DATE: February 25, 2014
TO: All Bidders of Record
FROM: Gil Rivera, Buyer
SUBJECT: Amendment # 2 to T-2920 “Re-issue, Medical Ultrasound & Transducer Systems”

BIDDERS ARE REQUIRED TO ACKNOWLEDGE RECEIPT OF ALL AMENDMENTS IN THE SPACES PROVIDED IN SECTION E, SIGNATURE OF FIRM’S AUTHORIZED REPRESENTATIVE.

This amendment becomes part of the Contract Documents and modifies the original bidding documents as noted below:

1. QUESTION: SECTION A: STANDARD BID TERMS AND CONDITIONS, PARAGRAPH 1. ACCEPTANCE, Will CNM accept the following alternative language?

   “Beginning immediately following Seller's completion of final assembly of the Equipment or if final assembly is not required, immediately following delivery of the Equipment to CNM's premises, CNM will be entitled to conduct acceptance testing to ensure that the Equipment performs in substantial accordance with Seller's published performance specifications for the Equipment. Such acceptance testing will be conducted over a period of not to exceed five (5) consecutive working days (Monday through Friday), and may include using the Equipment to examine no more than ten (10) patients as part of the testing process.

   If the CNM's tests indicate the Equipment does not operate in material and substantial accordance with Seller's published performance specifications for the Equipment, CNM will promptly notify Seller in writing and Seller will immediately be provided unencumbered access to the Equipment (on a twenty-four (24) hour per day basis) and a reasonable time to bring the Equipment into compliance. Immediately, following Seller’s completion of any necessary corrections, the remainder (or three (3) days, whichever is greater) of the acceptance testing period will commence as provided above.

   The Equipment will be deemed to be accepted by CNM upon the occurrence of the first of the following:

   1. The expiration of the acceptance testing period if (i) CNM has not notified Seller of performance deficiencies as provided above during the acceptance testing period or (ii) CNM has notified Seller of deficiencies and Seller has completed any necessary corrections; or
   2. The date on which CNM continues to use the Equipment after providing Seller with a notification of performance deficiencies as provided above; or
   3. The date on which the CNM first uses the Equipment for patient use other than as provided above.”
CNM’s Response: No, CNM does not accept this change. CNM has already modified Section A, Clause 1 per Amendment #1 so that acceptance is tied to a specific date after installation.

2. QUESTION: SECTION A: STANDARD BID TERMS AND CONDITIONS, paragraphs
8. BRAND NAME NOT REQUIRED
9. CANCELLATION
12. CONTRACT
13. CONTRACTOR’S GUARANTEE
26. INVITATION TERMS PART OF CONTRACT
31. OPTION TO RENEW
32. OWNERSHIP OF MATERIAL
35. PERIOD FOR BID ACCEPTANCE
38. RELEASES
40. REPORTS AND INFORMATION
42. RESPONSIBLE BIDDER
48. SUBCONTRACTORS
49. SUBMISSIONS OF SAMPLES/DRAWINGS/LITERATURE
50. TAXES
53. TERMINATION
55. WORKMANSHIP/COOPERATION

Will CNM accept deletions of these clauses in the resultant contract?

CNM’s Response: No. This Request for Bids is the basis that allows CNM to purchase the requested items in accordance with the New Mexico Procurement Code. The terms of this RFB and the General Terms may not be deleted from the resultant contract. Contract means CNM’s Purchase Order to the Awarded Lowest Responsible Bidder. The Purchase Order shall include language, “PURCHASED IN ACCORDANCE WITH CNM BID SCOPE OF WORK, TERMS AND CONDITIONS REFERENCED ABOVE.”

3. QUESTION: SECTION B: GENERAL TERMS AND CONDITIONS, paragraphs,
1. INSPECTION AND AUDIT
3. ACCEPTANCE AND REJECTION
4. ASSIGNMENT
9. PATENT AND COPYRIGHT INDEMNITY
11. PENALTIES
12. TITLE AND DELIVERY
14. OTHER APPLICABLE LAWS
15. OSHA REGULATIONS
17. APPLICABLE LAW
SECTION 2

Will CNM accept deletions of these clauses in the resultant contract?

