Procurement Stewardship Act Report

BID Protest Determinations between April 1, 2023 through March 31, 2024

File Number	Date of Decision	Protestor	Contracting Entity	Decision
SF20220129	05/02/2023	Bolla Oil Corp.	Department of Transportation	Denied
SF20230018	05/16/2023	Access: Supports for Living, Inc.	Office For People with Developmental Disabilities	Denied
SF20220093	05/30/2023	ModivCare Solutions, LLC	Department of Health	Denied
SF20220167	06/09/2023	GCOM Software LLC	Department of Health	Denied
SF20230051	06/20/2023	Catholic Charities Community Services	Department of Health	Denied
SF20230062	06/20/2023	Iris House: A Center for Women Living with HIV	Department of Health	Denied
SF20220175	06/30/2023	Village of Southampton	Department of Environmental Conservation	Denied
SF20230048	07/18/2023	American Food & Vending Corp.	SUNY at Binghamton	Moot
SF20220121	09/13/2023	Conduent State & Local Solutions, Inc.	Office of Temporary & Disability Assistance	Denied
SF20230075	09/21/2023	H2M Architects, Engineers, Land Surveying and Landscape Architecture, D.P.C.	Public Service Commission	Denied
SF20230096	11/03/2023	PTC Properties LLC	Office For People with Developmental Disabilities	Denied
SF20230103	01/04/2024	Public Consulting Group LLC	Department of Health	Moot
SF20230155	01/16/2024	Kapsch TrafficCom USA, Inc.	Department of Transportation	Denied
SF20230156	03/15/2024	Health Management Systems, Inc.	Office of the Medicaid Inspector General	Upheld

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by ModivCare Solutions, LLC with respect to the procurement of Non-Emergency Medical Transportation Brokerage Services conducted by the New York State Department of Health.

Determination of Bid Protest

SF–20220093

Contract Numbers – C037557 & C037558

May 30, 2023

The Office of the State Comptroller has reviewed a bid protest (Protest) filed by ModivCare Solutions, LLC (ModivCare) related to the above-referenced procurement conducted by the New York State Department of Health (DOH) for non-emergency medical transportation (NEMT) brokerage services for Upstate and Downstate New York. We have determined the grounds advanced by ModivCare are insufficient to merit overturning the contract awards made by DOH and, therefore, we deny the Protest. As a result, we are today approving the DOH contracts with Medical Answering Services LLC (MAS) for NEMT brokerage services for Upstate and Downstate New York.

BACKGROUND

Facts

DOH is responsible for ensuring the availability of NEMT for Medicaid enrollees in the State of New York (State) (Request for Proposals No. 17965R (RFP), Section 2.1, at p. 4). Social Services Law (SSL) § 365-h(4)(b), enacted as part of the State Fiscal Year 2020-21 budget, authorized DOH, following a competitive bidding process, "to contract with one or more transportation management brokers to manage [NEMT] transportation on a statewide or regional basis" (SSL § 365-h(4)(b); RFP, Section 2.1, at p. 5).

Accordingly, DOH issued the RFP on August 2, 2021, seeking "competitive proposals from qualified bidders to enter into a contract to provide [NEMT] brokerage management services for persons enrolled in the Medicaid program . . ." (RFP, Section 2.0, at p. 3). The RFP indicated that contracts would be awarded on a "regional basis," with DOH awarding "one contract for each of the two regions . . . or [ ] one contract for both regions" (RFP, Section 2.0, at p. 3). The two regions were Upstate[1] and Downstate[2] (RFP, Section 2.0, at p. 3). The RFP provided that NEMT broker(s) selected for contract award would be reimbursed under the contract(s) "in two ways: (1) an administrative fee on a per member per month ('PMPM') basis for each NY Medicaid enrollee that is eligible to have their [NEMT] services managed by the Contractor; and (2) a risk-sharing arrangement, by which the Contractor may be held responsible

[1] All State counties not specifically included within the "Downstate" region.
[2] New York, Kings, Queens, Bronx, Richmond, Nassau, Suffolk, Putnam, and Westchester counties.

financially depending on how the Contractor performs against a target budget for the [NEMT] services being managed by the Contractor" (RFP, Section 2.0, at p. 3).

The RFP provided that proposals would be evaluated on the basis of best value, with the technical proposal worth 70% and the cost proposal worth 30% of a proposal's total score (RFP, Section 8.1, at pp. 65-66). The RFP provided that a Technical Evaluation Committee would score technical proposals, and individual scores would be averaged to produce a raw score for each particular criterion. The raw scores for the criteria would be added together for a total raw technical score. The technical proposal with the highest raw score would receive a technical score of 70 points and the other technical proposals would receive a proportionate score according to the formula established in the RFP (RFP, Section 8.3, at pp. 66-67). The RFP provided that "[t]he Cost Proposals will be opened and reviewed for responsiveness to cost requirements including a review for actuarial soundness by [DOH's] independent actuary"[3] and "[i]f a cost proposal is found to be non-responsive, that proposal may not receive a cost score and may be eliminated from consideration" (RFP, Section 8.4, at p. 67). The RFP provided that a Cost Evaluation Committee would score cost proposals "based on a maximum cost score of 30 points" which would be "allocated to the proposal with the [lowest] Final Bid PMPM" with all other responsive cost proposals receiving a proportionate score based on their relation to the lowest Final Bid PMPM pursuant to the formula established in the RFP (*Id.*). Pursuant to the RFP, DOH would calculate a "Composite Score . . . for each region . . . by adding the bidders Technical Proposal and Cost Proposal Score for the region" (RFP, Section 8.5, at p. 67). The RFP provided that award would be made to the responsive and responsible offeror who had the highest composite score (RFP, Section 8.1, at p. 65; RFP, Section 8.7, at pp. 67-68).

DOH received four proposals in response to the RFP, three of which (including ModivCare) sought award for both regions and one of which sought award for the Upstate region only. Following evaluation and scoring of proposals, MAS was determined by DOH to be the responsive and responsible offeror with the highest composite score for both the Upstate and Downstate regions and was awarded contracts for both regions.

DOH provided ModivCare a debriefing on July 11, 2022. On July 18, 2022, ModivCare filed a protest with this Office (Protest). DOH filed a response to the Protest dated January 20, 2023, which was provided to all parties on March 14, 2023 (Answer). ModivCare replied to the Answer on March 16, 2023 (Reply). Finally, DOH filed a response, dated April 11, 2023, to the Reply (Response to Reply).[4]

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[3] DOH's independent actuary, Deloitte Consulting LLP (Deloitte), conducted the actuarial analysis of all cost proposals and produced an actuarial memorandum detailing the results on November 3, 2022. Although, as ModivCare alleges and DOH concedes, the actuarial analysis was done after all scoring was completed, DOH did not find any offeror non-responsive based on the actuarial analysis. Therefore, when the actuarial analysis occurred does not have any substantive bearing on this determination.

[4] At this Office's request, DOH addressed the new allegations contained in the Reply (*see* 2 NYCRR § 24.4(j)).

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.[5] 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. documentation contained in the procurement record forwarded to this Office by DOH with the DOH / MAS contracts;

2. correspondence between this Office and DOH arising out of our review of the proposed DOH / MAS contracts; and

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

    a. Protest;
    b. Answer;
    c. Reply; and,
    d. Response to Reply.

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, ModivCare challenges the procurement conducted by DOH on the following grounds:

1. DOH failed to obtain required prior federal approval for the proposed change from its previous NEMT management model to the NEMT broker model;
2. DOH failed to comply with federal requirements requiring capitated payments under the Medicaid program to be actuarially sound;
3. The contract awards to MAS do not achieve best value because the rates proposed by MAS are not actuarially sound and thus do not represent actual cost to the State;
4. DOH's scoring of ModivCare's technical proposals for Upstate and Downstate was arbitrary and capricious because:

[5] 2 NYCRR Part 24.

   a. DOH used unqualified evaluators that were unfamiliar with the NEMT benefit; and,
   b. Evaluators' comments on ModivCare's technical proposals were inconsistent with the content of the actual proposals, including one evaluator in particular who assigned low scores as retaliation for failing to accommodate the evaluator's disability; and,
5. MAS is not a responsible vendor as it lacks the financial and organizational capacity to perform the award due to lack of experience providing NEMT brokerage services and its proposed rates being actuarially unsound.

DOH Response to the Protest

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

1. DOH complied with applicable federal notice requirements for its change to the NEMT broker model;
2. Capitation rates for NEMT are not required to be actuarially sound;
3. DOH determined that MAS provided the best value proposal in accordance with the requirements of SFL, which does not require rates to be actuarially sound;
4. DOH evaluators possessed appropriate knowledge and experience in the area of NEMT services;
5. All DOH evaluators scored technical proposals consistent with the technical evaluation tool and the content of ModivCare's proposal; and,
6. MAS has met all the elements of a responsible offeror in accordance with SFL, including being financially capable and exceeding performance expectations in its previous contracts with DOH.

ModivCare's Reply to the Answer

In its Reply, ModivCare challenges the procurement on the following additional grounds:

1. MAS is not a responsible vendor, for the following reasons:
   a. A lobbyist on behalf of MAS engaged in impermissible contacts during the restricted period for the procurement in violation of SFL;
   b. A 2022 federal Office of Inspector General report demonstrates MAS is not a responsible vendor based on its previous failure to properly administer State NEMT benefits; and,
   c. There is an open Commission on Ethics and Lobbying in Government investigation into various "pay to play" schemes coordinated by MAS to influence the outcome of the procurement by providing large donations to Governor Hochul.

DOH's Response to ModivCare's Reply

In its Response to the Reply, DOH contends that:

1. DOH did not engage in impermissible contacts with the lobbyists identified by ModivCare, the Executive Chamber, or the Legislature regarding this procurement;
2. DOH disputes findings in the 2022 OIG report and does not believe it warrants a finding of non-responsibility for MAS; and,
3. DOH has not been contacted by the Commission on Ethics and Lobbying in Government to discuss any pending investigation. Moreover, DOH states that the Executive Chamber was not involved in the selection process for this procurement.

DISCUSSION

Federal Approval

ModivCare alleges that DOH "has not received prior approval required from the Centers for Medicare and Medicaid Services ('CMS') for its changes to NEMT management" because it "fail[ed] to submit a public notice and [State Plan Amendment (SPA)] [for] the NEMT broker system" (Protest, at pp. 3, 9, 27-29). ModivCare alleges that, as such, DOH "fails to comply with both 42 CFR 447.220[6] and 42 CFR 440.170" and "places federal financial participation for these payments at risk" (*Id.*).

DOH asserts that it is "following the normal process for SPA [ ] approval by CMS, which does not require prior approval of the SPA, just prior notice" and, accordingly, DOH "issued a Federal Public Notice (FPN) in the NYS Register in 2020 [ ] prior to the effective date of the SPA in accordance with federal requirements in 42 C.F.R. § 447.205" (Answer, at p. 17). DOH further asserts that it "intends to submit a[n] SPA in accordance with all applicable CMS requirements (Please see Exhibits 5 and 6)[7] before the end of the quarter in which the change established in the [SPA] is effective [which is] standard practice and timing for CMS SPA approval" (*Id.*).

As an initial matter, DOH is authorized to establish an NEMT brokerage program under 42 CFR § 440.170(a)(4) which provides,

> a State plan may provide for the establishment of a non-emergency medical transportation brokerage program in order to more cost-effectively provide non-emergency medical transportation services for individuals eligible for medical assistance under the State plan who need access to medical care or services, and have no other means of transportation.

[6] 42 CFR § 447.220 does not exist.
[7] Exhibit 5 is a copy of 42 CFR § 447.256; Exhibit 6 is a copy of 42 CFR § 430.20 (This section pertains to effective dates of State plans and plan amendments. For plan amendments that change the State's payment method and standards, such as the change to the NEMT broker model at issue here, 42 CFR § 447.256 applies).

To effectuate an SPA to include an NEMT brokerage program, DOH must (1) satisfy the notice requirements of 42 CFR § 447.205 and (2) obtain CMS approval in accordance with the applicable requirements of 42 CFR § 447.256.

DOH is required to "provide public notice of any significant proposed change in its methods and standards for setting payment rates for services" 42 CFR § 447.205(a). Such notice "must [[ ] [b]e published before the proposed effective date of the change" and "[a]ppear as a public announcement in one of the following publications [which include] [a] State register similar to the Federal Register" (42 CFR § 447.205(d)). DOH published notice of its planned transition "to a single Medicaid Transportation Broker" in the April 1, 2020, issue of the New York State Register (*see* Answer, Exhibit 4). Therefore, DOH has complied with this notice requirement.

DOH is also required to obtain CMS approval for "State plan and plan amendment changes in payment methods and standards" for which "CMS bases its approval on the acceptability of the Medicaid agency's assurances that the requirements of § 447.253 have been met, and the State's compliance with the other requirements of this subpart" (42 CFR § 447.256(a)(2)). Federal regulations contemplate a retroactive effective date, as follows: "A State plan amendment that is approved will become effective not earlier than the first day of the calendar quarter in which an approvable amendment is submitted" (42 CFR § 447.256(b)). DOH has advised that it intends to submit the SPA to CMS for approval after its contracts with MAS for NEMT brokerage services for Upstate and Downstate New York have been approved by this Office. This is allowable and consistent with the past practice of DOH in submitting SPAs relating to the NEMT program to CMS for approval subsequent to the desired effective date.[8] Based on applicable law and past practice, we find ModivCare's assertion that CMS approval of the SPA to incorporate the NEMT broker model is a precondition to DOH's issuing the RFP or awarding these contracts unavailing.

Actuarial Soundness

ModivCare alleges that "[u]nder 42 CFR § 438.4, capitated payments under the Medicaid program must be actuarially sound" and DOH did not comply because the RFP "failed to require brokers to propose actuarially sound rates" which was "fatal to the RFP" (Protest, at pp. 3, 8, 30-31). DOH contends that "Modivcare misinterprets the applicability of [42 CFR § 438.4] which is limited to capitation rates established for Medicaid managed care plans . . . [t]here is no legal requirement for NEMT capitation rates to be actuarially sound" (Answer, at p. 15).

[8] *See* SPA # 15-52, *available at* https://www.health.ny.gov/regulations/state_plans/status/non-inst/ (submitted to CMS on September 15, 2015 with a proposed effective date of July 1, 2015, and approved by CMS on November 30, 2015 with the July 1, 2015 effective date); *see also* SPA # 13-23 *available at* https://www.health.ny.gov/regulations/state_plans/status/non-inst/ (submitted to CMS on September 30, 2013 with a proposed effective date of July 1, 2013, and approved by CMS on December 4, 2013 with the July 1, 2013 effective date).

As an initial matter, we address whether offerors were required to propose actuarially sound rates and, accordingly, whether DOH was obligated to include that requirement in the RFP. 42 CFR § 438.4(b) provides, "Capitation rates for [managed care organizations], [prepaid inpatient health plans], and [prepaid ambulatory health plans] must be reviewed and approved by CMS as actuarially sound." Unlike the aforementioned health plans requiring actuarially sound rates, NEMT brokerage services are a benefit available to Medicaid enrollees and thus this requirement does not apply. Accordingly, there is no merit to this basis for protest.

Notwithstanding the foregoing, DOH did, in fact, conduct an actuarial analysis of the cost proposals submitted by all offerors as part of its responsiveness review (*see* RFP, Section 8.4, at p. 67). DOH states that "[Deloitte] provided to DOH an Actuarial Memorandum documenting its approach to and observations across all bidders, with a particular focus on the reasonableness of the cost proposal submitted by the awarded vendor in each region . . . [and] confirms not only the responsiveness of all bids, but also the reasonableness of each bidders' Cost Proposals, and most importantly, MAS' Cost Proposals" (Answer, at pp. 9, 16). These contentions by DOH are supported by the procurement record, which includes the Actuarial Memorandum.[9]

Best Value Determination

ModivCare alleges "the successful bid does not represent 'best value' as the Department has failed to conduct an appropriate cost analysis and therefore failed to determine the actual cost to the State for the successful bid" (Protest, at p. 17). ModivCare contends that "[a] PMPM is a form of a capitated payment [that] only reflect[s] the actual cost of service delivery if [it is] actuarially sound" and "[DOH] did not conduct an actuarial analysis of any of the bids" and therefore does not know "whether the proposed PMPM . . . falls within an acceptable range" (*Id.*, at p. 16). ModivCare further alleges that "[the gain sharing] arrangement incentivized bidders to submit PMPM bids that were not actuarially sound [and so low that they] can only be achieved through reductions in transportation expenses that would imperil access to Medicaid members" (*Id.*, at p. 17).

DOH responds, "There is no actuarial review component to determining 'best value,' only bid responsiveness . . . DOH determined MAS met the requirements of the procurement, presented the highest scoring technical proposal for both Regions, offered the most cost-effective solution for both Regions, and should be awarded the resulting contracts based on best value" (Answer, at p. 10). DOH further contends that "DOH determined, and subsequently confirmed with its actuary, that MAS' proposed PMPM is financially sound, access for members will not be inhibited, and services for enrollees will continue to be available when required" (*Id.*, at p. 13). Additionally, DOH asserts that while "Modivcare appears to believe the only avenue available to propose a lower PMPM to the DOH is to reduce payments to transportation providers to an unsustainable rate . . . [to the contrary] the gain sharing arrangement motivates bidders to submit PMPM rates which 1) allows them to be financially sustainable, and 2) be competitive and conscious that any profits received greater than 3% are shared with the DOH" (*Id.*, at p. 11).

[9] ModivCare provides its own actuarial analysis of the cost proposals, concluding that "there is not a scenario wherein the successful bid is a viable PMPM" (Protest, at pp. 12-13, 16, Exhibit 4). However, such analysis does not represent an independent, professional actuarial opinion, in contrast with the independent, professional actuarial opinion supplied by DOH.

As set forth above, a review of actuarial soundness for the proposed PMPM capitation rates is not required under federal or State law; rather, under State law, 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" (*Id.*). 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).

The RFP required offerors to submit monthly rates for administrative as well as service costs[10] for members for each of the five years of the contract(s) (RFP, Attachment B, Cost Proposal). The submitted rates were calculated to arrive at an annual PMPM rate for managed long-term care (MLTC) and non-MLTC members, utilizing DOH's estimated number of Medicaid enrollees for whom the broker(s) would arrange NEMT services (*Id.*). Those annual PMPM rates were then aggregated to arrive at a Final Bid PMPM for all five years of the contract(s), which was used to evaluate cost proposals (*Id.*; *see* RFP, Section 8.4, at p. 67). As noted above, the RFP provided that NEMT broker(s) selected for contract award would be reimbursed under the contract(s) "in two ways: (1) an administrative fee on a [PMPM] basis for each NY Medicaid enrollee that is eligible to have their [NEMT] services managed by the Contractor; and (2) a risk-sharing arrangement [also referred to as the 'Gain Sharing Arrangement'], by which the Contractor may be held responsible financially depending on how the Contractor performs against a target budget for the [NEMT] services being managed by the Contractor" (RFP, Section 2.0, at p. 3; RFP, Section 5.4, at p. 47). Pursuant to the Gain Sharing

[10] Administrative costs included the broker's personnel and administrative expenses, with line items such as claims management, training, facility expenses, and software. Service costs included the transportation expenses for the services of the transportation providers, with line items such as ambulance, parking/tolls, public transit, and taxi/livery/rideshare.

