Procurement Stewardship Act Report

BID Protest Determinations between April 1, 2018 through March 31, 2019

File Number	Date of Decision	Protestor	Contracting Entity	Decision
SF20180082	04/20/2018	Vera Institute of Justice	Victim Services, Office of	Denied
SF20180105	07/30/2018	Best Climate Control Corp.	SUNY at Stony Brook	Upheld
SF20180222	10/05/2018	Student Transport, Inc. d/b/a WNY Bus Co.	Office For People with Developmental Disabilities	Denied
SF20180218	10/17/2018	Northeast Associates in Rehabilitation, LLC	State Education Department	Denied
SF20180224	01/08/2019	OptumRx, Inc.	Department of Civil Service	Denied
SF20180224	01/08/2019	Express Scripts Inc.	Department of Civil Service	Denied

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Vera Institute of Justice with respect to the procurement of Case Manager Services conducted by the New York State Office of Victim Services.

Procurement Record – OVS01-0000007-1080200

Determination of Appeal

SF–20180082

April 20, 2018

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Office of Victim Services (OVS) for case manager services. We have determined the grounds advanced by Vera Institute of Justice (Vera) are insufficient to merit overturning OVS' decision not to consider the grant application of Vera and, therefore, we deny the Appeal.

BACKGROUND

Facts

OVS provides services and support to crime victims in New York State and administers grants available under the Federal Victims of Crime Act. OVS issued a Request for Applications for Case Manager Services (RFA) on December 20, 2017. Case managers "oversee coordination of the care of the victim in response to a variety of challenges and needs that arise from the victimization" (RFA, Section 2.2, at pg. 5). All Child Advocacy Centers and Victim Assistance Programs that are currently funded by an OVS contract were eligible to submit applications under this grant (*see* RFA, Section 2.3, at pg. 7). After initially determining whether applications met certain minimum qualifications, OVS evaluated and scored the applications according to the criteria set forth in the RFA, and made awards on the basis of best value (*see* RFA, Section 4, at pgs. 11-13). Applicants were directed to submit their applications through the Grants Gateway, an electronic portal system used statewide, and were required to be prequalified in the Grants Gateway prior to January 26, 2018, the RFA submission deadline (*see* RFA, Section 3.1, at pg. 8; Section 8, at pg. 23). The RFA was clear -- applicants that were not prequalified could not be considered for funding (*see* RFA, Section 8, at pg. 23; Section 3.2, at pg. 8).

Vera submitted an application on January 23, 2018. However, on February 22, 2018, OVS notified Vera it could not consider Vera's application because Vera failed to obtain the required prequalification in the Grants Gateway. By letter dated March 1, 2018, Vera filed a protest with OVS challenging OVS' rejection of Vera's application. OVS denied the protest in a letter dated March 7, 2018. Vera filed an appeal of OVS' determination with this Office by letter dated March 13, 2018 (Appeal) and OVS answered the Appeal on March 23, 2018 (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 the contract approval responsibility prescribed by SFL § 112, 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.[1] 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 Title 2 of the Codes, Rules and Regulations of the State of New York.

In the determination of the Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by OVS with respect to the grant awards;

2. the correspondence between this Office and OVS arising out of our review of the grant awards; and

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

    a. Vera's Appeal dated March 13, 2018; and
    b. OVS' Answer dated March 23, 2018.

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, Vera challenges the decision by OVS to deny funding of its application on the following grounds:

1. OVS erred in automatically rejecting Vera's application because Vera had uploaded the necessary documents in the Grants Gateway for prequalification and, even though Vera failed to submit such documents, the documents were visible to OVS. Furthermore, after notification from OVS, Vera took immediate steps to become prequalified.

OVS Response to the Appeal

In its Answer, OVS contends the Appeal should be rejected on the following grounds:

[1] 2 NYCRR Part 24.

1. Vera failed to submit the uploaded documentation and complete the prequalification process. Accordingly, since prequalification was a requirement in the RFA, the Vera application was not evaluated.

DISCUSSION

Prequalification as a Mandatory Specification

Vera asserts it substantially met the RFA prequalification requirement and urges OVS to reconsider its rejection of Vera's application (*see* Appeal, at pgs. 1-2). Vera further claims it had no reason to suspect that its submission had not been completed and its status was in jeopardy until Vera received notice that its application had been rejected (*see* Appeal, at pg. 1). OVS, however, states that prequalification in the Grants Gateway is a two-step process consisting of uploading the necessary documents and submitting them to the Grants Gateway system (*see* Answer). OVS asserts Vera was not prequalified since it did not complete both steps and, as a result, OVS did not evaluate Vera's application (*Id.*).

By way of background, after a vendor is initially prequalified in the Grants Gateway, a vendor must periodically upload and submit current documents as needed into the vendor's Document Vault in the Grants Gateway to *maintain* its prequalified status (*see* NYS Grants Gateway System: Monitoring and Updating Your Organization's Prequalification Status). After document submission, a vendor receives a system-generated email advising the vendor that its submission was successful (*see* NYS Grants Gateway System: Monitoring and Updating Your Organization's Prequalification Status, at pg. 9). Once the submission has been reviewed and approved, the vendor will receive a subsequent system-generated email confirming it is prequalified to apply for grants (*Id.*).

A clear requirement in the RFA was for applicants to be prequalified in the Grants Gateway prior to the deadline for receipt of applications (*see* RFA, Section 8, at pg. 23; Section 3.2, at pg. 8). Moreover, the RFA expressly provides that an application that has not been prequalified in the Grants Gateway will be immediately disqualified from further review (*see* RFA, Section 4.1, at pg. 11).

Vera states it was notified on January 15, 2018 that its prequalification status had lapsed (*see* Appeal, at pg. 1). Vera claims it uploaded the necessary documentation to the Grants Gateway on January 16, 2018 but unknowingly failed to submit the documents into the system (*Id.*). Based on the system process described above, Vera should have expected to receive emails indicating that it had successfully submitted the documents in its Document Vault and, ultimately, a subsequent email confirming Vera's prequalification status. Thus, we find Vera's statement that "there was no cause for Vera to suspect that submission had not been completed and our status was in jeopardy until the rejection of our proposal over a month later" unpersuasive.[2]

[2] We further note that the same individual at Vera submitted documentation in the system on at least 19 prior occasions and therefore, was presumably familiar with the prequalification process.

It is indisputable that OVS intended prequalification in the Grants Gateway to be a mandatory specification to be met by all applicants.[3] Because Vera failed to complete the prequalification process, OVS found Vera's application nonresponsive.

Waiver of Prequalification Requirement

Vera also asserts it had uploaded all the necessary documents in the Grants Gateway and the documents were visible to OVS staff at the time the applications were due and furthermore, Vera took "immediate steps to have its prequalification status updated – and that status was swiftly corrected to show that Vera is indeed prequalified" (Appeal, at pgs. 1-2).[4] OVS responds that it cannot confirm the documents were visible to OVS at the submission deadline; however, because the Grants Gateway informed OVS that Vera was not prequalified on the date applications were due, OVS did not evaluate Vera's application (*see* Answer).

In essence, Vera is requesting OVS to disregard an RFA specification and consider Vera's application, notwithstanding a "minor technical error" (*see* Appeal, at pg. 2). While a public contracting entity can reject bids that do not precisely comply with bid specifications, the public contracting entity may also "waive a technical noncompliance with bid specifications if the defect is a mere irregularity and it is in the best interest of the municipality [or state] to do so" (*Hungerford & Terry, Inc. v. Suffolk County Water Auth.*, 12 AD3d 675, 676 [2nd Dept. 2004]; *see also Le Cesse Bros. Contr. v. Town Bd. Of Town of Williamson*, 62 AD2d 28 [4th Dept. 1978]). Conversely, a public contracting entity may not waive a material or substantial variance from the bid specifications since doing so "would impair the interests of the contracting public authority or place some of the bidders at a competitive disadvantage" (*Hungerford*, at 676). However, where the variance is not material, a public contracting entity has discretion whether to waive the variance or reject the bid (*see e.g., Hamlin Constr. Co. v. County of Ulster*, 301 AD2d 848 [3rd Dept. 2003]; *George A. Nole & Son, Inc. v. Bd. Of Education of the City School Dist. Of Norwich & Kotasek Corp.*, 129 AD2d 873 [3rd Dept. 1987]).

Although OVS reserved the right to waive or modify minor irregularities in applications, since prequalification in the Grants Gateway was a mandatory requirement, this reservation of rights did not authorize a waiver of the pre-qualification requirement (*see* RFA, Section 5.11, at pg. 18). Furthermore, we note generally state agencies are instructed not to evaluate proposals for grant opportunities from vendors that are not prequalified in the Grants Gateway.[5] Thus, we will not disturb OVS' decision to not evaluate Vera's proposal.

CONCLUSION

[3] The RFA required that a vendor have one of the following four prequalification statuses to be considered for funding: Document Vault Prequalified; Document Vault Prequalified Open; Document Vault Prequalified/in review; or Document Vault Open for PQS edits (*see* RFA, Section 8, at pg. 23).
[4] As of the date of this Determination, Vera has not completed the prequalification process in the Grants Gateway.
[5] New York State Budget Bulletin H-1032: New York State Grants Reform, https://www.budget.ny.gov/guide/bprm/bulletins/h-1032rev.html.

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the determination of OVS to not consider the grant application of Vera. As a result, the Appeal is denied.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Best Climate Control Corp. with respect to the procurement of HVAC Maintenance Services conducted by the State University of New York at Stony Brook University Hospital.	**Determination of Bid Protest**
Contract Number – SNY01-C011323-3320215 with Commercial Instrumentation Services	**SF–20180105**
	July 30, 2018

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the State University of New York at Stony Brook University Hospital (SBUH) for HVAC maintenance services (Services). We have determined the grounds advanced by Best Climate Control Corp. (Best) are sufficient to merit overturning the contract award made by SBUH and, therefore, we uphold the Protest. As a result, we are today disapproving the SBUH contract with Commercial Instrumentation Services, Inc. (Commercial).

BACKGROUND

Facts

On February 2, 2018, SBUH issued Invitation for Bids Number 17/18-2795 (IFB) seeking a vendor to provide the Services. The resulting contract was to be awarded to the qualified responsible low bidder (*see* IFB, pgs. 4, 19).[1]

SBUH received four bids prior to the due date of March 14, 2018. SBUH determined two bids, including the bid submitted by Best, were not responsive to the terms of the IFB. Subsequently, SBUH awarded the contract to Commercial, the lowest bidder of the remaining two bidders.

