable industry-paid pricing for the seed-to-sale solution's equipment in the form of RFID tags. *See* Metrc Proposal, p.15 and Metrc BAFO, pp.4–8. The parties' written communications prior to award, including the issuance of the RFP, Metrc's proposal in response, the Division's BAFO request to Metrc, and Metrc's BAFO in response, constitute persuasive evidence of their understanding of the integrated contract's relevant terms.¹⁰ *See Estate of Dennis*, 714 S.W.2d 661, 664 (Mo. App. W.D. 1986) (“[B]efore a court interprets the meaning of a contract, it may receive evidence of the circumstances surrounding the making of the contract including the persons, objects, and events to which the words can be applied”); and Restatement (Second) of Contracts § 212.

BMS's protest resists this conclusion, relying upon a footnote included in Metrc's BAFO and Metrc's email response to the Division's request for clarification. BMS

¹⁰ The contract between Metrc and the State is an integrated agreement. RFP § 3.1.1(c).

Protest, pp.6–7. But these sources, read together, do not lead to the conclusion that Metrc’s proposal as accepted by the Division included variable pricing. The analysis of these two sources begins with the footnote. The first sentence of the footnote serves to explain the number chosen by Metrc for the “Estimated Quantity” column of line 11 in its BAFO. Metrc BAFO, pp.6–7. The first sentence refers to this figure as “[t]he estimated unit total,” and explains the location of the asterisk (correlating to the note) found before that figure in the line item. *Id.* In keeping with this focus, the first sentence states that “[t]he estimated unit total was derived from the state’s rules which, [sic] projected the total number of expected businesses to be licensed by the state at 340.” *Id.* at p.7. Metrc’s particular assumptions or calculation methods for the “Estimated Quantity” figure found in line item 11 do not render its proposed pricing for that line item variable. However, the second sentence in the footnote identifies a “fixed monthly cost” that related to a “per unit cost per licensed business.” *Id.* This statement, read along with the footnote’s first sentence, had the potential to suggest that Metrc’s line item 11 BAFO pricing—which expresses annual amounts for the original contract term and monthly amounts for renewal periods—depended on the correctness of these costs identified in the second sentence.

In light of that potential, the Division prudently sought clarification from Metrc as to whether Metrc’s pricing on BAFO line item 11 depended upon “the number of businesses that will actually be licensed.” March 29, 2019 Email from Stacia Dawson to Ernest Francise. Metrc’s response met the substance of the question, and removed any reasonable concern stemming from the footnote. “*The amount on Line Item 11 is our firm and fixed pricing. We utilized the state’s projection . . . as a key variable in arriving at our firm and fixed pricing.*” March 29, 2019 Email from Ernest Francise to Stacia Dawson (emphasis added). This clarification from Metrc became part of the contract. *See* RFP § 3.1.1. And with the clarification, the remainder of the contract ensures that, “[o]ther than the payments and reimbursements specified on Exhibit A, Pricing Page, no other payments or reimbursements shall be made to the contractor for any reason whatsoever.” RFP § 2.16.3.

BMS’s protest also looks to Exhibit B of Metrc’s proposal as a basis for nonresponsiveness. BMS Protest, pp.3, 6. But the single reference to licensee RFID tag purchases found there, *see* Metrc Proposal, Ex. B p.9, does not serve as contractual authority to charge prices to licensees in excess of the firm, fixed amounts found on Exhibit A.¹¹ The organization of the RFP, and of the proposals submitted in response to it, assists this analysis. The RFP called for the proposal’s Exhibit B to set forth the

¹¹ Notably, Metrc included this single reference in its original proposal, and never amended or even referred to that reference—or the exhibit in which it is contained—in its BAFO or post-BAFO clarification. These facts give rise to the inference that Metrc unintentionally retained this single reference in its proposal.

vendor's "Proposed Methodology, Approach, and Work Plan." RFP § 4.4.1(c). *See also id.* at p.2 (identifying Exhibit B as "Technical Proposal, Proposed Methodology, Approach, and Work Plan"). Contrast this substantive area of the proposal with Exhibit A, which the RFP refers to as the "Pricing Page." *Id.* at p.2, § 4.4.1(b), Ex. A, p.61. A considered reading of the RFP would not look for pricing authority in Exhibit B. Buttressing this point, the reference at issue in Exhibit B of Metrc's proposal contains no specificity regarding these purported prices (not even a numerical amount or range). Metrc Proposal, Ex. B p.9. Moreover, even if one attempts to read Metrc's lone and passing statement in Exhibit B as purported authority to charge prices against licensees for RFID tags, that statement would conflict with the several RFP provisions cited earlier in this letter that prohibit any charging of prices not found in Exhibit A. And the contract expressly resolves such conflicts in favor of the RFP's provisions. Metrc Proposal, p.3 and Metrc BAFO, p.1.¹²

II. BMS's protest fails to establish that the contracted-for seed-to-sale tracking solution would violate Mo. Const. Art. XIV, § 1.3(1)(d).

