

Procurement Stewardship Act Report

BID Protest Determinations between April 1, 2022 through March 31, 2023

File Number	Date of Decision	Protestor	Contracting Entity	Decision
<u>SF20220055</u>	07/25/2022	Family Residences and Essential Enterprises, Inc.	Office For People with Developmental Disabilities	Upheld
<u>SF20220068</u>	08/04/2022	Conduent State & Local Solutions, Inc.	NYS Department of Transportation and NYS Thruway Authority	Denied
<u>SF20220091</u>	09/20/2022	Elekta	SUNY - Upstate Medical University	Denied
<u>SF20220030</u>	10/06/2022	MetriTech Inc.	State Education Department	Denied
<u>SF20220031</u>	11/22/2022	CBN Secure Technologies, Inc.	Department of Motor Vehicles	Upheld
<u>SF20220112</u>	12/02/2022	Penn Power Group LLC (d/b/a Penn Power Systems)	Office of Homeland Security and Emergency Services	Denied

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by MetriTech, Inc.
with respect to the procurement of services to
develop and administer statewide English language
proficiency assessments conducted by the New York
State Education Department.

**Determination
of Appeal**

SF-20220030

Contract Number – C014460

October 6, 2022

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Education Department (NYSED) for development and administration of statewide English language proficiency assessments. We have determined the grounds advanced by MetriTech, Inc. (MetriTech)¹ are insufficient to merit overturning the contract award made by NYSED and, therefore, we deny the Appeal. As a result, we are today approving the NYSED contract with NCS Pearson, Inc. for implementation of NYSESLAT.

BACKGROUND

Facts

NYSED issued a request for proposals (RFP) seeking proposals “from highly qualified respondents with expertise in the development and administration of statewide English language proficiency assessments” including transitioning testing from a paper-based to a computer-based testing (CBT) platform (RFP, at pp. 1-3). NYSED is responsible for administering English language proficiency assessments to English language learner (ELL) students in grades K-12, to comply with federal and State law (*see id.*, at pp. 14-17).

Proposals were due no later than November 10, 2021 (*Id.*, at p. 97). The RFP set forth mandatory requirements that offerors were required to meet to be found responsive and proceed to technical evaluation (*see id.*, at pp. 12, 106). The RFP provided proposals would be evaluated according to specified technical criteria, including CBT which scores could be adjusted following a mandatory CBT demonstration, and cost (*see id.*, at pp. 98-106). The technical proposal was worth up to 70 points and the cost proposal up to 30 points (*see id.*). The RFP provided for the contract award to be made to the responsive and responsible offeror “whose aggregate technical and cost score is the highest among all the proposals rated” (*Id.*, at p. 106). NYSED reserved the right to request best and final offers (BAFO) from all responsive offerors; if NYSED exercised that right, contract award would be made to the responsive and responsible offeror with “the highest aggregate technical and financial score that results from the [BAFO]” (*see id.*).

¹ The Appeal was filed on behalf of MetriTech and its subcontractor, Data Recognition Corporation (DRC).

The RFP placed certain restrictions on subcontracting, providing, “Subcontracting will be limited to thirty percent (30%) of the total contract budget. A higher subcontracting limit will be allowed only when a bidder is proposing to subcontract for the provision of the CBT platform. In this case, the subcontracting limit will be increased to fifty percent (50%) of the total contract budget. In all other cases, the subcontracting limit will be 30%” (*Id.*, at pp. 2, 92).

Two offerors submitted responsive proposals by the deadline, MetriTech (along with its subcontractor DRC)² and NCS Pearson. NYSED decided to exercise its right to request BAFOs from all responsive offerors. Following receipt of BAFOs, NYSED awarded the contract to NCS Pearson, the offeror receiving the highest aggregate technical and financial score resulting from the BAFO.

Following notice of non-award, MetriTech requested a debriefing which was held by NYSED on February 7, 2022. MetriTech submitted a protest to NYSED on February 23, 2022 which NYSED denied on March 4, 2022. MetriTech submitted an appeal to this Office on March 18, 2022 (Appeal). NYSED filed an answer to the Appeal on July 12, 2022 (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 this contract approval responsibility, 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.³ 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 the OSC Protest Procedure.

In the determination of the Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by NYSED with the NYSED / NCS Pearson contract;
2. the correspondence between this Office and NYSED arising out of our review of the proposed NYSED / NCS Pearson contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. MetriTech’s protest to NYSED, dated February 23, 2022;

² MetriTech subcontracted with DRC for CBT at 21.6% of the total contract budget.

³ 2 NYCRR Part 24.

- b. NYSED’s protest determination, dated March 4, 2022;
- c. MetriTech’s Appeal to this Office, dated March 18, 2022 (Appeal); and,
- d. NYSED’s Answer, dated July 12, 2022 (Answer).

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, MetriTech challenges the procurement conducted by NYSED on the following grounds:

1. The evaluation methodology used to determine the score for the Program Management section (section 4.a)⁴ of the technical proposal was deficient, failed to align with the actual requirements of the RFP, and as a result, failed to comply with SFL § 163(9)(b).
2. The technical evaluators misunderstood the subcontracting relationship and communication between MetriTech and DRC, even though it was clearly explained in the proposal, which negatively impacted MetriTech’s technical score. As such, sections 2.c (Training and Technical Support for all CBT Administrations), 4.a (Program Management), and 4.b (Staffing Requirements)⁵ should be re-evaluated.
3. While subcontracting was allowed and even encouraged, as evidenced by the percentage of the overall cost that could be subcontracted for CBT, the fact MetriTech subcontracted improperly negatively impacted its score. MetriTech and its subcontractor DRC submitted a responsive proposal that met the criteria for selection of an award under the RFP.
4. The cost proposal spreadsheet contained numerous technical issues and errors that prevented NYSED from conducting a cost evaluation and scoring which complies with SFL §163(2)(b).

⁴ Section 4.a, Program Management, provides, “The Technical Proposal should include the bidder’s plan to provide and maintain one program manager who meets the minimum requirements specified in the ‘Program Manager Requirements’ section of this RFP.” The “Program Manager Requirements” specify that,

The program manager must, **at a minimum**, meet the requirements above and:

1. have a bachelor’s degree (a master’s degree or above, and project management certification through the Project Management Institute (PMI) as a Project Management Professional (PMP), or other recognized program management certification, is preferred.
2. be a fulltime employee of the organization,
3. be the central point of contact with NYSED for the contract,
4. have at least three years’ experience managing large-scale assessment projects from conception through completion,
5. have experience with the assessment of English language learners, Grades K-12, and knowledge or experience with cultural sensitivity/cultural responsiveness, and
6. have demonstrated knowledge of educational testing procedures.

(RFP, at pp. 81, 101) (emphasis added).

⁵ Section 2.c, *Training and Technical Support for all CBT Administrations* (see RFP, at pp. 79-80, 100); see fn. 4 for details on Section 4.a; Section 4.b, *Staffing Requirements* (see RFP, at pp. 80-84, 101-02).

NYSED Response to the Appeal

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

1. The RFP fully complied with SFL § 163(9)(b) as the minimum specifications or requirements were clearly stated and the general manner in which the evaluation and selection would be conducted was specified. Further, the Evaluation Committee evaluated each of the proposals received, including MetriTech's proposal, against the technical criteria set forth in the RFP using a standardized score sheet.
2. The NYSED Evaluation Committee awarded fewer points to certain areas of MetriTech's technical proposal based on weaknesses present in MetriTech's technical proposal as well as the demonstration, including communication, lack of clarity, and the role of MetriTech and DRC.
3. The mere use of a subcontractor in no way impacted MetriTech's score. NYSED agrees that MetriTech and DRC submitted a responsive proposal; however, another bidder submitted a responsive proposal and earned higher technical and cost scores.
4. Any errors in the cost proposal spreadsheet were addressed before final cost proposals were submitted and thus did not disadvantage MetriTech.

DISCUSSION

Technical Proposal Evaluation Methodology

MetriTech alleges that the RFP “did not adequately inform Offerors as to [the] level of specificity [NYSED] would evaluate and score section 4a⁶ [of the technical proposal]” and therefore the RFP “failed to comply with SFL § 163(9)(b) in that it failed to adequately disclose the required experience needed” (Appeal, at p. 3). Specifically, MetriTech alleges that “the RFP does not require the project manager to demonstrate experience with CBT administration” yet NYSED identifies as a weakness in MetriTech's technical proposal its failure to “demonstrate that the proposed project manager has experience with CBT administration” (*Id.*). MetriTech contends that the project manager “not only meets but exceeds all of the RFP requirements” (*Id.*).

NYSED responds that “the RFP was in full compliance with SFL § 163(9)(b) as the minimum specifications or requirements were clearly stated and the general manner in which the evaluation and selection shall be conducted were specified” (Answer, at p. 1 (emphasis in original)). NYSED asserts that “[t]he requirements of the RFP for the program manager position were listed as the minimum qualifications” and “[a]ddressing the minimum qualifications of an RFP does not necessarily result in an award of all of the points available” (*Id.*, at p. 2 (emphasis in original)). NYSED further contends that “[w]hile the RFP does not require the program manager to demonstrate experience with CBT administration, it is reasonable for NYSED's Evaluation Committee to consider whether the program manager has

⁶ See fn. 4, *supra*.

CBT administration experience [in scoring proposals], as the purpose of the RFP is the administration of CBT” (*Id.*).

NYSED awarded the contract under the RFP on the basis of best value. 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” (SFL § 163(1)(j)). A “responsive” offerer is an “offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency” (SFL § 163(1)(d)). SFL § 163(9)(b) provides that the “solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the *general manner* in which the evaluation and selection shall be conducted. Where appropriate, the solicitation shall identify the *relative importance and/or weight of cost and the overall technical criterion* to be considered by a state agency in its determination of best value” (emphases added).

Additionally, the New York State Procurement Guidelines indicate:

The RFP must present the criteria that will be used for the evaluation of proposals. At a minimum, the agency must disclose in the RFP the relative weights that will be applied to the cost and technical components of the proposals. An example would be: 30 percent for cost and 70 percent for technical. An agency may elect to include in the RFP a more detailed breakdown of the evaluation criteria, such as specifying the relative weights for detailed categories (e.g., Experience = 20 percent, Staffing = 15 percent, energy efficiency = 10 percent, and so forth).

(New York State Procurement Guidelines, at p. 30). The New York State Procurement Guidelines also expressly provide that “criteria and sub-criteria may, but are not required, to be disclosed in the RFP” (*Id.*, at p. 35).

The RFP required offerors to meet the mandatory requirements set forth in the RFP in order to be responsive (*see* RFP, at p. 12). In addition, the RFP clearly outlined the general manner in which the technical evaluation method and selection process would be conducted, including the criteria to be scored, and the weight to be allocated to each criterion. Specifically, the technical proposal would be worth up to 70 points, comprised of five broad categories, outlined in detail throughout the RFP, with the following maximum point values available for each: test development requirements for the NYSESLAT (25 points); CBT for the NYSESLAT, interim assessments, and NYSITELL (15 points); printing, duplication, and shipping of test materials (10 points); program management and staffing requirements (10 points); and data security, data privacy, and appropriate use (10 points) (*see id.*, at pp. 20-90, 98-103, 105-06). Contrary to MetriTech’s assertions, applicable law and guidelines do not require further specifics regarding the criteria used in NYSED’s evaluation method and selection process to be disclosed in the RFP.⁷ Thus, we are satisfied the RFP complies with applicable law and guidelines set forth above.