[1] The contract is primarily for services which, generally, are to be awarded on the basis of "best value" pursuant to the State Finance Law (*see* "Applicable Statutes," *infra* at pg. 3). In *Transactive Corporation v. New York State Department of Social Services* (236 AD2d 48, 53 [1997]; *aff'd on other grnds*, 92 NY2d 579 [1998]), the Appellate Division, Third Department, held that, while a State agency typically may not award a contract for services solely on the basis of price, it could be permissible when such approach effectively represents a cost-benefit analysis. In addition, the New York State Procurement Council recognizes that "[f]or certain services procurements, best value can be equated to low price" (NYS Procurement Guidelines, Section IV[A]; *see also* Section V[B][11]). Applying the rationale in *Transactive* and the direction found in the NYS Procurement Guidelines, this Office has upheld awards of service contracts based on cost alone where the services were routine in nature (such as with rubbish removal) and the solicitation sufficiently defined the qualitative and efficiency requirements, so that there is little room for technical variances which will have any meaningful value to the procuring agency (*see* Comptroller Bid Protest Decisions 20020035, 20100434 and 20160139; *see also* Comptroller Bid Protest Decision 20010084, at FN 7). Notwithstanding the fact that Best did not raise this issue, based our review of the procurement record, we are satisfied that SBUH could have awarded a contract for the Services solely on the basis of low price and that SBUH undertook the requisite cost-benefit analysis.

On March 30, 2018, SBUH informed Best that its bid was not responsive and, as a result, disqualified from the IFB. SBUH provided Best a debriefing regarding the non-responsive determination on April 18, 2018. By letter dated April 26, 2018, SBUH informed Best that the contract had been awarded to another bidder. On May 4, 2018, Best filed a protest with this Office challenging the award to Commercial (Protest). SBUH responded to the Protest (Answer) by letter dated May 23, 2018, and, on May 29, 2018, Best filed its reply (Reply) to the Answer with this Office.

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. One of those exceptions applies to contracts entered into by the State University of New York (SUNY). Education Law (EDL) § 355(5) allows SUNY to procure materials, equipment and supplies, construction and construction-related services, and printing contracts without prior approval of the Comptroller. For other types of contracts, such as the contract for services proposed in the instant matter, the Comptroller's approval is required so long as the value of the contract exceeds certain monetary thresholds that are negotiated by SUNY and this Office pursuant to EDL § 355(5). The value of the proposed SBUH/Commercial contract value exceeds the applicable monetary threshold and, therefore, is subject to the Comptroller's approval.

In carrying out the aforementioned responsibilities proscribed by SFL § 112, OSC has promulgated 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] This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no protest process engaged in at the department level, the Protest is governed by section 24.4 of Title 2 of the Codes, Rules and Regulations of the State of New York.

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by SBUH with the SBUH/Commercial contract;

2. the correspondence between this Office and SBUH arising out of our review of the proposed SBUH/Commercial contract; and

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

    a. Best's Protest dated May 4, 2018,
    b. SBUH's Answer to the Protest dated May 23, 2018, and

[2] 2 NYCRR Part 24.

c. Best's Reply to the Answer dated May 29, 2018.[3]

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."[5] A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."[6] "Specification" or "requirement" is defined to include "the necessary qualifications of the offerer, the capacity and capability of the offerer to successfully carry out the proposed contract."[7]

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, Best challenges the procurement conducted by SBUH on the following grounds:

1. SBUH incorrectly determined the bid submitted by Best failed to meet the IFB's reference requirement and, as a result, improperly deemed Best's bid non-responsive.

SBUH's Response to the Protest

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

1. The bid submitted by Best contained only two acceptable references instead of three, as required by the IFB, and therefore SBUH appropriately determined the bid non-responsive.

Best's Reply to the Answer

In its Reply, Best argues that:

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[3] While SBUH and Best submitted additional correspondence to this Office, including letters dated June 5, 2018, and June 8, 2018, respectively, these submissions were outside the scope of the filings permitted as of right under 2 NYCRR Part 24. Furthermore, the additional correspondence did not raise any new issues relating to the Protest and, therefore, are not formally addressed in this Determination.

[4] SFL § 163(10).

[5] SFL § 163(1)(j).

[6] SFL § 163(1)(d).

[7] SFL § 163(1)(e).

1. Best's use of SBUH as a reference complied with the requirements of the IFB. Furthermore, even though not required by the IFB, Best provided two additional references, each of which satisfied the reference requirement.

DISCUSSION

Responsiveness of Best's Bid

Best alleges SBUH improperly found Best to be non-responsive despite the fact that it "clearly satisfied the references requirement in the IFB" (*see* Protest, at pg. 3). SBUH asserts that since Best did not provide three acceptable references as required by the IFB, SBUH appropriately determined Best was non-responsive (*see* Answer, at pg. 2).

1. References Requirement

The IFB required that bidders "submit client references for minimum of three (3) current healthcare institutions they are servicing of which one (1) must be from a Hospital of similar size and scope of SBUH" (*see* IFB, at pg. 19). The bid submitted by Best contained five references. SBUH acknowledged two of the five references submitted by Best were acceptable (*see* Answer, at pg. 1). Thus, the only outstanding issue is whether Best submitted a third acceptable reference.

2. Use of SBUH as a Reference

Best stated it has performed HVAC maintenance services for SBUH for 13 years and, therefore, named SBUH as a reference (*see* Protest, at pg. 2). SBUH, however, "determined not to consider itself as a reference, since it might provide an advantage to a vendor that had been able to work with SBUH to the disadvantage to a vendor that had not had this opportunity" (Answer, at pg. 2).

Best avers the IFB does not prohibit use of SBUH as a reference (*see* Protest, at pgs. 2-3, Reply, at pg. 1). Best further alleges SBUH arbitrarily decided to exclude itself as a reference "only after it opened the bids and saw that [Best] was the low bidder" and that, by removing itself as a potential reference, SBUH disadvantages both current and prior vendors by depriving them of a reference that would have otherwise satisfied the IFB requirements (*see* Reply, at pg. 2).

The applicable IFB requirement does not expressly preclude the use of SBUH as a reference (*see* IFB, at pg. 19) and our review of the procurement record confirms SBUH made the decision to not consider itself as an acceptable reference after the bid due date. The procurement record further indicates SBUH provided Best and the other bidder that used SBUH as a reference an opportunity to submit an alternate reference (*see* Protest, Exhibit F). While SBUH reserved "the right to make all decisions regarding this IFB, including, without limitation, the right to decide whether a response does or does not comply with the requirements set forth [in the IFB]" (IFB, at pg. 7), we must now address whether this particular change to the reference requirement of the IFB was a permissible change.

It is generally understood that a procuring entity may waive technical non-compliance with bid specifications or requirements if the defect is a mere irregularity and it is in the best interest of the procuring agency to do so (*see* OSC Bid Protest Determination SF20100328; *Le Cesse Bros. Contracting, Inc. v. Town Board of the Town of Williamson*, 62 AD2d 28 [1978]). However, the procuring entity may not waive a material or substantial requirement, and a proposal would have to satisfy each and every material specification to be considered responsive (*Id.*). A variance is material if it would impair the interests of the contracting public entity, place the successful bidder in a position of unfair economic advantage or place other bidders or potential bidders at a competitive disadvantage (*see Cataract Disposal, Inc. v. Town of Newfane*, 53 N.Y.2d 266 [1981]; *Fischbach & Moore v. NYC Transit Authority*, 79 A.D.2d 14 [2nd Dept. 1981]; *Glen Truck Sales & Service, Inc. v. Sirignano*, 31 Misc.2d 1027 [Sup Ct Westchester County, 1961]).

In this case, while SBUH did not waive a bid specification, SBUH's determination to alter the specification of the IFB related to the submission of references must be held to the same materiality standard. If SBUH's change to such specification would impair the interests of SBUH, provide Commercial with an unfair advantage, or place other bidders or potential bidders at a disadvantage, it is not permissible.

SBUH's change to the reference specification after bid submission clearly could have disadvantaged any bidder relying on using SBUH as a reference to satisfy the IFB requirement. In this case, two of the four bidders submitted bids using SBUH as a reference. While Commercial was able to substitute another reference, Best, to the extent SBUH determined its remaining references were unacceptable, was placed at a disadvantage. Accordingly, SBUH's change to the reference requirement was not permissible. Therefore, SBUH's finding that the bid submitted by Best was non-responsive based on Best's use of SBUH as a reference cannot stand.[8]

Finally, we note that subsequent to SBUH finding the bid submitted by Best to be non-responsive (apparently at the debriefing), SBUH advised Best that SBUH would have given Best "a negative reference, so recusing itself had, in fact, potentially aided [Best] (*see* Answer, at pg. 2). Best states that it has performed HVAC maintenance services for SBUH for over 13 years and has never had any complaints about its work (*see* Protest, at pg. 2). While we find the timing of SBUH's disclosure as to its dissatisfaction with the work performed by Best to be curious, we need not resolve this issue in light of our findings below with regard to the additional references submitted by Best.

[8] Furthermore, we are not persuaded by SBUH's rationale for this post-submission change to the reference specification. SBUH states that considering itself as a reference might advantage a vendor that previously worked for SBUH to the disadvantage to a vendor that had not had this opportunity. In our view, using SBUH as a reference does not necessarily advantage or disadvantage a bidder, but rather permits a bidder with prior experience with SBUH to use such experience to satisfy the reference requirement. In such a case, SBUH must still ascertain whether it would provide the bidder a positive reference.

3. Additional References provided by Best

As previously stated, SBUH accepted two of the references submitted by Best, and, in addition to the SBUH reference (which SBUH would not consider), Best submitted two further references (Additional Reference 1 and Additional Reference 2, respectively). SBUH stated it had difficulty verifying that Best had provided services for these additional references (*see* Answer, at pg. 1).

Additional Reference 1 [9]

At SBUH's request, Best provided further documentation for Additional Reference 1, consisting of a purchase order from Additional Reference 1 to the prime contractor and an underlying purchase order from the prime contractor to Best which was acting as a subcontractor (*see* Protest, Exhibit G). SBUH determined this reference was not acceptable since "[Best] had performed installation work, not maintenance services, which is what the IFB required" (*see* Answer, at pg. 2).[10]

In response to SBUH's contention, Best claims its "scope of work for [Additional Reference 1] actually did include maintaining and servicing HVAC equipment" (Reply, at pg. 3). In support, Best refers to its purchase order with the prime contractor which lists "HVAC service requirements" as work Best would be performing (*Id.*).

As previously noted, the IFB requires that a bidder provide client references for current health care institutions that the bidder is "servicing" (*see* IFB, at pg. 19). While we agree that the work performed for the reference should relate to the scope of work required by the IFB, the language of the IFB does not limit such work solely to maintenance. Furthermore, the scope of work set forth in the IFB contemplates services other than maintenance, such as "repair, retrofit, replacement and installation" (*see* IFB, at pg. 14; *see* also IFB, pg. 13).

For these reasons, we find Additional Reference 1 satisfied the terms of the IFB and SBUH's rejection of Additional Reference 1 was improper.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Protest are of sufficient merit to overturn the contract award by SBUH. As a result, the Protest is upheld and we are today disapproving the proposed SBUH contract with Commercial for the Services.

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[9] Best did not provide SBUH with any additional information concerning Additional Reference 2. However, as discussed in this Determination, Additional Reference 1 satisfied the IFB reference requirement, making further references unnecessary.

[10] In its Answer, SBUH states "[n]otwithstanding the receipt of this reference [attached to the Answer], which indicated that [Best] had performed installation work, it still did not resolve SBUH's inability to verify that [Best] had performed work for [the reference]" (Answer, at pg. 2). In light of the documentation provided by Best, it is unclear why SBUH continued to question whether Best provided services to Additional Reference 1. In our view, the procurement record contains sufficient evidence to confirm Best performed work for Additional Reference 1 (*see e.g.*, Answer, Exhibit C, an email from the construction manager of Additional Reference 1 to SBUH stating that Best had performed installation work for the entity).