CNM’s Response: No. See explanation to question #2 above.

4. QUESTION: SECTION A, STANDARD BID TERMS AND CONDITIONS, PARAGRAPH 11, CONFIDENTIALITY,

Will CNM accept the following alternative language?

“Each party will treat the terms of this Agreement and the other party’s written, proprietary business information as confidential if marked as confidential or proprietary. CNM will treat Seller (and Seller’s third party vendors’) software and technical information as confidential information whether or not marked as confidential and shall not use or disclose to any third parties any such confidential information except as specifically permitted in this Agreement or as required by law (with reasonable prior notice to Seller). The receiving party shall have no obligations with respect to any information which (i) is or becomes within the public domain through no act of the receiving party in breach of this Agreement, (ii) was in the possession of the receiving party prior to its disclosure or transfer and the receiving party can so prove, (iii) is independently developed by the receiving party and the receiving party can so prove, or (iv) is received from another source without any restriction on use or disclosure.”
CNM’s Response: CNM is defined as a local public body within the state of New Mexico. Per paragraph 36. Public Information, CNM must provide information (i.e., copy of the Vendor’s response to Sections D, E, F, and G) and CNM’s Award (i.e., copy of the Purchase Order) if requested through the Public Information Act. CNM shall do so as needed without notifying the awarded vendor.

CNM has modified paragraph 11 as follows with regards to the Offeror’s Software and Technical confidential information:

WAS: 11. CONFIDENTIALITY. Any information provided to or developed by the Contractor in the performance of the resultant agreement shall be kept confidential and shall not be made available to any other individual or organization by the Contractor without prior written approval of CNM.

IS NOW: 11. CONFIDENTIALITY. CNM will treat Seller (and Seller’s third party vendors’) software and technical information as confidential information and shall not use or disclose to any third parties any such confidential information except as specifically permitted in this Agreement or as required by law. The receiving party shall have no obligations with respect to any information which (i) is or becomes within the public domain through no act of the receiving party in breach of this Agreement, (ii) was in the possession of the receiving party prior to its disclosure or transfer and the receiving party can so prove, (iii) is independently developed by the receiving party and the receiving party can so prove, or (iv) is received from another source without any restriction on use or disclosure.

5. QUESTION: SECTION A: STANDARD BID TERMS AND CONDITIONS, PARAGRAPH 14. DAMAGE AND SECURITY OF CNM PROPERTY, will CNM accept the following alternative language?

“Seller shall be responsible for damages, if and to the extent proximately caused by Seller’s own negligence, to the Equipment and to all adjoining property while installation is in progress; shall provide in connection with installation reasonable safeguards required as a means of protection against accidents; and shall remove from the premises at Seller’s expense, all materials, and refuse caused by Seller’s work including all packing materials, crating, etc., provided that CNM makes waste receptacles available.”

CNM’s Response: CNM accepts this alternative language. This paragraph with this change now becomes,

14. DAMAGE AND SECURITY OF CNM PROPERTY. Seller shall be responsible for damages, if and to the extent proximately caused by Seller’s own negligence, to the Equipment and to all adjoining property while installation is in progress; shall provide in connection with installation reasonable safeguards required as a means of protection against accidents; and shall remove from the premises at Seller’s expense, all materials, and refuse caused by Seller’s work including all packing materials, crating, etc., provided that CNM makes waste receptacles available.

6. QUESTION: SECTION A: STANDARD BID TERMS AND CONDITIONS, PARAGRAPH 29. NEW MATERIALS REQUIRED, will CNM accept the following alternative language?