⁷ This conclusion applies likewise to dispel MetriTech’s assertion that “SED needed to include detailed specificity about the communication between a contractor and a subcontractor, if it was going to be included, as a critical and necessary component of the overall evaluation” (Appeal, at p. 7).

Scoring of MetriTech’s Technical Proposal

MetriTech alleges that “the scoring metric [should] be re-evaluated and the scoring for section[s] 2.c, 4.a, and 4.b re-examined” because the “collaboration [between MetriTech and DRC relating to CBT administration] . . . was misunderstood by one or more of the technical reviewers and this lack of understanding impacted the overall technical score” (Appeal, at pp. 4-7).⁸ Additionally, MetriTech contends that “[w]hile subcontracting was allowed and even encouraged, as evidenced by the percentage of the overall cost that could be subcontracted for CBT, the fact MetriTech subcontracted negatively impacted the scoring” even though “MetriTech [and its subcontractor] DRC, submitted a responsive proposal that met the technical requirements [of the RFP]” (*Id.*, at p. 7).

NYSED counters that its “Evaluation Committee evaluated each of the proposals received against the technical criteria set forth in the RFP using a standardized score sheet” (Answer, at p. 3). NYSED asserts that “[c]ommunication, lack of clarity, and the role of MetriTech and DRC were identified as areas of weakness in sections 2c, 4a, and 4b . . . these issues were present throughout both the technical proposal as well as in the [mandatory CBT] demonstration, and affected MetriTech and DRC’s overall technical proposal score” (*Id.*, at p. 4). NYSED contends that “[t]he mere use of the subcontractor in no way impacted MetriTech’s score” (*Id.*, at p. 5). Finally, NYSED “agrees that MetriTech and DRC submitted a responsive proposal” but adds that “[t]he onus remained on MetriTech to explain how they, along with their chosen subcontractor (DRC), could provide a superior service (*Id.*, at p. 5).

Generally, this Office gives significant deference to a State agency in matters within that agency’s expertise and, furthermore, is unwilling to substitute its judgment for that of an agency in matters within an agency’s realm of expertise where the agency scored technical proposals in accordance with a pre-established technical proposal evaluation tool (*see* OSC Bid Protest Determination SF-20170192, at p. 7). We have long recognized that evaluators bring their own subjective views to the evaluation process and may interpret information in proposals differently. However, this Office “will generally not disturb a rationally reached determination of a duly constituted evaluation committee” unless “scoring is clearly and demonstratively unreasonable” (OSC Bid Protest Determination SF-20160188, at p. 8 (upholding evaluation committee’s technical scores where “review of the procurement record confirms the evaluators scored the proposals in a manner consistent with the evaluation/scoring instructions”); *see* OSC Bid Protest Determination SF-20200069, at p. 6; *see also* OSC Bid Protest Determination SF-20210006, at p. 6). Our review of the procurement record indicates NYSED scored MetriTech’s technical proposal according to the criteria set forth in the RFP and used the evaluation tool that was crafted prior to receipt of proposals. Moreover, the procurement record reasonably supports the scores the evaluators assigned to MetriTech’s technical proposal. Therefore, we have no basis to disturb the scores NYSED awarded to MetriTech.

⁸ *See* fn. 5, *supra*.

Cost Proposal Evaluation

MetriTech alleges that “[t]he cost proposal spreadsheet contained numerous technical issues and errors that prevented SED from conducting a cost evaluation and scoring which complies with State Finance Law §163(2)(b)” (Appeal, at p. 8). MetriTech contends that the “[RFP] did not provide a balanced and fair method to evaluate the cost proposal prior to receiving offers since the cost proposal spreadsheet had technical errors which resulted in SED re-issuing the cost proposal” (*Id.*, at p. 8). MetriTech further alleges that offerors submitting their BAFO “were allowed to revise the cost proposal workbook or work off a blank copy creating an evaluation process where the cost proposals of vendors could not be fairly compared. In addition, efforts by NYSED to correct the errors did not fix all of the problems and were not established ‘in advance of the receipts of offers’” (*Id.*, at p. 10).

NYSED avers that although “initially, the cost proposal spreadsheet contained a few technical issues and errors” “[i]nitial errors in the cost proposal spreadsheet were addressed before final cost proposals were submitted by bidders and are, therefore, irrelevant” (Answer, at p. 6). NYSED states that, nevertheless, “[p]reviously identified and corrected errors in the cost proposal spreadsheet had no bearing on MetriTech and DRC’s cost proposal score” and “[t]he only number analyzed in determining [the] cost proposal score was the ‘Total for All 3 Years’ amount in cell D189” and “MetriTech did not identify any issues related to cell D189” (*Id.*).

A “best value” determination shall “be based on clearly articulated procedures which require . . . a balanced and fair method, established in advance of the receipt of offers, for evaluating offers and awarding contracts” (SFL § 163(2)(b)).

The procurement record shows NYSED revised the cost proposal spreadsheet and posted it to its website with the Questions and Answers, prior to the November 10, 2021 proposal due date; however, our review found the revised spreadsheet still contained the seven errors identified by MetriTech (*see* Appeal, at p. 9). Nonetheless, such errors did not harm either of the two offerors as, on December 22, 2021, both offerors (MetriTech and NCS Pearson) were invited to submit a BAFO to NYSED and both offerors did so. For the BAFO, NYSED instructed the offerors to “resubmit[t] a complete cost proposal” by either “revis[ing] the workbook originally submitted,” namely the revised cost proposal spreadsheet that had been posted with the Questions and Answers, or using a blank copy provided by NYSED with the BAFO invitation. Both MetriTech and NCS Pearson used the cost proposal spreadsheet provided with the BAFO invitation to submit a BAFO.

The procurement record shows that the cost proposal spreadsheet provided with the BAFO and used by the offerors contained one error. Specifically, cell D123 in the Deliverables tab contained the formula “=D57” which copied the cost entered in cell D57 automatically into cell D123.⁹ Unless the formula was deleted, the error would also affect the Total Price for Year 3 in cell D187, which contained the formula “=SUM(D122:D186)” that automatically added the cost in cells D122 through D186. Likewise, cell D189, the Total Price of All 3 Years would be affected, as it contained the formula “=SUM(D187, D120, D54)” that automatically added the

⁹ MetriTech points out this error in its Appeal, stating, “On the DELIVERABLES tab – Row 123 . . . Column D . . . contains a formula copying the contents of Row 57 . . .” (Appeal, at p. 10).

cost in cells D187, D120, and D54. As a result, contrary to NYSED's assertion that cell D189 (i.e., the only number analyzed in determining the cost proposal score) was not impacted by any spreadsheet errors, the error in cell D123 could have affected cell D189.

However, despite this error, the procurement record shows that both offerors identified and resolved the error with their submitted BAFO cost proposal spreadsheet by removing the formula and entering their desired cost in cell D123. Therefore, neither offeror was prejudiced by the error in the cost proposal spreadsheet used to submit a BAFO. MetriTech admits that cell D123 "could be typed over if the issue was identified," and, in fact, submitted a BAFO cost proposal spreadsheet reflecting that MetriTech had done exactly that (*see* Appeal, at p. 10). Further, MetriTech fails to allege that any errors in the cost proposal spreadsheet prevented it from submitting either an initial proposal or subsequent BAFO reflecting its intended costs (*Id.*).

Moreover, there is no evidence in the procurement record to indicate that the error in the cost proposal spreadsheet had any effect on evaluators' ability to evaluate cost proposal submissions according to the RFP methodology. Since both offerors identified and resolved the single error remaining in the spreadsheet at the time of the BAFO, nothing prevented NYSED from evaluating the BAFO cost proposals according to the clearly articulated methodology set forth in the RFP, established prior to the receipt of proposals. Thus, we are satisfied evaluators scored MetriTech's cost proposal as required by applicable law and will not disturb the cost scores awarded by NYSED.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the contract award by NYSED. As a result, the Appeal is denied and we are today approving the NYSED / NCS Pearson contract for development and administration of statewide English language proficiency assessments.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by CBN Secure Technologies, Inc. with respect to the procurement to produce secure New York State identity documents conducted by the New York State Department of Motor Vehicles.

**Determination of
Bid Protest**

SF-20220031

Contract Number – C000957

November 22, 2022

The Office of the State Comptroller (Office or OSC) has reviewed the above-referenced procurement conducted by the New York State Department of Motor Vehicles (DMV) to produce secure New York State identity documents. We have determined the grounds advanced by CBN Secure Technologies, Inc. (CBNSTI) in its protest to the award are of sufficient merit to overturn the contract award made by DMV and, therefore, we uphold the protest. As a result, we are today returning non-approved the DMV contract with Idemia Identity & Security USA LLC (Idemia) to produce secure New York State identity documents.

BACKGROUND

Facts

DMV is responsible for “provid[ing] motor vehicle related services to residents of New York State . . . includ[ing] the issuance of secure driver’s licenses and other identification documents” (Request for Proposals (RFP), Section 1-2, at p. 9). Accordingly, DMV issued an RFP on May 24, 2021 seeking to award “a contract for the production of secure New York State Identity Documents . . . includ[ing] all required hardware, software, design, development, customization, installation, training, production personnel, supplies and maintenance incident to production” (RFP, Section 1-1, at p. 9). The RFP required the following driver’s licenses (DL) and identification cards (ID) to be produced under the resultant contract: “NYS Standard DL/ID, REAL [] DL/ID, Enhanced DL/ID, Employee ID and multiple Occupation/Professional ID card designs” (RFP, Section 4-5, at p. 39).

The RFP indicated the contract would be awarded to one responsive and responsible offeror (RFP, Section 3-1, at p. 24; RFP, Section 3-4, at pp. 27-29). A proposal would be deemed “complete” and scored if the offeror complied with all mandatory requirements (RFP, Section 3-1, at p. 24). The technical proposal would be worth 80% of the total score and would be evaluated according to criteria specified in the RFP (RFP, Section 3-4, at pp. 27-28). The cost proposal would be worth 20% of the total score (RFP, Section 3-4, at p. 28). DMV would score cost proposals by awarding the offeror submitting the lowest cost for each item the full points for that item and awarding other offerors a proportionate score based on their relation to the proposal

offering the lowest cost for an item (RFP, Section 3-5, at p. 28). The RFP provided that DMV would award the contract to the offeror with the highest combined technical and cost score (RFP, Section 3-4, at pp. 27-28).

Prior to the proposal due date of October 15, 2021, DMV received six responsive proposals, including responses from CBNSTI and Idemia. Following DMV's evaluation of proposals, the contract was awarded to Idemia, the responsive and responsible offeror who received the highest combined score. Subsequently, CBNSTI requested a debriefing, which DMV provided in written form on or about March 7, 2022, and in real-time on March 15, 2022.