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by
Northeast Associates in Rehabilitation, LLC with respect to the procurement of Core Rehabilitation Services conducted by the New York State Education Department.

Determination of Appeal

SF–20180218

Contract Number – C013536

October 17, 2018

The Office of the State Comptroller (OSC) has reviewed the above-referenced procurement conducted by the New York State Education Department (NYSED) for Core Rehabilitation Services to be provided through NYSED's Office of Adult Career and Continuing Education Services – Vocational Rehabilitation (ACCES-VR). We have determined the grounds advanced by Northeast Associates in Rehabilitation, LLC (Northeast) are insufficient to merit overturning NYSED's decision to reject Northeast's grant application for job placement services (one of the types of services being procured by NYSED, as further described below) and, therefore, we deny the Appeal.[1]

BACKGROUND

Facts

NYSED issued Request for Proposal #GC18-004 (RFP) on August 15, 2017, seeking proposals from community rehabilitation programs and other service providers for the provision of Core Rehabilitation Services (Rehabilitation Services) to individuals with disabilities throughout New York State, The Rehabilitation Services include assessment, employment preparation, job placement, supported employment, assistive technology, pre-employment transition, driver rehabilitation and related adjunct services (*see* RFP, at pg. 1).

The RFP required that eligible applicants submit an Application/Basic Information Form (Attachment 1 to the RFP) and the applicants' proposal for the specific services being applied for (Attachments 1-A-1-H of the RFP) (*see* RFP, at pg. 5). An applicant's Basic Information Form must receive a pass rating to be eligible to provide services (*see* RFP, at pg. 54).[2] The proposals submitted by Applicants who passed the Basic Information Form review, would then be

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[1] Northeast did receive grant awards for assessment and employment preparation services.

[2] The various services being procured pursuant to the RFP were grouped into the following service categories: Entry Services (Attachment 1-A); Assessment Services (Attachment 1-B); Employment Preparation (Attachment 1-C); Job Placement Services (Attachment 1-D); Supported Employment Services (Attachment 1-E); Assistive/Rehabilitation Technology Services (Attachment 1-F); Driver Rehabilitation Services (Attachment 1-G); and Adjunct Services (Attachment 1-H).

reviewed and scored (on a pass/fail basis) for the specific services being applied for (*Id.*). Only those proposals receiving a pass rating for a particular service category would be considered for contract award (*see* RFP, at pg. 54).

Northeast submitted proposals for various service categories by the October 25, 2017 submission deadline, but failed to include Attachment 1-D, the attachment used to apply for job placement services.[3] NYSED determined Northeast's proposal for job placement services failed and eliminated its proposal from further consideration.

By letter dated June 27, 2018, Northeast was advised of tentative award for services which received a pass rating, but was also deemed non-responsive and did not receive an award for job placement services as Attachment 1-D was not included in Northeast's submission. Northeast requested a debriefing and, by letter dated August 3, 2018, NYSED advised Northeast that its proposal for all services in the job placement services category did not receive a pass rating. By letter dated August 9, 2018, Northeast protested NYSED's decision to eliminate its proposal for job placement services from consideration. NYSED denied the protest in a letter dated August 20, 2018. Northeast then filed an appeal (Appeal) of NYSED's determination with this Office via email dated September 7, 2018. NYSED did not file any response to the Appeal.

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 the contract approval responsibility prescribed by SFL § 112, 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.[4] 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 Title 2 of the Codes, Rules and Regulations of the State of New York.

In the determination of the Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by NYSED with respect to the grant awards;

2. the correspondence between this Office and NYSED arising out of our review of the grant awards; and

[3] Job placement services are those "employment-related services necessary to obtain, retain, or advance in competitive, integrated employment (*see* RFP, at pg. 27).

[4] 2 NYCRR Part 24.

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

    a. Northeast's protest (Agency Protest) to NYSED dated August 9, 2018;
    b. NYSED's protest determination (Agency Protest Determination) dated August 20, 2018; and
    c. Northeast's Appeal dated September 7, 2018.

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, Northeast challenges NYSED's decision to eliminate Northeast's proposal for job placement services from consideration on the following grounds:

1. Northeast clearly intended to apply for the job placement services covered by Attachment 1-D, which Northeast inadvertently failed to submit with its proposal, and therefore NYSED should have given Northeast the opportunity to submit the missing attachment.

DISCUSSION

Northeast's Proposal for Job Placement Services

Northeast claims it was clear from Northeast's application and other documents submitted with its proposal that Northeast intended to apply for job placement services even though it failed to include Attachment 1-D (*see* Appeal; Agency Protest). Northeast further asserts it was not aware that Attachment 1-D had not been submitted with its proposal until NYSED so notified Northeast in the debriefing summary and NYSED should accept the completed Attachment 1-D submitted with Northeast's Agency Protest (*see* Appeal; Agency Protest). NYSED responds that Northeast's proposal for job placement services that did not include Attachment 1-D failed to comply with the express terms of the RFP (*see* Agency Protest Determination, at pg. 1).

The RFP required each applicant to submit, as part of its proposal, the appropriate CRS Service Form, which forms were attached to the RFP as Attachments 1-A through 1-H (*see* RFP, at pg. 52). Each form contains specific requirements related to the corresponding service or services and "[f]ailure to meet any of those…requirements will disqualify the applicant for that case service" (RFP, at pgs. 53-54). The RFP provided that "NYSED will deem the vendor to be 'non-responsive' if required forms are not submitted" (*see* RFP, at pgs. 2, 5 and 52). The RFP further stated "only vendors that submit the appropriate CRS Service Forms (Attachments 1-A through 1-H)…will be eligible for an award for the service(s) applied for" (*Id.*). Finally, the RFP expressly provided "[v]endor submissions of any of the…forms will not be accepted after the [proposal] due date" (*see* RFP, at pgs. 2 and 52).

Notwithstanding the language in the RFP, Northeast is requesting that NYSED accept the post-bid submission of required documentation initially missing from its proposal for job placement services (*see* Appeal; Agency Protest). Furthermore, Northeast contends "[w]hile we recognize that strictly following the RFP process is essential to maintaining its integrity, we know from our past experiences and those of others that some leeway can be allowed, and believe [our] circumstances justify an exception to the process" (*see* Agency Protest).

While a municipality or state agency can reject bids that do not precisely comply with bid specifications, a municipality or state agency may "waive a technical noncompliance with bid specifications if the defect is a mere irregularity and it is in the best interest of the municipality [or state] to do so" (*Hungerford & Terry, Inc. v. Suffolk County Water Auth.*, 12 AD3d 675, 676 [2nd Dept. 2004]; *see also Le Cesse Bros. Contr. v. Town Bd. Of Town of Williamson*, 62 AD2d 28 [4th Dept. 1978]). Conversely, a municipality or state agency may not waive a material or substantial variance from the bid specifications since doing so "would impair the interests of the contracting public authority or place some of the bidders at a competitive disadvantage" (*Hungerford*, at 676). Furthermore, a bidder may not later provide essential information missing from its bid at the time of submission (*see Le Cesse*, at 32).

In this case, Northeast acknowledges it failed to submit a key document (Attachment 1-D) with its proposal for job placement services (*see* Appeal). As set forth above, the RFP was clear that submission of the applicable CRS Service Form was a material and essential element of an applicant's proposal. Since the submission of Attachment 1-D was a material requirement of the RFP, NYSED was unable to waive this requirement. Moreover, our review of the procurement record shows that NYSED consistently found incomplete proposals, like Northeast's proposal for job placement services, to be non-responsive and eliminated them from consideration for award.[5] Thus, NYSED correctly determined Northeast's proposal for job placement services was not responsive to the RFP.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the determination of NYSED to not consider Northeast's proposal for job placement services. As a result, the Appeal is denied.

[5] Forty-four other submitting agencies failed for some or all of the services applied for and five of those agencies similarly failed to submit the service form for job placement services (Attachment 1-D).

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Student Transport, Inc., d/b/a WNY Bus Co. with respect to the procurement of Western New York Program Site Transportation Services conducted by the New York State Office for People with Developmental Disabilities.

Determination of Appeal

SF–20180222

Contract Number – C0SWN00190

October 5, 2018

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Office for People with Developmental Disabilities (OPWDD) for transportation services to and from certain program sites operated by the Western New York Developmental Disabilities State Operations Office, an agency of OPWDD serving Cattaraugus, Chautauqua, Erie, Genesee, Niagara and Orleans Counties (Services). We have determined the grounds advanced by Student Transport Inc., d/b/a WNY Bus Co. (WNY Bus) are insufficient to merit overturning the contract awards made by OPWDD and, therefore, we deny the appeal.[1]

BACKGROUND

Facts

On April 4, 2018, OPWDD issued Invitation for Bid #WNY 051818 (IFB) seeking vendors to provide the Services. The resulting contract for each program site was to be awarded to the responsible bidder providing the lowest Total Annual Transportation Cost[2] for that site (*see* IFB, at pg. 16).[3] Bidders were permitted, but not required, to bid on all fifteen sites (*Id.*).

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[1] This Office has approved the OPWDD contracts for transportation services at various program sites except those contracts awarded to Corvus Bus & Charter Inc., for the reasons discussed later in this determination.

[2] The Total Annual Transportation Cost for each program site is equal to the daily cost of providing transportation services, including travel time, mileage and other ancillary costs set forth in the IFB for each route associated with that particular site multiplied by 250, the estimated number of transport days each year (*see* IFB, Exhibit A).

[3] The contract is primarily for services which are to be awarded on the basis of "best value" pursuant to the State Finance Law (*see* "Applicable Statutes," *infra* at pg. 3). In *Transactive Corporation v. New York State Department of Social Services* (236 AD2d 48, 53 [1997]; *aff'd on other grnds*, 92 NY2d 579 [1998]), the Appellate Division, Third Department, held that, while a State agency typically may not award a contract for services solely on the basis of price, it could be permissible when such approach effectively represents a cost-benefit analysis. In addition, the New York State Procurement Council recognizes that "[f]or certain services procurements, best value can be equated to low price" (NYS Procurement Guidelines, Section IV[A]; *see also* Section V[B][11]). Applying the rationale in *Transactive* and consistent with the NYS Procurement Guidelines, this Office has upheld awards of service contracts based on cost alone where the services were routine in nature (such as with rubbish removal), or the solicitation sufficiently defined the qualitative and efficiency requirements, so that there is little room for technical variances between proposals which would have any meaningful value to the procuring agency (*see*

WNY Bus submitted timely proposals for seven program sites. By letter dated July 13, 2018, OPWDD notified WNY Bus that WNY Bus' proposal was disqualified because WNY Bus failed to provide references verifying it possessed at least three years of relevant experience as required by the IFB (*see* IFB, at pg. 7).

By letter dated July 18, 2018, WNY Bus filed a protest with OPWDD challenging the disqualification of its proposal and the award of contracts for the five program sites where it would have ostensibly been the low bidder. By letter dated September 10, 2018, OPWDD denied the protest. By letter dated September 18, 2018, WNY Bus filed an appeal (Initial Appeal) of OPWDD's contract awards for those five sites with this Office. By letter dated September 21, 2018 WNY Bus filed an amended appeal with this Office (Appeal). OPWDD did not file any response to the Appeal.