Arrangement in the RFP, the transportation broker/contractor would share net income on an annual basis over limits as specified in the RFP[11] (RFP, Section 4.2.20, at pp. 36-37).

DOH evaluated administrative costs as part of the Final Bid PMPM and will reimburse administrative costs to the contractor. DOH also evaluated service costs as part of the Final Bid PMPM and the contractor will share net income over a specified percentage of revenues received (i.e., profits) with DOH – administrative and services costs are a reasonable predictor of net income. Therefore, we believe that the cost evaluation methodology used by DOH was reasonably related to the anticipated actual costs to be incurred under the contracts. As discussed more fully below relating to the general scoring of technical proposals, our review of the procurement record shows that DOH evaluated the proposals in accordance with the evaluation criteria set forth in the RFP and its evaluation tools.[12] Accordingly, the RFP was consistent with the SFL's requirements for a contract awarded on the basis of best value, and DOH's award of the contracts to MAS, the offeror with the highest composite score for both the Upstate and Downstate regions, was based on a best value determination.

Moreover, as noted above, DOH did have a review conducted by an independent third party, Deloitte, for actuarial soundness. This included review of MAS' PMPM rates, which encompassed review of the service rates that the broker proposes to pay to the transportation providers. The procurement record reflects that MAS' cost proposals for both the Upstate and Downstate regions were actuarially sound. We further note that the gain sharing arrangement provides a mechanism by which the broker is encouraged to maintain payment of reasonable rates to its transportation providers by removing any incentive to negotiate a rate that would lead to a profit greater than 5% over total revenues received, as such profit would be forfeited to DOH.

Scoring

1. Qualifications of Evaluators Scoring Technical Proposals

ModivCare alleges that DOH "utilized evaluators from offices and bureaus that were unfamiliar with the NEMT benefit" and such "lack of substantive knowledge about NEMT prejudiced ModivCare's Technical Proposal [scoring]" (Protest, at p. 25). DOH responds that it "selected individuals with appropriate knowledge and experience [in the area of NEMT services] to populate the Evaluation Team, and conducted training on how to perform evaluations, apply the rating scales, and use the scoring sheets" (Answer, at pp. 3, 16).

This Office generally defers to agency determinations where they are properly within the agency's expertise and supported by the procurement record. Clearly the choice of evaluators is within DOH's expertise and therefore, we defer to DOH in its selection. Further, our review of

[11] For example, in Contract Year 1, the broker will retain all net income that is equal to or less than 3% of the total revenues received; the broker will share equally with DOH all net income that is over 3% but less than or equal to 5% of the total revenues received; and, DOH will receive all net income that exceeds 5% of the total revenues received by the broker.

[12] With harmless exceptions as noted herein, at pp. 11-12.

the procurement record indicates each evaluator fully scored the technical proposals for the assigned regions using the scoring sheets to provide comments as each evaluator deemed appropriate, and thus we find no basis to question their qualifications.

2. General Scoring of Technical Proposals

ModivCare alleges that there are "inconsistencies in [DOH's] responses [during the debriefing] about weaknesses regarding ModivCare's proposal and the actual text of ModivCare's proposal" and such inconsistencies resulted in scoring by DOH that was "arbitrary and capricious" (Protest, at pp. 25, 27). DOH responds that "the evaluation process was anything but arbitrary and capricious" as "evaluators received training prior to review and agreed to adhere to all requirements presented in the technical evaluation document" (Answer, at p. 17). DOH further responded that "[i]t is not uncommon for a reviewer to offer comments on both strengths and weaknesses on the same item of a bidder's Proposal [as doing so] offers insight on what a bidder explained well . . . and also offers the possibility of identifying some missing details which ultimately led to the sub-optimal score indicated on the evaluator's evaluation document" (*Id.*, at p. 16).

As stated above, this Office generally defers to a State agency in matters within that agency's expertise (*see* OSC Bid Protest Determination SF-20170192, at p. 7). This Office is particularly 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). Accordingly, 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).

The procurement record includes a technical evaluation tool that was established prior to receipt of proposals and shared with technical evaluators. The technical evaluation tool includes a scoring rubric for evaluators to use to score all technical criteria from 0 to 5.[13] Based on our

[13] The following ratings received the following scores:

- "Excellent" received 5 points ("The proposal significantly exceeded the expectations for the item being evaluated. The proposal clearly and concisely demonstrated a superior level of performance and/or provision of services, and reflected an innovative and sound approach.");
- "Very Good" received 4 points ("The proposal clearly and concisely demonstrated a high level of performance and approach.");
- "Good" received 3 points ("The proposal demonstrated an adequate level of performance and approach.");
- "Fair" received 2 points ("The proposal did not clearly demonstrate an adequate level of performance.");
- "Poor" received 1 point ("The proposal did not provide enough information to adequately assess performance."); and,
- "Not provided" received 0 points ("The proposal did not include information to address the criteria being evaluated.")

review of the procurement record, DOH evaluators, with the exception of Evaluator 3 for the Downstate region (hereafter "Evaluator 3") which is discussed below, evaluated technical proposals according to the clearly articulated criteria set forth in the RFP and consistent with the evaluation instructions/technical evaluation tool. Our review of evaluators' scores and comments (with the exception of Evaluator 3) did not reveal any contradictions between an evaluator's written comments and the scores assigned by such evaluator to ModivCare's technical proposals. Thus, we are satisfied that these evaluators scored ModivCare's technical proposals in a manner consistent with the RFP and technical evaluation tool and will not disturb the technical scores awarded by these DOH evaluators.

3. Scoring of ModivCare's Downstate Technical Proposal

With respect to Evaluator 3, ModivCare contends that DOH's scoring of ModivCare's Downstate technical proposal was "arbitrary and capricious" because this "visually impaired" evaluator "punished [ModivCare] for an inability to accommodate his or her disability [by providing the entirety of its technical proposal in black and white]" as required by the RFP (Protest, at pp. 13, 24-25). DOH responds that Evaluator 3 "scored the items in question to the best of their ability" and "[t]here is no evidence that [Evaluator 3] demonstrated animus towards Modivcare and completed an apparently non-biased and consistent evaluation of Modivcare's Technical Proposal" (Answer, at p. 16). DOH further contends that Evaluator 3's "scores remained intensely consistent with the other 3 evaluators who scored Modivcare's Downstate Region Technical Proposal" and "items scored a '1' were valid scores due to elements of Modivcare's proposal being illegible to this individual" (*Id.*, at p. 8).

Although DOH points out that it could have disqualified ModivCare's proposal for failure to follow format requirements set forth in the RFP,[14] DOH, in fact, evaluated ModivCare's technical proposal for the Downstate region, and therefore we must examine whether Evaluator 3 evaluated all technical proposals for the Downstate region consistent with the RFP and pre-established technical evaluation tool.

The procurement record shows that Evaluator 3 scored technical proposals inconsistently with the technical evaluation tool.[15] The procurement record shows that, in several instances for each of the offerors' technical proposals, Evaluator 3 assigned scores that were inconsistent with the other three evaluators.[16] As a result, we cannot conclude that Evaluator 3 evaluated proposals consistent with the RFP and technical evaluation tool.

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[14] DOH asserts that "the black and white format . . . of [ ] proposals was required in the RFP Section 7.0 Proposal Submission," DOH provided ModivCare "the opportunity to submit a Technical Proposal which met the requirements," and "[a]lthough . . . not all of the revised Technical Proposal submitted by ModivCare was in black and white, [NYSDOH] accepted ModivCare's response in order to proceed with the competitive procurement and allow a potentially capable vendor's proposal to be evaluated" even though NYSDOH could have disqualified the proposal (Answer, at pp. 6-7).

[15] Evaluator 3 "scored [certain items] a 1 . . . due to elements of ModivCare's proposal being illegible to this individual" (Answer, at p. 8); whereas, the technical evaluation tool provides for a score of "1" for a "Poor" rating, defined as "[t]he proposal did not provide enough information to adequately assess performance."

[16] A review of the Downstate technical proposal scores shows that Evaluator 3's scores varied by two or more points from the other three evaluators in several instances for each of the three offerors for that region.

Nevertheless, this Office has long recognized the doctrine of excusable, harmless error in the procurement process. That is, while there may have been an error in the procurement process, the correction of the error would not change the outcome (i.e., the award) and, therefore, the error is harmless. Since our review of the procurement record shows that Evaluators 1, 2, and 4 for the Downstate region scored technical proposals according to the clearly articulated criteria set forth in the RFP and used the scoring rubric that was crafted prior to receipt of proposals, as set forth in the technical evaluation tool, the scores of Evaluators 1, 2, and 4 are valid. Eliminating the scores of Evaluator 3 for all offerors for the Downstate region does not change the procurement's outcome and MAS would still be the offeror with the highest composite score for the Downstate region.

Based on the foregoing, to the extent Evaluator 3 scored technical proposals for the Downstate region inconsistently with the RFP and technical evaluation tool, such error was harmless.

Vendor Responsibility

SFL provides that "[s]ervice contracts shall be awarded on the basis of best value to a responsive and responsible offerer" (SFL § 163(4)(d)). "Prior to making an award of contract, each state agency shall make a determination of responsibility of the proposed contractor" (SFL § 163(9)(f)). For purposes of SFL § 163, "responsible" means the financial ability, legal capacity, integrity and past performance of a business entity (SFL § 163(1)(c)).

ModivCare makes several allegations that MAS, the contract awardee, is not a responsible vendor and that DOH erred in its finding of responsibility (Protest, at pp. 3, 18-23; Reply, at pp. 3-9). DOH asserts that it determined MAS met all the elements of a responsible offeror and none of ModivCare's assertions merit a finding of non-responsibility with respect to MAS (Answer, at pp. 13-15; Response to Reply, at pp. 1-4). Each claim related to the responsibility of MAS is addressed separately below.

1. Financial Ability and Legal Capacity

ModivCare alleges that "MAS does not have the financial or organizational capacity to perform the award and is therefore not a responsible bidder" (Protest, at p. 19). ModivCare contends that MAS "has no experience providing NEMT brokerage services" and "has never managed an at-risk contract, nor a statewide contract" (*Id.*, at pp. 3, 19). ModivCare further contends that MAS "has proposed rates that would leave them ultimately unable to manage this business from a financially sound position" and "cannot be considered actuarially sound" (*Id.*, at pp. 21, 23).

DOH responds that it determined that MAS "met all the elements of a 'responsible' bidder in accordance with State Finance Law" and "MAS has proven to be a financially capable vendor, remains legally authorized to conduct business in NYS, has exceeded performance expectations in its previous contracts with the DOH, and has demonstrated a superior level of integrity among members of its organization" (Answer, at pp. 13-14). DOH asserts that that MAS has been managing NEMT services in New York for nearly 20

years, currently oversees five out of six regions that include 60 counties and nearly 6.55 million enrollees, and DOH is "confident in [MAS'] ability to manage NEMT services in a Regional or statewide broker model" (*Id.*, at p. 14). Further, DOH states that it "does not believe that experience as a vendor under a risk-based NEMT brokerage services agreement is a prerequisite to achieving success in managing NEMT services in the State of New York (*Id.*).

ModivCare's allegations that MAS has no relevant experience and is not financially capable of performing under the contracts are speculative and unsupported by evidence. Our review of the procurement record confirms DOH conducted a vendor responsibility review of MAS and reviewed MAS' financial ability, legal capacity, integrity, and past performance, as statutorily required. As documented in the procurement record, DOH determined MAS to be a responsible offeror that can successfully perform the services under the contracts for the prices submitted in MAS' cost proposals. Moreover, as part of our review of the DOH / MAS contracts, this Office examined and assessed the information provided in the procurement record and conducted an independent vendor responsibility review of MAS. Our review did not provide any basis to overturn DOH's responsibility determination on this ground.

2. Contacts During Procurement Lobbying Law Restricted Period

ModivCare alleges that "lobbyists registered to represent [MAS] . . . lobbied the Executive Chamber on [NEMT] at least seven times on behalf of [MAS]" on the subject of "Medicaid funding" during the restricted period imposed by SFL § 139-j (Reply, at p. 5).[17] ModivCare alleges that "such meetings are impermissible contacts under State Finance Law" because "a reasonable person could infer that there was no legitimate purpose in meeting with the Executive Chamber" (*Id.*). ModivCare alleges that the lobbyists, on behalf of MAS, "pursued these contacts in a knowing and willful manner" which "should disqualify MAS as a bidder for this procurement as a non-responsible bidder" (*Id.*, at p. 6).

DOH responds that "not all lobbying is prohibited" and ModivCare's "claim makes numerous inferences and assumptions which are not supported by any facts about the intent of the alleged lobbying to the Executive Chamber" (Response to Reply, at p. 1). DOH states that "no member of the Department involved in this procurement had any contact with any of the lobbyists identified in ModivCare's reply" and "there was no impermissible contact between the Department and the Executive Chamber or Legislature regarding the procurement" (*Id.*, at p. 2).

SFL § 139-j(3) provides that "[e]ach offerer that contacts a governmental entity about a governmental procurement shall only make permissible contacts with respect to the governmental procurement." SFL § 139-j(1)(c) defines "contacts" to mean "any oral, written or

[17] ModivCare cites to bi-monthly reports with the New York State Commission on Ethics and Lobbying in Government, showing lobbying communications from July 2021 to August 2022 between O'Donnell & Associates, LLC on behalf of MAS, and various members/staff of the Senate and Assembly as well as the Executive Chamber. The stated subject was "TRANSPORTATION – GENERAL" and the focus was "STATE FUNDING" for the "STATE [NEMT] PROGRAM." Note, we will not address, and ModivCare does not raise, the involvement of Senate and Assembly members/staff in these meetings, as members/staff of the State legislature are exempt from the restrictions on contacts in SFL § 139-j when acting in their official capacity (SFL § 139-j(4)).

electronic communication with a governmental entity under circumstances where a reasonable person would infer that the communication was intended to influence the governmental entity's conduct or decision regarding the governmental procurement." A knowing and willful violation of SFL § 139-j(3) "shall result in a determination of non-responsibility for such offerer" (SFL § 139-j(10)(b)).

The procurement record does not reflect any impermissible contacts by MAS or any agent of MAS during the restricted period for this procurement. Nevertheless, ModivCare alleges that meetings between MAS and the Executive Chamber *de facto* constituted impermissible contacts; however, this alone is insufficient to conclude that impermissible contact(s) occurred under governing law. SFL § 139-j prohibits communications with a governmental entity that occur under circumstances where a reasonable person would infer that the communication was intended to influence the governmental entity's conduct regarding a governmental procurement. DOH asserts and the record corroborates that it and not the Executive Chamber conducted the instant procurement. ModivCare has produced no evidence to show that the MAS or the Executive Chamber attempted to influence DOH's actions relating to the procurement, and there are no allegations that MAS attempted to influence DOH directly. In fact, as noted above, the procurement record shows that DOH established a methodology for evaluating proposals prior to receipt of proposals and evaluation and scoring was conducted by staff level evaluators who followed such methodology.[18]

Moreover, the information supplied by ModivCare is insufficient to support the contention that there were impermissible contacts, much less support the contention that such alleged impermissible contacts were knowing and willful. Therefore, based on our review, we find there is insufficient evidence to disturb the responsibility determination made by DOH.

3. <u>Findings of United States Department of Health and Human Services Office of Inspector General Report</u>

ModivCare contends that "[t]he OIG report[19] detailed severe failings by MAS . . . that imply MAS has not properly administered the transportation benefit it manages for New York State's Medicaid program" and such "past performance should disqualify [MAS] from this bid, and further, should compel OSC to find that MAS is not a responsible bidder" (Reply, at pp. 6-7). Specifically, ModivCare claims "the OIG report implicates two prongs of responsibility determination: integrity and past performance" (Answer, at p. 7).

DOH responds that "the OIG audit should not cast a negative perception on MAS as a capable or responsible bidder given the transition issues with the previous vendor [ModivCare]" (Response to Reply, at p. 3). DOH further responds that it "disagrees with several findings in the OIG audit," and "[i]t would be unfair to deem MAS a non-responsible bidder over findings

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[18] With harmless exceptions as noted herein, at pp. 11-12.

[19] United States Department of Health and Human Services, Office of Inspector General, Report No. A-02-21-01001: New York claimed $196 million, over 72 percent of the audited amount, in federal reimbursement for NEMT payments to New York City transportation providers that did not meet or may not have met Medicaid requirements (September 2022).

which [DOH] itself disputes" (*Id.*). DOH concludes that it "does not believe [the OIG report] warrants a finding of non-responsibility" for MAS (*Id.*).

The procurement record reflects that DOH addressed the 2022 OIG report in its vendor responsibility review. This Office also reviewed the report as part of its independent review. Our review revealed that the focus of the OIG audit was DOH's management and oversight of the NEMT program and not a specific vendor.[20] Accordingly, the OIG report does not sufficiently support the allegation that MAS is a non-responsible bidder to override DOH's responsibility determination. Therefore, we will not disturb the responsibility determination made by DOH.

4. <u>Potential Pending Investigation by the Commission on Ethics and Lobbying in Government</u>

ModivCare contends that "various [news] articles allege a 'pay to play' scheme whereby [MAS] sought to influence the awarding of the RFP through large donations to Governor Kathy Hochul" and "[on] or about August 11, 2022 . . . the Republican candidate for Attorney General, Michael Henry, formally filed an ethics complaint with JCOPE, requesting that it investigate the RFP award [to MAS]"[21] (Reply, at p. 8). ModivCare contends that "there is a prima facie case" of "favoritism, fraud, corruption, or a material and substantial irregularity that undermined the fairness of the [RFP] process" and, as such, "[i]t would be improper for OSC to approve the [contract] award[s] during the pendency of the Commission's investigation" (*Id.*).

DOH responds that it "cannot comment on whether there is an active investigation by the Commission based on this alleged complaint but to date has not been contacted by any member of the Commission to discuss it" and, in any event, "the Executive Chamber does not provide input on procurements managed by [DOH] and was not involved in the selection of the awards in this procurement" (Response to Reply, at p. 3).

We are unable to confirm or deny the existence of the alleged CELG investigation. In this regard, we note that pursuant to State law and an Executive Order[22] applicable to DOH, vendors must remain responsible for the duration of the contract. Should a finding be made by CELG or others relevant to this procurement, further responsibility review could be warranted. Therefore, based on our review of the procurement record as it stands today, and this Office's independent vendor responsibility review of MAS, we find no reason to disturb DOH's determination that MAS is responsible.

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[20] DOH disputes several findings in the OIG report; we note that we do not take a position on such findings, and it is not necessary for us to resolve the disputes between OIG and DOH to make our determination on the Protest.

[21] The State Joint Commission on Public Ethics no longer exists and was succeeded by The Commission on Ethics and Lobbying in Government or CELG.

[22] Executive Order No. 192, effective January 15, 2019, under former Governor Cuomo; continued via Executive Order No. 1 by Governor Hochul.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the contract awards by DOH. As a result, the Protest is denied and we are today approving the DOH / MAS contracts for NEMT brokerage services for Upstate and Downstate New York.

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 Electronic Benefits Transfer services conducted by the New York State Office of Temporary and Disability Assistance.

Contract Number – C022599

Determination of Appeal

SF–20220121

September 13, 2023

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Office of Temporary and Disability Assistance (OTDA), on behalf of the Northeast Coalition of States (NCS)[1] for Electronic Benefits Transfer (EBT) services. We have determined the grounds advanced by Conduent State & Local Solutions, Inc. (Conduent) are insufficient to merit overturning the contract award made by OTDA and, therefore, we deny the Appeal. As a result, we are today approving the OTDA contract with Fidelity Information Services, LLC (FIS) for EBT services.