CBNSTI filed a protest with this Office on March 21, 2022 (Initial Protest), as supplemented on June 22, 2022 (Supplemental Protest; collectively, the Initial Protest and Supplemental Protest will be referred to as the "Protest"). Idemia responded to the Initial Protest on March 30, 2022 (Idemia Answer) and the Supplemental Protest on June 30, 2022 (Idemia Supplemental Answer). DMV responded to the Protest on August 8, 2022 (DMV Answer). CBNSTI filed a reply on August 30, 2022 (Reply).

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 this contract approval responsibility, OSC has promulgated the 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 there was no protest process engaged in at the department level, the Protest is governed by section 24.4 of the OSC Protest Procedure.

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DMV with the DMV / Idemia contract;
2. the correspondence between this Office and DMV arising out of our review of the proposed DMV / Idemia contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. CBNSTI's Initial Protest, dated March 21, 2022;
 - b. Idemia's Answer, dated March 30, 2022;
 - c. CBNSTI's Supplemental Protest, dated June 22, 2022;
 - d. Idemia's Supplemental Answer, dated June 30, 2022;

¹ 2 NYCRR Part 24.

- e. DMV's Answer, dated August 8, 2022;
- f. CBNSTI's Reply, dated August 30, 2022;
- g. E-mail from Anthony Laulette at DMV to Zachary Nash at OSC, dated September 28, 2022 (DMV E-mail 1); and,
- h. E-mail from Anthony Laulette at DMV to Zachary Nash at OSC, dated October 21, 2022 (DMV E-mail 2).

ANALYSIS OF THE PROTEST

Initial Protest to this Office

In its Initial Protest, CBNSTI challenges the procurement conducted by DMV on the following grounds:

1. DMV's technical evaluation methodology/tool and its application to technical proposals was arbitrary, unreasonable, and overly subjective, and thus did not result in a best value award;
2. DMV's defective technical evaluation tool incentivized evaluators to give "Average" scores which resulted in technical scores being suppressed / technical proposals being undervalued and cost proposals likewise being overvalued as compared to the 80% technical / 20% cost split disclosed in the RFP, and thus did not result in a best value award;
3. DMV's flawed technical evaluation methodology resulted in contract award to a card that is "below average" in security in a secure identification card procurement, and thus did not achieve best value;
4. DMV made the contract award to a non-responsible vendor, in contravention of State law requiring State contracts be awarded only to responsible vendors; and,
5. The contract awardee conducts business operations in Russia and therefore Governor Hochul's Executive Order No. 16 prevents the contract award from proceeding.²

Supplemental Protest to this Office

In its Supplemental Protest, CBNSTI further challenges the procurement conducted by DMV on the following additional grounds:

1. The weighting that DMV assigned to the cost components of the RFP was not reflective of the contract spend/production value, and thus did not deliver a best value award; and,

² In its Supplemental Protest, CBNSTI withdrew this allegation (*see* Supplemental Protest, at p. 1). Therefore, it will not be addressed in this Determination.

2. CBNSTI's proposal provides the best value to the State since it received the highest technical score and offered the lowest cost for the three cards that comprise more than 80% of the contract value (Standard DL/ID, Real DL/ID, and Enhanced DL/ID).

DMV's Response to the Protest

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

1. DMV's technical evaluation methodology is rational and all proposals received were evaluated equally and reasonably, utilizing the same criteria set forth in the RFP and evaluation tool;
2. All points were available to be awarded to offerors in the technical evaluation and, in fact, CBNSTI received many scores outside of "Average";
3. While CBNSTI outscored Idemia in Document Security and Durability, Idemia's proposal provides the best value to the State by optimizing quality, cost, and efficiency, among responsive and responsible offerors;
4. DMV conducted a vendor responsibility review of Idemia, and did not discover anything that would call into question Idemia's responsibility;
5. There is nothing in the SFL that mandates that cost evaluations be based solely on the expected volumes of the impending contract; and,
6. All anticipated contract costs must be taken into consideration when evaluating cost proposals, not just the Standard DL/ID, REAL DL/ID, and Enhanced DL/ID; however, even if only those three items were considered, Idemia still had the lowest cost.

Idemia's Response to the Protest

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

1. DMV made a reasonable best value determination in accordance with applicable law and the stated evaluation criteria;
2. Just because CBNSTI did not earn the maximum technical points available for criteria where it was the highest ranked offeror does not mean that full technical points were not available under DMV's evaluation methodology;
3. While CBNSTI received the highest score under the Document Security and Durability criterion, Idemia received the highest composite score; and the RFP clearly indicates that award would be made on a best value basis and not solely on the Document Security and Durability criterion;

4. DMV properly determined that Idemia is a responsible vendor and CBNSTI's unfounded speculation does not provide a basis to disturb that determination; and,
5. DMV's cost evaluation complied with the SFL in that the RFP disclosed the manner in which the cost evaluation would be conducted and the relative importance of cost (20%), DMV assigned relative weights to the twelve cost line items that made up the cost proposal based on DMV's experience and expertise, and DMV applied the methodology accordingly.

CBNSTI's Reply to DMV's Answer

In its Reply to DMV's Answer, CBNSTI expounds upon the grounds set forth in the Protest and further contends that had DMV developed and implemented a cost evaluation tool / methodology that bore a reasonable relationship to the actual or anticipated costs the State will incur under the Contract then the best value determination would have been made in favor of an award to CBNSTI.

DISCUSSION

Best Value Determination

State agencies are required to award service contracts based on best value (SFL § 163(10)). 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" (SFL § 163(1)(j)). The basis must "reflect wherever possible, objective and quantifiable analysis" (SFL § 163(1)(j)). Additionally, the solicitation issued by the procuring State agency must "prescribe the minimum specifications or requirements that must be met to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted" (SFL § 163(9)(b)). Finally, the contracting agency must document "in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria, which whenever possible, shall be quantifiable, and the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted" (SFL § 163(7)).

It is well-established that SFL § 163 "implicitly requires [, as part of a best value determination,] that the cost evaluation methodology have a reasonable relationship to the anticipated *actual* costs to be incurred by the State under the terms of the contract" (OSC Bid Protest Determination SF-20150153, at p. 11; *see* OSC Bid Protest Determination SF-20080408, at p. 9; *see also* OSC Bid Protest Determination SF-20100156, at p. 6). Therefore, when evaluating cost, the State agency awarding the contract "must generally consider all expected costs and must weigh such costs in a manner reasonably designed to predict actual costs under the contract" (OSC Bid Protest Determination SF-20080408, at p. 9; *see* OSC Bid Protest Determination SF-20100156, at p. 6).

CBNSTI asserts that by allocating only 55% of the cost score to Standard DL/ID, Real DL/ID, and Enhanced DL/ID cards, DMV's procurement "resulted in an award that does not secure a best value for [DMV] . . . [and if DMV] had applied weighting that is reflective of the contract spend / production value (i.e., 80% for the key three card categories), CBNSTI would have had the highest Total Score" and been awarded the contract (Supplemental Protest, at pp. 2-3).

DMV responds that "[w]hile CBN's analysis is accurate that an estimated 80%³ of the contract value resides with the Standard, REAL, and Enhanced documents and that DMV assigned 55% of the available points to those three items, it does not support their position that the cost points were incorrectly allocated . . . there is nothing in State Finance Law that mandates that cost evaluations be based solely on the expected volumes of the impending contract" (DMV Answer, at p. 3).

Our review of the procurement record shows DMV developed a cost evaluation tool that assigned percentages to each of the twelve categories of items under the contract, as shown in Table One below, further dividing the 20% total cost proposal weighting.⁴ In the cost evaluation tool, DMV assigned the Standard DL/ID, Real DL/ID, and Enhanced DL/ID cards a total of 55% of the available cost points, while the remaining nine cost categories received a combined total of 45% of the cost points. In contrast, when estimating contract value, DMV assigned the Standard DL/ID, Real DL/ID, and Enhanced DL/ID cards approximately 95% of the contract value, while the remaining nine categories combined comprised approximately 5% of the value.⁵ Table One provides a side-by-side comparison of cost evaluation weighting to contract value weighting:

³ Notably, and as illustrated more fully in the following discussion and in Table One, a review of the procurement record shows that DMV estimated approximately 95% of the contract value would be attributed to the Standard, REAL, and Enhanced DL/IDs.

⁴ The cost evaluation tool provided for 200 possible points, with the available points for each of the twelve categories being equal to two times the percentage amount (e.g., 20% = 40 points). The RFP provided that "the Bidder proposing the lowest overall cost will be given the full amount of points for the Cost portion of that item, then points will be awarded proportionally to the next lowest Bidders using the following formula: (Lowest Proposal Cost/Bidder's Proposal Cost) x Points Allocated (RFP, Section 3-5, at p. 28).

⁵ The procurement record shows that DMV utilized a combination of historical purchasing data and projected card usage rates to estimate contract usage and value. As reflected in Table One, an estimated contract value was not provided for "future out of scope work."

Table One

Contract Items	Cost Evaluation Weighting (%)	Estimated Contract Value Weighting (%)⁶
Cost Per Standard DL/ID	20	16.77
Cost Per Real DL/ID	20	52.85
Cost Per Enhanced DL/ID	15	25.24
Cost Per Employee ID with Proximity Chip	5	0.10
Cost Per Employee ID without Proximity Chip	5	4.60
Cost Per Occupation/Professional ID	5	0.00 ⁷
Annual Lease Price Per Additional ICW	5	0.15
Annual Lease Price Per Additional Mobile ICW	5	0.10
Annual Lease Price Per Additional IRW	5	0.00
Annual Lease Price Per Signature Capture Devices (Quantity Equal to the Number of ICWs in Appendix J)	5	0.14
Annual Lease Price per Additional Scanner	5	0.05
Hourly Rate for Future Out of Scope Work (Change Requests)	5	N/A

When asked to justify these disparities, DMV provided that “the majority of the contract is spent on license production; consequently, DMV assigned the majority of the cost-related points to the Standard DL/IDs, REAL DL/IDs, and Enhanced DL/IDs” (DMV E-mail 1). Further, “DMV felt it prudent and reasonable to split cost points evenly between the Standard DL/ID and the REAL DL/ID, as demand for the Standard DL/ID is expected to decrease and demand for the REAL DL/ID is expected to increase . . . [and] [c]onsistent with [the prior RFP for these services], DMV determined that a 15% cost weight to the Enhanced DL/ID was reasonable in relation to the other two primary card types” (DMV E-mail 2). With respect to the remaining nine items, DMV determined that “any item in the cost evaluation tool would be assigned a minimum of 5% weight” (DMV E-mail 1). DMV then asserted that this 5% weight “was reasonable in order to properly consider the financial impact of each element where the agency may incur such costs” (DMV E-mail 2). Lastly, to justify the substantially disproportionate weighing of the remaining categories in the aggregate, DMV summarily asserted that the “cost evaluation weights of items 4 through 12, while not directly proportional to the three primary card types (items 1 through 3), still bear a reasonable relationship to them. Weighing each of the three primary card types three to four times more heavily than any one of items 4 through 12 supports this and is in line with the intent of SFL 163 . . .” (*Id.*). DMV failed to provide any support for the 40% underweighting of the first three categories cumulatively (95%/55%) compared to the 40% overweighting of the remaining nine categories cumulatively (5%/45%).

⁶ Percentages calculated by dividing the estimated extended cost per item (estimated quantity times Idemia’s bid price) by the estimated total contract value (total of all estimated extended costs per item). Numbers have been rounded to the nearest hundredth of a percent.