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 the contract approval responsibility prescribed by SFL § 112, 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.[4] 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 Title 2 of the Codes, Rules and Regulations of the State of New York.

In the determination of the Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by OPWDD with the various awarded contracts;

2. the correspondence between this Office and OPWDD arising out of our review of the proposed awarded contracts; and

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

    a. WNY Bus' protest (Protest) to OPWDD dated July 18, 2018;

Comptroller Bid Protest Decisions 20020035 and 20100434; *see also* Comptroller Bid Protest Decision 20010084, at FN 7). Notwithstanding the fact that WNY Bus did not raise this issue, based our review of the procurement record, we are satisfied that OPWDD's award of these contracts based on lowest price undertook the requisite cost-benefit analysis and, in this case, was appropriate.

[4] 2 NYCRR Part 24.

b. OPWDD's protest determination (OPWDD Protest Determination) dated September 10, 2018;
c. WNY Bus' Initial Appeal dated September 18, 2018; and
d. WNY Bus' Amended Appeal dated September 21, 2018.

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.[5] 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."[6] A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."[7]

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, WNY Bus challenges the procurement conducted by OPWDD on the following grounds:

1. OPWDD improperly disqualified WNY Bus' proposal for failure to satisfy the experience requirement of the IFB and such determination was contrary to the award criteria and bidder qualifications set forth in the IFB.
2. The disqualification of WNY Bus was arbitrary in view of the fact that one other bidder having the same or even less experience than WNY Bus was awarded a contract.

DISCUSSION

1. Responsiveness of WNY Bus' Proposal to Experience Requirement

WNY Bus alleges OPWDD improperly disqualified its proposal and, "had WNY Bus not been wrongfully disqualified, it should have been the recipient of five contract awards (*see* Appeal, at pg. 2). In support of its position, WNY Bus asserts that its owners have significantly more than 3 years' transportation business experience and, therefore, "the purported grounds for disqualification are arbitrary and contrary to the documented qualifications submitted by WNY Bus" (*Id.*). OPWDD claims disqualification was appropriate since WNY Bus was incorporated in May 2016 and, consequently, had not done business with the references long enough to meet the 3 year minimum experience requirement (*see* OPWDD Protest Determination, at pg. 1). OPWDD stated that the experience of a "non-controlling" owner of WNY Bus could not be considered to meet the experience requirement (*Id.*).

[5] SFL § 163(10).
[6] SFL § 163(1)(j).
[7] SFL § 163(1)(d).

The IFB required that "[a]ll bidders must submit at least three (3) work references in [sic] that will verify that they have at least three (3) years of relevant experience to complete the work as listed in [the IFB]" (IFB, at pg. 7). WNY Bus claims its ownership possesses more than 15 years' experience in the transportation industry which clearly meets the IFB's experience requirement (*see* Appeal, at pg. 3). OPWDD acknowledged one of WNY Bus' owners gained transportation experience through a different company, but ultimately determined not to impute such experience to WNY Bus because that individual did not have a controlling interest in WNY Bus (*see* OPWDD Protest Determination, at pg. 1). WNY Bus points out that the IFB did not allow for "percentages and controlling interests of owners [as] factors to be used in determining qualifying experience" (Appeal, at pg. 3).

The specific language of the IFB provides that the "bidder . . . have at least three (3) years relevant experience" (IFB, at pg. 7, emphasis added). The express language of the IFB imposes this experience requirement on the bidder, i.e., the entity submitting the bid in response to the IFB issued by OPWDD. In this instance, the bidder is WNY Bus. WNY Bus was formed in 2016 and therefore, is clearly unable to satisfy the three-year minimum experience requirement. Accordingly, while we do not agree with OPWDD's assertion that the prior experience of a controlling owner of the bidder could have been used to satisfy the experience requirement, we do agree with OPWDD's determination that WNY Bus did not satisfy the experience requirement and, thus, its proposal was non-responsive.

Furthermore, the issue as to whether the experience of a bidder's owner could be used to satisfy an experience requirement imposed on the bidder was previously addressed by this Office in the context of an OPWDD procurement for other transportation services. In that instance, OPWDD submitted a proposed contract award to a bidder purporting to use its owner's prior experience to demonstrate the requisite experience providing transportation services. During this Office's review of the procurement record, we advised OPWDD that when the IFB requires a "bidder" to demonstrate it has certain minimum experience, the only experience that can be used to satisfy that requirement is experience performed by, and directly attributable to, the entity submitting the bid.

2. Proposed Award to Another Bidder with Similar Experience

WNY Bus alleges OPWDD acted arbitrarily in disqualifying WNY Bus since OPWDD awarded a contract to another bidder, Corvus Bus & Charter Inc. (Corvus), that was formed on November 13, 2015, and, like WNY Bus, had fewer than three years' experience (*see* Initial Appeal, at pg. 2). OPWDD considered the experience of Corvus' controlling owner with another company to satisfy the IFB's experience requirement (*see* OPWDD Protest Determination, at pg. 1). As a result, with the group of contracts submitted, OPWDD submitted a proposed contract with Corvus to this Office. We subsequently determined Corvus was non-responsive for the reasons set forth above and returned such contract non-approved to OPWDD.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the contract awards, other than the award to Corvus, by OPWDD.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeals filed by Express Scripts, Inc. and OptumRx, Inc. with respect to the procurement of Pharmacy Benefit Services for The Empire Plan, Excelsior Plan, Student Employee Health Plan and NYS Insurance Fund Workers' Compensation Prescription Drug Programs conducted by the New York State Department of Civil Service.

New York State Department of Civil Service
Contract Number – C000718

Determination of Appeals

SF–20180224

January 8, 2019

The Office of the State Comptroller (OSC) has reviewed the above-referenced procurement conducted by the New York State Department of Civil Service (DCS) to provide pharmacy benefit services for The Empire Plan, Excelsior Plan, Student Employee Health Plan, and NYS Insurance Fund Workers' Compensation Prescription Drug Programs (Programs).[1] We have determined the grounds advanced by Express Scripts, Inc. (ESI) and OptumRx, Inc. (Optum) are insufficient to merit the overturning of the contract award made by DCS and, therefore, we deny the Appeals. As a result, we are today approving the DCS contract with CaremarkPCS Health, L.L.C. (Caremark) to provide pharmacy benefit services for the Programs.[2]

BACKGROUND

Facts

On May 29, 2018, DCS, for itself and on behalf of NYSIF, issued Request for Proposal #RX-2018-1 (RFP) seeking a vendor to administer the prescription drug benefits offered through the Programs, which include coverage for prescription drugs dispensed through retail network pharmacies, mail service pharmacies, designated specialty pharmacies and non-network pharmacies (*see* RFP, at Section I, pg. 1-4). The Programs include a number of utilization management controls including mandatory generic substitution, prior authorization, physician education and various cost containment provisions (*see* RFP, at Section I, pg. 1-5). The Programs

[1] The purpose of the RFP is for DCS and the New York State Insurance Fund (NYSIF), as the procuring agencies, to enter into separate contracts with the successful offeror who shall be responsible for providing pharmacy benefit services for the Programs (*see* RFP, at Section I, pg. 1-2).

[2] As of the date of this Determination, NYSIF has not yet submitted its contract with Caremark to this Office for review and approval.

provide benefits to enrollees and covered dependents for covered drugs subject to applicable copayments, supply limits and benefit maximums (*see* RFP, at Section I, pgs. 1-4 – 1-5).

The RFP provided for a contract award for the pharmacy benefit services to the responsive and responsible offeror whose proposal offers the best value to the procuring agencies (*see* RFP, at Section VI, pgs. 6-1 and 6-13). Each offeror's proposal was to consist of three distinct parts: the administrative proposal, the technical proposal and the cost proposal (*see* RFP, at Section II, pg. 2-8, and Sections III, IV and V). The procuring agencies only considered for evaluation and selection those proposals satisfying the submission requirements set forth in Section II of the RFP and the Minimum Mandatory Requirements set forth in Section III of the RFP (*see* RFP, at Section VI, pg. 6-1). The technical and cost proposal components of the evaluation process were based on 1,000 total available points; 250 points available to the technical proposal and 750 points available to the cost proposal (25% of the evaluation allocated to the technical proposal and 75% allocated to cost) (*see* RFP, at Section VI, pg. 6-2). An offeror's technical proposal could be awarded up to 100 additional points (to be added to the technical raw score[3]), based on the offeror's current level of minority and women owned business enterprises (MWBE) utilization, by submitting an optional diversity practices questionnaire (*Id*.). The technical and cost scores were combined and the offeror with the highest total combined score would be selected for award (*see* RFP, at Section VI, pg. 6-13).

Three offerors submitted proposals to DCS prior to the July 13, 2018 submission due date: (i) Caremark, (ii) Optum, and (iii) ESI. By letter dated August 21, 2018, DCS made a tentative contract award to Caremark, the offeror receiving the highest total combined score after the evaluation and selection process. DCS submitted the contract with Caremark to this Office for review and approval on October 11, 2018.

ESI Agency-Level Protest to DCS

By letter dated July 19, 2018, DCS informed ESI that its proposal: (i) failed to satisfy the mandatory minimum requirements of the RFP and (ii) was non-responsive to the cost proposal requirements. In this correspondence, DCS advised ESI that its proposal would be removed from the evaluation process and not considered for award. By letter dated August 2, 2018, ESI filed a protest with DCS challenging DCS' non-responsive determination. Subsequently, by letter dated September 5, 2018, ESI filed another protest with DCS challenging DCS' contract award to Caremark.[4] DCS denied ESI's protests by letters dated September 10, 2018 and October 2, 2018, respectively.

ESI Appeal to OSC

ESI filed appeals of DCS' protest determinations with this Office by letters dated September 24, 2018 and October 16, 2018 (collectively, ESI Appeal). Caremark responded to

[3] *See* n. 18, *infra*.

[4] The RFP sets forth two separate processes for submitting protests, one process for protests challenging a non-responsive determination and another process for protests of the selection decision (*see* RFP, at Section II, pgs. 2-13 – 2-17).

the ESI Appeal by letter dated October 12, 2018 (Caremark Answer). DCS responded to the ESI Appeal by letters dated October 18, 2018 and November 2, 2018 (collectively, DCS Answer).

Optum Agency-Level Protest to DCS

By letter dated August 21, 2018, DCS informed Optum of the tentative award to Caremark. Optum filed a selection protest with DCS on September 4, 2018 challenging the award to Caremark. DCS denied the Optum protest by letter dated October 4, 2018.

Optum Appeal to OSC

Optum filed an appeal of DCS' protest determination with this Office by letter dated October 15, 2018 (Optum Appeal, and together with the ESI Appeal, the Appeals). Caremark responded to the Optum Appeal by letter dated October 23, 2018 (Caremark Answer). DCS responded to the Optum Appeal by letter dated October 24, 2018 (DCS Answer).[5]

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 the contract approval responsibility prescribed by SFL § 112, this Office has issued 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.[6] This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because these are appeals of agency protest decisions, the Appeals are governed by section 24.5 of the OSC Protest Procedure.