BACKGROUND

Facts

On behalf of, and in cooperation with, the NCS, OTDA issued a Request for Proposals (RFP) for EBT services on September 3, 2020. The RFP sought EBT services to ensure the distribution of benefits for the Supplemental Nutrition Assistance Program (SNAP),[2] Women Infants and Children (WIC),[3] and Cash programs[4] (RFP, Section 1.1, at p. 13). OTDA is the New York State agency responsible for administering public assistance programs which require the issuance of electronic benefits that can be used like cash allowing recipients to make authorized purchases under each program.

The RFP provided that, following an initial screening, proposals deemed to be responsive would be evaluated for contract award on the basis of best value (RFP, Section 16, at p. 332). An

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[1] The States of New York, Connecticut, New Hampshire, Rhode Island, Vermont, Maine, and the Commonwealth of Massachusetts joined to form the NCS for the purpose of procuring a cost effective regional EBT system (RFP, Section 1.1, at p. 13).
[2] The SNAP program provides income eligible recipients with a monthly electronic benefit that is used like cash to purchase food at authorized retail food stores.
[3] The WIC program is a special supplemental food program that provides income eligible recipients (pregnant or breastfeeding women, infants, and children up to age five) with electronic benefits to purchase nutritious foods, milk, juice, formula, and other items.
[4] Cash programs include delivering cash assistance "for a variety of Federal and State assistance programs, including, but not limited to Temporary Assistance to Needy Families (TANF), the Home Energy Assistance Program (HEAP), and State general assistance programs" (RFP, Section 1.1, at p. 13).

offeror's technical proposal would constitute 75% of the total evaluation score and the cost proposal would account for 25% of the score (RFP, Section 16.1, at p. 332; RFP, Section 16.2, at p. 333). The offeror receiving the highest weighted technical score would be awarded the maximum total of 75 points, with other offerors receiving a proportionate score based on their relation to the proposal receiving the highest technical score (RFP, Section 16.1.2, at p. 333). Similarly, the offeror with the lowest cost would be awarded the maximum 25 points, with other offerors receiving a proportionate score based on their relation to the proposal offering the lowest cost (RFP, Section 16.2, at p. 333). Finally, the offeror with the highest total combined score—based on the combination of the technical and financial scores—would be awarded the contract (RFP, Section 16.3, at p. 333).

Prior to the proposal due date of May 13, 2021, OTDA received two responsive proposals, from Conduent and FIS. Following OTDA's evaluation of proposals, the contract was awarded to FIS, the responsive and responsible offeror receiving the highest combined score. Subsequently, Conduent requested a debriefing, which was held on June 28, 2022.

Conduent filed a protest with OTDA on July 15, 2022 (Protest). OTDA denied Conduent's Protest on August 26, 2022 (OTDA Determination). Conduent filed an Appeal with this Office on September 12, 2022 (Appeal).[5] Conduent submitted additional correspondence on February 16, 2023 (Conduent's February 16, 2023 Correspondence).[6] FIS filed an answer to the Appeal on April 6, 2023 (FIS Answer). OTDA responded to the Appeal on April 10, 2023 (OTDA Answer). Subsequently, Conduent, OTDA, and FIS submitted additional correspondence (Additional Correspondence from Parties).[7]

<u>Comptroller's Authority and Procedures</u>

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.[8] This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest

[5] The Appeal was characterized by Conduent as both an appeal and a direct protest to OSC. While the other parties contend that the submission of an appeal and a direct protest is arguably outside the scope of submissions permitted as of right under 2 NYCRR Part 24, it was considered in this Office's review and determination.
[6] While this submission was arguably outside the scope of submissions permitted as of right under 2 NYCRR Part 24, it was considered in this Office's review and determination. *See* footnote 12, *infra*.
[7] Conduent submitted a response to both FIS's Answer and OTDA's Answer on April 13, 2023. OTDA submitted a response to Conduent's April 13, 2023 Correspondence on May 10, 2023. Conduent submitted additional correspondence to this Office on August 2, 2023, to which FIS replied on August 11, 2023. Conduent replied to FIS's August 11, 2023 Correspondence via email on August 17, 2023. OTDA replied on August 17, 2023 to Conduent's August 2, 2023 Correspondence. Conduent replied to OTDA's August 17, 2023 Correspondence on August 24, 2023. While the Additional Correspondence from Parties was arguably outside the scope of submissions permitted as of right under 2 NYCRR Part 24, it was considered in this Office's review and determination. *See* footnote 12, *infra*.
[8] 2 NYCRR Part 24.

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 OTDA with the OTDA / FIS contract;

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

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

   a. Protest;
   b. OTDA Determination;
   c. Appeal;
   d. Conduent's February 16, 2023 Correspondence;
   e. FIS Answer;
   f. OTDA Answer;
   g. Conduent's April 13, 2023 Correspondence;
   h. OTDA's May 10, 2023 Correspondence;
   i. Conduent's August 2, 2023 Correspondence;
   j. FIS's August 11, 2023 Correspondence;
   k. Conduent's August 17, 2023 Correspondence;
   l. OTDA's August 17, 2023 Correspondence; and,
   m. Conduent's August 24, 2023 Correspondence.

ANALYSIS OF THE APPEAL

<u>Appeal to this Office</u>

In its Appeal and subsequent correspondence,[9] Conduent challenges the procurement conducted by OTDA on the following grounds:

1. OTDA's award on behalf of NCS gave too much consideration to the interests of other states and failed to achieve best value for New York State as required by State Finance Law § 163;
2. OTDA made material errors in technical proposal scoring, including improperly awarding points to FIS, not awarding points to Conduent that should have been awarded, and making mathematical tabulation errors;
3. OTDA failed to disclose in the RFP how various cost components would be weighted in violation of New York State law;

[9] Specifically, Conduent's February 16, 2023, April 13, 2023, August 2, 2023, August 17, 2023 and August 24, 2023 Correspondence.

4. OTDA may have improperly established the cost evaluation methodology after the RFP was released;
5. OTDA improperly established weighting for its cost evaluation methodology because Conduent, who provided the lowest cost for the core services which comprise the largest portion of contract expenditures for NCS, did not receive the highest cost score;
6. OTDA failed to meet the minimum statutory standards in State Finance Law § 163 with respect to the debriefing it provided to Conduent;
7. OTDA failed to comply with New York's Freedom of Information Law (FOIL) by not producing documents in response to Conduent's request;[10]
8. The evaluators for the procurement may have conflicts of interest that compromise their objectivity; and,
9. Public policy developments in card technology since the issuance of the RFP in 2020 compel OTDA to abandon the contract award to FIS and issue a new competitive procurement requiring the use of chip cards to protect the interests of the State in preventing fraud.

OTDA Response to the Appeal

In its Answer and subsequent correspondence,[11] OTDA contends the Appeal should be rejected and the award upheld on the following grounds:

1. Conduent may not raise grounds for protest with OSC that it did not timely / properly raise initially pursuant to OTDA's protest procedure;[12]
2. The multi-state RFP resulted in a best value award to FIS for both New York and the NCS;
3. Any mathematical errors that occurred in the evaluation and scoring of technical proposals did not change the outcome of the procurement process;
4. OTDA complied with State Finance Law § 163(9)(b) requirements regarding disclosures in the RFP, specifically disclosing the weight afforded to an offeror's cost proposal;
5. OTDA complied with State Finance Law § 163(7) requirements by finalizing the evaluation criteria prior to the receipt of proposals;
6. OTDA properly established a cost evaluation methodology which used historical and/or anticipated volumes to determine projected costs for EBT services;
7. OTDA conducted Conduent's debriefing in compliance with the minimum statutory requirements set forth in State Finance Law § 163(9)(c);

[10] Consistent with the longstanding policy of this Office enunciated in prior bid protest determinations, issues related to the procuring agency's action or inaction on a FOIL request do not impact our review of the contract award and are not considered as part of our review of appeals. Furthermore, in making this Determination, we have reviewed the entire procurement record, which includes any documentation related to the procurement that would have been within the scope of Conduent's FOIL request. Accordingly, the Determination will not address this allegation.
[11] Specifically, OTDA's May 10, 2023 and August 17, 2023 Correspondence.
[12] OTDA also asserts OSC is not required to waive deadlines or consider additional materials submitted by Conduent beyond those specifically provided for in the OSC Protest Procedure. As this Office's review is governed by the OSC Protest Procedure established under this Office's own regulations, we are not constrained by the limitations of an agency's procedures or an agency's interpretation of the OSC Protest Procedure. Pursuant to the OSC Protest Procedure, OSC has discretion to waive deadlines, accept additional filings, and obtain additional information relevant to the procurement. Therefore, we will review the grounds for appeal raised by Conduent as identified herein.

8. OTDA has disclosed records in response to Conduent's FOIL request pursuant to Public Officers Law;[13]
9. OTDA required evaluators to attest that they did not have any conflicts of interest and OTDA is not aware of any conflicts of interest; and,
10. It is not in the best interests of the State to reissue the procurement with revised requirements as OTDA does not possess the resources or expertise to develop a new chip enabled EBT system and federal guidance regarding the use of EBT chip cards or development of a chip enabled EBT system has not been issued.

FIS Response to the Appeal

In its Answer and subsequent correspondence,[14] FIS contends the Appeal should be rejected and the award upheld on the following grounds:

1. Conduent may not raise grounds for protest with OSC that it did not timely / properly raise initially pursuant to OTDA's protest procedure;[15]
2. OSC is not required to waive deadlines or consider additional materials submitted by Conduent beyond those specifically provided for in the OSC Protest Procedure;[16]
3. OTDA, on behalf of NCS, properly applied the best value standard as required by New York State law;
4. Any tabulation or scoring errors made by OTDA in the evaluation would not have changed the result of the award and FIS would still be determined the offeror providing best value;
5. OTDA's disclosures about the cost evaluation methodology prior to the receipt of proposals were sufficient and complied with State Finance Law;
6. The items in the cost proposal were not weighted and, as a result, Conduent having the lowest cost on one component of pricing does not mean they had the lowest overall pricing or provided the best value;
7. Conduent concedes that it received all FOIL documentation from OTDA regarding FIS' proposal rendering Conduent's ground for appeal moot;[17]
8. Conduent's allegations that there may be a potential conflict of interest amongst the evaluators is unsubstantiated; and,

10. Conduent's request to amend the procurement to account for chip technology is meritless as EBT cards are procured outside of the EBT contract, the RFP contemplates the use of chip technology should New York opt to procure card services under the EBT contract, and FIS is fully qualified to assist the State with implementation of chip cards.

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[13] *See* footnote 10, *supra*.
[14] Specifically, FIS's August 11, 2023 Correspondence.
[15] *See* footnote 12, *supra*.
[16] *See* footnote 12, *supra*.
[17] *See* footnote 10, *supra*.

DISCUSSION

Best Value Determination

1. Best Value in a Multi-State Procurement

Conduent contends "OTDA violated its duty, both under the RFP and New York State Finance Law § 163, to select a contractor that would offer 'best value' to the State of New York" (Conduent's April 13, 2023 Correspondence, at p. 5). Conduent further asserts "[t]he RFP, the protest process, the OSC approval process, and any resulting contract, should serve New Yorkers – not the NCS as a whole, and not the other states that have joined the NCS" (Appeal, at p. 4).

OTDA responds "the [m]ulti-[s]tate RFP award to [FIS] was a best value award for both New York and the NCS" (OTDA Answer, at p. 3). OTDA contends not only did New York staff serve as lead agency on behalf of the NCS for this procurement, but New York staff also prepared the RFP and "included all required New York specific information and forms" (*Id*.). OTDA further asserts that, while the other NCS states do benefit from the procurement, "New York also benefits from the aggregation of pricing" (*Id*., at p. 4). FIS points out that the RFP "expressly states that evaluators would award the contracts to the provider with the 'best value,' which is in accordance with New York law" (FIS Answer, at p. 4). FIS further states "New York law does not prohibit 'best value' from accounting for services in a regional system that New York is a part of" (*Id*., at p. 6).

The RFP provided that OTDA would award the contract for EBT services 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)).

The RFP clearly outlined how the technical evaluation would be conducted and set forth specific criteria to be scored. An offeror's technical proposal would constitute 75% of the total evaluation score (RFP, Section 16.1, at p. 332). Each technical proposal consisted of an evaluation of six criteria with an associated weight percentage of the total technical score: (1) Evaluation of the Executive Summary – 5%; (2) Key Personnel Experience – 10%; (3) Offeror Experience – 25%; (4) Quality of EBT Solution – 38%; (5) Diversity Practices – 10%; and (6) WIC [EBT Requirements] – 12% (RFP, Section 16.1.1, at pp. 332–333). The evaluation tool/instructions provided that all evaluators would evaluate the technical proposals according to the six criteria set forth in the RFP and then the scores for all evaluators per NCS state for each of the six criteria would be averaged and then weighted according to the aforementioned weight percentages to produce a final score by criterion. An overall final score for each NCS state was calculated by adding the weighted scores for each criterion. The overall final score for each NCS state was then multiplied by its respective state multiplier (50% for New York, 15% for Massachusetts, and 7% each for Connecticut, New Hampshire, Rhode Island, Vermont, and Maine) to produce a final total score for each offeror's technical proposal. The offeror receiving the highest weighted technical score would be awarded the maximum total of 75 points, with other offerors receiving a

proportionate score based on their relation to the proposal receiving the highest technical score (RFP, Section 16.1.2, at p. 333). The procurement record shows that all evaluators were provided with a detailed evaluation tool and instructions, which were finalized prior to receipt of proposals and followed the evaluation tool/instructions which OTDA crafted in accordance with State Finance Law.

The RFP further clearly outlined how the cost evaluation would be conducted, as explained more fully in the *Cost Proposal Evaluation Methodology* section below.

Based on our review of the procurement record, regardless of the fact that the procurement was issued on behalf of multiple states, the methodology OTDA used to evaluate and score proposals was balanced, fair, and included an objective and quantifiable analysis, in accordance with State Finance Law requirements.[18] Thus, we find no basis to question the evaluation methodology used by OTDA.

2. Technical Proposal Evaluation Methodology - NCS State Weighting

Conduent asserts "OTDA allowed evaluators to depart from the 'best value' to New York requirement of the RFP and the State Finance Law" by assigning "arbitrary" weights to the evaluators' scores (Conduent's April 13, 2023 Correspondence, at pp. 2, 5). Specifically, Conduent alleges "[i]nstead of using the states' 'respective historical volumes' to weight the evaluators' [ ] scores, OTDA recalibrated them on a 'curve,' benefiting the small states (with the lowest volumes) . . . skew[ing] the scoring weights away from New York's interests" (Conduent's April 13, 2023 Correspondence, at p. 2). Conduent asserts it was "outcome determinative" that "OTDA randomly picked '50%' as the weight to apply to the New York evaluators' scores, even though, according to the RFP, New York's caseload consumes at least two thirds of the population (Conduent's April 13, 2023 Correspondence, at pp. 2, 5 (emphasis omitted)).

OTDA replies "[OSC's] 2013 Decision [in OSC Bid Protest Determination SF-20130334] did not mandate weighting technical proposal scores based upon each coalition state's caseload percentage" (OTDA's May 10, 2023 Correspondence, at p. 2).[19] OTDA explains "[t]o fairly allocate participation among the coalition states in the technical evaluation process, weights based on case volume amounts were not utilized . . . [i]nstead, the coalition agreed that the EBT program for each coalition state had equivalent importance regardless of state size . . . [a]s a result, it was determined that smaller states should have a higher level of participation than their case volume allocated amounts to afford them with a reasonable level of participation in the technical evaluation process" (*Id.*). OTDA asserts "New York's 50% technical evaluation allocation amount was reasonable in that it was equivalent to the total of the other coalition states . . . mean[ing] that New York evaluators would have decisive influence on the outcome of the technical evaluation" (*Id.*). OTDA further contends "the 50 evaluators assigned across the seven coalition states evaluated each technical proposal response in the same manner . . . regardless of an evaluator's physical

[18] With harmless errors, as discussed in more detail herein.

[19] NCS' previous procurement of EBT services in 2012 and resulting contract award in 2013 by OTDA to Xerox Corporation (in 2017, Conduent separated from Xerox and became the provider of EBT services under the contract) was the subject of an appeal. This Office determined in SF-20130334 that the appeal grounds were insufficient to merit overturning OTDA's contact award.

location, each evaluator was directed to evaluate and score each technical proposal response pursuant to pre-established evaluation instructions" (*Id.*).

State Finance Law requires that proposals be evaluated according to "a balanced and fair method, established in advance of the receipt of offers" and, as long as the agency determination is rational and supported by the procurement record, this Office will generally defer to the expertise of the agency in establishing an evaluation methodology that meets its own needs.

As stated above, after the initial scoring and weighting of technical proposals according to the technical evaluation criteria, overall final technical scores were multiplied by a preestablished respective state multiplier applied to technical evaluators' scores by NCS state to calculate a weighted score for each state before being combined to produce a final total score for each offeror's technical proposal. OTDA determined to weight evaluators by states taking into consideration both historical volumes and the importance of a state's participation in the EBT program regardless of the volumes. While the weighting afforded does not exactly match the historical volumes by state, contrary to Conduent's claim, it was not required to, and is nonetheless balanced and fair. OTDA made a rational determination to weight states with less volume on a curve to afford them meaningful representation. Even so, New York retained the greatest amount of influence compared to the other member states (50%). Accordingly, there is no basis to question the technical proposal evaluation methodology.[20]

Moreover, the application of a respective state multiplier to technical evaluators scores by NCS state did not impact how the evaluation of technical criteria was performed, as it was performed the same by all evaluators, regardless of state affiliation. As set forth above, all evaluators were required to use the same scoring tool and follow the same evaluation instructions developed pursuant to State Finance Law.

Furthermore, our review of the procurement record shows that, despite Conduent's assertions otherwise, the respective state multiplier applied to technical evaluators' scores by NCS member state was not outcome determinative—there would have been no impact on the procurement result had OTDA not applied to the respective state multiplier to the technical evaluators' scores.

Scoring of Technical Proposals

Conduent contends "[g]iven that Conduent has already identified math errors that OTDA committed . . . it is reasonable to assume that other math errors occurred when OTDA was finalizing its evaluations [of technical proposals] for the RFP award" and "even a minor calculation error on a key variable could have made a difference in changing the final award determination" (Appeal, at p. 6; *see also* Conduent's February 16, 2023 Correspondence, at p. 4). Conduent

[20] This Office's Determination in SF-20130334 is not inconsistent with this conclusion. The 2013 Determination found that OTDA was not required to distribute the number of technical evaluators scoring the procurement proportionally across the participating states, nor was OTDA required to weight the evaluators by NCS state membership (OSC Bid Protest Determination SF-20130334, at p. 11 ("While the composition of the evaluation teams was not proportional or weighted (by NCS member state), this was not required")). The 2013 Determination did not address the applicable requirements should the agency decide to weight evaluators by NCS state, as OTDA has done in the instant procurement by applying a respective state multiplier to technical evaluators' scores by NCS state.

further contends that it was "deprived of 17 points that it should have received" in the technical proposal where "the evaluation criteria were described in detail and allowed for no subjectivity" and "the evaluators simply did not follow the criteria provided in OTDA's evaluation tool" (Appeal, at p. 12; Appeal, Exhibit 6, at p. 1). In addition, Conduent alleges "multiple evaluators committed calculation errors on objective scoring measures" that "resulted in FIS being improperly awarded 50 points on Diversity Practices, which in turn affected FIS's overall technical score" (Conduent's February 16, 2023 Correspondence, at pp. 2, 3 (emphasis omitted); *see* Conduent's February 16, 2023 Correspondence, Exhibit A).