“Notwithstanding anything in this Agreement to the contrary, Seller may use refurbished parts in new Products as long as it uses the same quality control procedures and warranties as for new Products. Any part for which Seller has supplied a replacement shall become Seller property.”

CNM’s Response: No, CNM does not accept this change. Refurbished parts are deemed as used parts by CNM. Used parts are not allowed on this RFB because CNM would then be required to meet the requirements of New Mexico Statutes Annotated, Chapter 13, Clause 13-1-155, “A. A central purchasing office, when procuring used items of tangible personal property the estimated cost of which exceeds five thousand dollars ($5,000), shall request bids as though the items were new, adding specifications that permit used items under conditions to be outlined in the bid specifications, including but not limited to requiring a written warranty for at least ninety days after date of delivery and an independent "certificate of working order" by a qualified mechanic or appraiser.” The provisions of 13-1-155 do not allow the manufacturer to provide this “certificate of working order.”
7. QUESTION: SECTION A: STANDARD BID TERMS AND CONDITIONS, PARAGRAPH 36. PUBLIC INFORMATION. Will CNM accept the following alternative language?

“Seller understands that CNM may be subject to State Public/Open Records laws. CNM shall not be prohibited from complying with such Public/Open Records laws if required to do so; however, CNM shall (a) promptly notify Seller in writing of any such Public/Open Records laws requests, (b) give Seller sufficient time to challenge the request or redact any necessary information to the extent permitted by law, and (c) only provide such information as is necessary to comply with such Public/Open Records laws.”

CNM’s Response: No. CNM will supply Public Information as needed without informing the awarded vendor. In addition, CNM will post Award Tabulation information including Offeror names and Offeror pricing on CNM’s Purchasing Request for Bids website at the time of award.

8. QUESTION: SECTION A: STANDARD BID TERMS AND CONDITIONS, PARAGRAPH 39. REPLACEMENT PARTS. Will CNM accept the deletion of the last sentence?

CNM’s Response: No, CNM does not agree to remove this sentence. Although this RFB is for new and unused equipment, replacement parts purchased by CNM should be new and unused equipment. If the vendor wishes to replace failed components with refurbished parts as part of a warranty repair, then the vendor may do so only upon CNM’s written approval. Such approval will not be unduly withheld; however, CNM must ensure that the replacement is for warranty work, and not for items or repair work that needs to be purchased and/or paid for by CNM.

9. QUESTION: SECTION A: STANDARD BID TERMS AND CONDITIONS, PARAGRAPH 46. STATE AND LOCAL ORDINANCES. Will CNM accept the following alternative language?

“Seller will comply with the requirements of Federal and State laws and regulations that are applicable to it and require compliance by it as a manufacturer and vendor of medical devices.”

CNM’s Response: CNM accepts this change. The paragraph now reads as follows,

46. STATE AND LOCAL ORDINANCES. Seller will comply with the requirements of Federal and State laws and regulations that are applicable to it and require compliance by it as a manufacturer and vendor of medical devices.

10. QUESTION: SECTION B: GENERAL TERMS AND CONDITIONS, PARAGRAPH 2. WARRANTIES. Will CNM accept the following alternative language?

“Product warranties are set forth in the Seller warranty forms delivered with the Quotation. Seller may use refurbished parts in new Products as long as it uses the same quality control procedures and warranties as for new Products. Any part for which Seller has supplied a replacement shall become Seller property.”

CNM’s Response: No. This clause has already been modified per Amendment # 1, question # 5. In addition, CNM does not accept used or refurbished equipment as explained in question # 6 in this Amendment # 2.

11. QUESTION: SECTION B: GENERAL TERMS AND CONDITIONS, PARAGRAPH 6. TERMINATION AND DELAYS. Will CNM accept the following alternative language?