In the determination of the Appeals, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DCS with the DCS/Caremark contract;

2. the correspondence between this Office and DCS arising out of our review of the proposed DCS/Caremark contract; and

[5] Optum supplemented its appeal with additional correspondence dated October 29, 2018. DCS and Caremark submitted correspondence to this Office responding to Optum's October 29th submission, including DCS' letter of November 5, 2018 and Caremark's letter of November 6, 2018. Optum replied to the DCS and Caremark responses by letter dated November 9, 2018. While this additional correspondence is outside the scope of submissions permitted as of right under 2 NYCRR Part 24, this additional correspondence was considered and addressed as necessary in this Determination. Optum submitted an additional correspondence dated December 6, 2018, which was considered in our review of the procurement, but is not referenced or formally addressed in this Determination.
[6] 2 NYCRR Part 24.

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

    a. ESI's agency-level protests to DCS dated August 2, 2018 and September 5, 2018;
    b. DCS' agency-level protest determinations of ESI's protests dated September 10, 2018 and October 2, 2018;
    c. ESI's Appeal to OSC, dated September 24, 2018 and October 16, 2018;
    d. Caremark's Answer to ESI's September 24, 2018 Appeal dated October 12, 2018;
    e. DCS' Answer to ESI's September 24, 2018 Appeal dated October 18, 2018;
    f. DCS' Answer to ESI's October 16, 2018 Appeal dated November 2, 2018;
    g. Optum's agency-level protest to DCS dated September 4, 2018;
    h. DCS agency-level protest determination of Optum's protest dated October 4, 2018;
    i. Optum's Appeal to OSC dated October 15, 2018;
    j. Caremark's Answer to Optum's Appeal dated October 23, 2018; and
    k. DCS' Answer to Optum's Appeal dated October 24, 2018.[7]

ANALYSIS OF THE APPEALS

A. ESI Appeal

In its Appeal, ESI challenges the procurement conducted by DCS on the following grounds:

1. While due to a clerical or technological error Exhibits I.Y.1 and I.Y.3 were omitted from two of the CDs submitted with ESI's proposal, a third CD contained unredacted versions of these exhibits. Therefore, DCS incorrectly determined that ESI's proposal was non-responsive to the RFP's requirements relating to the submission of these exhibits.
2. DCS was aware that Exhibits I.Y.1 and I.Y.3 were on one of the CDs submitted with ESI's proposal and DCS should have corrected this technical error internally, or asked ESI to submit corrected CDs.
3. The vaccine administration fees set forth in ESI's cost proposal complied with the requirements of the RFP.
4. In rejecting ESI's proposal, DCS acted in an arbitrary, capricious and ultra vires manner.

DCS Response to the ESI Appeal

In its Answer, DCS contends ESI's Appeal should be rejected and the award upheld on the following grounds:

1. The submission of Exhibits I.Y.1 and I.Y.3 was a minimum mandatory requirement of the RFP, and ESI's failure to submit these exhibits was a material defect that DCS could not waive. Further, DCS acted in accordance with the RFP by not considering the

[7] *See* n. 5 and n. 6, *supra*.

exhibits contained in the materials ESI submitted in response to the RFP's Freedom of Information Law (FOIL) requirements.
2. ESI's submission of two alternative vaccine administration fees in Exhibit V.G. of ESI's cost proposal was contrary to the RFP requirements and, as a result, DCS properly found ESI's cost proposal to be non-responsive and non-compliant.
3. The facts and records support DCS' finding that the proposal submitted by ESI was not responsive to the requirements of the RFP.

Caremark Response to the ESI Appeal

In its Answer, Caremark contends ESI's Appeal should be rejected and the award upheld on the following grounds:

1. Exhibits I.Y.1 and I.Y.3 were critical elements of the RFP and, although ESI contends the inclusion of these exhibits in the FOIL-redacted version of its submission satisfies the RFP, the RFP specified the FOIL submission would not be part of the offeror's proposal and would not be reviewed during the evaluation process.
2. The RFP required a fixed vaccine administration fee for each of the types of vaccines described. ESI proposed a variable vaccine administration fee for each vaccine, contrary to this requirement.

B. Optum Appeal

In its Appeal, Optum challenges the procurement conducted by DCS on the following grounds:

1. Caremark materially deviated from the RFP's requirements as evidenced by Caremark's low proposed cost.
2. Caremark gained an unfair advantage by basing its proposal on six months of 2018 claims data that was available only to Caremark, as the incumbent service provider, while all other offerors prepared their proposals on the basis of 2017 claims data as directed by the RFP.
3. Caremark's use of the phrase "CVS Health" in its proposal to refer to itself and its corporate parent caused confusion and resulted in DCS misevaluating Caremark's proposal and crediting Caremark for the work and resources of its corporate parent. Furthermore, DCS did not similarly assign credit to Optum for the capabilities its corporate parent.

DCS Response to the Optum Appeal

In its Answer, DCS contends Optum's Appeal should be rejected and the award upheld on the following grounds:

1. Caremark did not submit any extraneous terms as part of its proposal and no material deviations from the RFP were incorporated into the DCS/ Caremark contract resulting from the procurement.

2. There was no material difference between the experience in 2017 and the experience for the first six months of 2018. Moreover, Optum did not request 2018 claims data during the procurement process and DCS' decision to provide claims data on a calendar year basis is consistent with DCS' longstanding procurement practice.
3. DCS applied the evaluation methodology equally to both proposals, and considered the parent companies of both Optum and Caremark as part of the technical evaluation.

Caremark Response to the Optum Appeal

In its Answer, Caremark contends Optum's Appeal should be rejected and the award upheld on the following grounds:

1. The requirements of the 2018 RFP differed significantly from those of the 2017 RFP, and these changes affected overall pricing in a substantial way.
2. Caremark relied on 2017 data to formulate its proposal in compliance with the RFP.
3. DCS is aware of both Caremark's and Optum's large corporate parents and Optum failed to demonstrate that these relationships were confusing to DCS during evaluation of the proposals. Even if some confusion had actually existed with respect to Caremark's Diversity Practices Questionnaire, the confusion did not impact the scoring of proposals.

DISCUSSION

A. ESI Appeal

ESI's Appeal challenges (i) DCS' determination that the proposal from ESI was non-responsive to the requirements of the RFP and (ii) DCS' subsequent determination to eliminate ESI's proposal from consideration. We will address the actions of DCS below.

1. Responsiveness of ESI's Proposal - Retail Pharmacy Network Exhibits

ESI states that due to a clerical or technological error Exhibits I.Y.1 (Proposed Retail Pharmacy Network File) and I.Y.3 (Proposed Retail Pharmacy Network Access Prerequisite Worksheet) were omitted from two of the CDs in ESI's proposal (*see* ESI Appeal, at pg. 3). ESI asserts, however, that a third CD submitted with its proposal labeled "Administrative Section – Redacted" contained unredacted versions of these exhibits (*Id*.).[8] ESI further asserts that DCS should have corrected this technical error internally, or requested corrected CDs from ESI (*see* ESI Appeal, at pg. 4). Finally, ESI asserts that DCS's exclusion of ESI's proposal from consideration was contrary to the provisions of the RFP which allowed for correction of minor errors (*Id*.).

DCS asserts that ESI's failure to include data regarding ESI's retail pharmacy network was a material omission of a mandatory requirement of the RFP and, therefore, this omission

[8] The October 2, 2018 determination of DCS related to ESI's selection protest states that "Exhibit I.Y.I did contain requested redactions for FOIL purposes." However, resolution of this factual dispute as to whether this submission contained redactions is not necessary to our analysis.

constituted a non-correctable material defect (*see* DCS October 18 Answer, at pg. 2). Caremark concurs with DCS' position, stating that "[t]he information that was supposed to be included in the missing exhibits is among the most critically important elements of the RFP" (Caremark Answer, at pg. 1).

The State Finance Law provides that the "solicitation [issued by the procuring agency] shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive" (SFL § 163[9][b]). Section III.B of the RFP sets forth minimum mandatory requirements for offerors, including requirements related to an offeror's proposed retail pharmacy network (*see* RFP, at Section III.B.5, pg. 3-3). Section III.B.5 advises offerors that "[t]he Procuring Agencies will only accept Proposals from Offerors that attest and demonstrate through current valid documentation to the satisfaction of the Procuring Agencies that the Offeror meets the Proposal's Minimum Mandatory Requirements set forth herein this Section III.B." Section III.B.5 goes on to require that an offeror demonstrate satisfaction of the minimum mandatory requirements related to the offeror's retail pharmacy network by submitting Exhibits I.Y.1 and I.Y.3 with the offeror's Administrative Proposal.

ESI concedes that the Administrative Proposal it submitted contained two blank CDs and no hard copies of the retail pharmacy network exhibits (*see* ESI Appeal, at pg. 3).[9] ESI suggests, however, that its proposal was nevertheless responsive to this submission requirement of the RFP since these same retail pharmacy network exhibits were included in a third CD submitted by ESI containing a FOIL-redacted version of its proposal (*see* ESI Appeal, at pgs. 3-5).

The third CD to which ESI alludes is a submission in response to Section II.8 of the RFP which provided offerors the ability to submit a redacted version of their proposals in an effort to protect proprietary and/or trade secret information from disclosure in response to a FOIL request. However, the language of Section II.8 of the RFP, addressing this optional submission, explicitly states that the redacted material "should not be included in the Offeror's Proposal" and "[t]he FOIL-related materials described herein will not be considered part of the Offeror's Proposal and **will not be reviewed as part of the Procurement's evaluation process** (*see* RFP, at Section II, pg. 2-27, emphasis added). Accordingly, DCS' decision to not review ESI's FOIL-related materials as part of the evaluation process was consistent with the clear language of the RFP and, therefore, will not be disturbed by this Office.

The correspondence submitted to this Office by ESI and DCS devote a significant amount of time discussing whether ESI's omission of the retail pharmacy network exhibits from its Administrative Proposal was a correctable technical non-compliance with the requirements of the RFP, or a non-waivable material defect.

In general, while a municipality or state agency can reject bids that do not precisely comply with bid specifications, a municipality or state agency may "waive a technical noncompliance with bid specifications if the defect is a mere irregularity and it is in the best

[9] During this Office's review of the procurement record, we noted that ESI's administrative proposal did, in fact, contain a hard copy of Exhibit I.Y.3, despite ESI's statement to the contrary. However, our review confirmed ESI failed to submit a hard copy of Exhibit I.Y.1 and therefore the inclusion of a hard copy of Exhibit I.Y.3 in ESI's administrative proposal does not alter the conclusions reached in the Determination with respect to this issue.

interest of the municipality [or state] to do so" (*Hungerford & Terry, Inc v Suffolk County Water Auth*, 12 AD3d 675, 676 [2nd Dept 2004]; *see also Le Cesse Bros Contr v Town Bd of Town of Williamson,* 62 AD2d 28 [4th Dept 1978] affd 46 NY2d 960 [1979]). Conversely, a municipality or state agency may not waive a material or substantial variance from the bid specifications since doing so "would impair the interests of the contracting public authority or place some of the bidders at a competitive disadvantage" (*Hungerford*, at 676). A variance is material if it would impair the interests of the contracting public entity, place the successful bidder in a position of unfair economic advantage or place other bidders or potential bidders at a competitive disadvantage (*see Cataract Disposal, Inc v Town of Newfane*, 53 NY2d 266 [1981]; *Fischbach & Moore v NYC Transit Authority*, 79 A.D.2d 14 [2nd Dept 1981]; *Glen Truck Sales & Service, Inc v Sirignano*, 31 Misc.2d 1027 [Sup Ct Westchester Co 1961]).