OTDA responds "the mathematical calculations employed for purposes of evaluating [technical] proposals are sound" and review of the procurement record "revealed no mathematical errors [ ] resulting in a change to the evaluation result" (OTDA Answer, at p. 6). OTDA further responds that the examples of scoring errors provided by Conduent [in its Appeal, Exhibit 6] "failed to take into consideration the actual RFP provisions in question which may be much more descriptive than the Scoring Sheet summaries [referenced by Conduent]" and "[e]xamination of the procurement record for the RFP confirms that the evaluators scored the proposals in a manner consistent with the RFP, the Evaluation Criteria, the Evaluation Instrument, the Evaluation Instructions, and the Scoring Sheets" (OTDA Answer, at pp. 13, 15). With respect to Conduent's claim related to the scoring of Diversity Practices, OTDA asserts Conduent's "claim is flawed as evaluator subjectivity may be applied to the [Diversity Practices Questionnaire] Questions" as, OSC has previously recognized "that evaluators bring their own subjective views to the evaluation process and may interpret information in proposals differently" (OTDA Answer, at pp. 17, 19). Lastly, OTDA asserts "[e]ven if OSC were to determine that [all of the] alleged errors were in fact flaws in the evaluation of the technical proposals – such errors if corrected in the manner desired by Conduent would not change the outcome of the award to FIS" and are, therefore, "harmless" (OTDA Answer, at p. 20).

This Office is generally 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). Accordingly, 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).

The procurement record includes a technical evaluation tool that was established prior to receipt of proposals and shared with technical evaluators. Based on our review of the procurement record, NCS evaluators, with immaterial exceptions as discussed below, evaluated technical proposals according to the clearly articulated criteria set forth in the RFP and consistent with the evaluation instructions/technical evaluation tool. Thus, we are satisfied that, with the limited exceptions noted below, the NCS evaluators scored the technical proposals in a manner consistent with the RFP and technical evaluation tool.

Notwithstanding the foregoing, we reviewed the procurement record and the alleged scoring errors identified by Conduent in the Appeal (Exhibit 6) and Conduent's February 16, 2023 Correspondence (Exhibit A). While it is possible that Conduent should have been awarded additional points for meeting certain objective criteria, this Office has long recognized the doctrine of excusable, harmless error in the procurement process. That is, while there may have been an error in the procurement process, the correction of the error would not change the outcome (i.e., the award) and, therefore, the error is harmless. Our review of the procurement record shows that NCS evaluators scored a majority of the technical proposals according to the clearly articulated criteria set forth in the RFP and used the scoring rubric that was crafted prior to receipt of proposals, as set forth in the technical evaluation tool. Furthermore, our review of the record did not identify any additional scoring errors in either the FIS or Conduent technical proposals that, if not corrected, would have disadvantaged Conduent or advantaged FIS. Likewise, our review of the record did not identify any mathematical errors in the calculation of scores for the award.[21] Moreover, if Conduent's technical proposal were to receive all points available for the objective criteria that were allegedly scored in error, the ranking would not have changed, and FIS still would have been awarded the contract. Therefore, we will not disturb the technical scores awarded by the NCS evaluators.

Based on the foregoing, to the extent certain NCS evaluators scored certain portions of technical proposals inconsistently with the RFP and technical evaluation tool, such error was harmless.

Evaluation of Cost Proposals

1. Establishment and Disclosure of Cost Proposal Evaluation Methodology

Conduent alleges "OTDA ultimately weighted various price components in a manner that was never disclosed in the RFP, and may not have even been set when the RFP was released" (Appeal, at p. 7). OTDA responds "[i]n accordance with [the] statutory standard, the evaluation criteria must be finalized prior to the receipt of bid proposals as opposed to the date the RFP was issued [and] the evaluation instrument and evaluator scoring tools were in fact completed and finalized prior to the date bid proposals were received by OTDA" (OTDA Answer, at p. 8). OTDA further responds, "the RFP [ ] satisfies the statutory standard [for disclosure] because the RFP set forth the weighted amount of a bidder's financial proposal (25%) comprising the total score" (*Id.*, at p. 9).

SFL § 163(7) provides that "[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" (emphasis added). SFL § 163(9)(b) provides that the "solicitation shall prescribe the minimum specifications or requirements that must be met in order

[21] Conduent makes several allegations regarding calculation errors and speculates that "it is reasonable to assume that other math errors occurred when OTDA was finalizing its evaluations for the RFP award" (Appeal, at p. 6). This speculation is not supported by the procurement record.

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).

The RFP clearly outlined how the cost evaluation would be conducted, including identifying the objective formula used to evaluate cost and the relative weight of cost to be used in the best value determination (25%) (*see* RFP, Section 16.2, at p. 333). Contrary to Conduent's assertions, further specifics regarding the cost weighting utilized by OTDA were not required to be disclosed in the RFP (*see* OSC Bid Protest Determination, SF-20170111, at pp. 5-6). Further, our review of the procurement record confirms the methodology used to evaluate cost proposals and the corresponding scoring tool were finalized before the initial receipt of offers as required by law in accordance with applicable statutory requirements.

2. <u>Cost Proposal Evaluation Methodology</u>

Conduent contends OTDA's cost evaluation was "improper" because it is "implausible" that "Conduent could have lost on pricing" when Conduent "provided the lowest price for Core Benefits, which represents the largest financial cost to the NCS" (Appeal, at p. 7). Conduent further contends "some components of the [cost evaluation] favoring the awardee (e.g., 'Optional Services') should have been weighted as 'zero' given that NCS has not used such services in the past" (Appeal, at p. 8).

OTDA responds "Conduent's lower bid for SNAP [the RFP's largest financial cost component] was not enough to overcome its higher pricing in almost all other financial categories" (OTDA Answer, at p. 10). OTDA asserts "the financial categories of a bidder's financial proposal were in fact not weighted" since "there was no compelling reason to weigh the 'Optional Services' or any other financial category to zero . . . [r]ather, [ ] the use of historical and/or anticipated volumes for each financial category (and sub criteria therein) [is] a sound methodology to determine projected costs for the EBT engagement" (*Id.*, at pp. 8-10). Similarly, FIS contends that, since the cost proposal evaluation criteria were not weighted, "the record does not support [Conduent's] claim that having the lowest cost for one individual component is determinative to win on lowest overall pricing" (FIS Answer, at p. 5).

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)). Moreover, it is well-established that SFL § 163 implicitly requires, as part of the 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. Therefore, when evaluating the cost, the State agency awarding the contract must generally consider all expected costs and evaluate such costs in a manner reasonably designed to predict actual costs under the contract.

The RFP sets forth the criteria that OTDA utilized to evaluate cost proposals, advising that the offeror with the lowest cost would be awarded the maximum 25 points, with other offerors

receiving a proportionate score based on their relation to the proposal offering the lowest cost, according to the following formula: (Low Bid Price Offer divided by Proposal being evaluated Bid Price Offer) * 25 Points (RFP, Section 16.2, at p. 333). The RFP also sets forth the required pricing components, including core, optional, and state-specific products and services (RFP, Section 13, at pp. 299-322; RFP, Appendix P, Pricing Schedule). Offerors were advised that all pricing submitted in Appendix P, Pricing Schedule, would be factored into their cost proposal score.[22] Our review of the procurement reflects that OTDA developed a cost evaluation tool that calculated cost components by multiplying the prices bid in Appendix P by volumes of usage that were either based on historic volumes or expected usage. In evaluating the optional services,[23] the procurement record reflects OTDA developed the anticipated volumes after lengthy discussions with the NCS States and OTDA's own past usage history to correspond to future anticipated needs. As a result, the data used to evaluate the cost of optional services bore a reasonable relationship to the costs anticipated to be incurred by the State under the terms of the awarded contract for optional services expected to be utilized.

As determined above, the methodology OTDA used to evaluate and score cost proposals complied with applicable New York State law requirements. Thus, we find no basis to question the evaluation methodology OTDA used for the cost proposals.

Sufficiency of Conduent's Debriefing

Conduent asserts that OTDA did not comply "with minimum statutory standards for the debriefing with respect to the disclosures it provided on the scoring of the financial proposal" (Appeal, at pp. 8–9). Conduent further alleges OTDA failed to provide "any insight into how far apart its technical score was in comparison to FIS's score because the disclosure of competing bidder's pricing is not, according to OTDA, explicitly required under [SFL] § 163(9)(c)" (Appeal, at p. 9). Finally, Conduent alleges "[w]ithout the ability to compare tangible numbers between its own proposal and FIS's proposal, Conduent's debriefing did not comport with the purpose of the debriefing as stated in [SFL] § 163(9)(c)" (Appeal, at p. 9).

OTDA counters "OTDA was not required to provide the scoring of a competitor's bid proposal during the debriefing" (OTDA Answer, at p. 10). OTDA alleges they "complied with the minimum statutory standards set" and that "OTDA informed Conduent of its score and ranking for the technical criteria and financial components in accordance with debriefing standards" (*Id.*, at pp. 10, 12).

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 offeror was not selected for award; (B) the qualitative and quantitative analysis employed by the agency in assessing the

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[22] *See* RFP Questions and Answers, No. 177.

[23] The RFP provides that "Optional Services" are "[s]ervices which may be considered for purchase under the procurement by any member State or group of member State(s), at any time during contract negotiation or during the Contract Period" (RFP, Section 1.4.3, at p. 16).

> 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 reflects OTDA provided Conduent with a debriefing agenda that set forth the parameters of the debriefing consistent with SFL § 163(9)(c)(iv). As documented in the procurement record, the debriefing agenda provided Conduent with its relative ranking and total score for the cost proposal. However, SFL § 163(9)(c)(iv) does not require agencies to disclose the scores of any other offeror during a debriefing to explain why the winning proposal was selected (*see* OSC Bid Protest Determination SF-20220068, at pp. 6-7). Based on our review of the procurement, the OTDA's debriefing satisfied the statutory standard and we find no merit to Conduent's allegations regarding the sufficiency of the debriefing.

Potential Conflicts of Interest

Conduent suggests the evaluators may have had conflicts of interest that compromised their ability to fairly and objectively evaluate proposals (Appeal, at p. 13). Specifically, Conduent alleges "[s]ince OTDA redacted the names of the evaluators from the few documents that it produced in connection with its FOIL disclosure to Conduent, Conduent is concerned that as an interested party, it has no ability to determine whether [the evaluators] may have sought employment with, or have business or other relationships with any bidder entities that could compromise their objectivity" (*Id*.).

OTDA replies there is "no known conflict of interest" as "[p]rior to receiving sections of a bid proposal to review, each evaluator was required to complete a disclosure form attesting that serving in such role did not present a conflict of interest" (OTDA Answer, at p. 17).

Based on our review of the procurement record, each evaluator submitted a disclosure form to OTDA, prior to reviewing proposals, certifying that they "neither know nor [are] involved in any potential conflict of interest situation" and agreeing "to promptly notify the New York State OTDA management of any potentially conflicting situation of which I become aware." Moreover, Conduent failed to provide any information to substantiate its allegation. Thus, we find no merit to this allegation.

RFP EBT Card Specifications

Conduent asserts that since the RFP, which "contemplated the use of cards limited to 'magstripe technology'" was issued almost three years ago, "there have been public policy developments that have made it clear that magstripe-only cards need to be replaced by EMV chip cards in New York" (Conduent's August 2, 2023 Correspondence, at p. 1 (emphasis omitted)). Conduent contends that "[s]igning a new State EBT contract to continue using these magstripe-only cards would . . . be inconsistent with efforts to reduce EBT fraud losses" and recommends

OTDA abandon the contract award to FIS and issue a new competitive procurement for EMV chip cards (*Id.*, at pp. 2, 5 (emphasis omitted)).

OTDA contends that "[t]he process to develop and change over to a new chip enabled EBT system . . . will be complex, extensive, and multifaceted requiring wide-ranging resources (both human and financial) [and] will take significant time to develop and implement" (OTDA's August 17, 2023 Correspondence, at p. 1). OTDA further contends that "[t]he Food and Nutrition Service of the U.S. Department of Agriculture (FNS), which oversees and provides funding towards a state EBT program, has *not* issued guidance to states regarding the use of EBT chip cards or a timetable to develop and implement a chip enabled EBT system" (*Id.*, at p. 1 (emphasis in original)). Lastly, OTDA asserts that "overturning the results of the 2020 RFP by disapproving the FIS contract would result in an inappropriate, lengthy single source contract with Conduent [the incumbent] for EBT magstripe services which is not in the best interest of New York" (*Id.*, at p. 3).

This Office generally defers to agency determinations where they are properly within the agency's expertise and supported by the procurement record. OTDA, as the State agency responsible for administering public assistance programs which require the issuance of electronic benefits, possesses the requisite expertise to determine the specific needs and requirements for EBT services, including appropriate EBT card specifications. Our review of the procurement record provides no basis to question OTDA's expertise and judgment regarding this matter. Accordingly, we defer to OTDA in its required EBT card specifications and find no reason to overturn the contract award to FIS on this basis.

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 OTDA. As a result, the Appeal is denied and we are today approving the OTDA / FIS contract for EBT services.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Bolla Oil Corp. with respect to the procurement for the Renovation and Operation of a Fuel Service Station Facility on the Hutchinson River Parkway conducted by the New York State Department of Transportation.

Contract Number – L03806R

Determination of Appeal

SF–20220129

May 2, 2023

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Transportation (NYSDOT) for the renovation and operation of a fuel service station facility on the Hutchinson River Parkway. We have determined the grounds advanced by Bolla Oil Corp. (Bolla) are insufficient to merit overturning the contract award made by NYSDOT and, therefore, we deny the Appeal. As a result, we are today approving the NYSDOT contract with CPD NY Energy Corp. (CPD) for the renovation and operation of a fuel service station facility on the Hutchinson River Parkway.

BACKGROUND

Facts

NYSDOT issued a request for proposals (RFP) "seeking proposals from qualified firms interested in renovating and operating a [fuel] service station facility at a rest area located on the Hutchinson River Parkway (HRP), in the vicinity of North St., White Plains, N.Y." (RFP, Section 1.1, at p. 1). The successful offeror would execute a lease with NYSDOT (*Id.).*

The RFP specified proposals would "be evaluated by [NYSDOT] using a Best Value Method evaluation process based on the technical and cost criteria" (RFP, Section 6.1, at p. 14). Prior to any substantive evaluation of a proposal, the RFP provided that "[p]roposals shall be pre-screened to determine if they meet the minimum RFP responsiveness, referenced in Section 1.3" (*Id.*). Notably, proposals "which do not [meet minimum RFP responsiveness requirements] shall be deemed non-responsive and shall be removed from further consideration" (*Id.*; *see also* RFP, Section 1.3, at p. 3). Minimum responsiveness requirements included providing all specified proposal documents in a specified format by the proposal deadline (*see* RFP, Section 1.3, at p. 3).

Once it was determined that the proposal met minimum RFP responsiveness, the RFP provided that technical proposals would be worth 40% (40 points), cost proposals 50% (50 points), and oral presentations 10% (10 points) of the total score for a proposal (*Id.*; RFP, Section 6.2, at p. 14; RFP, Section 6.3, at p. 15; RFP, Section 6.5, at p. 16). The RFP provided that NYSDOT would score technical and cost proposals to make an "initial best value determination" (RFP, Section 6.4, at p. 15). NYSDOT would "shortlist" "any Proposer within 10 points of the top initial

Best Value ranked Proposal" to continue with the evaluation process, including the oral presentation (*Id.*; RFP, Section 6.5, at p. 16). NYSDOT determined "[p]roposals which do not make the shortlist shall not be included in the remaining best value evaluation process steps" (RFP, Section 6.4, at p. 15). A "Final Best Value Determination" would be made by adding the oral presentation scores and perfected cost scores (following any best and final offers) to the technical scores (RFP, Sections 6.9, at p. 17). Award would be made to the offeror with the highest "Final Best Value score" (*Id.*).

NYSDOT received eight proposals by the proposal due date of August 3, 2022, at 12:00 p.m. EST. Six responsive proposals proceeded to initial best value determination, and only one was shortlisted (CPD). NYSDOT awarded the contract to CPD, the offeror with the highest Final Best Value score.

NYSDOT notified Bolla on September 7, 2022, that Bolla's proposal was non-responsive and was not evaluated for contract award. Subsequently, Bolla submitted an initial protest to NYSDOT of its non-responsive determination on September 9, 2022 (Protest), which NYSDOT denied on September 12, 2022 (NYSDOT Determination). Bolla submitted an appeal, dated September 9, 2022, and electronically transmitted to this Office on September 20, 2022 (Appeal). NYSDOT filed an Answer to the appeal on February 15, 2023 (Answer).

Comptroller's Authority and Procedures

Under State Finance Law (SFL) § 112(3), before any revenue contract made for or by a state agency which exceeds twenty-five 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.[1] This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because this is an appeal of an agency protest decision, the Appeal is governed by section 24.5 of the OSC Protest Procedure.

This procurement is not subject to the competitive bidding requirements of SFL § 163, as this is not an expenditure contract involving the purchase of goods or services, but rather a revenue contract, i.e., a contract that generates revenue for the State. However, in fulfilling this Office's statutory duty under SFL § 112, we generally require that revenue contracts be let pursuant to a competitive process.

In the determination of this Appeal, this Office considered:

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

[1] 2 NYCRR Part 24.

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

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

    a. Protest;
    b. NYSDOT Determination;
    c. Appeal; and,
    d. Answer.

ANALYSIS OF THE APPEAL

Appeal to this Office

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

1. NYSDOT unreasonably and arbitrarily determined Bolla's initial proposal submission was non-responsive as Bolla's timely initial submission substantially complied with RFP requirements to separate the technical proposal from the cost proposal; and,

2. NYSDOT unreasonably and arbitrarily determined Bolla's proposal resubmission was non-responsive as Bolla timely resubmitted both the technical proposal and the cost proposal as required by the RFP and requested by NYSDOT.

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 properly determined Bolla's initial submission was non-responsive to the requirements of the RFP because Bolla combined the technical and cost proposals in a single document; and,

2. NYSDOT properly determined Bolla's resubmission was non-responsive to the requirements of the RFP because, while NYSDOT received Bolla's resubmitted technical proposal, Bolla failed to resubmit the cost proposal.

DISCUSSION

Non-Responsive Determination

Bolla contends "the basis given for disqualification was factually incorrect, and that Bolla's submissions were, in every respect, timely, complete and in conformity with the requirements of the RFP" (Appeal, at p. 3). NYSDOT responds that the non-responsive determination was

appropriate since "Bolla initially combined the Technical and Cost proposals which contravened the instructions in the RFP, and when provided an opportunity to correct the non-conforming submission, NYSDOT did not receive separate Technical and Cost proposals as required by the RFP" (Answer, at p. 3). As the facts and contentions surrounding Bolla's initial proposal submission and resubmission vary, we address each separately below.