⁷ DMV estimated quantities and value for two cards which purportedly fit into this category: “OGS Printed Card Delivered (iClass)” and “DFI Badges.” Both cards yielded percentages less than one one-thousandth of a percent.

Contrary to DMV's assertions, the objective evidence of DMV's own procurement record demonstrates that the weights DMV chose for the cost evaluation do not bear a reasonable relationship to the estimated usage and contract values prepared by DMV; in fact, for a majority of the contract items, there is a substantial discrepancy between cost evaluation weighting and the actual significance of an item under the contract. DMV's purported justifications do not assist in establishing a reasonable relationship, but rather fail to address the objective facts presented in the procurement record. While cost evaluation and estimated usage need not be an exact match, the magnitude of the disparity in this instance, especially when viewed in aggregate, undercuts any claim that the State received best value. As such, DMV has failed to show a reasonable relationship between the weights chosen for its cost evaluation methodology (55% for the Standard, REAL, and Enhanced DL/IDs and 45% for the other nine items) and the actual anticipated costs under the contract according to its own estimates (95% for the Standard, REAL, and Enhanced DL/IDs and 5% for the other nine items).

For these reasons, the cost evaluation methodology used by DMV does not meet the statutory requirements of a best value determination. Therefore, we cannot find that the contract award by DMV was made on the basis of best value.

Evaluation and Scoring of the Technical Proposals

Notwithstanding the foregoing determination, we will separately address CBNSTI's claims regarding the technical proposal evaluation methodology and scoring.

1. Evaluation Methodology for Technical Proposals

CBNSTI asserts that DMV's technical "Evaluation Tool [and DMV's technical] evaluation process, were [not] reasonably developed or reasonably applied" (Initial Protest, at p. 5).⁸ DMV responds "[a]ll proposals received were evaluated equally and reasonably, utilizing the same criteria set forth in the RFP and the evaluation tool" (DMV Answer, at p. 1).

As stated above, State Finance Law requires that service contracts be awarded on the basis of best value which reflects "objective and quantifiable analysis" (*see* SFL §§ 163(1)(j), 163(10)).

The RFP sets forth the criteria that DMV utilized to evaluate technical proposals, as follows: Experience and Expertise (9%), Document Security and Durability (29%), Production and Quality Control (14%), Production Site and Data Security (14%), Issuing Office and Support and Maintenance Requirements (9%), and Diversity Practices (5%) (RFP, Section 3-4, at pp. 27-28). The procurement record shows, prior to the receipt of proposals, DMV developed an Evaluation Tool which included a detailed scoring rubric, as follows:

⁸ CBNSTI makes several references to DMV's 2012 procurement for secure New York State identity documents to support its contentions regarding the deficiencies in the technical evaluation methodology and its application in the instant procurement. As this Office's review is limited to review of the procurement record for the contract award related to the Protest, we will not consider information extraneous to such procurement record, including but not limited to the 2012 procurement record.

Rating	Score	Description - Based on DMV preferences or Demo items requested
OUTSTANDING	100%	The response addresses the requirement completely, exhibits outstanding knowledge, creativity, innovation or other factors to justify this rating.
ABOVE AVERAGE	75%	The response addresses the requirement completely, with value added, and in a highly effective manner.
AVERAGE	50%	The response addresses most elements of the requirement. Demonstration addresses most required minimum items requested.
BELOW AVERAGE	25%	The response meets some of the requirement.
POOR	0%	Non-responsive/lacks basic response to requirement.

The scoring rubric for the technical proposals instructed evaluators to award 50% of the available points for a criterion if a proposal “addresses most elements” of the criterion, leaving latitude to evaluators to award additional points to those proposals that exceeded their expectations. The Evaluation Tool instructed evaluators to provide written justification for any score other than “Average.” This Office has consistently recognized the appropriateness of a scoring methodology that “allow[s] evaluators a breadth of points to fully evaluate the strengths and weaknesses of a proposal” (see OSC Bid Protest Determination SF-20210086, at p. 6 (finding agency’s technical evaluation methodology to be balanced and fair where evaluators were instructed to award 50% of available points for a criterion if a proposal met the relevant requirements of the criterion, and providing the ability to award additional points if the proposal exceeded expectations for the criterion)).

Based on our review of the procurement record, we conclude that the methodology DMV used to evaluate and score technical proposals was balanced, fair, and included an objective and quantifiable analysis. Thus, we find no basis to question the evaluation methodology DMV used for the technical proposals. However, we reiterate that due to the deficiencies in the cost evaluation methodology, we cannot find that the contract award by DMV was made on the basis of best value.

2. Application of Evaluation Criteria to Technical Proposals

CBNSTI contends “the lack of clarity surrounding how the scored components of the RFP could be considered ‘Outstanding,’ and ‘Above Average,’ and the requirement that an evaluator provide additional justification for those ratings, likely had the unintended consequence of discouraging evaluators from designating the scored components of the proposal as anything other than ‘Average’ . . . as no additional justification was required for [an] ‘Average’ rating” (Initial Protest, at p. 5). CBNSTI claims that DMV’s “defective [technical] Evaluation Tool . . . prevent[ed] full points [from being awarded] on the technical requirements” while DMV’s “cost scoring tool [] utilized a formula to ensure that all 200 of the [available cost] points were awarded” and that this “circumvented the intended 80 percent technical / 20 percent cost split and resulted in an award where cost was valued significantly more than the stated 20 percent (*Id.*, at p. 9). Finally, CBNSTI contends that “the defective Evaluation Tool and its unreasonable and arbitrary

application” led to DMV’s selection of a contract awardee with a “Below Average” score for the “Document Security and Durability” technical evaluation category which was “deemed by [DMV] to be the most important evaluation category” (*Id.*, at pp. 9-10).⁹

DMV contends that CBNSTI’s allegation “that evaluators were incentivized to give components an ‘Average’ score . . . fails to consider the [144] comments that [CBNSTI] itself received for above-average responses on their proposal” (DMV Answer, at p. 2). DMV further contends “All points were available to be awarded in every section of the RFP as the possibility did exist that an offerer could achieve a rating of ‘Outstanding’ in each of the scorable requirements, thus earning 100% of the available points . . . [however] [b]eing the top ranked offerer in any of the technical categories did not entitle any bidder to receive all available points for that section” (*Id.*, at p. 3 (emphases in original)). Additionally, DMV contends that it “did not set nor specify a minimum number of points that must be attained by a bidder in order to be declared the tentative winner of the technical portion of the RFP” (*Id.*, at p. 1). Finally, DMV asserts that “[w]hile DMV recognizes that [CBNSTI] outscored [Idemia] in the Document Security and Durability category . . . DMV stands by its determination that [Idemia’s] proposal provides the best value” (*Id.*, at p. 4).

This Office is unwilling to substitute its judgment for that of an agency in matters within an agency’s realm of expertise where the agency scored technical proposals “according to the pre-established technical proposal evaluation tool” (*see* OSC Bid Protest Determination SF-20170192, at p. 7). OSC “will generally not disturb a rationally reached determination of a duly constituted evaluation committee unless scoring is clearly and demonstratively unreasonable” (*see* OSC Bid Protest Determination SF-20210164, at p. 5 (*citing* OSC Bid Protest Determination SF-20160188, at p. 8)).

Based on our review of the procurement record, DMV evaluated technical proposals according to the clearly articulated criteria set forth in the RFP and consistent with the evaluation instructions/instrument. Our review also showed that the evaluators consistently scored across the spectrum of the scale and provided justification for their scores as required by the instructions. Contrary to CBNSTI’s assertions, offerors, including CBNSTI, did receive scores other than “Average.”¹⁰ Further, our review did not reveal any contradictions between an evaluator’s written comments and the scores assigned by such evaluator to CBNSTI’s technical proposal.

Additionally, to the extent that CBNSTI contends that the scores awarded to Idemia do not merit contract award, the RFP does not require an offeror to receive a certain number of points to be selected for contract award, nor does the SFL provide for such a requirement (*see* OSC Bid Protest Determination SF-20210164, at p. 4).

⁹ CBNSTI also seems to allege that Document Security and Durability should have been weighted more heavily than the 29% that DMV afforded it since it was “deemed by [DMV] to be the most important evaluation category” (Initial Protest, at pp. 9-10). However, while DMV did afford the most weight to Document Security and Durability out of all the technical criteria, the procurement was based on best value, including multiple technical and cost factors. This Office will not disturb the weighting of technical criteria as established by DMV where, as here, the matter was within the agency’s expertise and reasonably supported by the procurement record.

¹⁰ For example, DMV asserts, and the procurement record corroborates, within CBNSTI’s technical proposal “CBN[STI] received 144 scorable requirement scores outside of ‘Average’ by the evaluation team” (DMV Answer, at p. 2).

Thus, we are satisfied evaluators scored CBNSTI's technical proposal in a manner consistent with the RFP and evaluation instrument and will not disturb the technical scores awarded by DMV. However, as set forth above, we cannot find that DMV's contract award was made on the basis of best value, and therefore the technical proposal scores are moot.

Vendor Responsibility

CBNSTI alleges that Idemia "cannot credibly be considered a responsible offerer" (Initial Protest, at p. 13). CBNSTI, relying on a report issued by Reuters, asserts "Advent International (the investment banking group which has owned Idemia since 2016 . . .) is selling its identification firm Idemia" and that "Idemia is still carrying a heavy debt load and ' . . . its key credit metrics remain weak, according to rating agency Moody's'" (*Id.*, at pp. 13-14). CBNSTI further contends "the financial statements submitted by Idemia are essentially a nullity since they give no indication of the future – who will own and operate Idemia in 2023 and beyond" (*Id.*, at p. 14).

DMV asserts that "DMV has, and will continue to, exercise its due diligence throughout the [vendor responsibility] review process . . . [and that] DMV's [vendor responsibility] review of [Idemia] has not divulged anything necessitating the vendor's exclusion from this procurement" (DMV Answer, at p. 5). DMV further notes that "since the sale of [Idemia] and the form that company might take after the sale is speculative, there are presently no grounds to identify [Idemia] as a non-responsible bidder" (*Id.*).

Idemia responds that "CBNSTI's focus on uncorroborated allegations is misguided and . . . offers no legitimate basis to upset the [DMV's] responsibility determination" (Idemia Answer, at pp. 12-13). Idemia adds that "[e]ven if a future corporate transaction was relevant to the issue of responsibility, there is no such ongoing activity taking place that would result in a change of ownership or control of [Idemia]" (*Id.*, at p. 13).

SFL provides that "[s]ervice contracts shall be awarded on the basis of best value to a responsive and responsible offer" (SFL § 163(9)(f)). "Prior to making an award of contract, each state agency shall make a determination of responsibility of the proposed contractor" (*Id.*). For purposes of SFL § 163, "responsible" means the financial ability, legal capacity, integrity and past performance of a business entity (SFL § 163(1)(c)).