We note that the procuring agency initially determines whether a variance from the bid specifications is material or if it may be waived as a mere irregularity *(see A&S Transportation Co v County of Nassau*, 154 AD2d 456 [2nd Dept 1989]; *AT&T Communications v County of Nassau*, 214 AD2d 666 [2nd Dept 1995]; and *Hungerford & Terry, Inc v Suffolk County Water Auth*, 12 AD3d 675, 676 [2nd Dept 2004]). In this instance, the submission requirement for the retail pharmacy network exhibits is set forth in Section III.B of the RFP entitled "**Minimum Mandatory Requirements**" (*see* RFP, at Section III, pg. 3-2, emphasis in original). The requested exhibits identify an offeror's retail pharmacy networks for all Programs and demonstrate compliance with the minimum retail pharmacy network access guarantees for Program enrollees as required by the RFP (see RFP, at Section III, pgs. 3-3 – 3-4). The significance of an offeror's retail pharmacy network and the information related to such network does not appear to be in dispute. Therefore, under the facts presented, we find no basis to question DCS' assessment that the submission of Exhibits I.Y.1 and I.Y.3 as part of an offeror's Administrative Proposal was a material requirement of the RFP. Having concluded that the submission of the retail pharmacy networks exhibits was a material requirement, DCS could not waive or otherwise correct ESI's failure to satisfy this requirement.

Finally, contrary to ESI's suggestion that DCS was required to internally correct ESI's proposal or request corrected CDs from ESI, we point out that an agency's ability to waive a non-material deviation is discretionary (*see* SF-20120222 citing *L. J. Coppola, Inc v Park Mechanical Corp*, 131 AD2d 641 [2nd Dept 1987] and *Landtek Group Inc v City of Long Beach*, 2007 NYMisc Lexis 7387 [Sup Ct Nassau Co 2007]). Therefore, even if we were to assume, arguendo, that the deviation in this case was not material, whether a waiver of this requirement was warranted was a matter completely within DCS' discretion and DCS could reject ESI's proposal since it did not precisely comply with bid specifications.

2. Responsiveness of ESI's Proposal - Vaccination Administration Fees

Having determined above that ESI's proposal was non-responsive to a material requirement of the RFP, it is not necessary to address the responsiveness of ESI's cost proposal.[10] However, in an effort to fully address the responsiveness of ESI's proposal, we will briefly discuss this issue.

[10] As defined in the SFL, a "responsive" offer is an "offer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency" (SFL §163[1][d]).

ESI asserts the submission of two alternative vaccine administration fees in Exhibit V.G of its cost proposal complied with the cost proposal requirements of the RFP (*see* ESI Appeal, at pg. 7). ESI further asserts that DCS has historical claims data that would provide DCS with the ability to analyze ESI's bid (*see* ESI Appeal, at pg. 6). DCS asserts ESI's submission of alternate fees for vaccine administration failed to comply with the cost proposal requirements of the RFP and was incompatible with the evaluation method for such fees (*see* DCS October 18, 2018 Answer, at pg. 4). Caremark posits that even if the alternative vaccine administration fees proposed by ESI would result in lower costs to DCS, as ESI claims, such a departure from the RFP requirements would allow "a bidder to redefine the terms of the RFP [and] would grant that bidder a distinct and unfair advantage" (Caremark Answer, at pg. 2).

Section V of the RFP sets forth the requirements for an offeror's cost proposal. Section V.C describes the completion of the cost proposal exhibits and instructs that "[t]he Offeror must complete the … cost exhibits in strict accordance with the directions set forth in this RFP and submit them as part of their Cost Proposal" (RFP, at Section V, pg. 5-2). Included among the cost proposal submissions is Exhibit V.G (Vaccination Administration Fees) which requires offerors to propose administration fees for ten vaccines listed on a single-page form.

The Exhibit V.G. submitted with ESI's cost proposal offered *two* potential administration fees for each of the listed vaccines – one fee when the pharmacy charges a usually and customary ("U&C") ingredient cost and another fee when the pharmacy charges a discounted ingredient cost. In support of ESI's position that the submission of two potential fees was responsive, ESI asserts "the Department does not cite any provision of the RFP that requires a single Vaccine Administrative [sic] Fee or prohibits the inclusion of different Vaccine Administrative [sic] Fees depending on how the claim adjudicates. Thus, any argument that the inclusion of two Vaccine Administrative [sic] Fees was contrary to the RFP is not supported by the terms of the RFP" (ESI Appeal, at pgs. 6-7).

In support of DCS' position that the submission of two potential administration fees was non-responsive, DCS points to the language of Section V.C.1 of the RFP pertaining to Vaccination Network Pharmacy Pricing, that requires "[t]he offeror . . .quote the DCS Program . . . an Administration **Fee** . . . as proposed in Exhibit V.G." (RFP, at Section V, pg. 5-42, emphasis added). Additionally, DCS states that the cost evaluation methodology established by DCS prior to the receipt of proposals did not provide for the evaluation of alternate vaccination administration fees.

While ESI questions DCS' reliance on the use of "singular" language in the RFP to support its position that a single fixed fee was required, ESI fails to point to any language in the RFP suggesting that proposing two alternative vaccine administration fees would be permissible. Furthermore, our review of the format of the exhibit itself, containing a column labeled "Administration Fee" to be completed by the offeror supports DCS's position that a single fee was requested. In light of the foregoing, we find no reason to question DCS' assessment that the Exhibit V.G. submitted with ESI's cost proposal was not responsive.

3. DCS Determination to eliminate ESI's Proposal from Consideration

ESI asserts that in rejecting ESI's proposal, DCS acted in an arbitrary, capricious and ultra vires manner (*see* ESI Appeal, at pg. 7). DCS asserts that its actions with respect to ESI are consistent with the RFP and supported by the procurement record (*see* DCS October 18, 2018 Answer, at pg. 5).

As discussed above, the proposal submitted by ESI did not satisfy the minimum mandatory requirement set forth in the RFP with regard to the submission of retail pharmacy network exhibits, or the cost proposal requirements of the RFP. Accordingly, DCS properly determined that ESI's proposal was non-responsive and eliminated ESI's proposal from further consideration.[11] The determinations by DCS are consistent with the requirements of the RFP and the SFL, and are supported by the procurement record.

B. Optum Appeal

1. Caremark's Low Projected Cost

Optum asserts Caremark's low projected cost is evidence, in and of itself,[12]that Caremark materially deviated from the RFP's requirements (*see* Optum Appeal, at pg. 3).[13] In support of its position, Optum points to Caremark's protest of an earlier 2017 pharmacy benefits services RFP[14] in which Caremark stated its 2017 bid "was intended to fulfill those contractual requirements at the lowest possible price" (*Id*.). Optum posits that since Caremark "slashed its lowest possible price by over $500 million," as compared to Caremark's bid on a "nearly identical" pharmacy benefits services RFP issued in 2017, "Caremark could have done so only by materially deviating from contractual requirements" (Optum Appeal, at pg. 7).

In response, DCS states that Caremark did not submit any extraneous terms as part of its proposal and no material deviations from the RFP were incorporated into the DCS/ Caremark contract resulting from the procurement (*see* DCS Answer, at pg. 4; *see also* RFP, Exhibit I.I – Extraneous Terms Template).

Caremark asserts Optum's argument is based upon a false premise that the earlier 2017 RFP and the current RFP were "nearly identical" (*see* Caremark Answer, at pg. 3). Caremark cites various differences in the requirements of the current RFP as compared to the 2017 RFP,

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[11] Section III. B.10 of the RFP expressly stated that "[a]ny Offeror that fails to satisfy any of the above Minimum Mandatory Requirements [including the submission of the retail pharmacy network exhibits] shall be eliminated from consideration."

[12] Optum states that "Caremark chopped more than **half a billion dollars** off its lowest price [in response to the 2017 RFP]. That fact, by itself, is evidence that Caremark deviated from the RFP's requirements" (Optum Appeal, at pg. 3, emphasis in original).

[13] With respect to an offeror's cost proposal, the RFP requires the submission of five cost exhibits containing various quotes and fees (*see* RFP, at Section V, pg. 5-2). In evaluating cost proposals, DCS applied the cost quotes to normalized claims data to arrive at an offeror's total projected cost and then used this figure to determine the points to be awarded to the cost proposal (*see* RFP, at Section V, pg. 5-1, and Section VI, pgs. 6-12 – 6-13).

[14] The 2017 pharmacy benefits services RFP issued by DCS on June 5, 2017 was ultimately withdrawn by DCS on May 21, 2018.

including pharmacy networks, formulary of drugs, rebate policies and vaccine costs that could have affected overall pricing (*see* Caremark Answer, at pgs. 3-4).

In its Appeal, Optum did not identify any specific deviations from the requirements of the RFP to support this particular assertion.[15] Rather, Optum's claim rests solely on assumptions arising out of a statement made by Caremark in a protest of a previously withdrawn 2017 RFP issued for pharmacy benefit services. Further, while Optum suggests that only a "material deviation" from the requirements could have resulted in Caremark's significantly lower bid, we note that the cost proposal submitted by Optum for this RFP was substantially less than the cost proposal submitted by Optum in response to the 2017 RFP (Optum's current cost proposal was $172,356,642 less than the cost proposal it submitted in 2017) (*see* DCS Answer, at pg. 5). Moreover, there are a multitude of factors that could have potentially influenced Caremark's decision to submit a substantially lower cost proposal in response to the current RFP issued by DCS (e.g., financial considerations, differences in the RFP specifications as compared to the previously issued 2017 RFP,). Finally, consistent with DCS' assertion that "Caremark did not submit any extraneous terms via Exhibit I.1 as part of its proposal . . . and no material deviations were incorporated into the resulting contract between Caremark and the Department" (DCS Answer, at pg. 5), our review of the procurement record did not identify any material deviations from the cost requirements set forth in the RFP.

For the above reasons, we find Optum's claim unsupported and unavailing.

2. <u>2018 Claims Data</u>

Optum alleges Caremark gained an unfair advantage by basing its proposal on six months of 2018 claims data that was available only to Caremark, as the incumbent service provider, while all other offerors prepared their proposals on the basis of 2017 claims data (*see* Optum Appeal, at pg. 12).

DCS responds that there was "no material difference between the experience in 2017 and the experience for the first six months of 2018" (DCS Answer, at pg.7). In its determination of Optum's agency-level protest, DCS stated "pharmacy claims under the Empire Plan are so numerous and diverse (17 million prescriptions annually) that there is little volatility in the claims data from month to month." Additionally, DCS notes that Optum did not request 2018 claims data during the procurement process and DCS' decision to provide claims data on a calendar year basis is consistent with DCS' longstanding procurement practice (*Id.*).