1. Bolla's Initial Proposal Submission

Bolla asserts the RFP requirements were met with its initial proposal submission as "no cost information was included in the Part I Technical and Management Proposal/Submittal, nor any Technical and Management information in Part II [Cost and Administrative Proposal/Submittal]" (Appeal, at p. 2). Bolla asserts that "[t]he transmitted proposal consisted of clearly-marked, separated Parts I [technical] and II [cost] . . .[and] [e]ach part was clearly labelled" (Appeal, at p. 5).[2]

NYSDOT asserts "Bolla omits that this [initial submission] combined the Part I Technical Proposal [in a single document] with the Part II Cost Proposal, a clear deviation from Section 5.1 of the RFP" (Answer, at p. 1).

The RFP set forth unambiguous specifications for proposers to be considered responsive (*see* RFP, Section 1.3, at p. 3).[3] Specifically,

> For the purposes of evaluation, each Proposal must be submitted in two (2) parts. Part I shall consist of the Technical and Management Proposal/Submittal. Part II shall consist of the Cost and Administrative Submittal/Proposal. Each part of the Proposal must be complete in order that the evaluation of both parts can be accomplished independently and concurrently, and the Technical and Management Proposal/Submittal can be evaluated strictly on the basis of merit. **Cost information must not be included in the Part I: Technical and Management Proposal/Submittal**. . . .
>
> **Note:** *Cost information is **NOT** to be included in Part I: Technical and Management Proposal/Submittal. Technical information is **NOT** to be included in Part II: Cost and Administrative Proposal/Submittal.*

(emphasis in original) (RFP, Section 5.1, at p. 5). The RFP provided further formatting instructions for submissions: "**Proposer shall submit one (1) electronic copy of Part I – Technical and Management Proposal/Submittal and one (1) electronic copy of Part II – Cost**

[2] The procurement record shows that Bolla's initial submission included, among other exhibits, a single document that contained both the technical and cost proposals. The technical proposal was labelled as Part I within the document and spanned pages 3 – 21, while the cost proposal was labelled Part II and spanned pages 21 – 22.

[3] The RFP outlined the requirements for the technical and cost proposal submissions, stating "[a]ny Proposer that does not provide **ALL** the following **by the Proposal Submission Deadline** will be determined to be non-responsive and will be removed from further consideration" (emphasis in original) (RFP, Section 1.3, p. 3; *see also* RFP, Section 6.1, at p. 14).

and Administrative Proposal via email or managed file transfer to the Designated Representative below" (emphasis in original) (RFP, Section 7.1, at p. 18).

It is undisputed that Bolla's initial submission was sent via email to NYSDOT on August 3, 2022, at 11:22 a.m. EST and was thus received prior to the deadline for receipt of proposals (*see* Appeal, at p. 2, Exhibit 2; Answer, at p. 1). Bolla contends that including technical and cost proposals in a single document with separate headings is substantially compliant, while NYSDOT contends that the technical and cost proposals must be in separate documents (*see* Appeal, at pp. 2, 5; Answer, at p. 1). To interpret the RFP, offerors must look to what is contained within its four corners, and not any subjective assumptions. The RFP requirements were clear and emphasized in multiple sections that the technical and cost submissions needed to be separate. Accordingly, we find NYSDOT properly determined Bolla's initial proposal submission was non-responsive for failing to meet minimum RFP requirements.[4]

2. Bolla's Proposal Resubmission

Upon Bolla's receipt of NYSDOT's request to re-submit the proposal in two parts as directed by the RFP, Bolla asserts timely compliance through "resub[mission of] all relevant documents and attachments in two separate email transmissions prior to the RFP deadline" (Appeal, at p. 2).[5] Bolla claims that a "Message Trace Report" from its Microsoft Exchange email server "reflects that all three emails sent from [Bolla], including the resubmitted Parts I and II were received by NYSDOT prior to the bid deadline of August 3, 2022 at 12:00 p.m. [EST]" (*Id.*).

NYSDOT responds "Bolla failed to follow the clear guidance for submission of proposals and then failed to correct its error when afforded the opportunity to do so" (Answer, at p. 1). NYSDOT asserts after requesting Bolla resubmit its proposal in compliance with the two-part requirement of the RFP that while "at 11:58 a.m. [EST] [NYSDOT] received a response from [Bolla] with a file titled 'Bolla Proposal – Part I RFP L03806R' . . . [NYSDOT] did not receive another email with the revised Part II [cost] documents" (*Id.*, at p. 2).

It is uncontested that NYSDOT received Bolla's timely resubmission of its technical proposal (Appeal, at p. 2; Answer, at p. 2). Where the parties differ is in whether NYSDOT timely received Bolla's cost proposal in compliance with RFP requirements (Appeal, at p. 2; Answer, at p. 2). Bolla submits evidence that purports to show an email from Bolla containing the resubmitted cost proposal that was "received" by NYSDOT at "15:59:15 [UTC] (11:59:15 EDT)" (Appeal, at

[4] Notably, although NYSDOT could have disqualified Bolla for its proposal being non-responsive based on its initial submission, NYSDOT instead allowed Bolla an opportunity to resubmit its proposal in compliance with RFP requirements. It is undisputed that NYSDOT emailed Bolla on August 3, 2022, at 11:29 a.m. EST requesting Bolla resubmit its proposal "in 2 parts: Part I – Technical and Management Proposal/Submittal and Part II – Cost and Administrative Proposal." (Appeal, at p. 2, Exhibit 3; Answer, at p. 2).

[5] We do not address Bolla's allegation that NYSDOT erroneously found its resubmission non-responsive due to the inclusion of merchandise and food price list information in the Part I Technical and Management Proposal since NYSDOT determined Bolla's resubmission was non-responsive for "failing to submit its bid in compliance with the RFP" and not related to the merchandise and food price list (*see* Appeal, at pp. 3, 5; Answer, at pp. 2 – 3).

p. 2, Exhibits 3, 4, 5 and 7).[6] NYSDOT contends Bolla's "[Message Trace Report] shows a different server associated for that [ ] email [with the resubmitted cost proposal], which NYSDOT did not receive" (Answer, at p. 2). In addition, NYSDOT asserts that while it "does not know if the server issue resulted in the non-delivery of the second email, [] NYSDOT did not receive the email [containing a separate cost proposal]" (*Id.*). To further support this assertion, NYSDOT states it "conducted an IT review" which confirmed the second email from Bolla "was not delivered by Microsoft Outlook" (*Id.*, at fn. 1).[7]

Based on our review of the procurement record, the evidence submitted by both NYSDOT and Bolla is inconclusive to determine whether the cost proposal resubmission email was timely received by NYSDOT. The emails submitted by Bolla have limited evidentiary value as none show that attachments were included (*see* Appeal, Exhibits 3, 4 and 5). More importantly, these emails lack evidentiary value as, without additional proof of receipt, a copy of an email does not conclusively prove receipt by the intended recipient. The Message Trace Report submitted by Bolla shows the initial proposal submission as well as the technical proposal resubmission, which were indisputably received by NYSDOT, were received in the "SMTP" server; whereas, the cost proposal resubmission email was received in the "STOREDRIVER" server rather than the "SMTP" server (*see* Appeal, Exhibit 7). While this shows the cost proposal resubmission email was received in Bolla's exchange server, it fails to show that the email was sent out of the exchange server and received by the intended recipient, NYSDOT. Likewise, NYSDOT's documentary submission of a screenshot of an NYSDOT employee's inbox fails to satisfactorily refute whether Bolla's cost proposal resubmission email was received. NYSDOT's submission does not provide a comprehensive picture of the contents of the NYSDOT employee's mailbox, nor does it provide the details of the emails shown as received by NYSDOT. Therefore, we find the evidence in the procurement record insufficient to definitively determine whether NYSDOT timely received the cost proposal resubmission email. Nevertheless, even if NYSDOT had timely received the cost proposal resubmission email and had not declared Bolla to be non-responsive, the correction of the error would not change the outcome of the award, as discussed further below.

Harmless Error

Notwithstanding the foregoing, this Office has long recognized the notion of excusable harmless error in the procurement process. That is, while there may have been an error in the procurement process, the correction of the error would not change the outcome (i.e., the award) and, therefore, the error is harmless.

Our review of the procurement record reflects that, even if NYSDOT had found Bolla's resubmitted proposal responsive, Bolla would not have been susceptible to contract award. Since Bolla's technical proposal was not scored, for purposes of this discussion, we will assume that Bolla received a perfect technical score of 40 points. If Bolla's cost proposal were scored pursuant

[6] In support of this contention, Bolla submitted three emails sent from Bolla to NYSDOT as documentary evidence of Bolla's initial submission, and subsequent separated technical and cost resubmissions, as well as a Message Trace Report that included sent/receive information for the three emails (Appeal, Exhibits 3, 4, 5 and 7).

[7] In support of this contention, NYSDOT submitted a screenshot of an NYSDOT employee's inbox showing search results that included two emails from Bolla, one email from NYSDOT, and one undeliverable email, all of which were received between 11:29 a.m. and 12:00 p.m. on August 3, 2022 (*see* Answer, Exhibit A). Notably absent was a third email from Bolla or any details about the content of the emails received.

to the RFP,[8] among all responsive offerors Bolla would have ranked last in cost scoring (compared to the top ranked cost score of CPD). Adding Bolla's hypothetical perfect technical score to its cost score to determine Bolla's initial best value score yields a last-place ranking among responsive offerors (compared to the top-rank initial best value score of CPD). Therefore, scoring Bolla's proposal would not have changed NYSDOT's initial best value determination. Additionally, Bolla's initial best value score does not fall within 10 points of the top initial best value ranked offeror (CPD). Therefore, even if Bolla's proposal had been scored, Bolla would have failed to make the shortlist, failed to advance to the remaining best value evaluation process steps, and the results of the procurement would not have changed.

Based on the foregoing, to the extent NYSDOT erred in finding Bolla's proposal non-responsive, such error was harmless.

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 NYSDOT. As a result, the Appeal is denied and we are today approving the NYSDOT / CPD contract for the renovation and operation of a fuel service station facility on the Hutchinson River Parkway.

[8] The RFP specified NYSDOT would score cost proposals by awarding the offeror submitting the highest proposed yearly rent full points and awarding other offerors a proportionate score based on their relation to the proposal offering the highest proposed yearly rent (RFP, Section 6.3, at p. 15).

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by GCOM Software LLC with respect to the procurement of maintenance and operation services for management information systems and mobile applications to support the Special Supplemental Nutrition Program for Women, Infants and Children conducted by the New York State Department of Health.	**Determination of Bid Protest** **SF–20220167** June 9, 2023

Contract Number – C037938

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Health (DOH) for maintenance and operation services for management information systems and mobile applications to support the Special Supplemental Nutrition Program for women, infants and children (WIC). We have determined the grounds advanced by GCOM Software LLC (GCOM) are insufficient to merit overturning the contract award made by DOH and, therefore, we deny the Protest. As a result, we are today approving the DOH contract with Currier, McCabe and Associates, Inc. (CMA) for maintenance and operation services for management information systems and mobile applications to support WIC.

BACKGROUND

Facts

DOH issued a request for proposals (RFP) seeking proposals from qualified offerors to provide maintenance and operation services for management information systems and mobile applications to support WIC (RFP, Section 2.0, at p. 4). DOH is responsible for administering WIC which "provides breastfeeding support, nutrition counseling, health education, health care referrals, referrals to other services, and nutritious foods to approximately 370,000 women, infants and children each month through 90 local providers . . . at 400 service sites" (RFP, Section 2.1, at p. 4). WIC's fundamental purpose "is to ensure the health and well-being of income eligible families with young children" (*Id.*).

The RFP specified that "[a]ll proposals deemed to be responsive to the requirements of [the] procurement [would] be evaluated and scored for technical qualities and cost" (RFP, Section 8.1, at p. 41). The RFP further specified that DOH would evaluate proposals based on best value, with technical proposals worth 70% and cost proposals worth 30% of an offeror's final/composite score (RFP, Section 8.1, at p. 41; RFP, Section 8.3, at p. 41; RFP, Section 8.4, at p. 42). An offeror's technical proposal score would be calculated by averaging the individual scores of the DOH evaluators (RFP, Section 8.3, at p. 41). The offeror with the lowest all-inclusive not-to-

exceed maximum price would receive the maximum cost score of 30 points and "[a]ll other responsive proposals [would] receive a proportionate score based on the relation of their Cost Proposal to the proposal[] offered at the lowest final cost, using [the formula set forth in the RFP]" (RFP, Section 8.4, at pp. 41–42). Contract award would be made to the offeror "with the highest composite score(s) whose experience and qualifications have been verified" (RFP, Section 8.8, at p. 42).

DOH received three proposals by the July 7, 2022, deadline, including proposals from GCOM and CMA. Following evaluation of proposals, DOH awarded the contract to CMA, the offeror with the highest composite score. Thereafter, on November 2, 2022, DOH provided a debriefing to GCOM. GCOM submitted a protest to this Office on November 10, 2022, as corrected by email on November 11, 2022 (collectively, Protest). DOH submitted an answer on March 14, 2023 (Answer) to which GCOM replied on March 17, 2023 (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. documentation contained in the procurement record forwarded to this Office by DOH with the DOH / CMA contract;

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

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

    a. Protest;
    b. Answer; and
    c. Reply.[2]

[1] 2 NYCRR Part 24.
[2] GCOM submitted correspondence dated April 27, 2023 (Correspondence), after DOH replied to an audit question from this Office. In this Correspondence, GCOM states, "OSC should not approve the proposed contract without an audit of the procurement process and a transparent review of the entire procurement record" (Correspondence, at p. 2). Pursuant to its authority under SFL § 112, this Office conducts an audit of the entire procurement record, which

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, GCOM challenges the procurement conducted by DOH on the following grounds:

1. DOH violated the New York State Procurement Guidelines when it required offerors to submit references in response to the RFP but failed to check such references to verify the experience and qualifications of the offerors;

2. CMA's proposal was not responsive because at the price proposed by CMA, CMA could not be offering to provide all of the services required by the RFP's scope of work; and,

3. CMA is not a responsible vendor because of CMA's lack of organizational capacity and CMA's poor past performance on government contracts involving the software used by DOH's management information system and mobile applications for WIC, specifically, in New Jersey.

DOH Response to the Protest

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

1. The Procurement Guidelines are guidelines and do not establish mandatory rules; furthermore, in the RFP, DOH reserved the right to check references at its discretion;

2. DOH evaluated CMA's proposal and found it to be sufficiently responsive to the requirements of the RFP; and,

3. DOH determined that CMA was a responsible vendor in accordance with the SFL, Procurement Guidelines, and the terms of the RFP.

GCOM Reply to the Answer

In its Reply,[3] GCOM expounds upon the grounds set forth in the Protest and further asserts that:

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includes a review of the procurement process, regardless of the filing of a protest. While this Correspondence is outside the scope of submissions permitted as of right under 2 NYCRR Part 24, this additional Correspondence was considered in our review of the procurement but is not referenced or formally addressed in this Determination.

[3] GCOM's allegation that its verified protest "carries more weight than the DOH response, which is unsworn" demonstrates a misunderstanding of OSC's Bid Protest Procedures (Reply, at p. 1). OSC Bid Protest Procedures do not require verification of submissions. Moreover, it is this Office's role to independently review the procurement record and protest submissions to determine the merits of any protest.

1. DOH has failed to comply with New York's Freedom of Information Law (FOIL) by not producing documents in response to GCOM's request;[4]

2. DOH failed to disclose all the evaluation criteria in the RFP in violation of SFL § 163(9)(b);

3. DOH misunderstood the meaning of "best value" by making an award under the RFP to CMA, the offeror with the lowest cost, instead of to GCOM, the offeror with the highest technical score; and,

4. DOH violated the New York State Administrative Procedure Act (SAPA), and its award under the procurement is based on such violation, due to its use of an unpromulgated "rule."[5]

DISCUSSION

Reference Check

GCOM asserts "DOH . . . did not check the references [submitted by CMA] to verify the experience and qualifications of CMA" even though the RFP "required that proposing vendors identify references in their proposals, an action that triggered DOH's obligation to check the references, under the [New York State] Procurement Guidelines" (Protest, at p. 6). GCOM contends that, as such, DOH "violat[ed] the procedure governing this procurement" (*Id.*). In addition, GCOM states pursuant to Section 8.6 of the RFP, references were to be used to verify a bidder's compliance with Section 3.0 of the RFP, and DOH's failure to check references consequently violated RFP Section 8.8 which required DOH to verify the experience and qualifications of the awardee (Reply, at p. 4).

DOH responds "[t]he Procurement Guidelines do not constitute New York State Finance Law, nor do they establish in any other way mandatory rules applicable to every procurement by a New York State agency or authority" (Answer, at p. 4).[6] DOH further responds, "[i]n the RFP, [DOH] reserved the right to check references at its discretion [and] determined that each of the proposals submitted in response to the RFP, including, of course, the proposal submitted by CMA, sufficiently addressed the RFP requirements [such] that further verification or checking of bidders' references were unnecessary during the evaluation process" (*Id.*).

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[4] Consistent with the longstanding policy of this Office enunciated in prior bid protest determinations, issues related to the procuring agency's action or inaction on a FOIL request do not impact our review of the contract award and are not considered as part of our review of bid protests. Furthermore, in making this Determination, we have reviewed the entire procurement record, which includes any documentation related to the procurement that would have been within the scope of GCOM's FOIL requests. Accordingly, the Determination will not address this allegation.
[5] GCOM contends that if it is DOH's "established practice only to check references to confirm a bidder meets the minimum qualifications to bid set forth in the RFP," as DOH claims, such practice "was a 'rule' under SAPA, and, in this case, void in light of DOH's failure to follow SAPA's procedures . . . [and] DOH's selection of CMA was the product of that SAPA violation" (Reply, at p. 3). We find no merit to the contention that such an internal agency policy would be subject to SAPA and thus will not address further (*see* SAPA § 102(2)(b) (defining what does and does not constitute a "rule" under SAPA)).
[6] The Answer is not paginated. For purposes of this Determination, this Office includes page numbers as they would have appeared, if included.

The RFP required the Administrative Proposal to contain various items, including references "for three prior [alike or similar] projects [including] firm names, addresses, contact names, telephone numbers, and email addresses" (RFP, Section 6.1, at pp. 32-33). The RFP provided that "[a]t the **discretion** of the Evaluation Committee, references **may** be checked at any point during the process to verify bidder qualifications to propose [set forth in Section 3.0]" (RFP, Section 8.6, at p. 42 (emphases added)). The RFP also provided "[t]he purpose of the Technical Proposal is to demonstrate the qualifications, experience, competence, and capacity of the Bidder and the Bidder's assigned staff to perform the services contained in this RFP" (RFP, Section 6.2, at p. 34). Accordingly, offerors were required to include in their technical proposals documentation sufficient to show the offerors' experience and qualifications met the requirements set forth in Section 3.0 of the RFP (RFP, Section 6.2(C), at p. 34).

As an initial matter, the RFP provided DOH with the discretion to check references, and DOH opted not to do so. While the RFP required DOH to "award to the Finalist(s) with the highest composite score(s) whose experience and qualifications have been verified," the RFP does not require that verification be done through a reference check (RFP, Section 8.8, at p. 42). As discussed above, offerors were required to include information evidencing compliance with the experience and qualification requirements of the RFP in their technical proposals. DOH "determined that CMA's proposal contained adequate documentation to satisfy its qualifications to bid without additional reference checks" (Answer, at p. 5). Thus, DOH complied with Section 8.8 of the RFP.