Our review of the procurement record confirms DMV conducted a vendor responsibility review of Idemia. DMV reviewed Idemia's financial and organizational capacity, legal capacity, integrity, and past performance as statutorily required. As documented in the procurement record, and based on factual evidence rather than speculation,¹¹ DMV determined Idemia to be a responsible offeror that can successfully perform the services under the contract for the prices submitted in Idemia's cost proposal.¹² Moreover, as part of our review of the DMV / Idemia

¹¹ No evidence has been presented regarding a sale of Idemia; nor has any evidence been presented to suggest that such a sale would adversely impact Idemia's responsibility.

¹² CBNSTI asserts "that the pricing and daily rates offered by several of the offerors, including [Idemia], are not commercially sustainable" (Supplemental Protest, at p. 3). The procurement record shows that DMV confirmed with Idemia that services could be provided for the prices submitted in Idemia's cost proposal.

contract, this Office examined and assessed the information provided in the procurement record and conducted an independent vendor responsibility review of Idemia. Our review did not provide any basis to overturn DMV's responsibility determination.

Based on the foregoing, there is insufficient evidence to disturb the responsibility determination made by DMV.

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 DMV to Idemia. As a result, the Protest is upheld and we will not be approving the DMV contract with Idemia for the production of secure New York State identity documents.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Family Residences and Essential Enterprises, Inc. with respect to the grant award for the provision of Crisis Services for Individuals with Intellectual and/or Developmental Disabilities conducted by the New York State Office for People with Developmental Disabilities.

**Determination
of Appeal**

SF-20220055

July 25, 2022

Procurement Record – OPD01-0000295-3660243

The Office of the State Comptroller has reviewed the above-referenced grant award made by the New York State Office for People with Developmental Disabilities (OPWDD) for Crisis Services for Individuals with Intellectual and/or Developmental Disabilities and Resource Center(s) for OPWDD’s Region 3 (CSIDD). We have determined the grounds advanced by Family Residences and Essential Enterprises, Inc. (FREE) are sufficient to merit overturning the grant award made by OPWDD to Young Adult Institute, Inc. (YAI) and, therefore, we uphold the Appeal. As a result, we are today returning non-approved the OPWDD grant award for Region 3 CSIDD to YAI.

BACKGROUND

Facts

On December 1, 2021, OPWDD issued a request for applications (RFA) seeking applications from not-for-profit providers of CSIDD for its Region 3 (*see* RFA, Section 1.1.1, at p. 5).¹ Region 3 includes eighteen New York State counties, covering the Capital District, Hudson Valley, and Taconic areas (*Id.*, Section 1.3.1.2, at p. 6). OPWDD intended to award one grant contract as a result of the RFA (*Id.*, Section 1.1.1, at p. 5). The awardee would be required to become certified by the Center for START Services at the Institute on Disability at the University of New Hampshire (*Id.*, Section 1.3.2, at p. 6).

A team of OPWDD staff evaluated applications (*Id.*, Section 7.1.3, at p. 32). The RFA provided for a contract to be awarded based on a “combination of technical merit and cost that would most benefit OPWDD” (*Id.*). The applicant with the highest final composite score (up to 100 points, including the technical, cost, and interview scores minus any penalty points) would be awarded the grant contract (*Id.*, Sections 7.7 and 7.8, at p. 35). The technical proposal was

¹ CSIDD is available to individuals 6 years of age or older who meet medical necessity criteria and are eligible for OPWDD services (*see* RFA, Section 1.3.3.1, at pp. 6-7). The goal of CSIDD is to provide short-term crisis services to help stabilize individuals with intellectual and/or developmental disabilities, who have significant behavioral or mental health needs, within their existing care networks (*Id.*).

worth up to 70 points and included the following scoring criteria: philosophy and mission; vision and goal; proposed staff; experience; description of services; technology; development plan for services; property for resource center use; and diversity practices (*Id.*, Sections 6.7 and 7.3, at pp. 26-30, 33). The cost proposal was worth a maximum of 20 points and considered several factors (*Id.*, Sections 6.8 and 7.4, at pp. 30-32, 33-34).² Penalties could be imposed in the form of a points deduction³ if an applicant's required cover letter was incomplete in any material respect (*Id.*, Sections 6.6.2.1 and 7.2.2, at pp. 25, 33). Applicants whose proposals earned the three highest intermediate scores (up to 90 points including the technical and cost scores minus any penalty points) would advance to an interview, worth up to 10 points (*Id.*, Sections 7.5 and 7.6, at p. 34). OPWDD also reserved the right to adjust the technical score based on material differences OPWDD identified between the technical proposal and the substance of the interview (*Id.*, Section 7.6.7, at pp. 34-35).

Applications were due on January 14, 2022. YAI, FREE, and two other vendors submitted applications by the due date and OPWDD awarded the grant contract to YAI, the applicant with the highest final composite score. FREE requested a debriefing, which was held with OPWDD on February 28, 2022.

Thereafter, on March 16, 2022, FREE submitted a protest of the grant award to OPWDD (Protest to OPWDD) pursuant to OPWDD's bid protest policy, as contained in the RFA (*Id.*, Section 8.16, at pp. 47-48). OPWDD denied FREE's protest in a written determination on April 12, 2022 (OPWDD Determination). FREE then appealed such denial to this Office on April 26, 2022 (Appeal). OPWDD submitted a response to the appeal on May 10, 2022 (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 this contract approval responsibility, 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 the OSC Protest Procedure.

² These factors included: lowest cost; understanding of annual expenditure requirements for clinical team, start-up and non-personal costs; whether the applicant utilized correct and reasonable NPS/Admin fees; whether the applicant's budget reflected an adherence to a phased-in staffing pattern; whether a Funding Request Summary was provided for each year, showing Medicaid Reimbursement amounts; and, the extent to which the applicant was as specific as possible when describing the anticipated costs associated with each operational element of their budget and how each line item would be phased in or required at start-up (*Id.*, Section 7.4, at pp. 33-34).

³ The RFA provided that "[u]p to two points may be deducted for each missing element and in each instance where the prescribed format is not followed" (RFA, Section 7.2.2, at p. 33).

⁴ 2 NYCRR Part 24.

In the determination of the Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by OPWDD with respect to the grant award;
2. the correspondence between this Office and OPWDD arising out of our review of the proposed OPWDD / YAI grant award; and,
3. the following correspondence / submissions from the parties (including the attachments thereto):
 - a. FREE's Protest to OPWDD;
 - b. OPWDD's Determination;
 - c. FREE's Appeal; and,
 - d. OPWDD's Answer.

Applicable Statutes

The grant award in question is subject to the requirements of Article 11-B of the SFL.⁵ Therefore, the procurement conducted by OPWDD is not subject to the competitive bidding requirements of SFL § 163 since those statutory competitive bidding requirements do not apply to “contracts approved in accordance with article eleven-B of [the SFL]” (SFL § 160(7)). While Article 11-B does not require competitive bidding, the Comptroller, in fulfilling his statutory duty of assuring that state contracts are awarded in the best interest of the State, requires that agencies undertake a competitive process for grant awards or, alternatively, document why competition is not appropriate or feasible. Thus, notwithstanding the inapplicability of SFL § 163, this Office generally requires that grant contracts be awarded after a fair and impartial competitive procurement process which provides a level playing field for all potential award recipients, except where the agency can document a sole source, single source or emergency justification for a non-competitive award (consistent with the documentation for such awards under SFL § 163). To determine whether the procurement process is fair and impartial, we look to whether: “1) the scoring system itself was clear; and 2) the evaluators, in assigning scores, arrived at reasonable conclusions” (OSC Bid Protest Determination SF-20150159, at p. 3). In light of these non-statutory standards, we will proceed to analyze the issues raised in this Appeal.

⁵ Article 11-B of the SFL applies to grant awards to not-for-profit organizations as part of a program plan developed by a State agency (*see* SFL § 179-q(1), (2), (6), (10)).

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, FREE challenges the grant award decision by OPWDD on the following grounds:

1. FREE's cover letter statement in response to RFA Section 8.32.2.6 was complete, thus FREE should not have lost a point for failing to include the words "providing a prudent amount";
2. OPWDD should not have deducted points from FREE's score in connection with OPWDD's inability to locate FREE's attachment to its proposal as FREE made no error in uploading the attachment with FREE's application submission;
3. The technical proposal evaluation was not conducted according to the rubric provided to the OPWDD evaluators;
4. OPWDD inaccurately scored FREE's technical proposal in the following instances:
 - a. OPWDD did not identify specific weaknesses in FREE's responses to the Vision and Goal, Proposed Staff, Linkages and Outreach, and Treatment Plan criteria, therefore FREE may have lost points in these criteria incorrectly; and
 - b. FREE's proposal included descriptions of cost estimates as well as fencing around the exit of the property in the Property Use and Property Renovation criteria, so these criteria should have been scored higher.
5. OPWDD's summary of FREE's interview responses does not accurately reflect FREE's answers and the details FREE provided during the interview; therefore OPWDD did not accurately score FREE's responses.

OPWDD Response to the Appeal

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

1. The RFA set forth the cover letter requirements, including the use of specific language regarding insurance coverage. Even if OPWDD had not deducted a point for this cover letter error, FREE would have ranked the same;
2. No points were deducted as a result of OPWDD's clarification request relating to FREE's attachment;
3. To the extent that FREE alleges that OPWDD is required to share evaluation documents with FREE, OPWDD is not required to share evaluation documents with FREE before contract approval;
4. OPWDD provided FREE with details in the debriefing summary regarding specific information that was not included in FREE's technical proposal for Vision and Goal, Proposed Staff, Linkages and Outreach, and Treatment Plan criteria, and had such information been included FREE would have received a higher score for those criteria;
5. FREE's technical proposal lacked certain details for Property Use and Property Renovation criteria that, had they been included, would have earned them a higher score for those criteria; and,

6. With respect to OPWDD’s summary of FREE’s interview responses, while there were strengths in FREE’s staffing plan there were also weaknesses and, had FREE provided more detail, it would have received a higher score.

DISCUSSION

Technical Evaluation Methodology

FREE contends that the “technical proposal evaluation provided [by OPWDD] does not include the scoring as indicated in the rubric” (Appeal, at p. 1). OPWDD responds that, “[t]o the extent that [FREE is alleging] that OPWDD should have shared evaluation documents with FREE...OPWDD is not required to share [those] documents with FREE before contract approval” (Answer, at p. 1).

While not entirely clear, we believe FREE is alleging OPWDD’s technical proposal evaluation is inconsistent with the scoring rubric developed by OPWDD. As further described below, our review of the procurement record shows that OPWDD’s technical proposal evaluation is inconsistent with its scoring rubric; therefore, the scoring system is not clear.

The RFA set forth the number of available points for the technical proposal as well as the categories of criteria to be evaluated (RFA, Section 7.3, at p. 33). OPWDD further crafted an Evaluation Plan prior to the receipt of applications that was provided to evaluators, setting forth the number of points available for each category of criteria within the technical proposal: philosophy and mission (4 points); vision and goal (4 points); proposed staff (4 points); experience (6 points); description of services (30 points)⁶; technology (4 points); development plan for services (4 points); property for resource center use (10 points); and diversity practices (4 points, rounded to the nearest whole number). The Evaluation Plan also included a scoring rubric to be used by evaluators to rate the technical criteria:⁷

Rating	Description	Value
Unsatisfactory/ No Response	The Applicant is not capable of completing the services required or information demonstrating this ability is not included in the application.	0
Minimal – barely meets requirements	The Applicant demonstrates minimal ability to complete the services required and minimal ability to meet the needs of OPWDD.	1
Adequate – meets minimum requirements	The Applicant’s ability to complete the services required and to meet the needs of OPWDD is adequate.	2
Very Good	The Applicant’s ability to complete the services required and to meet the needs of OPWDD is very good. Detailed, articulate, sound understanding of requirements with some Strengths.	3
Outstanding	The Applicant’s ability to complete the services required and to meet the needs of OPWDD is outstanding. Demonstrates exceptional understanding, capabilities and strengths.	4

⁶ According to the technical evaluation score sheets, these 30 points were further broken down into 12 questions, worth 3, 2, 3, 3, 2, 3, 3, 3, 1, 3, 1, and 3 points, respectively.