Caremark states it "relied on the 2017 data for its submission and complied with the terms of the RFP" (Caremark Answer, at pg. 5). Caremark points out that all offerors had access to two years of claims data, the 2017 claims data provided under the current RFP and 2016 claims data provided under the previously-issued 2017 RFP (*Id.*).

[15] A purported deviation identified by Optum in a subsequent correspondence to this Office dated October 29, 2018, is addressed in Discussion Section C, *supra*.

Pursuant to SFL§ 163(9)(a), DCS was required to conduct a procurement that provided "a reasonable process for ensuring a competitive field; a fair and equal opportunity for offerers to submit responsive offers; and a balanced and fair method of award." Under the process set forth in the RFP, DCS provided informational claim data files containing claims paid for the period January 1, 2017 through December 31, 2017 to assist offerors in the development of their cost proposals (*see* RFP, at Section V, pg. 5-1). We must determine, however, whether Caremark's status as the incumbent pharmacy benefits manager with access to six months of 2018 claims data gave Caremark an unfair advantage in the procurement process.

Initially, we recognize that an incumbent service provider will generally possess more current information with respect to the services being provided than other prospective offerors. If a state agency has ongoing needs for a particular service, the agency must begin the re-procurement process prior to the expiration of the current service contract. During the re-procurement process, the current service provider will, by necessity, have access to the current information regarding the services being provided. The current service provider's access to such information is an inherent consequence of its status as the incumbent.

In support of its position that Caremark's access to the 2018 claims data provided Caremark with an unfair advantage, Optum suggests that the 2018 data:

- revealed the specific mix of brand drugs prescribed in the six months of 2018 and this up-to-the-minute information allowed Caremark to lower its price (Optum Appeal, at pg. 14),
- contained the most current information regarding the use of specialty drugs, and insight into the trends in the use of various specialty drugs provided Caremark an unfair advantage in formulating its discounts for specialty drugs (*Id.*),
- provided up-to-minute insight into the percentage of policyholders using retail chain pharmacies and such information allowed Caremark to project and to bid lower costs as prescriptions filled at large retail chains tend to be less expensive than those filled at independent pharmacies (Optum Appeal, at pg. 15), and
- provided the most recent and relevant figures concerning the overall volume of drugs prescribed, allowing Caremark to formulate its pricing more aggressively and accurately than other offerors (*Id*.).

In response, DCS states:

- In terms of drug mix and specialty utilization,
    - (i) <u>for Empire Plan non-Medicare members</u>, claims data for 2017 and 2018 were the same for 20 of the top 25 brand drugs, 24 of the top 25 generic drugs, and 25 of the top 25 specialty drugs;
    - (ii) <u>for Medicare members</u>, claims data for 2017 and 2018 were the same for 23 of the top 25 brand drugs, 24 of the top 25 generic drugs, and 23 of the top 25 specialty drugs (DCS Answer, at pg.7).

- In terms of retail pharmacy utilization, in both 2017 and 2018, retail pharmacies accounted for 91% utilization and independent pharmacies accounted for 9% utilization (*Id*.).

Based on the information provided by DCS, there seems to be only minor differences in certain drug usage between 2017 and the first six months of 2018. Thus, it does not appear that Caremark's "access to" such information provided Caremark with an unfair advantage in the procurement process.

3. <u>Treatment of the Parent Corporations in Technical Evaluations</u>

Optum asserts that Caremark promoted significant confusion in its proposal by using the phrase "CVS Health" to refer to both Caremark and its corporate parent, CVS Health Corporation (*see* Optum Appeal, at pgs. 17-21). Optum alleges that, as a result of Caremark's actions, DCS misevaluated Caremark's proposal, providing Caremark with improper credit for the work and resources of its parent corporation, while treating Optum unequally by not providing Optum credit for the capabilities of its parent, UnitedHealth (*see* Optum Appeal, at pg. 18). Optum further asserts that, while this confusion and unequal treatment is readily apparent in the scoring of the Diversity Practices Questionnaires (DPQs), the confusion caused by Caremark's actions infected the evaluation of Caremark's entire proposal (*see* Optum Appeal, at pgs. 17-21).

DCS states that both Optum and Caremark submitted information about their corporate parents in their respective proposals (*see* DCS agency-level protest determination, Worden attachment, at pg.9). DCS responds while there may have been some confusion regarding Caremark's entries in its DPQ, any such confusion was confined to the DPQ portion of Caremark's proposal (*Id.*). Further, DCS asserts "even assuming the DPQ was misevaluated, at most, it constituted harmless error" (DCS Answer, at pg. 9). Finally, DCS states that the evaluation methodology was applied equally to both proposals, and the parent companies of both Optum and Caremark were considered as part of the technical evaluation (*Id.*).

Caremark responds that both Optum and Caremark "have prominent and significant corporate parents, each of which are…well known to DCS…[and] the general public", and avers there is no evidence to support Optum's assertion that these relationships were confusing to DCS (Caremark Answer, at pg. 6). Caremark further asserts that even if some confusion had actually existed with respect to its DPQ, the confusion did not impact the scoring of proposals (*Id*.).

SFL §163(2) sets forth the operating principles intended to guide the state procurement process, stating: "[t]he objective of state procurement is to facilitate each state agency's mission while protecting the interests of the state and its taxpayers and promoting fairness in the contracting with the business community." To this end, the state's procurement process is "to be based on clearly articulated procedures [including] a balanced and fair method, established in advance of the receipt of offers, for evaluating offers and awarding contracts" (SFL §163[2][b]).

Below, we address DCS' scoring of the DPQs and, more generally, the technical proposals of Caremark and Optum in light of this operating principle.

a. Scoring of the Diversity Practices Questionnaire

The DPQ (Exhibit IV.B. of the RFP) was designed to award additional points to an offeror's evaluated technical proposal based on the offeror's current level of Minority and Women Business Enterprises (MWBE) utilization (*see* RFP, at Section VI, pg. 6-2).[16] Based on the evaluation of an offeror's responses to eight questions concerning the offeror's MWBE utilization, up to 100 points could be added to the offeror's technical score (*see* RFP, at Section VI, pgs.6-2 – 6-5).

DCS acknowledges "CVS Caremark may have caused confusion regarding corporate structure in entries within the DPQ" (DCS agency-level protest determination, Worden attachment, at pg. 9). DCS claims, however, that any errors in the scoring of the DPQ would not have changed the award to Caremark (*Id.*; *see also* DCS Answer, at pg. 9). Specifically, DCS asserts that "[a]ssuming… Optum received 100 points for the DPQ and Caremark received zero points, the result of the procurement would have been the same. Caremark would still have been awarded the Contract based on a best value determination that considered both the technical and cost evaluations" (DCS Answer, at pg. 9).

This Office has long recognized the notion of excusable harmless error in the procurement process (*see* SF-20070368, SF-20080185, SF-20080412, SF-20090314; SF-20090447, SF-20100130, SF-20100338, SF-20110203, SF-20140222, SF-20150080, SF-20160139, and SF-20160248). That is, while there may have been an error/flaw in the procurement process, the correction of the error/flaw would not change the outcome (i.e., the award) and, therefore, the error/flaw is harmless.

In this instance, our review of the procurement record reveals that, prior to consideration of the DPQs, the raw technical score for Caremark was 681.68 points and the raw technical score for Optum was 667.97 points (out of a possible 1000 raw technical points).[17] Even if Optum had received the total 100 additional available DPQ points and Caremark did not receive any additional DPQ points, in light of the relative weight of cost in the evaluation, Caremark would still have had the highest combined total score and received the award. [18]

Since the correction of the errors related to the scoring of the DPQs would not have changed the outcome, we concur with DCS' assessment that any errors related to the scoring of the DPQs were harmless.

[16] Since the DPQ was not a mandatory submission, failing to submit the DPQ would not result in the proposal's disqualification from the procurement (*see* RFP, at Section VI, pg. 6-2).
[17] A maximum value of 1,000 points was assigned to the criteria used to evaluate the technical proposals which produced a raw technical score for each offeror's technical proposal (*see* RFP, at Section VI, pgs. 6-11 – 6-12). The DPQ score was added to the raw technical score and the offeror whose proposal received the highest combined technical and DPQ scores was awarded 250 points, the maximum available points for the technical proposal. Other offerors' proposals received technical scores calculated proportionately according to a predetermined formula (*Id.*).
[18] The total evaluation score was based on 1,000 total available points, with 250 points available for the technical proposal and 750 points available for the cost proposal (i.e. 25% allocated to the technical proposal and 75% allocated to the cost proposal) (*see* RFP, at Section VI, pg. 6-2).

b. Consideration of Parent Companies in Technical Evaluation Generally

Optum asserts the "confusion caused by Caremark's proposal goes far beyond the DPQ [and] infected Caremark's entire evaluation" (Optum Appeal, at pg. 20). DCS responds that any corporate confusion was confined to Caremark's DPQ and was not so pervasive as to infect any of the remainder of the RFP (*see* DCS agency-level protest determination, Worden attachment, at pg. 9). DCS points out that both Optum and Caremark submitted information about their corporate parents in their proposals, and claims that, other than the removal of Optum's parent company from the evaluation of the DPQ, the parent companies of both offerors were considered as part of the technical evaluation process (*Id.*).[19] DCS further asserts the evaluation methodology was applied equally to all proposals (*see* DCS Answer, at pg.9).

The technical proposal requirements were set forth in Section IV of the RFP, encompassed 144 pages and required the submission of numerous exhibits and attachments (*see* RFP, at Section IV, pgs. 4-1- 4-144). In response to these technical proposal requirements, Caremark and Optum submitted technical proposals comprising 1,194 and 1,361 pages, respectively. As evidence of the complexity of the technical evaluation conducted by the five members of the technical evaluation team, the tool used to evaluate the technical proposals consisted of 120 pages of detailed evaluation criteria. It is in this context that the technical evaluation team conducted its review of the proposals submitted by Caremark and Optum, both of whom are subsidiaries of large corporations with substantial assets and capabilities.

Initially, we note that Caremark and Optum (the subsidiary entities) are the "offerors" with respect to this procurement. That is, Caremark and Optum are the entities (i) submitting and signing the proposals in response to the RFP; (ii) ultimately responsible for providing the services outlined in their respective proposals; and (iii) required to satisfy the minimum mandatory requirements set forth in Section III of the RFP to be considered "responsive" and, therefore, susceptible of being selected for contract award.[20]

It is clear that, at least to some degree, the proposals from Caremark and Optum referenced their corporate parents.[21] While Optum and DCS disagree as to the extent that Caremark's proposal listed assets and abilities attributable to its corporate parent, as well as any potential confusion that may have resulted, DCS asserts (i) any confusion regarding the corporate structure of Caremark was limited to the DPQ; (ii) both offerors were treated fairly with regard to the treatment of their corporate parents; and (iii) the evaluation methodology was applied equally to both proposals (*see* DCS Answer, at pgs. 9-10). DCS also notes that both Caremark and Optum submitted vendor responsibility questionnaires for themselves and their parent companies (*see* DCS Answer, at pg.10). Moreover, the procurement incorporated additional controls addressing the relationship between separate corporate entities, including a Financial

[19] DCS states that New York's MWBE regulations permit only the "contractor," as defined in such regulations, to received credit for diversity practices, and thus "State law prohibited giving Optum credit for the work of UnitedHealth Group in the DPQ" (DCS Answer, at pg. 10).