Turning to GCOM's assertion that the New York State Procurement Guidelines (Guidelines) mandate DOH to check references, the Procurement Guidelines provide "[i]f the agency requires a bidder to submit references as part of the response, the agency must, at a minimum, verify the references provided as part of its evaluation process" (New York State Procurement Guidelines (2014), at p. 31). Although the Guidelines "are designed to assist State agencies in making procurements efficiently and effectively by providing agency program and fiscal staff with a source of basic, systematic guidance about State procurement policies and practices," they do not have the same legal authority as statutes, rules and regulations (*see* New York State Procurement Guidelines (2014), at p. 1). DOH reserved the right to check references but was not required to do so by either the RFP (for the reasons set forth above) or the Guidelines. Accordingly, there is no merit to this basis for protest.

Evaluation of CMA's Technical Proposal

GCOM asserts "DOH apparently only considered whether CMA met the Minimum Qualification Requirements set forth in Section 3.1 of the RFP, and in no way considered whether the CMA was offering to provide all of the services required by the RFP" (Protest, at p. 5). GCOM alleges "[u]nder any analysis, CMA's proposal was non-responsive to the RFP because, at the price proposed by CMA: (i) CMA cannot be offering to supply all the FTEs contemplated by the RFP's minimum staffing requirement; and (ii) CMA could not be offering to provide all of the services actually required by the RFP's scope of work at the price it is offering" (*Id.*, at p. 11). GCOM further contends "[t]he extremely low price offered by CMA . . . can only mean that CMA's proposal, if carefully read, did not meet the RFP's scope of work specifications and requirements" (*Id.*, at p. 7).

DOH responds that "the Evaluators determined that CMA's proposal was sufficiently responsive to each of the requirements applicable to bidders set forth in Section 3.0 (Bidders' Qualifications to Propose), Section 4.0 (Scope of Work), Section 6.0 (Proposal Content), and Section 7.0 (Proposal Submission)" (Answer, at p. 5). Further, DOH states it found CMA's cost proposal to be responsive and reasonable and CMA's technical proposal to have met the requirements and specifications of the RFP (*Id.*). DOH also noted that "[a] lower price is not an automatic indicator that the chosen vendor cannot perform the services sought to be procured . . . [i]t is an indicator that the winning vendor may be willing to accept less profit or may be more efficient or capable, any and all of which are in the best interests of the People of the State" (Answer, at p. 6).

1. Responsiveness under SFL

State Finance Law provides that contracts for services shall be awarded on the basis of best value to a responsive and responsible offeror (SFL § 163(4)(d); § 163(10)). 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 RFP specifically prescribed the minimum qualifications required to submit a proposal, including required types and levels of experience, and stated that the "[f]ailure to meet these Minimum Qualifications will result in a proposal being found non-responsive and eliminated from consideration" (RFP, Section 3.1, at p. 7).[7]

The procurement record reflects that DOH conducted a review of each offerors' proposal to determine whether an offeror met the minimum qualifications of the RFP and concluded CMA was responsive as required by the applicable statutory provision.

2. RFP's Scope of Work

In addition to the minimum qualifications discussed above that an offeror must meet in order to be responsive pursuant to SFL § 163, the RFP sets forth the scope of work, including the maintenance and operation services, that the awarded offeror will be required to provide (*see* RFP, Section 4.0, at p. 8; *also see* RFP, Sections 4.1.3, 4.2.3, 4.3.3, 4.4.3, 4.5.1, 4.6, 4.7, 4.8, 4.9, 4.10, 4.11, 4.12, and 4.13 for specific requirements). Each offeror was required to "provide responses that address all of the requirements of this RFP as part of its Technical Proposal" which DOH would evaluate and score (RFP, Section 4.0, at p. 8).

[7] These minimum qualifications are distinguishable from other RFP requirements applicable to technical proposals which "demonstrate the qualifications, experience, competence, and capacity of the [offeror] to perform the services contained in [the] RFP," and are evaluated and scored pursuant to the RFP (RFP, Section 6.2, at p. 34; *see* RFP, Section 6.2(D), at pp. 35-39).

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)).

The procurement record shows, prior to the receipt of proposals, DOH developed an evaluation tool consistent with the evaluation criteria relating to the scope of work described in the RFP. Based on our review of the procurement record, DOH evaluated CMA's technical proposal according to the clearly articulated criteria set forth in the RFP and consistent with the evaluation instructions/instrument and determined CMA's technical proposal met the requirements of the RFP. Additionally, DOH concluded CMA's cost proposal was reasonable (Answer, at p. 5).[8]

For the reasons set forth above, we will not disturb DOH's determination.

Vendor Responsibility

GCOM contends that CMA is "not a 'responsible contractor' for this project" due to its "technical and staffing inadequacies" (Protest, at p. 23). GCOM further contends that CMA is not responsible due to its "history of underperformance on WIC technology contracts in other states" (*Id.*, at p. 23). More specifically, GCOM contends that "CMA has no track record of successfully managing a system like New York's and thus cannot be considered a responsible contractor under New York State law and the New York State Procurement Guidelines" (*Id.*, at p. 25). GCOM asserts that CMA only has experience managing a WIC on the Web system like New York's in the State of New Jersey and "[w]hile CMA could only be proven to be a responsible contractor by stellar performance in New Jersey, it has demonstrated the opposite" (*Id.*, at pp. 24-25).

DOH responds it determined CMA was a responsible contractor after considering various factors, including the Vendor Responsibility Questionnaire, Prior Non-Responsibility Determinations and Bidder's Certified Statements completed by CMA as required by the RFP (Answer, at p. 6).

As stated above, SFL provides that "[s]ervice contracts shall be awarded on the basis of best value to a responsive and responsible offerer" (SFL § 163(4)(d); § 163(10)). "Prior to making an award of contract, each state agency shall make a determination of responsibility of the proposed contractor" (SFL § 163(9)(f)). For purposes of SFL § 163, "'[r]esponsible' or 'responsibility' means the financial ability, legal capacity, integrity, and past performance of a business entity" (SFL § 163(1)(c)).

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[8] This Office, as part of our review of the procurement record, confirmed with DOH that DOH was confident that CMA could fulfill the contract obligations at the price bid and nothing has come to our attention during our review that would cast doubt on DOH's affirmation.

GCOM makes multiple allegations relating to CMA's organizational capacity (specifically staffing inadequacies attributable to CMA's low bid) and underperformance maintaining another state's WIC system but fails to substantiate those allegations. Our review of the procurement record confirms DOH conducted a vendor responsibility review of CMA and reviewed CMA's financial ability, legal capacity, integrity, and past performance, as statutorily required. As documented in the procurement record, DOH determined CMA to be a responsible offeror that can successfully perform the services under the contract for the prices submitted in CMA's cost proposal. Moreover, as part of our review of the DOH / CMA contract, this Office examined and assessed the information provided in the procurement record and conducted an independent vendor responsibility review of CMA. Our review did not provide any basis to overturn DOH's responsibility determination.

Best Value Determination

GCOM alleges that "DOH has displayed a misunderstanding of 'best value'" (Reply, at p. 3). To support this allegation, GCOM contends that despite DOH admitting that GCOM received the highest technical proposal score, "[DOH] claims that CMA offered a better value because its price was purportedly lower" (*Id.*). GCOM further asserts that DOH "violated [SFL] Section 163(9)(b)" because "[DOH] evaluators relied on 'evaluation criteria' that the 'Department did not disclose to any bidder'" (Reply, at p. 3 (*citing* Answer, at pp. 2-3).

DOH asserts that it "selected 'best value', as defined in [SFL §] 163(1)(j), as the basis for the award . . . [and] quantif[ied] in the RFP the percentage weighting of the Technical (70%) and Cost (30%)" (Answer, at p. 2). DOH further asserts that it "conducted a fair, impartial and competitive procurement . . . and awarded the contract pursuant to the RFP to the bidder that offered the best value to the State" (*Id.*, at p. 6). DOH notes that GCOM, although "awarded the maximum number of points for its Technical Proposal," ranked second as "CMA's significantly lower Cost Proposal created a scoring differential that was great enough to place CMA in first place" (*Id.*, at pp. 3, 6). DOH refutes GCOM's allegation that DOH violated SFL § 163(9)(b), contending the RFP "described in general terms the manner in which bidders' proposals would be evaluated and selected, as required by SFL section 163(9)(b), and the Procurement Guidelines, by quantifying in the RFP the percentage weighting of the Technical (70%) and Cost (30%) Proposals of each bidder" (*Id.*, at p. 2).

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)). SFL requires the solicitation issued by the procuring State agency to "describe and disclose the general manner in which the evaluation and selection shall be conducted" (SFL § 163(9)(b)). Notably, it does not require the State agency to specifically disclose the allocation of points amongst all criteria in the solicitation. Additionally, a "[S]tate 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" (SFL § 163(7)). In sum, a best value award is a flexible concept based on a balancing

of the cost and the technical benefits that turns on the particular circumstances of a given procurement.

Here, DOH defined "best value" for purposes of this procurement as the proposal receiving the highest composite score, consisting of 70% from technical proposals and 30% from cost (RFP, Section, 8.1, at p. 41; RFP, Section 8.3, at 41; RFP, Section 8.4, at pp. 41-42; RFP, Section 8.5, at p. 42). This general description of the evaluation and selection process set forth in the RFP satisfied the statutory requirement of SFL § 163(9)(b). The RFP also sets forth the general evaluation criteria for the cost and technical proposals and the formula to be used to award points to cost proposals (RFP, Section 6.2, at pp. 34-39, RFP, Section 6.3, at pp. 39-40, RFP, Section 8.3, at p. 41, RFP, Section 8.4, at pp. 41-42). In addition, the procurement record reflects that prior to the receipt of proposals, DOH developed a technical evaluation instrument that defined and detailed the evaluation process for technical proposals, and DOH subsequently scored proposals consistently and in accordance with the technical evaluation instrument and RFP. Therefore, DOH's evaluation and selection process met the requirements of the SFL, and the award made to CMA was based on a best value determination.

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 DOH. As a result, the Protest is denied and we are today approving the DOH / CMA contract for maintenance and operation services for management information systems and mobile applications to support WIC.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by the Village of Southampton with respect to the grant awards for Water Quality Improvement Projects conducted by the New York State Department of Environmental Conservation. Procurement Record – DEC01-0000164-3350000	**Determination of Appeal** **SF–20220175** June 30, 2023

The Office of the State Comptroller has reviewed the above-referenced grant awards made by the New York State Department of Environmental Conservation (DEC) for Water Quality Improvement Projects (WQIP). We have determined the grounds advanced by the Village of Southampton (Southampton) are insufficient to merit overturning the grant awards made by DEC and, therefore, we deny the Appeal.

BACKGROUND

Facts

DEC issued a request for applications (RFA) seeking applications statewide from local governments and not-for-profit corporations for the WQIP program (RFA, at p. 2). The RFA requested applications that would "implement projects[1] that directly improve water quality or aquatic habitat or protect a drinking water source" (*Id.*).

The RFA specified requirements applicable to all applicants as well as those based on project type (*Id.*). Additionally, the RFA specified that "[a]pplications are ineligible that . . . [d]o not meet the requirements for that project type" (RFA, at p. 6).

The procurement record reflects that Southampton applied for a Wastewater Treatment Improvement project grant. The RFA specified each applicant applying for a Wastewater Treatment Improvement project grant must submit an engineering report, a map identifying the project area, a floodplain map (if applicable), a WQIP budget, and a Sexual Harassment Prevention Certification form (RFA, at p. 8).

Prior to the, July 29, 2022, submission deadline, DEC received WQIP applications, including from Southampton. On October 3, 2022, DEC notified Southampton its application was ineligible for WQIP funding. In response, on October 6, 2022, Southampton filed a protest with DEC (Protest). DEC denied the Protest via electronic mail on November 15, 2022 (DEC

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[1] The RFA specified various project types that may be funded through WQIP, including: wastewater treatment improvement, non-agricultural nonpoint source abatement and control, land acquisition for source water protection, salt storage, aquatic connectivity restoration, and marine district habitat restoration (RFA, at pp. 3–4).

Determination). Southampton filed an Appeal of the DEC Determination with this Office on December 1, 2022 (Appeal), to which DEC filed an answer on February 9, 2023 (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 this Appeal, this Office considered:

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

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

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

    a. Protest;
    b. DEC Determination;
    c. Appeal; and
    d. Answer.

ANALYSIS OF THE APPEAL

Appeal to this Office

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

1. DEC should not have deemed Southampton's application non-responsive because Southampton's engineering report was submitted and signed by a NYS-registered professional engineer, the stamped cover page was submitted thereafter, and the initial absence of the stamped seal was an inconsequential oversight.

[2] 2 NYCRR Part 24.

DEC Response to the Appeal

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

1. DEC properly determined Southampton's application was non-responsive for Southampton's failure to timely submit a stamped engineering report with its application as required by the RFA.

DISCUSSION

Non-Responsive Determination

Southampton seeks relief from DEC's determination that its application was non-responsive, contending that "the only item submitted after the deadline of the application was the [engineer's] seal" (Appeal, at p. 2). Southampton asserts that "since the [engineering] report had been in fact submitted and signed by a registered NYS [professional engineer] the absence of the [professional engineer] stamped seal can be considered to be a 'non-substantive' or 'inconsequential' oversight that has no impact on the findings/recommendations presented in the Village's submittal" (*Id.*).

DEC responds that "[t]he engineering report that was submitted with [Southampton's] application . . . did not contain the required stamp of the engineer," a requirement that was based on New York State Education Law § 7209 (Answer, at p. 1). DEC contends that "[w]hile a revised engineering report with a certification letter stamped by the engineer was transmitted to [DEC after the submission deadline], [DEC] cannot accept submissions of missing or incomplete documents after the application submission deadline" (*Id.*). Moreover, DEC states that "[t]o allow the submission of a required document after the submission deadline would provide an unfair advantage to [Southampton]" (*Id.*).

The RFA clearly specified that the required attachments for Water Treatment Improvement applications must include the submission of an "[e]ngineering report **prepared, stamped, signed, and dated** by a NYS-registered professional engineer" (RFA, at p. 8 (emphasis in original)). Additionally, the RFA stated "**[a]pplications that do not attach an engineering report or other required attachments**" are deemed ineligible (RFA, at p. 12 (emphasis in original)). Further, New York State Education Law (EL) § 7209(1) requires a report prepared by a professional engineer to be stamped with that engineer's seal and provides that "[n]o official of this state, or of any city, county, town or village therein, charged with the enforcement of laws, ordinances or regulations shall accept or approve any plans, specifications, or geologic drawings or reports that are not stamped" with such seal.

The procurement record reflects Southampton failed to submit an engineering report in compliance with the RFA and New York State law. Southampton itself concedes that it failed to submit an engineering report that was stamped prior to the application deadline (Appeal, at p. 2). The RFA requirements were clear that applicants would be ineligible for award under the RFA if an engineering report prepared, ***stamped***, signed, and dated by a NYS-registered professional

engineer was not submitted. Furthermore, EL §7209 prohibits DEC from accepting or approving an unstamped report.

Our review of the procurement record confirms that DEC consistently interpreted and applied this mandatory requirement in accordance with the RFA; in fact, DEC deemed other applicant's ineligible for failing to include engineering reports compliant with the RFA. Additionally, contrary to Southampton's contentions, there is nothing in the RFA or applicable law requiring DEC provide Southampton an opportunity to correct a non-compliant submission after DEC's ineligibility determination. Accordingly, we find DEC properly determined Southampton's proposal was non-responsive for failing to submit a stamped engineering report prior to the application deadline.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the grant awards by DEC. As a result, the Appeal is denied.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Access: Supports for Living, 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–20230018

Procurement Record – OPD01-0000302-3660243

May 16, 2023

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 Access: Supports for Living, Inc. (Access) are insufficient to merit overturning the grant award made by OPWDD to Young Adult Institute (YAI) and, therefore, we deny the Appeal.

BACKGROUND

Facts

OPWDD issued a request for applications (RFA) on September 28, 2022, seeking applications from not-for-profit providers for CSIDD in Region 3 (RFA, Section 1.1.1, at p. 5; RFA, Section, 1.3.2, at p. 6). Region 3 includes eighteen New York State counties, covering the Capital District, Hudson Valley, and Taconic areas (RFA, Section 1.3.1.2, at p. 6).

The RFA provided that an evaluation team of OPWDD staff would evaluate each application based on a "combination of technical merit and cost that would most benefit OPWDD" (RFA, Section 7.1.1, at p. 30; RFA, Section 7.1.3, at p. 31). The grant contract would be awarded to the applicant achieving the highest final composite score (RFA, Section 7.5.1, at p. 32; RFA, Section 7.5.2, at p. 33). The final composite score, worth up to 100 points, consisted of a technical proposal worth 80 points[1] and cost proposal worth 20 points[2] (RFA, Section 7.3, at pp. 31–32; RFA, Section 7.4, at p. 32; RFA, Section 7.5.1, at p. 32).

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[1] Several evaluation criteria were scored as part of the technical proposal (RFA, Section 7.3, at pp. 31-32). These technical scoring criteria included: philosophy and mission; vision and goals; proposed staff; experience; description of services; technology; development plan for services; property for resource center use; and diversity practices (*Id.*).
[2] The cost proposal was scored based on the following evaluation criteria: lowest cost; an "[u]nderstanding of annual expenditure requirements for clinical team, Start-Up and Non-Personal Costs;" whether "[t]he applicant utilized correct and reasonable NPS/Admin fees;" whether "[t]he applicant's budget reflected an adherence to a phased in staffing pattern;" "[a] Funding Request Summary . . . for each year, showing Medicaid Reimbursement amounts;" and "specific[ity] . . . when describing the anticipated costs associated with each operational element of their budget and how each line item will be phased in or required a[t] start up" (RFA, Section 7.4, at p. 32).

OPWDD received three proposals by the due date of November 3, 2022. OPWDD awarded the grant contract to YAI, the applicant with the highest final composite score. On December 15, 2022, OPWDD notified Access of non-award. On December 27, 2022, Access received a debriefing and on January 27, 2023, Access received a summary of their debriefing.

Thereafter, on February 2, 2023, Access submitted a protest of the grant award to OPWDD (Protest) pursuant to OPWDD's bid protest policy as outlined in the RFA. OPWDD denied Access' protest on February 16, 2023 (OPWDD Determination), and Access subsequently submitted an appeal to this Office on February 27, 2023 (Appeal). OPWDD submitted an answer on March 8, 2023 (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 this Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by OPWDD with respect to the OPWDD / YAI 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. Protest;
    b. OPWDD Determination;
    c. Appeal; and
    d. Answer.

[3] 2 NYCRR Part 24.

Applicable Statutes

The grant award in question is subject to the requirements of Article 11-B of the SFL.[4] 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.

ANALYSIS OF THE APPEAL

Appeal to this Office

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

1. OPWDD failed to clearly disclose the allocation of cost points available to applicants among the cost proposal evaluation criteria;[5]

2. OPWDD failed to score Access' cost proposal consistent with the RFA and the cost proposal evaluation methodology as applied to the other cost proposals; and,

3. OPWDD evaluators and staff misunderstood the phased-in staffing requirements of the RFA, resulting in flawed deductions to Access' cost proposal score.

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[4] 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)).