⁷ OPWDD provided the rubric to FREE in the debriefing summary.

Since the rubric values only spanned from 0-4 and the points available for the technical criteria ranged from 0-6, OPWDD needed to convert the rubric values into point scores for each technical criterion. The method for conversion is not included in the RFA or Evaluation Plan. Notably, the procurement record does not contain the raw, pre-converted scores of the evaluators, but only the post-conversion scores.⁸ The procurement record shows that a conversion chart was created and provided to the evaluators on January 19, 2022 (after receipt of proposals). However, our review of evaluators' score sheets revealed conflicting comments describing how evaluators converted values from the rubric to final scores.

In addition to the obvious inconsistencies in conversion formulas found in the procurement record, the scores themselves show that the conversion chart could not possibly have been used in certain instances. Specifically, one evaluator awarded 4 points to a vendor for a technical criterion that was worth up to 6 points; however, according to the conversion chart, 4 points are not available for a 6-point question. Likewise, another evaluator awarded 2 points to a vendor for a technical criterion worth up to 5 points, which, according to the conversion chart, was not possible.

Based on the above, it is clear the technical proposals were not scored consistently among evaluators in accordance with the RFA, the Evaluation Plan and scoring rubric. Furthermore, although it is unlikely the conversion chart was crafted prior to the receipt of applications, evaluators still did not uniformly follow that formula to convert raw scores to final scores. As a result, we cannot conclude that the technical evaluation methodology was fair and balanced. Accordingly, OPWDD's award to YAI cannot stand. Therefore, while it is not necessary to address the other grounds raised in the Appeal, we offer the following guidance on those issues.

Application Component Scoring

FREE claims OPWDD failed to score certain components of its application appropriately as described below.

1. Cover Letter

With respect to penalty points deducted for cover letter deficiencies, FREE makes two allegations.⁹

First, FREE alleges that its cover letter statement in response to RFA Section 8.32.2.6 was complete, thus FREE should not have lost a point (Appeal, at p. 1). OPWDD responds that "the RFA described the cover letter requirements for bidders in section 6.6, including the specific

⁸ OPWDD confirmed that they did not retain raw scores for this procurement. Thus, there is no opportunity to convert raw scores in accordance with the conversion chart to determine if such conversion would have altered the outcome.

⁹ The procurement record shows that OPWDD deducted four points total as penalty points for cover letter deficiencies pursuant to RFA Section 7.2.2. The procurement record identifies four areas of the cover letter that OPWDD deemed deficient, including the two areas referenced in FREE's two allegations. However, the procurement record fails to specify exactly how many points were deducted for each identified deficiency. The RFA indicates up to two points may be deducted for each cover letter deficiency (RFA Section 7.2.2, at p. 33). For purposes of this Determination, we will assume one point was deducted for each of the four identified deficiencies, making up the total four points.

requirements in section 6.6.1” and, even if OPWDD had not deducted a point for this deficiency, FREE would have ranked the same overall (Answer, at p. 1). The RFA required the cover letter to include a two-part attestation regarding insurance coverage: (1) “Warrant the Applicant is willing and able to obtain an errors and omissions insurance policy providing a prudent amount of coverage for the willful or negligent acts, or omissions of any officers, employees or agents thereof” **and** (2) “provide proof of Workers Compensation and Disability Insurance and a Certificate of Insurance in accordance with Section 8.32.2.6” (RFA Section 6.6.1, at p. 24 (emphasis added)). In its cover letter, FREE only attested that it “is willing and able to obtain an errors and omissions insurance policy in accordance with Section 8.32.2.6 of this RFA.” The RFA was clear that if the prescribed format of the cover letter was not followed or if it was incomplete in any material respect, points would be deducted (RFA, Section 7.2.2, at p. 33). Therefore, OPWDD appropriately deducted a point for FREE’s failure to include this attestation requirement in its cover letter.

Second, FREE asserts OPWDD should not have deducted points resulting from OPWDD’s failure to locate an attachment referenced in FREE’s proposal as FREE made no error when it uploaded the attachment with its application submission (Appeal, at p. 1). OPWDD responds that “no points were deducted as a result of FREE’s clarification request” (Answer, at p. 1). The procurement record shows that a request for clarification involving “the attachment referenced in FREE’s application submission” was one of the cover letter deficiencies for which points were deducted.¹⁰ Although the procurement record is inconsistent with OPWDD’s assertion, based on the above determination that OPWDD did not score proposals consistent with the RFA, we do not need to further consider whether OPWDD’s point deduction in this instance was improper and, in any event, the deduction of one point would not have affected FREE’s overall ranking.

2. Technical Proposal and Interview

Lastly, FREE makes several allegations that OPWDD scored its technical proposal inaccurately: (1) “FREE’s response to the Vision and Goal, Proposed Staff, Linkages and Outreach, and Treatment Plan were complete and thorough. In multiple sections ‘weaknesses’ was listed but there was no mention as to what those weaknesses were, therefore additional points may have been lost incorrectly”; and (2) “For the Property Use, as well as Property Renovation, the answer did include description of cost estimates as well as fencing around the exit of the property” (Appeal, at pp. 1-2). FREE also claims OPWDD’s summary of “the questions and responses during the interview do not accurately reflect the answers and details” FREE provided in the actual interview (Appeal, at p. 2).

With respect to FREE’s technical proposal, OPWDD responds that had FREE provided more details and specifics in its proposal, FREE would have received a higher score (*see* Answer, at p. 2). With respect to the scoring of FREE’s interview responses, OPWDD stated, as an example, “while there were strengths in the staffing plan, such as highly qualified leadership, there were also weaknesses, such as the lack of clarity regarding the number of staff that would need to be hired to achieve a full staffing pattern” and similarly claimed that if FREE had provided more detail in its interview responses, it would have received a higher score (Answer, at p. 2).

¹⁰ *See supra* at fn. 7.

With respect to the specific scores assigned by the evaluators, this Office generally defers to agency determinations where they are properly within the agency's expertise and supported by the procurement record. Accordingly, this Office "will generally not disturb a rationally reached determination" of an evaluator unless "scoring is clearly and demonstratively unreasonable" (OSC Bid Protest Determination SF-20160188, at p. 8 (upholding technical scores where "review of the procurement record confirms the evaluators scored the proposals in a manner consistent with the evaluation/scoring instructions"); *see also* OSC Bid Protest Determination SF-20200069, at p. 6; OSC Bid Protest Determination SF-20210006, at p. 6).

However, as we concluded above, the procurement record shows that the evaluators did not score technical proposals/interviews consistently among themselves using a pre-established scoring methodology and, as a result, we are unable to conclude FREE's scores are supported by the procurement record.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are of sufficient merit to overturn the grant award by OPWDD to YAI. As a result, the Appeal is upheld and we will not be approving the grant award for Region 3 CSIDD to YAI.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Conduent State & Local Solutions, Inc. with respect to the procurement of Automated Work Zone Speed Enforcement Services conducted by the New York State Department of Transportation for the New York State Department of Transportation and the New York State Thruway Authority.

**Determination
of Appeal**

SF-20220068

August 4, 2022

Contract Numbers – DOT C038040 and Thruway C010674

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Transportation (NYSDOT) for automated work zone speed enforcement services for NYSDOT and the New York State Thruway Authority (NYSTA). We have determined the grounds advanced by Conduent State & Local Solutions, Inc. (Conduent) are insufficient to merit overturning the contract awards made by NYSDOT and NYSTA¹ and, therefore, we deny the Appeal. As a result, we are today approving the NYSDOT and NYSTA contracts with American Traffic Solutions, Inc. d/b/a Verra Mobility (Verra Mobility) for automated work zone speed enforcement services.

BACKGROUND

Facts

NYSDOT issued a request for proposals (RFP) seeking proposals for a vendor to “offer all-inclusive turnkey automated photo speed enforcement services in active work zones” for NYSDOT and NYSTA (RFP, Section 1.1, at p. 1). Proposals were due no later than March 4, 2022 (*see* RFP Modification # 6, at p. 1). The RFP provided that proposals would be evaluated using best value pursuant to State Finance Law (SFL) § 163 and that “two separate contracts (one from NYSDOT and one from NYSTA)” would be awarded “to the same [responsive and responsible contractor] for the same services” (*see* RFP, Section 3.2, at p. 5).

Responsive proposals were scored on a 115-point scoring system, with the written technical proposal worth a maximum of 75 points, the field demonstration and interview portion of the technical proposal worth a maximum of 10 points, and the cost proposal worth a maximum of 30 points (*see* RFP, Sections 6.2 and 6.3, at pp. 20-21). Technical proposals were reviewed by an evaluation committee consisting of technical, program, and management personnel from both NYSDOT and NYSTA (*see* RFP, Section 6.1, at p. 19). The RFP set forth detailed criteria for evaluators to use in scoring the written technical proposals (*see* RFP, Section

¹ Although the Appeal does not explicitly challenge the NYSTA award, since the above-referenced procurement resulted in both the NYSDOT and NYSTA awards, this determination will consider and apply equally to both.

6.2, at p. 20). Following the technical and cost scoring, a “shortlist” of offerors (those who “submit[ed] a proposal with an initial average weighted best value score within 10 points of the top initial average weighted best value ranked [p]roposal”) would be required to provide a field demonstration and sit for an interview with the evaluation committee (*see* RFP, Sections 6.4 and 6.5, at pp. 21-22). Field demonstrations and interviews would be scored by the evaluation committee according to criteria set forth in the RFP (*see* RFP, Section 6.5, at p. 22). The RFP provided for the contract award to be made to the offeror with the highest final best value score ((average weighted written technical proposal score + average weighted field demonstration and interview score) + cost proposal score) (*see* RFP, Section 6.9, at p. 23).

Two offerors submitted responsive proposals by the deadline, Conduent and Verra Mobility. Both offerors were also “shortlisted” such that they provided a field demonstration and were interviewed. NYSDOT and NYSTA awarded the contracts to Verra Mobility, the offeror receiving the highest final best value score.

Following notice of award on April 8, 2022, NYSDOT and Verra Mobility executed a contract for automated work zone speed enforcement services on May 18, 2022. Likewise, NYSTA and Verra Mobility executed a contract on June 29, 2022.

Following notice of non-award on April 8, 2022, Conduent requested a debriefing which was held on April 12, 2022. Conduent submitted a protest to NYSDOT on April 22, 2022 which NYSDOT denied on May 16, 2022. Conduent submitted an appeal to NYSDOT on May 23, 2022 which NYSDOT denied on May 25, 2022. Conduent submitted an appeal to this Office on June 9, 2022 (Appeal). NYSDOT filed an answer to the Appeal on June 20, 2022 (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 this contract approval responsibility, 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.² 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 the OSC Protest Procedure.