“If either party materially breaches this Agreement and the other party seeks to terminate this Agreement for such breach, such other party shall notify the breaching party in writing, setting out the breach, and the breaching party will have thirty (30) days following receipt of such notice to remedy the breach. If the breaching party fails to remedy the breach during that period, the other party may terminate this Agreement by written notice to the breaching party. For the avoidance of doubt, this Agreement is not terminable for convenience and may only be terminated in accordance with this Agreement. If Seller determines in good faith at any time that there are legal or regulatory compliance and/or material credit issues with this Agreement, if any, Seller may terminate this Agreement (including warranty services hereunder) immediately upon written notice to CNM.
If CNM cancels an order, within 30 days of the mutually agreed upon delivery date, without Seller’s prior written consent, CNM will pay a cancellation charge of fifteen percent (15%) of the price of the Products ordered. Seller will retain as a credit any payments received up to the amount of the cancellation charge. If CNM cancels an order for Products for which Seller has provided site evaluation services, CNM will also pay Seller reasonable charges for such services performed prior to cancellation. If applicable for the order, CNM will pay all progress payments (other than the final payment) prior to final Product calibration, and Seller may, at its option, delay final calibration until required progress payments are received. If CNM fails to schedule a delivery date with Seller within six (6) months after order entry, Seller may cancel CNM’s order upon written notice to CNM.”

12. CNM’s Response: No. CNM has already modified this clause per Amendment # 1.

13. QUESTION: SECTION B: GENERAL TERMS AND CONDITIONS, PARAGRAPH 8. INDEMNIFICATION AND INSURANCE. Will CNM accept the following alternative language?

“Seller agrees to indemnify and save CNM harmless from claims by third persons asserted against CNM that the equipment supplied by Seller has caused bodily injury (including death), if and to the extent such injury is proximately caused by the negligent act or omission of Seller and is determined by a court of competent jurisdiction to be a legal liability of Seller, and provided that CNM furnishes to Seller prompt written notice and requisite authority, information and assistance to defend the claim.

Seller shall maintain insurance coverage in accordance with its Certificate of Insurance, attached hereto, against all claims that may arise out of or result from the performance of its obligations under the agreement for which Seller may be legally liable.”

CNM’s Response: CNM accepts this change with the second paragraph removed. The paragraph now reads as follows,

8. INDEMNIFICATION AND INSURANCE. Seller agrees to indemnify and save CNM harmless from claims by third persons asserted against CNM that the equipment supplied by Seller has caused bodily injury (including death), if and to the extent such injury is proximately caused by the negligent act or omission of Seller and is determined by a court of competent jurisdiction to be a legal liability of Seller, and provided that CNM furnishes to Seller prompt written notice and requisite authority, information and assistance to defend the claim.

14. QUESTION: Will CNM accept the incorporation of Seller’s General Terms, Product Terms, and Warranty Statements into the resulting agreement, with the following language regarding order of precedent of these documents:

“The Agreement is hereby amended by clarifying the governing terms of the Agreement are as follows:
1. Section A and B of the BID #T-2920
2. The Quotation, including the attached terms and conditions (i.e. Vendor General T&Cs, Product T&Cs, and Warranty Statements attached to the Quotation.)

CNM’s Response: No. Official responses to this RFB shall include Offeror’s bid as completed on CNM’s RFB Section D Bid Response Form, completed RFB Sections E, F, and G forms, and any specification sheets or descriptive literature if offering “Equal Performance” items. Vendor quote forms or other documentation is not considered an official Bid document and shall not be treated as such. As stated on Amendment # 1, Vendor specific terms and conditions are not accepted and shall not be included in the resultant award.

BIDDERS ARE REQUIRED TO ACKNOWLEDGE RECEIPT OF ALL AMENDMENTS IN THE SPACES PROVIDED IN SECTION E, SIGNATURE OF FIRM’S AUTHORIZED REPRESENTATIVE.

All other specifications, terms and conditions remain unchanged. This amendment may also be downloaded from CNM’s website http://www.cnm.edu/depts/purchasing/request-for-bids. The due date and time of on or before 4:00 PM, March 3, 2014 remains unchanged.