BMS's protest claims that Metrc's proposed seed-to-sale tracking solution would run afoul of Mo. Const. Art. XIV, § 1.3(1)(d). BMS Protest, pp.8–9. That provision states, in part, that "[t]he Department shall certify, if possible, at least two commercially available systems to licensees as compliant with its tracking standards and issue standards for the creation or use of other systems by licensees." Mo. Const. Art. XIV, § 1.3(1)(d). BMS's claim rests on the premise that the seed-to-sale solution sought by the RFP, or parts of that solution, is somehow one of the "systems" referenced by this provision. BMS Protest, pp.8–9. This premise is incorrect.

The "systems" discussed by the constitutional provision are distinct from the seed-to-sale solution. *See* RFP Att. 3 ("Qualified Facility acquires Seed to Sale System that integrates with State system"). The Department is not to *provide* these "systems"; rather, the Department "shall certify, if possible, at least two commercially available systems . . . as compliant with its tracking standards." Mo. Const. Art. XIV, § 1.3(1)(d). BMS's protest argues that Metrc's solution would require licensees to use a sole system. BMS Protest, pp.8–9. But this argument misses the mark. A number of "systems" available to licensees from sources other than the State, including if possible "at least two commercially available systems" and systems "create[d] . . . by licensees" themselves,

¹² The foregoing analysis renders moot the third claim raised by BMS's protest, as well as that part of the second claim raised by BMS's protest that concerns the constitutionality of potential taxes or fees collected by the vendor from licensees. *See* BMS Protest, pp.8–10.

that comply with the Department’s “issue[d] standards” for the same, may be used in conjunction with the contracted-for seed-to-sale solution. *See* Mo. Const. Art. XIV, § 1.3(1)(d). BMS’s protest offers no reason to doubt the contracted-for solution’s potential to do so.

III. BMS’s protest fails to establish that the Committee used undisclosed evaluation criteria to assign particular subjective adjectival ratings.

BMS’s protest claims that the Committee assigned two adjectival ratings to the proposal of Metrc in the “Proposed Methodology and Approach” category based on undisclosed evaluation criteria. BMS Protest, pp.10–12. The RFP and the Committee’s narrative make up the sole factual basis for this claim. *Id.* Those items, however, do not provide a sufficient factual basis to establish the claim’s validity. Indeed, those same documents support the conclusion that the Committee’s ratings adhered to the publicly-disclosed standards set forth in the RFP. And a brief review of the Committee’s deliberations substantiates that conclusion.

For the evaluation of the “Technical Proposal,” the RFP set forth weighted categories and aspects (or sub-categories), a table of defined adjectival ratings for each category, and a table of comparative values for each adjectival rating in each aspect. RFP §§ 4.6, 4.8–4.10, Att. 5. This information informed vendors of the content and structure of the subjective evaluation. This information also informed vendors of what, in each aspect, would differentiate higher and lower adjectival ratings (and thus what, in each category, would differentiate higher and lower subjective scores).

In the “Proposed Methodology and Approach” category, the RFP defined a “Satisfactory” rating as “meets all requirements; proposal offers no significant benefits beyond the stated requirements; no significant weaknesses exist; reasonable confidence in the proposed approach.” *Id.* at Att. 5, p.1. In the same category, the RFP defined a “Superior” rating as “meets all requirements; proposal offers some benefits beyond the stated requirements; no material weaknesses; high confidence in the proposed approach.” *Id.* The RFP defined a “Distinctive” rating in this category as “exceeds the requirements in a way that promises significant benefits to the government; proposal presents innovative, and/or best-in-class solutions; high confidence in the proposed approach.” *Id.* In the “Patient Registry Solution” and “Facility Licensing Application Solution” aspects of this category, a “Satisfactory” rating would receive ten points per aspect, a “Superior” rating would receive 15 points per aspect, and a “Distinctive” rating would receive 20 points per aspect. *Id.*¹³