In the determination of the Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by NYSDOT with the NYSDOT / Verra Mobility contract;

² 2 NYCRR Part 24.

2. the documentation contained in the procurement record forwarded to this Office by NYSTA with the NYSTA / Verra Mobility contract;
3. the correspondence between this Office and NYSDOT arising out of our review of the proposed NYSDOT / Verra Mobility contract;
4. the correspondence between this Office and NYSTA arising out of our review of the proposed NYSTA / Verra Mobility contract; and,
5. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Conduent's protest to NYSDOT, dated April 22, 2022;
 - b. NYSDOT's protest determination, dated May 16, 2022 (NYSDOT Protest Determination);
 - c. Conduent's appeal to NYSDOT, dated May 23, 2022;
 - d. NYSDOT's appeal determination, dated May 25, 2022;
 - e. Conduent's Appeal, dated June 9, 2022 (Appeal); and,
 - f. NYSDOT's Answer, dated June 20, 2022 (Answer).

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, Conduent challenges the procurement conducted by NYSDOT on the following grounds:

1. NYSDOT failed to score Conduent's written technical proposal in accordance with the RFP's evaluation criteria³; and,
2. The debriefing provided to Conduent by NYSDOT was insufficient as a matter of State law and procurement policy.

NYSDOT Response to the Appeal

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

1. NYSDOT scored Conduent's proposal in accordance with the RFP; and,
2. The debriefing that NYSDOT provided to Conduent entirely satisfied the requirements of SFL § 163, and, even if it were deemed inadequate, that is not a basis to disapprove a contract award.

³ In the Appeal, Conduent initially focuses on the Firm Experience category of the technical proposal. Later in the Appeal, Conduent more broadly challenges the entire scoring methodology of the written technical proposal. Accordingly, this Determination will generally address the broader grounds of whether the scoring of the written technical proposal, as a whole, comports with the RFP and is supported by the procurement record.

DISCUSSION

Evaluation and Scoring of Conduent's Written Technical Proposal

Conduent contends that the NYSDOT and NYSTA evaluation committee's "*entire* evaluation of Conduent's [written technical proposal] [was] arbitrary and inconsistent with the RFP requirements" (Appeal, at p. 22, fn. 11). NYSDOT replies that the "RFP clearly identified all factors to be considered as part of this best value procurement, and the [] evaluation process conformed with the RFP's criteria" (Answer, at p. 5).

The RFP provided for the award of the NYSDOT and NYSTA contracts on the basis of best value which "optimizes quality, cost and efficiency, among responsive and responsible offerers" and "[s]uch basis shall reflect, wherever possible, objective and quantifiable analysis" (SFL § 163(1)(j)). A "best value" determination shall "be based on clearly articulated procedures which require . . . a balanced and fair method, established in advance of the receipt of offers, for evaluating offers and awarding contracts" (SFL § 163(2)(b)). Further, SFL § 163(7) provides "[w]here the basis for award is the best value offer, the state agency shall document, in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria, which whenever possible, shall be quantifiable, and the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted."

The RFP set forth specific criteria required to be addressed in the written technical proposal and the maximum number of points assigned to each evaluation criterion (*see* RFP, Section 6.2, at p. 20). An evaluation committee of eight individuals were provided with pre-established evaluation instruments with instructions that directed them how to evaluate and score proposals in accordance with the requirements of the RFP.

Our review of the procurement record confirms that NYSDOT and NYSTA evaluators used a pre-established evaluation instrument to score written technical proposals in accordance with the clearly articulated criteria set forth in the RFP. Thus, we are satisfied NYSDOT and NYSTA met the applicable legal requirements with respect to the evaluation of the written technical proposals.

Conduent further contends that "evaluators provided no rational basis to support why Conduent was not awarded the full number of points for certain criteria" because the evaluators did "not assign weaknesses to certain less-than-perfect Conduent scores if the score [was] at or above average for a particular evaluation criterion, thus rendering the affected scores arbitrary and unreasonable" (Appeal, at p. 2). NYSDOT asserts that "Conduent relies on the flawed assumption that it was not required to demonstrate strengths to earn award of the Contract . . . [and] confus[es] being responsive . . . with being perfect" (Answer, at p. 3). Specifically addressing Conduent's assertion that NYSDOT failed to support its less-than-perfect score of the Firm Experience criterion, NYSDOT maintains "evaluators considered the projects contained in Conduent's proposal, evaluated strengths and weaknesses, and scored the proposal in accordance with the RFP" (Answer, at p. 4).

Generally, this Office gives significant deference to a State agency in matters within that agency's expertise (*see* OSC Bid Protest Determination SF-20170192, at p. 7). It is incumbent upon the agency to assess its needs in relation to a particular program and develop an RFP and evaluation instrument that effectively meets those needs (*see* OSC Bid Protest Determination SF-201700297, at p. 6). This Office is unwilling to substitute its judgment for that of an agency in matters within an agency's realm of expertise where the agency scored technical proposals "according to the pre-established technical proposal evaluation tool" (*see* OSC Bid Protest Determination SF-20170192, at p. 7).

We have long recognized that evaluators bring their own subjective views to the evaluation process and may interpret information in proposals differently. However, this Office "will generally not disturb a rationally reached determination of a duly constituted evaluation committee" unless "scoring is clearly and demonstratively unreasonable" (OSC Bid Protest Determination SF-20160188, at p. 8 (upholding evaluation committee's technical scores where "review of the procurement record confirms the evaluators scored the proposals in a manner consistent with the evaluation/scoring instructions" and "[there were no] contradictions between an evaluator's written comments and the score assigned by such evaluator to [the technical] proposal."); *see also* OSC Bid Protest Determination SF-20200069, at p. 6).

As discussed above, evaluators scored Conduent's written technical proposal consistent with the RFP and evaluation instrument. Further, our review did not reveal any contradictions between an evaluator's written comments and the scores assigned by such evaluator to Conduent's written technical proposal. Thus, there is no basis to disturb the technical scores awarded by NYSDOT and NYSTA to Conduent's written technical proposal.

Sufficiency of Debriefing

Conduent contends that the debriefing provided by NYSDOT was insufficient as a matter of law and procurement policy because it (i) failed to provide Conduent's "relative ranking within each of the major evaluation categories," (ii) "failed to include the mandatory explanation of the qualitative and quantitative analysis underlying how and why [NYSDOT and NYSTA] evaluated and scored Conduent's proposal," and (iii) failed to provide the reasons "underlying [NYSDOT's and NYSTA's] designation of Verra Mobility as the tentative contract awardee," including the scores awarded to Verra Mobility (Appeal, at pp. 2, 13, 16). NYSDOT responds that the Appeal itself "illustrates that [NYSDOT's] RFP set forth the Contract's selection criteria, that [NYSDOT] clearly communicated how Conduent scored on each criterion, and that the debriefing explained how the evaluators applied the RFP criteria to Conduent's proposal to arrive at Conduent's evaluation scores" (Answer, at p. 2). NYSDOT further contends that "[SFL] 163 requires that an agency give the reasons for selecting the winning proposal only if the debriefing is conducted after final award" which NYSDOT interprets to occur after "a contract is executed and approved by [OSC]" and that it "was not required to provide Conduent with Verra Mobility's scores" (*Id.*). Lastly, NYSDOT offers that "even if OSC were to deem [NYSDOT's] debriefing to be inadequate, there is no basis . . . to disapprove of a contract award on that basis" (*Id.*, at p. 3).⁴

⁴ We note that this Office conducts a de novo review of the full procurement record and conducts its own analysis of the specific factual or legal allegations forming the basis on which a protesting party challenges a contract award.

SFL § 163(9)(c)(iv) sets forth the minimum information that must be provided in a debriefing: “(A) the reasons that the proposal, bid or offer submitted by the unsuccessful offerer was not selected for award; (B) the qualitative and quantitative analysis employed by the agency in assessing the relative merits of the proposals, bids or offers; (C) the application of the selection criteria to the unsuccessful offerer’s proposal; and (D) when the debriefing is held after the final award, the reasons for the selection of the winning proposal, bid or offer. The debriefing shall also provide, to the extent practicable, general advice and guidance to the unsuccessful offerer concerning potential ways that their future proposals, bids or offers could be more responsive.”

The procurement record submitted to this Office by NYSDOT contained a debriefing agenda, which was provided to Conduent in advance of/at the debriefing, that included the following topics: “best value” evaluation process, discussion of technical strengths and weaknesses of Conduent’s proposal, and competitiveness of Conduent’s cost proposal. The debriefing agenda also included a detailed breakdown of Conduent’s technical scores by criterion as well as its interview and cost scores. Based on our review of the procurement record, we conclude that the debriefing provided by NYSDOT was sufficient to satisfy SFL § 163(9)(c)(iv)(A), (B), and (C).

However, Conduent asserts that NYSDOT was required to provide Conduent’s relative technical and cost rankings, as well as the reasons why Verra Mobility’s proposal was selected for award, including technical and cost scores. Conduent claims that, as a result of its failure to provide such reasons, NYSDOT did not satisfy SFL § 163(9)(c)(iv)(D).

NYSDOT was not required to provide technical and cost rankings to Conduent during the debriefing. Rather, guidance on debriefings from the New York State Procurement Council recommends that agencies provide “information as to the relative ranking of [a] bidder’s bid/proposal in each of the major evaluation categories” (NYS Procurement Bulletin Debriefing Guidelines, effective January 30, 2019). Although information that an agency may provide, and that NYSDOT has admittedly provided in the past as its “typical practice,”⁵ relative ranking is not information legally required to be provided to an offeror during a debriefing under SFL § 163.

In its Answer, NYSDOT contends that since the reasons for selecting the winning proposal are only required to be provided during a debriefing that occurs “after final award,” it was appropriate to omit that information in this instance since OSC had not yet approved the NYSDOT / Verra Mobility contract at the time of Conduent’s debriefing (*see* Answer, at p. 2). However, in the context of SFL § 163 debriefings, “after final award” refers to the time period after the agency and selected offeror have executed the contract, but prior to OSC approval. Here, Conduent’s debriefing was held on April 12, 2022, over a month prior to the May 18, 2022 execution of the NYSDOT / Verra Mobility contract; thus the requirements of SFL § 163(9)(c)(iv)(D) were not triggered and NYSDOT was not required to disclose the reasons for selecting the winning proposal during the debriefing with Conduent. In any event, SFL § 163(9)(c)(iv) does not specifically require agencies to disclose the scores of any other offeror,

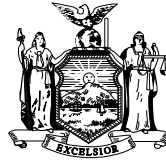
⁵ NYSDOT Protest Determination, at p. 2.

individual, consensus or otherwise, during a debriefing to explain why the winning proposal was selected (*see* OSC Bid Protest Determination SF-20200165, at p. 10; *see also* OSC Bid Protest Determination SF-20180264, at p. 8).

For the reasons set forth above, the debriefing provided by NYSDOT was sufficient to satisfy SFL § 163(9)(c)(iv).