[5] Access raised this same issue in the Protest which OPWDD initially denied on the basis that Access failed to raise the issue during the time permitted by the RFA to ask questions and therefore had waived its right to raise it as a ground for protest (*see* Protest, at p. 1; OPWDD Determination, at p. 1). Notwithstanding, OPWDD did address the merits in both its agency-level determination and response to the Appeal filed with this Office (*see* OPWDD Determination, at p. 2; Answer at p. 2). Therefore, although Access also challenges OPWDD's determination that this protest ground was untimely, this Office will instead consider the merit of the original grounds for protest (*see* Appeal, at p. 1).

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. OPWDD clearly disclosed the cost proposal evaluation criteria in the RFA;

2. OPWDD consistently applied its cost proposal evaluation methodology to all proposals; and,

3. OPWDD evaluators understood the RFA requirements pertaining to phasing-in staffing and scored that portion of Access' cost proposal accordingly.

DISCUSSION

Disclosure of Cost Proposal Evaluation Methodology

Access contends "[t]he lack of transparency surrounding the distribution of points in the cost scoring section makes the award procedurally flawed" (Protest, at p. 1). Specifically, "a distribution of points across sections of the cost proposal was not outlined in the RFA, as was the case for the technical proposal" (Protest, at pp. 1–2). Access asserts it is "unaware of how many points were given for low cost, and other sections of the Cost Proposal Evaluation process" (Appeal, at p. 1). OPWDD counters "Section 7.4.1.1 of the RFA specifically stated that, 'Lowest Cost will not be the only criteria considered in the Cost Proposal Evaluation,' and Section 7.4 'Cost Proposal Evaluation (20)' of the RFA lists several cost scoring criteria" (Answer, at p. 1).

As outlined above, this Office looks to whether the scoring system was clear to determine whether the grant award was fair and impartial. Here, the RFA clearly articulated the general manner for the evaluation of applications, with technical proposals worth 80 points and cost proposals worth 20 points (RFA, Section 7.3, at pp. 31–32; RFA, Section 7.4, at p. 32). The RFA further specified the cost evaluation criteria that would be used to evaluate and score cost proposals (RFA, Sections 7.4.1.1–7.4.1.6, at p. 32). As previously stated, SFL § 163 does not apply to the RFA, however, it is instructive. SFL § 163 does not require solicitations to set forth the points or weighting applicable to each criterion of a cost or technical proposal.[6] Therefore, even if the standards of SFL § 163 did apply here, OPWDD would not be required to include any more specificity regarding the allocation of the 20 available cost points. Therefore, we are satisfied OPWDD sufficiently disclosed the cost proposal evaluation methodology resulting in a fair and impartial procurement process.

[6] 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."

Cost Proposal Scoring

1. Generally

Access asserts "[i]t is unclear whether Access' proposal was scored by the same scoring criteria as the other proposers" (Appeal, at p. 1). OPWDD contends that it is "demonstrated in the procurement record, [that] the same scoring criteria and points breakdown were used to evaluate and score all bidders' cost proposals" (Answer, at p. 2).

The procurement record reflects prior to the receipt of proposals, OPWDD established a cost evaluation instrument that was consistent with the cost evaluation criteria outlined in the RFA. Based on our review of the procurement record, we are satisfied that all cost proposals were scored according to the clearly articulated cost evaluation criteria outlined in the RFA and the pre-established cost evaluation instrument.

2. Phased-In Staffing Plan

Access asserts that the failure to "understand[] the [phased-in staffing] requirements of [RFA Section 2.1.2] by [OPWDD] evaluators and [ ] staff may have led to a detrimental [cost] score [for Access]" (Appeal, at p. 2). Specifically, Access concedes "[i]t is true that Clinical Coordinators are a necessary component of a Crisis Intervention Services and Resource Center in the OPWDD regulations" but contends "the RFA indicated that [the Clinical Coordinator was] a position that could be phased in" (*Id.*).

OPWDD asserts that "Access' argument that evaluators misunderstood the phased-in staffing requirement is [] erroneous and misplaced" and "OPWDD's scoring is consistent with the phase-in described in RFA Section 2.1.2" (Answer, at p. 2). OPWDD asserts that "[t]he issue was not that Access had proposed to phase-in staffing . . . [r]ather, the issue was that its proposed phase-in was to hire [Clinical] Coordinators in the seventh month of the award" (*Id.*). OPWDD adds "Access could have scored higher [for this criterion of the cost proposal] if it had indicated an earlier hiring of the Clinical Coordinators to support the transition of CSIDD from state-operated services" (*Id.*).

The RFA provided that an "applicant will demonstrate that it employs or has access to staff sufficient to form the comprehensive Region 3 CSIDD team and Resource Center and will outline an initial staffing plan as well as a plan for phased-in staffing . . . [which] must include, but is not limited to . . . Clinical Team Coordinators" (RFA, Sections 2.1.2 and 2.1.3, at p. 10). The RFA further provided that the cost proposal evaluation would include the following relevant criteria: the applicant's "understanding of annual expenditure requirements for clinical team, Start-Up and Non-Personal Costs" as well as "[t]he applicant's budget reflected an adherence to a phased in staffing pattern" (RFA, Sections 7.4.1.2 and 7.4.1.4, at p. 32).

With respect to specific scores assigned by 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

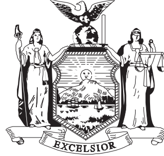
Bid Protest Determination SF-20160188, at p. 8 (upholding scores where "review of the procurement record confirms the evaluators scored the proposals in a manner consistent with the evaluation/scoring instructions"); *see also* OSC Bid Protest Determination SF-20200069, at p. 6; OSC Bid Protest Determination SF-20210006, at p. 6; OSC Bid Protest Determination SF-20210070, at p. 5).

The procurement record reasonably supports the scores assigned to Access' cost proposal, including those related to the phased-in staffing plan proposed—which were clearly within OPWDD's expertise to evaluate. In addition, the comments provided in the evaluation instruments further support the evaluators' scores. Therefore, there is no basis to disturb the cost proposal scores OPWDD awarded to Access.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the grant award by OPWDD to YAI. As a result, the Appeal is denied.

THOMAS P. DINAPOLI
STATE COMPTROLLER



110 STATE STREET
ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

July 18, 2023

John G. Powers, Esquire
Hancock Estabrook, LLP
1800 AXA Tower 1, 100 Madison Street
Syracuse, NY 13202

Re: Request for Proposal 22/23/028 for Vending Services

Dear John G. Powers:

On May 2, 2023, you filed with this Office, on behalf of your client, American Food & Vending Corp., an appeal challenging the contract award made by the State University of New York Binghamton (SUNY) to Servomation Refreshments, Inc. in the above-referenced procurement.

Pursuant to the requirements of SFL §112, SUNY submitted the contract to this Office for review and approval. After conducting our review of the procurement, this Office returned the contract non-approved to SUNY, finding that (1) several requirements in the Request for Proposals were unclear/deficient; (2) the technical evaluation methodology was unclear resulting in inconsistent and subjective evaluation; (3) the cost evaluation methodology was unclear resulting in inconsistent and subjective evaluation; and, (4) the ten-year term length was not justified. Accordingly, your protest is rendered moot and this Office will not be issuing a formal determination with regard to your protest.

Thank you for taking the time to participate in the State procurement process.

Sincerely,

Brian J. Fuller

Brian Fuller
Director of Contracts

cc: Matthew Schofield, SUNY Binghamton (mschofie@binghamton.edu)
W. Bradley Hunt, Esq., Servomation Refreshments, Inc. (bhunt@mackenziehughes.com)

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Catholic Charities Community Services, Archdiocese of New York with respect to the grant awards for the Hunger Prevention and Nutrition Assistance Program conducted by the New York State Department of Health.	**Determination of Bid Protest** **SF–20230051**
Procurement Record – DOH01-0000729-3450000	June 20, 2023

The Office of the State Comptroller has reviewed the above-referenced grant awards made by the New York State Department of Health (DOH) for the Hunger Prevention and Nutrition Assistance Program (HPNAP). We have determined the grounds advanced by Catholic Charities Community Services, Archdiocese of New York (CCCS) are insufficient to merit overturning the grant awards made by DOH and, therefore, we deny the Protest.

BACKGROUND

Facts

DOH issued a request for applications (RFA) on September 22, 2022, seeking applications from not-for-profit organizations to provide emergency food and nutrition support services to food insecure populations in New York State (RFA, Section I, at p. 3; RFA, Section II, at p. 6). Funding would be available for five components[1] in eight geographic regions[2] (RFA, Section I, at p. 3; RFA, Section I.C, at p. 4). DOH expected to award up to 55 grant contracts for a five-year term, allocated among the regions and components as set forth in the RFA (RFA, Section I.C, at p. 5).

The RFA set forth minimum eligibility requirements applicants must meet to be considered for award (RFA, Section II, at p. 6; RFA, Section V.C, at p. 36). An evaluation team of DOH staff would evaluate each eligible application based on a "100 point system"[3] focusing on the "following factors: responsiveness to RFA; expertise of Contractor and staff; project organization and administration; nutrition standards and effectiveness and cost efficiency in meeting the nutritional needs of food insecure, low-income populations; and the completeness, clarity, accuracy and feasibility of the proposal" (RFA, Section V.C, at p. 37). The RFA provided that an

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[1] Component A – Food Bank Projects; Component B – Food Pantry and/or Soup Kitchen Projects; Component C – Special Nutrition Initiatives; Component D – Food Recovery Projects; and, Component E – Resource/Grant Distribution Projects (RFA, Section I, at p. 3).

[2] Albany, Buffalo, Elmira, Long Island, New York City, Rochester, Syracuse, and Westchester (RFA, Section I.C, at p. 4).

[3] The RFA further specified available points as follows: Program Summary (Maximum Score: 10 points); Statement of Need (Maximum Score: 15 points); Applicant Organization (Maximum Score: 10 points); Program Activities (Maximum Score: 35 points); Project Evaluation (Maximum Score: 10 points); and, Budget (Maximum Score: 20 points) (RFA, Section V.A, at pp. 26-34).

applicant "must score a minimum of 65 [points] on their proposal to be considered for funding" (RFA, Section V.C, at p. 37). For applications receiving scores of 65 or above, proposed budgets would be evaluated for "effectiveness, cost efficiency, and feasibility of proposal" (*Id.*).

The RFA provided that the "application with the highest score in each component [ ] will receive an award" and other awards "will be recommended based on high score in each region regardless of the Component Type" (RFA, Section I.C, at p. 6). Awards would be made "until funding for that Region has been exhausted" (*Id.*).

Applicants were required to submit applications online through the New York State Grants Gateway (RFA, Section IV.E, at pp. 17-18). DOH made 44 grant awards, exhausting the HPNAP funding for all regions/components. On April 17, 2023, DOH notified CCCS of non-award. On May 4, 2023, DOH provided CCCS with a debriefing.

Thereafter, on May 11, 2023, CCCS submitted a protest to this Office (Protest). DOH submitted an answer on May 22, 2023 (Answer).

<u>Comptroller's Authority and Procedures</u>

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.[4] 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 DOH with the DOH HPNAP grant awards;

2. the correspondence between this Office and DOH arising out of our review of the procurement record in connection with the proposed DOH HPNAP grant awards; and

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

    a. Protest; and,
    b. Answer.

ANALYSIS OF THE PROTEST

[4] 2 NYCRR Part 24.

Protest to this Office

In its Protest, CCCS challenges the decision by DOH to deny funding of its application on the following grounds:

1. DOH failed to exercise its rights reserved under the RFA, including seeking clarifications of CCCS' proposals or correcting minor application errors, which would have resulted in CCCS scoring the minimum of 65 to be considered for an award;
2. CCCS should have received 20 points, the maximum number of points available for the budget sections of the proposal because CCCS submitted a budget that met all of the RFA requirements; and,
3. DOH was required under SFL § 163(9)(c)(iii) to provide CCCS with an in-person debriefing.

DOH Response to the Protest

In its Answer, DOH contends the Protest should be rejected on the following grounds:

1. CCCS met the minimum of 65 to be considered for funding but did not achieve a sufficient score relative to other applicants in the New York City Region (the region in which CCCS applied) to receive funding;
2. The RFA clearly stated the budget sections of the proposal would be scored as part of the competitive process; and,
3. DOH sent a debriefing letter to CCCS describing the strengths and weaknesses of CCCS' application. DOH offered a video conferencing debrief to those unsuccessful applicants that had additional questions or requested clarification of the debriefing letter, which CCCS did not.

DISCUSSION

Scoring of Proposals

1. Minimum Score to be Considered for Award

CCCS asserts DOH "did not avail itself of rights under the RFA that would have resulted in a higher score [for CCCS]" of at least 65 which would have allowed CCCS' proposal to be considered for funding (Protest, at p. 2). DOH responds that CCCS did, in fact, receive the minimum 65 points to be considered for funding as set forth in the RFA, but CCCS did not score high enough, in relation to other applicants for Component E in the New York City Region, for an award (Answer, at p. 3).[5] Specifically, CCCS scored lower than sixteen funded applications and eight unfunded applications in the New York City Region (*Id.*).

[5] The Answer is not paginated. For purposes of this Determination, this Office includes page numbers as they would have appeared, if included.

The procurement record clearly shows CCCS met the minimum number of points to be considered for funding, and CCCS was considered for funding. Accordingly, CCCS' contention lacks merit. The RFA provided "the application with the highest score in each component…will receive an award. Awards will be recommended based on high score in each region regardless of the Component Type [and a]wards will be made until the funding for that Region has been exhausted" (RFA, Section I, at p. 6). However, although considered for funding, based on our review of the procurement record, CCCS' total score was not sufficient for it to be susceptible for award.

2. Scoring Methodology for Budget

CCCS contends that by submitting a "compliant" budget that met all of the requirements of the RFA without any "non-compliant," or ineligible items, DOH should have awarded CCCS the full 20 points available for the budget evaluation category (*see* Protest, at p. 3). To explain its position, CCCS expounds "[b]ecause Budget forms are established in the RFA document, and funding amounts are pre-determined, a compliant submission of a budget should arguably be one that meets all of the RFA instructions and, in turn, receives the entirety of the available points [and] only in the case of a non-compliant [budget] submission…an Applicant would see any significant point reductions in this category" (*Id.*). DOH asserts "[i]t was abundantly clear in [the RFA] that [the budget] section was scored as part of a competitive review process" and further, CCCS' position "would not be consistent with the pre-established and scored program specific budget questions stated in the [RFA]" (Answer, at p. 4).

The RFA established various criteria relating to an applicant's budget to be evaluated and scored by DOH (*see* RFA, Section V.A.6, at pp. 34-35). Applicants were required to "[p]rovide a narrative justification for each budget item to fully explain the intent of the funding for the budget category as well as how the amount was computed" (RFA, Section V.A.6, at p. 34). Furthermore, the RFA specified that "[s]coring will be based on the budget's clarity, completeness and feasibility" (RFA, Section V.A.6, at p. 35). Contrary to CCCS' position that a "compliant" budget should receive the maximum score of 20 points, DOH was required to follow the scoring methodology set forth in the RFA. Our review of the procurement record shows DOH evaluated and scored the budget section of CCCS application in accordance with the criteria set forth in the RFA. Accordingly, CCCS' contention lacks merit.

Debriefing

CCCS alleges that, although DOH did provide CCCS with a debriefing letter summarizing the strengths and weaknesses of CCCS' proposal, DOH violated State Finance Law (SFL) § 163 by failing to provide "the statutorily mandated debrief meeting [which has] adversely affected CCCS' ability to ask pointed questions of the evaluation committee and have access to publicly available information" (Protest, at p. 4).

DOH states "CCCS did not request additional information in response to the written debrief" and therefore was not "invited to a video conferencing debrief where the written document was reviewed" (Answer, at p. 5). To refute CCCS' allegation that it was adversely affected by DOH's failure to offer an in-person debriefing, DOH contends "the written debrief provided was

inclusive of the information that is required to be provided in a debriefing [pursuant to SFL § 163]" (*Id.*).

As an initial matter, we note that SFL § 163 does not apply to the instant grant awards.[6] Accordingly, there is no statutory debriefing requirement that applies in this case. The RFA provided for an applicant to request a debrief of its application no later than 15 calendar days from the date of award or non-award (RFA, Section V.C, at p. 38). Notably, the RFA did not state the debriefing would be held in-person. As stated above, the debriefing requirements in SFL § 163 do not apply here and, while DOH was not required to offer a debriefing, it did so and complied with the applicable terms of the RFA.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the grant awards by DOH. As a result, the Protest is denied.

[6] This Office has previously explained SFL§ 163's inapplicability to the award of grant contracts to not-for-profit organizations:

> SFL § 163 generally applies to contracts for goods and services for the State. SFL § 160(7) defines "services" as " . . . the performance of a task or tasks and may include a material good or a quantity of material goods, and which is subject of any purchase or other exchange." SFL §160(7) states that the definition of "services" in that section of the law is not applicable to " . . . contracts approved in accordance with article eleven-B . . . ." This procurement relates to the award of grant contracts to not-for-profit organizations subject to provisions of Article 11-B of the SFL. Therefore, it is not a procurement for the award of a "service," and, as a result, it is not subject to the provisions of SFL §163 or the Procurement Guidelines. While the resulting contracts are subject to Article 11-B of the SFL, that article is generally concerned with ensuring that contracts, renewals, and payments thereunder, are processed in a prompt manner; it does not generally impose procedural requirements with respect to the selection of grant recipients.

(OSC Bid Protest Determination SF-20110219, at p. 2).

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Iris House: A Center for Women Living with HIV with respect to the grant awards for the Hunger Prevention and Nutrition Assistance Program conducted by the New York State Department of Health.

Procurement Record – DOH01-0000726-3450000

Determination of Bid Protest

SF–20230062

June 20, 2023

The Office of the State Comptroller has reviewed the above-referenced grant awards made by the New York State Department of Health (DOH) for the Hunger Prevention and Nutrition Assistance Program (HPNAP). We have determined the grounds advanced by Iris House: A Center for Women Living with HIV (Iris House) are insufficient to merit overturning the grant awards made by DOH and, therefore, we deny the Protest.

BACKGROUND

Facts

DOH issued a request for applications (RFA) on September 22, 2022, seeking applications from not-for-profit organizations to provide emergency food and nutrition support services to food insecure populations in New York State (RFA, Section I, at p. 3; RFA, Section II, at p. 6). Funding would be available for five components[1] in eight geographic regions[2] (RFA, Section I, at p. 3; RFA, Section I.C, at p. 4). DOH expected to award up to 55 grant contracts for a five-year term, allocated among the regions and components as set forth in the RFA (RFA, Section I.C, at p. 5).

The RFA set forth minimum eligibility requirements applicants must meet to be considered for award (RFA, Section II, at p. 6; RFA, Section V.C, at p. 36). An evaluation team of DOH staff would evaluate each eligible application based on a "100 point system"[3] focusing on the "following factors: responsiveness to RFA; expertise of Contractor and staff; project organization and administration; nutrition standards and effectiveness and cost efficiency in meeting the nutritional needs of food insecure, low-income populations; and the completeness, clarity, accuracy and feasibility of the proposal" (RFA, Section V.C, at p. 37). The RFA provided that an

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[1] Component A – Food Bank Projects; Component B – Food Pantry and/or Soup Kitchen Projects; Component C – Special Nutrition Initiatives; Component D – Food Recovery Projects; and, Component E – Resource/Grant Distribution Projects (RFA, Section I, at p. 3).
[2] Albany, Buffalo, Elmira, Long Island, New York City, Rochester, Syracuse, and Westchester (RFA, Section I.C, at p. 4).
[3] The RFA further specified available points as follows: Program Summary (Maximum Score: 10 points); Statement of Need (Maximum Score: 15 points); Applicant Organization (Maximum Score: 10 points); Program Activities (Maximum Score: 35 points); Project Evaluation (Maximum Score: 10 points); and, Budget (Maximum Score: 20 points) (RFA, Section V.A, at pp. 26-34).

applicant "must score a minimum of 65 [points] on their proposal to be considered for funding" (RFA, Section V.C, at p. 37). For applications receiving scores of 65 or above, proposed budgets would be evaluated for "effectiveness, cost efficiency, and feasibility of proposal" (*Id.*).