¹³ BMS’s protest complains of the RFP’s “Distinctive,” “Superior,” and “Satisfactory” adjectival ratings, and their corresponding definitions, for the “Proposed Methodology

While BMS's protest complains about the definition for the "Satisfactory" adjectival rating in the "Proposed Methodology and Approach" category, *see* n.13 above, BMS's protest does not claim that BMS's proposal merited higher adjectival ratings for the "Patient Registry Solution" and "Facility Licensing Application Solution" aspects. BMS Protest, pp.10–12. Nor does BMS's protest claim that Metrc's proposal merited lower adjectival ratings for these aspects. *Id.* Instead, BMS's protest asserts that the Committee awarded Metrc's proposal higher ratings for these aspects because Metrc's proposal somehow included the particular types of benefits beyond the RFP's requirements for which the Committee was—secretly—looking all along. *Id.* at pp.11–12.

BMS's protest cites the RFP and the Committee's narrative as evidence for this assertion. BMS Protest, pp.11–12. But these documents do not suffice to establish this claim. Indeed, the RFP and the Committee's narrative offer a more plausible explanation: namely, that these ratings invited vendors independently to select and include value-added functionality in their proposals, above and beyond the RFP's minimum requirements, so as to distinguish themselves from their competitors and increase the value of their proposals to the State. A brief review of the Committee's deliberations affirms that the Committee did not, in a manner more specific than the adjectival ratings definitions, conduct their subjective evaluation with particular value-added features or types of features in mind.

and Approach" category. BMS Protest, p.11. BMS's protest also alleges that, with respect to the former two ratings and their definitions, "[t]he RFP did not remotely suggest what sort of benefits the evaluators wanted to see." *Id.* However, BMS voiced no concern as to the legality of these provisions prior to award. Nor did BMS indicate prior to award that these provisions restricted or limited BMS's ability to submit a proposal or were ambiguous, contradictory, or arbitrary. Therefore, to the extent that BMS puts forward this complaint and allegation as bases to protest the award to Metrc, the same are waived. *World Wide Technology, Inc. v. Office of Administration*, Cole Co. Cir. Ct. Case No. 18AC-CC00080, April 19, 2018 Judgment pp.1–2 (plaintiff's failure to raise issues concerning "the language, specifications or requirements of the RFP . . . prior to the bid deadline," despite RFP language calling for same, provided independent basis for dismissal). *See also Blue & Gold Fleet, L.P. v. U.S.*, 492 F.3d 1308 (Fed. Cir. 2007) (unsuccessful vendor's failure to raise matters regarding solicitation prior to close of process, despite RFP language calling for same, resulted in waiver). "A waiver rule . . . prevents contractors from taking advantage of the government and other bidders, and avoids costly after-the-fact litigation." *Id.* at 1314.

IV. BMS's protest fails to establish that the rating assigned to its proposal's "Overall Relevant Experience" aspect was arbitrary, capricious, or unreasonable.

BMS's protest claims that the Committee's "Overall Relevant Experience" rating for BMS's proposal was arbitrary, capricious, and unreasonable. BMS Protest, pp.12–13. This claim fails. As set forth in detail in n.4 above, BMS's proposal presented a responsiveness concern due to the modifications of the Veritek solution that would be required in order to utilize that solution for facility licensing. Ultimately, BMS's proposal, including but not limited to this aspect, was determined to be responsive. April 1, 2019 Memorandum from Stacia Dawson to Cindy Stafford, p.1. However, this determination of responsiveness in no way prohibited the Committee from considering the nature of the Veritek solution as utilized by the State of Florida in assigning ratings to aspects of the "Past Performance" category. And as the Committee's narrative notes, "[BMS]'s proposed subcontractor to provide Facility Licensing Application Solution, Veritek, has limited experience with Facility Licensing Application Solutions and [BMS] did not document experience providing Facility Licensing Application Solutions." Committee Subjective Evaluation Narrative, pp.12–13. BMS's protest does not dispute the facts set forth in this paragraph, or those found in BMS's proposal and BAFO response (*see* n.4 above). Those facts provide sufficient basis for the "Overall Relevant Experience" aspect rating assigned by the Committee to BMS's proposal.

CONCLUSION

For the reasons set forth above, I find that BMS's protest fails to establish a basis for cancellation of the Division's award of RFPT30034901901827 to Metrc. Therefore, **I deny BMS's protest.** Pursuant to 1 C.S.R. § 40-1.050(12), the Division will take no further action on BMS's protest.

Sincerely,



Karen S. Boeger, CPPB
Director