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 by NYSDOT and NYSTA. As a result, the Appeal is denied and we are today approving the NYSDOT / Verra Mobility contract and the NYSTA / Verra Mobility contract for automated work zone speed enforcement services.



STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

September 20, 2022

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

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

Dear Susan Himmer:

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

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

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

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

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

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

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

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

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

Sincerely,

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

Brian Fuller
Director of Contracts

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

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by
Penn Power Group LLC (d/b/a Penn Power
Systems)
with respect to the procurement of
Stockpile Equipment Maintenance: Generators,
Trash Pumps, Light Towers, and Sandbaggers
conducted by the New York State Division of
Homeland Security and Emergency Services.

**Determination
of Bid Protest**

SF-20220112

December 2, 2022

Contract Number – C400018

The Office of the State Comptroller (Office or OSC) has reviewed the above-referenced procurement conducted by the New York State Division of Homeland Security and Emergency Services (DHSES) for stockpile equipment maintenance for generators, trash pumps, light towers, and sandbaggers. We have determined the grounds advanced by Penn Power Group LLC, d/b/a Penn Power Systems (Penn Power) are insufficient to merit overturning the contract award made by DHSES and, therefore, we deny the Protest. As a result, we are today approving the DHSES contract with Kinsley Group, Inc., d/b/a Kinsley Power Systems (Kinsley) for stockpile equipment maintenance.

BACKGROUND

Facts

DHSES provides leadership, coordination, and support to prevent, protect against, prepare for, respond to, recover from, and mitigate disasters and other emergencies across New York State. In support of this mission, DHSES issued an invitation for bids (IFB) on June 16, 2022, seeking bids from qualified bidders “to provide large generator (50 Kw and above), 6-inch trash (water) pump, light tower and sandbag maintenance to equipment housed for disaster relief in ten (10) disaster logistic stockpiles located throughout New York State” (IFB, Section 1, at p. 1). The IFB required the “selected contractor to provide adequate staff to maintain inventory at the ten (10) New York State locations” and “[s]ervices [as] required for Off-Site deployed assets at locations and times to be identified” (*Id.*).

DHSES specified “[t]he contract will be awarded to the responsible and responsive bidder who meets all mandatory contract requirements . . . and all [m]andatory [b]id [s]ubmission [r]equirements . . . at the lowest total bid amount” (IFB, Section 10, at p. 3).¹

Prospective bidders were given the opportunity to ask DHSES questions prior to submission of bids, and DHSES publicly posted responses (IFB, Section 6, at p. 3). DHSES received four bids prior to the IFB due date of July 14, 2022, including one each from Kinsley and Penn Power.

Following evaluation, DHSES determined that three out of the four bids were non-responsive to one or more mandatory contract requirements. Accordingly, DHSES awarded the contract to Kinsley, the only responsive bidder, and notified all bidders of award status on August 10, 2022. Penn Power requested a debriefing which was held via video conference on August 15, 2022. Subsequently, Penn Power submitted a Protest, dated August 16, 2022, to this Office (Protest). DHSES responded to the Protest on August 30, 2022 (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 this contract approval responsibility, OSC has promulgated the 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.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 the OSC Protest Procedure.

In the determination of the Protest, this Office considered:

¹ State Finance Law provides that, generally, contracts for services shall be awarded on the basis of “best value” to a responsive and responsible offeror (SFL § 163(4)(d)). In *Transactive Corporation v. State Department of Social Services*, 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 (236 A.D.2d 48, 53 (1997), *aff’d on other grnds*, 92 N.Y.2d 579 (1998)). 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* Section V(B)(11)). Applying the rationale in *Transactive Corporation* 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 and the solicitation sufficiently defined the qualitative requirements, so that there is little room for technical variances which will have any meaningful value to the procuring agency (*see, e.g.*, OSC Bid Protest Determination SF-20160139, at fn. 1). For this procurement, which is primarily for services, DHSES concluded that an award based on best value equated to lowest price and used an invitation for bids instead of a request for proposals, the typical method to procure services. Notwithstanding the fact that Penn Power did not raise this issue, based on our review of the procurement record, our Office is satisfied that DHSES’ award of this contract based on lowest price was appropriate.

² 2 NYCRR Part 24.

1. the documentation contained in the procurement record forwarded to this Office by DHSES with the proposed DHSES / Kinsley contract;
2. the correspondence between this Office and DHSES arising out of our review of the proposed DHSES / Kinsley contract; and,
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Penn Power's Protest, dated August 16, 2022; and,
 - b. DHSES' Answer, dated August 30, 2022.

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, Penn Power challenges the procurement conducted by DHSES on the following grounds:

1. Kinsley failed to meet the minimum requirements prescribed by the IFB, specifically maintaining regional operation centers in New York State, including the Capital District, Western New York and the Lower Hudson Valley; therefore, DHSES erred in finding Kinsley responsive and awarding the contract to Kinsley; and,
2. If any other bidder submitted a waiver of certified service-disabled veteran-owned business (SDVOB) participation goals, such waiver should be rejected. Penn Power is aware of one SDVOB who is available to perform work under the contract, and no bidders besides Penn Power contacted this SDVOB; so, no other bidder is able to provide the required documented evidence of good faith efforts to obtain SDVOB participation that would be required for a waiver.

DHSES Response to the Protest

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

1. DHSES properly concluded Kinsley met the requirements of the IFB; therefore, DHSES properly awarded the contract to Kinsley, the responsive bidder with the lowest bid; and,
2. Kinsley has not submitted a request for waiver of SDVOB participation goals, thus Penn Power's assertion is premature and without merit.

DISCUSSION

Responsiveness

Penn Power asserts Kinsley “does not appear [to] meet [] specific [IFB] requirements, based on the definition of a Regional Operational Center” (Protest, at p. 4) (emphasis omitted).³ Penn Power claims that “the definition of . . . a Regional Operational Center should be a legally owned or leased facility, which provides adequate tooling, support equipment, safety equipment meeting OSHA regulations, an adequate back-office support staff assigned to full time staffed positions whom are based and physically report to these Regi[o]nal Operation[al] Centers[,] such as service managers, service advisors, support staff, service technicians and parts person[nel] to support the contracted service attributes for that designated specific region in support of this IFB” (*Id.*) (emphasis omitted).⁴ To support its assertion, Penn Power contends that Kinsley’s business address in Tonawanda, New York “may appear to meet the requirement for a legal business address within the Western NY Region but would not meet the definition of a ‘Regional Operational Center’” (*Id.*) (emphasis omitted).

DHSES submits that they “properly evaluated Kinsley’s bid” and “concluded that Kinsley produced satisfactory proof of its business locations to satisfy the IFB’s requirements” (Answer, at p. 2). Moreover, DHSES notes that regional operation centers were “understood [by bidders] to be physical brick and mortar locations, in the requisite areas” (*Id.*).

SFL § 163(9)(b) provides that the “solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted.” A “responsive” offerer is an “offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency” (SFL § 163(1)(d)). The IFB required bidders to submit supporting documentation to prove how they met certain mandatory contract requirements in order to be determined responsive (*see* IFB, Sections 3, 10, and 11, at pp. 1-5). The mandatory requirement at issue here states “all bidders must submit supporting documentation providing . . . [p]roof of maintaining regional operation centers in New York State to include the Capital District, Western NY, and Lower Hudson Valley” (IFB, Section 3, at p. 1). While the IFB does not define “regional operation center,” the procurement record includes DHSES’ minutes of Penn Power’s debriefing in which DHSES states that a regional operation center, for purposes of the IFB, is a physical business location, a unit of the main office or headquarters offering the same/comparable services.

The procurement record shows that DHSES evaluated all bidders with respect to whether they met the requirement of maintaining regional operation centers in the designated locations using the same evaluation tool. Specifically, DHSES reviewed each bid to determine whether a bidder had a physical office location in each of the three specific geographic regions, which is consistent with DHSES’ description of a regional operation center as discussed above. The

³ The Protest is not paginated. For purposes of this Determination, this Office includes page numbers as they would have appeared, if included.

⁴ Penn Power makes this claim based on a definition of “regional operation center” crafted by Penn Power, and not found in the IFB (*see* fn. 5, *infra*).

procurement record shows that DHSES found Kinsley met this requirement. Furthermore, the photographs in the Protest showing Kinsley had a physical office location in Western New York do not contradict DHSES' determination.⁵ Thus, we have no basis to disturb DHSES' finding that Kinsley was responsive to the requirements of the IFB, as written.

Compliance with SDVOB Participation Requirement

Penn Power asserts “if there were [SDVOB] waivers filed [] by any bidder [for the IFB]” they should be “rejected” (Protest, at p. 13). Penn Power continues that other bidders would have been unable to provide the required “documented evidence that a good faith effort was made to solicit services from [an SDVOB]” because the SDVOB “Storm Power Solutions was not solicited by another [bidder] [besides] Penn Power” despite the fact that the owner of Storm Power Solutions “verbally announced to all bidders in attendance [at the mandatory pre-bid meeting] of his capabilities to execute the services in part as a certified SDVOB subcontractor” (*Id.*).

DHSES counters that “[a]s a waiver for the utilization of an SDVOB has not been submitted at this time, [Penn Power’s] request is premature” (Answer, at p. 2). DHSES further asserts that “the anecdotal information provided by [Penn Power] regarding its interactions with a subcontractor is irrelevant” (*Id.*, at p. 3).

Article 17-B of the Executive Law sets aspirational goals for State contracts made directly or indirectly to certified SDVOBs (Executive Law § 369-j(1); 9 NYCRR § 252.2). “Where practical, feasible and appropriate, State agencies shall seek to achieve a six percent goal on all State contracts for [SDVOBs]. Where achieving the goal is not practical, feasible or appropriate, State agencies shall seek a waiver . . .” (9 NYCRR § 252.2(h)(1)). Here, the IFB required bidders to “submit a completed SDVOB Utilization Plan” or, if applicable, an application for waiver of SDVOB goals (*see* IFB, Section 11, at p. 5; *see also* IFB, Attachment A, at p. 23). Additionally, the IFB indicated “DHSES may disqualify a Bidder’s bid or proposal as being non-responsive . . . [i]f a Bidder fails to submit an SDVOB utilization Plan . . . [or] a request for a waiver” (IFB, Attachment A, at p. 23).

DHSES reviewed Kinsley’s bid and determined it contained the necessary documentation, as required by the IFB, with respect to the SDVOB participation requirement; specifically, Kinsley submitted an SDVOB utilization plan. The procurement record shows that Kinsley did not submit a request for waiver of SDVOB participation goals. Our independent review of the procurement record confirms Kinsley submitted an SDVOB utilization plan demonstrating how Kinsley intended to meet the 6% SDVOB participation goal, as required by the IFB and therefore, there is no merit to Penn Power’s speculative assertions.

⁵ To interpret the IFB, bidders must look to what is contained within its four corners, and not any subjective assumptions. To the extent that a prospective bidder was uncertain about the meaning of an IFB requirement, several opportunities were provided to ask DHSES questions prior to the bid due date, both at the pre-bid conference and during the formal question and answer period.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the contract award by DHSES. As a result, the Protest is denied, and we are today approving the DHSES / Kinsley contract for stockpile equipment maintenance for generators, trash pumps, light towers, and sandbaggers.