[20] DCS has stated that Caremark, without consideration of its corporate parent, satisfied the minimum mandatory requirements of the RFP and our review of the procurement record does not lead us to further question DCS' assessment.

[21] DCS cites examples from Optum's technical proposal that reference the experience of its parent UnitedHealth Group and a related affiliate, United HealthCare (*see* DCS Answer, at pg. 11).

Guarantee that was executed by CVS Health Corporation as the Guarantor (*see* DCS Answer, at pg. 11).

Based on our review of the procurement record, it appears that DCS conducted a balanced and fair review of the submitted proposals and evaluated them in accordance with the criteria listed in the RFP and the evaluation instrument that was developed by DCS before the receipt of proposals.[22]

C. Responsiveness of Caremark's Administrative Proposal to Section III.G.4.a.11 of the RFP

While not part of the formal OSC Protest Procedure, based on our review of the procurement record, and in light of certain issues raised by Optum in its correspondence to this Office dated October 29, 2018,[23] we asked DCS to explain how DCS determined Caremark's administrative proposal satisfied the provisions of RFP Section III.G.4.a. 11.[24]

As stated above under "Background," an offeror's proposal is comprised of three separate and distinct parts, an administrative proposal, a technical proposal and a cost proposal, each with their respective requirements (*see* RFP, at Section II, pg. 2-8). The administrative proposal requirements are set forth in Section III of the RFP, including a list of minimum mandatory requirements (*see* RFP, at Section III.B, pgs. 3-2). In addition, Section III.G of the RFP posed certain questions related to pharmaceutical manufacturer revenue, retail pharmacy network relationships and drug pricing (*see* RFP, at Section III.G, pgs. 3-9 – 3-19). Specifically, an offeror was required to respond to twenty detailed drug pricing questions concerning the offeror's pricing model, unit pricing, pricing lists, management of pricing lists, and claims processing system (*see* RFP, at Section III.G.4, pgs. 3-16 - 3-19).

Relevant to the discussion here, Section III.G.4.a.11 (Question #11) inquired of an offeror as follows:

> If the Programs MAC list is to be managed as an entirely independent list, please detail the price setting rules that will be applied? Please confirm that The Programs' MAC list will be managed to achieve discounts on an aggregate basis that both exceed the Guaranteed Minimum Discounts off of the aggregate AWP for Generic Drugs and exceed the most aggressively discounted MAC list in the Offeror's book of business (*see* RFP, at Section III.G.4, pg. 3-18).

In responding to the question raised by this Office, DCS initially noted that "[p]roposals were evaluated in a holistic manner, looking to the totality of each proposal" and "[i]n

[22] There were 253 individual components to be scored in the main technical evaluation by five evaluators from four different agencies. During our review of the procurement record, we noted there were no wide discrepancies in scoring in the main technical evaluation which would indicate errors or inconsistencies in the scoring.

[23] In its October 29, 2018 correspondence, Optum asserts Section III.G.4.a.11 was a minimum mandatory requirement of the RFP that Caremark failed to meet since Caremark refused to confirm that its Maximum Allowable Cost (MAC) list would be managed to (i) exceed the Guaranteed Minimum Discounts off of the aggregate Average Wholesale Price (AWP)] for Generic Drugs and (ii) exceed the most aggressively discounted MAC list in Caremark's book of business.

[24] This Office posed the question to DCS by correspondence dated November 20, 2018 and copied both Optum and Caremark on this correspondence.

responding to the RFP, each Offeror provided responses that required the Department to undertake an analysis which cross-referenced various portions of the RFP" (*see* DCS correspondence dated November 27, 2018, at pg. 1). DCS provided this further explanation of its assessment of Caremark's response to Question #11:

- Question #11 is not part of the RFP's minimum mandatory requirements, which are set forth in Section III.B 1-12 of the RFP;
- Question #11 was part of DCS' responsibility determination, that included an assessment of an offeror's financial protections and transparency, and was intended to provide DCS with additional information to identify potential conflicts of interest;
- Caremark committed to the actual cost requirements of Section V.C.5 of the RFP;
- Caremark did not submit any extraneous terms with its proposal and did not object to these related provisions of the draft contract set forth in Section VII.A of the RFP:

  > "[t]he Contractor or its Key Subcontractor, if any, must manage the Programs' MAC List(s) consistent with, or better than, their most aggressive generic pricing list used to reimburse Pharmacies" (Section 12.8.3a), and
  >
  > "[t]he setting of an overall minimum discount off of the aggregate AWP for all Generic Drugs dispensed at Network and Mail Service Pharmacies shall in no way modify the Contractor's contractual obligation to maximize the DCS Program's aggregate discount above the Contractor's overall Guaranteed Minimum Discount of [TBD] off of the aggregate AWP" (Section 12.8.3k); and

- the language of a subsequent question in this section, (*see* III.G.4.a.13, Question #13), demonstrates that Question #11 was not intended to mandate that an offeror provide pricing (including AWP discounts, MAC and dispensing fees) equal to or better than all other clients (*see* DCS correspondence dated November 27, 2018, at pgs. 2-5).

Initially, we accept DCS' categorization of Question #11 as a general inquiry to obtain information to assess an offeror's responsibility, rather than a minimum mandatory requirement of the RFP. DCS's categorization is supported by the fact that Question #11 was not in the Section III.B of the RFP entitled "Minimum Mandatory Requirements." Further, the format of the questions listed in Section III.G of the RFP, and the manner in which these questions solicit additional explanatory information, evidences an information gathering exercise rather than the establishment of a minimum mandatory requirement.[25] Finally, the plain language of Question #13 (also part of Section III.G.4.a of the RFP) clearly anticipates a situation where the offeror's pricing is not equal to or better than other clients (*see* RFP, at Section III.G.4.a, pg. 3-18).[26]

[25] Section III.B of the RFP provides "[t]he Procuring Agencies will only accept Proposals from Offerors that attest and demonstrate through current valid documentation…that the Offeror meets the Proposal's Minimum Mandatory Requirements set forth herein this Section III.B" (*see* RFP, at Section III.B, pg. 3-2). Section III.B then sets forth representations and warranties to be met by the offeror and confirmed in an attestation submitted with the offeror's administrative proposal (*Id*.). Section III.B differs significantly from Section III.G, wherein an offeror is expected to provide detailed information regarding various aspects of its business (*see* RFP, at Section III.G, pgs. 3-9 – 3-19).

[26] Question #13 asks "Is the Offeror's pricing (including AWP discounts, MAC and dispensing fees) equal to or better than all other clients of the Offeror? If it is not, please detail the reason for the Programs not being offered the equivalent or better pricing. If it is not the Offeror's best pricing in the Offeror's book of business, please identify any chain Network Pharmacy the Offeror will be earning positive spread on for each Brand Drug script dispensed to an Enrollee/Claimant of the Programs" (RFP, at Section III.G.4.a, pg. 3-18).

Since the responses to Question #11 are part of the offeror's administrative proposal, these responses were not evaluated and scored by the technical evaluation team, but rather reviewed on a pass/fail basis as the first step in DCS' evaluation and selection process. This manner of reviewing the administrative proposals is consistent with the evaluation methodology set forth in the RFP (see RFP, at Section VI, pg. 6-1), the evaluation instrument developed by DCS prior to the receipt of proposals and the guidance provided in the New York State Procurement Guidelines.[27]

As stated above, Question #11 solicited information relative to the offeror's management of the Programs' MAC List, specifically asking for confirmation that the offeror's management of the MAC List would achieve discounts on an aggregate basis that both exceed: (i) the Guaranteed Minimum Discounts off of the aggregate AWP for Generic Drugs and (ii) the most aggressively discounted MAC list on the offeror's book of business.

With respect to the first requested confirmation, Caremark, in its administrative proposal, unambiguously makes the statement "[w]e will manage the Programs' MAC list to achieve the discounts on an aggregate basis." Caremark's response, however, goes on to explain the manner in which this would be accomplished which is less clear, stating "[i]f the Guaranteed Minimum Discount is not achieved, the Programs will be made whole dollar for dollar. While we cannot guarantee that the MAC list will exceed the Guaranteed Minimum Discounts, the State will receive the benefit of any over-performance of the guarantees." As for the second confirmation related to Caremark's book of business, Caremark states that "[t]he Program MAC list will not be compared against any other MAC lists within our book of business" but "[w]hen viewed as a whole, in terms of scope, timing and discounts, we expect the MAC list to be as aggressive or more aggressive than any similar employer plan client."

While we concur with DCS' statement that Caremark's response to Question #11 could be interpreted as "imprecise," DCS determined that Caremark's responses were satisfactory evidence of its overall commitment to manage the MAC list to maximize the Programs' aggregate discount and provide pricing consistent with or better than Caremark's most aggressive price list for similar clients (*see* DCS correspondence dated November 27, 2018, at pgs. 4-5).[28] As further support of DCS' assessment of Caremark's responses, DCS states that Caremark's response to Question #11 was evaluated in conjunction with Caremark's response to, Question #13, which "recognizes there are scenarios in which the Programs may not receive the best pricing in all aspects of an Offeror's book of business" (*see* DCS correspondence dated November 27, 2018, at pg. 5). Caremark responded to Question #13 stating it "is offering the Programs extremely competitive pricing that is commensurate with its size, drug mix, and plan

[27] The New York State Procurement Guidelines provide that a procuring agency may conduct an administrative review of proposals to: (i) determine on a pass/fail basis that certain minimum mandatory qualifications (e.g., minimum experience requirements) in the RFP have been met; or (ii) ensure that all required documents and forms are included in the submission. Proposals found to be materially incomplete may be disqualified as provided for in the RFP (*see* NYS Procurement Guidelines, May 2014, at Section V.G, pg. 34).

[28] DCS notes Optum's responses to Question #11 and Question #13 were "similarly imprecise" (*see* DCS correspondence dated November 27, 2018, at pg. 6). In response to Question #11 Optum states "The Programs' MAC list will represent the most aggressive MAC pricing available **to similar clients,**" and in its response to Question #13, Optum states "OptumRx has other large customers, including health plans, that may have specific component guarantees (such as AWP discounts, MAC, or dispensing fees) that are **better than being offered to the Programs** (*Id*., emphasis added).

design requirements, which may or may not be equivalent to the best pricing in our book of business" since Caremark "has a wide variety of clients in its book of business, some of which may have elected alternative discount arrangements in exchange for unique terms and conditions". In light of the foregoing, DCS determined that Caremark's administrative proposal satisfied the requirements of Question #11 (*see* DCS correspondence dated November 27, 2018, at pgs. 4-5).

Based on the foregoing and our review of the procurement record, we find no basis to disturb DCS' determination that Caremark's proposal satisfied the requirements of Question #11.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeals are not of sufficient merit to overturn the contract award by DCS. As a result, the Appeals are denied and we are today approving the DCS/Caremark contract for pharmacy benefit services for the Programs.