The RFA provided that the "application with the highest score in each component [ ] will receive an award" and other awards "will be recommended based on high score in each region regardless of the Component Type" (RFA, Section I.C, at p. 6). Awards would be made "until funding for that Region has been exhausted" (*Id.*).

Applicants were required to submit applications online through the New York State Grants Gateway (RFA, Section IV.E, at pp. 17-18). DOH made 44 grant awards, exhausting the HPNAP funding for all regions/components. On April 17, 2023, DOH notified Iris House of non-award. On May 4, 2023, DOH provided Iris House with a debriefing.

Thereafter, on May 26, 2023, Iris House submitted a protest to this Office (Protest).[4] DOH submitted an answer on June 7, 2023 (Answer).[5]

<u>Comptroller's Authority and Procedures</u>

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.[6] 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 DOH with the DOH HPNAP grant awards;

2. the correspondence between this Office and DOH arising out of our review of the procurement record in connection with the proposed DOH HPNAP grant awards; and

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[4] The AIDS Healthcare Foundation, Member and Manager of Iris House, initially submitted a protest on Iris House's behalf on May 11, 2023. This submission, albeit timely under OSC's Protest Procedures, did not comply with Protest Procedure requirements to "contain specifically enumerated factual and/or legal allegations, setting forth the basis on which the protesting party challenges the contract award by the public contracting entity." Therefore, this Office did not consider this initial submission in this Determination.
[5] DOH submitted an answer to the May 11, 2023, protest, dated May 22, 2023, which, for the reasons enumerated above in fn. 4, we will not consider in this Determination.
[6] 2 NYCRR Part 24.

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

    a. Protest; and,
    b. Answer.

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, Iris House challenges the decision by DOH to deny funding of its application on the following grounds:

1. DOH failed to properly review and evaluate all materials submitted by Iris House which caused DOH to erroneously conclude Iris House's proposal was deficient and adversely score its proposal;
2. DOH's denial of Iris House's proposal was arbitrary; and,[7]
3. DOH's evaluation of Iris House's proposal was not made in accordance with the RFA, there were errors in calculation, the RFA was vague and ambiguous, DOH improperly considered matters outside the RFA and there were conflicts of interest.[8]

DOH Response to the Protest

In its Answer, DOH contends the Protest should be rejected on the following grounds:

1. DOH reviewed Iris House's proposal, as submitted to DOH, in its entirety and scored the proposal appropriately.

DISCUSSION

DOH's Evaluation/Scoring of Iris House's Proposal

Iris House asserts it "provided the entirety of information responsive to the RFA via the New York State Grants Gateway portal [but] **key responsive information was overlooked or excluded [by DOH] as a result of a computer glitch or other anomaly in Grants Gateway**" (Protest, at pp. 1-2 (emphasis in original)). Specifically, Iris House makes this assertion in connection with the budget sections of its proposal which DOH, in the debriefing letter provided to Iris House, stated lacked detail (*Id.*, at p. 2). Iris House contends that an error in the Grants Gateway caused information, including key budget information, to be omitted from its proposal and, consequently, DOH's "failure to effectively access and review this important information

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[7] Iris House does not elaborate on this Protest ground. The procurement record shows DOH evaluated Iris House's proposal in accordance with the RFA, and the evaluation tool and instructions DOH established in advance of submission of applications. Therefore, there is no merit to this general allegation.

[8] The Protest does not contain specifically enumerated factual or legal allegations that set forth the basis for these challenges. Accordingly, this Determination will not further address these challenges (*see* 2 NYCRR § 24.4(h)).

resulted in an atypically low score on the 'Budget' section of Iris House's application and, ultimately, [DOH's denial of funding]" (*Id.*, at p. 3).

DOH states "there is no evidence in either the protest record or the possession of [DOH] that a computer or Grant[s] Gateway 'glitch' occurred that could have resulted in critical information being 'omitted from the application'" (Answer, at p. 3).[9] DOH claims "Iris House was responsible for reviewing their application for completeness and accuracy in advance of the submission deadline, review which in [DOH's] view was not adequately performed" (*Id.*). DOH notes various narrative sections of Iris House's application submitted in the Grants Gateway (Personal Services – Salary, Travel, Utilities, Operating Expenses, and Other) were blank and that cost information was not provided in certain sections as required by the RFA (Answer, at p. 4). DOH further contends Iris House included participant incentives as expenses that were not allowable under the RFA for Component B (*Id.*). DOH asserts its "[r]eviewers reviewed [Iris House's] application in its entirety" and that "the application defects described above validate the scoring of the Iris House application" (Answer, at pp. 3-4).

Nothing in our review of the procurement record leads us to question DOH's claim that it reviewed the entire application as submitted by Iris House and scored that application in accordance with the evaluation tool and instructions DOH established in advance of submission of applications. Further, Iris House's assertion that omission of information in its application was caused by a glitch in the Grants Gateway is unsupported. Thus, there is no basis to disturb the scores DOH awarded to Iris House.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the grant awards by DOH. As a result, the Protest is denied.

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[9] The Answer is not paginated. For purposes of this Determination, this Office includes page numbers as they would have appeared, if included.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by H2M Architects, Engineers, Land Surveying and Landscape Architecture, D.P.C. with respect to the procurement of air quality monitoring consultant services conducted by the New York State Department of Public Service.	**Determination of Bid Protest** **SF–20230075**
Contract Number – C222351	September 21, 2023

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Public Service (DPS) for environmental consultant services, specifically air quality monitoring during the decommissioning of the Indian Point nuclear power generation facility in Buchanan, New York ("air quality monitoring"). We have determined the grounds advanced by H2M Architects, Engineers, Land Surveying and Landscape Architecture, D.P.C. (H2M) are insufficient to merit overturning the contract award made by DPS and, therefore, we deny the Protest. As a result, we are today approving the DPS contract with Sound Environmental Associates, LLC (SEA) for air quality monitoring.

BACKGROUND

Facts

DPS issued a request for proposals for air quality monitoring (RFP) on January 9, 2023. DPS is a State agency with "jurisdiction over utility rates and practices" and is "charged with ensuring safe and adequate utility service at just and reasonable rates for New York utility ratepayers" (RFP, Section I.A., at p. 1). The RFP sought to procure "environmental consulting services to develop and implement a Community Air Monitoring Plan (CAMP) to be in place during the decommissioning of Indian Point" (RFP, Section I.B, at p. 1).[1] The RFP indicates Indian Point "is currently undergoing work to safely transfer and store its remaining spent nuclear fuel, decommission the facility, and restore the site for future use" (*Id.*).

The RFP specified DPS "desires to select the Bidder who will provide the 'best value,' taking into consideration the most beneficial combination of qualifications, services, cost, and the consistency of the bid with the requirements of [the] RFP" (RFP, Section VI.A, at p. 10). The RFP clearly articulated a "Not-to-Exceed Cost" requirement, stating "[t]he total not-to-exceed costs for the entire project is [*sic*] $500,000" (RFP, Section III.A, at p. 4). The RFP provided that "[o]nly proposals deemed to be responsive to the submission requirements set forth in this RFP will be evaluated" (RFP, Section VI.A, at p. 10). The technical proposals would comprise 65% (up to 65 points) of an offeror's final score, while the cost proposal would comprise 35% (up to 35 points)

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[1] Indian Point was permanently shut down in April 2021, and is scheduled to start a heavy demolition phase in late 2023 (RFP, Section I.B, at p. 1).

of an offeror's final score (RFP, Section VI. B, at pp. 10–11). The offeror with the highest overall score would be selected for contract award (RFP, Section VI.C, at p. 11).

DPS received four proposals by the due date of March 3, 2023. After an initial review by DPS, two proposals were rejected as non-responsive;[2] the proposals submitted by H2M and SEA were found to be responsive and proceeded to technical and cost evaluation. DPS awarded the contract to SEA,[3] the offeror with the highest overall score. DPS held a debriefing with H2M on June 21, 2023. H2M submitted a protest to this Office on June 23, 2023 (Protest), which DPS answered on June 29, 2023 (Answer), and H2M replied to on July 3, 2023 (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.[4] 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 DPS with the DPS / SEA contract;
2. the correspondence between this Office and DPS arising out of our review of the proposed DPS / SEA contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
    a. Protest;
    b. Answer; and,
    c. Reply.

[2] For submitting cost proposals that exceeded the not-to-exceed cost requirement of $500,000 set forth in Section III.A of the RFP.
[3] DPS initially awarded the contract to H2M. However, on June 12, 2023, DPS notified H2M that DPS was rescinding H2M's contract award as DPS had erroneously calculated the technical scores and H2M no longer had the overall highest score. H2M does not dispute the correction of the technical scoring (*see* Protest, at p. 2).
[4] 2 NYCRR Part 24.

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, H2M challenges the procurement conducted by DPS on the following grounds:

1. DPS failed to follow the cost evaluation methodology disclosed in the RFP, and instead utilized a cost evaluation methodology that was not disclosed in the RFP; and,
2. The cost evaluation methodology used by DPS was faulty in design.

DPS Response to the Protest

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

1. DPS's cost evaluation methodology was consistent with the terms of the RFP and requirements of State Finance Law.

H2M's Reply to the Answer

In its Reply, H2M further elaborates on the grounds contained in its Protest and alleges that DPS's cost evaluation methodology did not result in a best value award.

DISCUSSION

Disclosure of Cost Evaluation Methodology

H2M asserts "[t]he RFP contains no statement that the sole [cost] evaluation criteria will consist of a ratio of the proposer's bid to the lowest bidder's bid" (Protest, at p. 2). H2M contends "[t]he methodology that will be used is required to be set forth clearly and explicitly in the RFP[, and that] [t]he RFP contained a single metric – the cost threshold [but] DPS used a different, unpublished method, its secret relative cost ratio" (Reply, at p. 1).

DPS responds "[the RFP] state[d] that the cost proposals will be scored based on a *maximum* cost score of 35 points" (Answer, at p. 1 (emphasis in original)).

SFL § 163(9)(b) provides,

> 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).

The RFP clearly articulated the general manner in which the evaluation would be conducted: "Cost Proposals [would] be scored based on a maximum cost score of 35 points" (RFP, Section VI.B, at p. 11). State Finance Law does not require the solicitation specifically prescribe how the procuring agency will award points (such as weighting of particular criteria or, as in this instance, the use of mathematical formulas). Therefore, despite H2M's assertion that DPS should have disclosed in the RFP the actual formula used to calculate an offeror's cost score, DPS was not required to disclose further specifics regarding its cost methodology in the RFP (*see* OSC Bid Protest Determination, SF-20170111, at pp. 5–6). Thus, we are satisfied that the RFP met the applicable legal requirements with respect to disclosure of the cost evaluation methodology.

Cost Evaluation Methodology

H2M asserts the cost methodology is "faulty in design" as "[t]he conceived ratio does not account for the cost of quality" (Protest, at p. 3). H2M contends the "RFP expresses only one metric ($500,000) and does so in a binary fashion ([not-to-exceed])" accordingly "[a]ny proposer whose bid does not exceed $500,000 should therefore be awarded the full measure of cost evaluation points (that is 35)" (*Id.*, at p. 2). Under this methodology, H2M claims it "[would] have not only the superior technical merit score, but the superior overall score, and should be awarded the contract pursuant to [ ] the RFP" (*Id.*, at p. 3).

DPS counters "the [DPS's] approach to reviewing the cost proposals was consistent with the RFP, as well as the requirements of State Finance Law" (Answer, at p. 1). DPS asserts that "[t]he fact that the RFP indicated that up to 35 points could be awarded, does not mean that 35 points must be automatically awarded across the board to all bidders" (*Id.*). To support its position, DPS explains "[i]f every qualified bid received all 35 points in the cost evaluation, it would set up inflexible criteria focused solely on technical qualifications . . . contrary to prudent public policy as well as State Finance Law" (*Id.,* at p. 2).

SFL § 163(7) provides that "[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." State Finance Law requires that service contracts be awarded 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)).

As described above, the RFP clearly articulated "[t]he Cost Proposals will be scored based on a maximum cost score of 35 points (35% of the final score)" (RFP, Section VI.B, at p. 11). The procurement record reflects that DPS crafted a scoring tool for cost proposals using a mathematical formula to calculate each offeror's cost score by converting the price offered to a weighted point

score using the following formula: (lowest cost / cost being evaluated) x the total cost points. Accordingly, the offeror with the lowest cost received the full 35 points and other offerors received proportional scores based on the application of the formula. Our review of the procurement record confirms the methodology used to evaluate cost proposals and the corresponding scoring tool that evaluators used to score cost proposals were finalized before the initial receipt of offers in accordance with applicable statutory requirements. As a result, the evaluation of the cost proposals conducted by DPS was consistent with the RFP and met the applicable legal requirements.

H2M's contention that it (or any offeror for that matter) should be awarded the full available points for proposing a cost that did not exceed $500,000 fails to distinguish between a mandatory requirement and cost evaluation methodology. The requirement that cost proposals not exceed $500,000 was mandatory for all offerors; the consequence of failure to meet the requirement was being found non-responsive (which, in fact, occurred with two offerors).[5] Meeting the requirement meant an offeror was responsive but did not entitle an offeror to a particular number of cost points, nor did DPS establish a cost evaluation methodology in that manner. Rather, as set forth above, DPS awarded the highest available points to an offeror proposing the lowest cost and then awarded points to other offerors proportionally in comparison to the lowest cost. To accept H2M's contention here (H2M should have received the full amount of cost points for simply meeting a mandatory requirement) would be to disregard the cost evaluation methodology established by DPS, consistent with the RFP and SFL, and adopt a cost evaluation methodology crafted by one of the offerors. This Office generally defers to agency determinations where they are properly within the agency's expertise and supported by the procurement record. DPS, as the State agency responsible for ensuring safe and adequate utility service at just and reasonable rates for New York utility ratepayers, possesses the expertise to develop an RFP and methodology to evaluate proposals submitted in response to the RFP to effectively meet the needs and requirements for air quality monitoring services related to the decommissioning and future use of the Indian Point facility. Our review of the procurement record confirms DPS complied with the statutory requirements in developing the cost evaluation methodology and, for the reasons set forth above, we will not disturb such methodology.

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 DPS. As a result, the Protest is denied and we are today approving the DPS / SEA contract for air quality monitoring.

[5] The RFP provided "[i]f a cost proposal is found to be non-responsive, that proposal may not receive a cost score and may be eliminated from consideration" (RFP, Section VI.B, at p. 11).

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by PTC Properties LLC with respect to the procurement of snow removal and ice control services conducted by the New York State Office for People with Developmental Disabilities.

Contract Numbers – C0SBR00634, C0SBR00635, and C0SBR00636

Determination of Appeal

SF–20230096

November 3, 2023

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Office for People with Developmental Disabilities (OPWDD) for snow removal and ice control services in Broome, Chenango, Delaware, Tioga, Tompkins, and Otsego counties. We have determined the grounds advanced by PTC Properties LLC (PTC) are insufficient to merit overturning the contract awards[1] made by OPWDD and, therefore, we deny the Appeal. As a result, we are today approving the OPWDD contracts with multiple awardees for snow removal and ice control services in Clusters 1-6, 11-13 and 15.

BACKGROUND

Facts

On April 21, 2023, OPWDD, on behalf of the Broome Developmental Disabilities State Operations Office,[2] issued an invitation for bid (IFB) seeking snow removal and ice control services at community residences in Broome, Chenango, Delaware, Tioga, Tompkins, and Otsego Counties (IFB, at p. 19). OPWDD is responsible for "provid[ing] care, treatment, rehabilitation, education, training and support services to developmentally disabled persons" (IFB, at p. 3). The IFB specified that "[s]now removal and ice control services are required at OPWDD residences which are occupied by a developmentally disabled population [and such residents often] require an additional level of care regarding snow and ice removal due to functional mobility limitations" (IFB, at p. 19).

The IFB included a site listing that provided a breakdown of geographic sites to be serviced under the contract, referred to as "clusters" (IFB, Exhibit A). Bidders were instructed to submit bids by cluster and they were able to "bid on one or multiple Clusters" (IFB, at p. 17). The IFB specified that there are seventeen (17) Clusters and "each Cluster will be evaluated separately"

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[1] OPWDD awarded multiple contracts under this procurement to the following entities: A Great Choice Lawn Care and Landscaping, LLC for Clusters 1–6; Edmund Rajmer d/b/a All Weather Enterprises for Clusters 11–13; and Daniel G. Snyder d/b/a DGS Construction for Cluster 15. OPWDD did not make awards under this solicitation in Chenango, Delaware, Otsego and Tompkins counties (i.e., Clusters 7-10, 14, 16 and 17).

[2] The Broome Developmental Disabilities State Operations Office is an agency of OPWDD that serves Broome, Chenango, Delaware, Tioga, Tompkins, and Otsego Counties (IFB, at p. 3).

(*Id.*). For each Cluster outlined, the IFB required "[a]ll sites included in a Cluster [] be serviced by the bidder who is awarded the contract for that Cluster" (IFB, at p. 17). The IFB provided that "OPWDD will select the responsible and responsive Bidder that will provide the lowest Total Annual Seasonal Cost per Cluster" (*Id.*) (emphasis omitted).[3]

PTC submitted its bid for consideration to OPWDD prior to the June 6, 2023, submission deadline. On June 12, 2023, OPWDD notified PTC it would not be awarded a contract. Following its June 12, 2023, debriefing, PTC submitted a protest to OPWDD on June 20, 2023 (Protest). OPWDD issued its determination denying the Protest on July 6, 2023 (OPWDD Determination). PTC then submitted an appeal to this Office on July 13, 2023 (Appeal), to which OPWDD responded on July 26, 2023 (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.

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 snow removal and ice control services contracts;

[3] 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 service and technology procurements where qualifications can be determined on a pass-fail basis, best value can be equated to low price" (NYS Procurement Guidelines (2023), Section 4.5.2; *see* Section 4.4). 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 service was 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. For this procurement, which is primarily for services, OPWDD 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 PTC did not raise this issue, based on our review of the procurement record, our Office is satisfied that OPWDD's award of these contracts based on lowest price is appropriate.

[4] 2 NYCRR Part 24.

2. the correspondence between this Office and OPWDD arising out of our review of the proposed snow removal and ice control services contracts;

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

   a. Protest;
   b. OPWDD Determination;
   c. Appeal; and
   d. Answer.

ANALYSIS OF THE APPEAL

Appeal to this Office

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

1. OPWDD violated the terms of the IFB which indicated each Cluster would be evaluated separately by arbitrarily rejecting PTC's bid for Clusters 7–10, 14, 16 and 17 based on a comparison of its bid pricing to bids received for other Clusters; and[5]

2. The winning bids for Clusters 1–6, 11–13, and 15, were so unrealistically low that the awardees risk non-performance of the contracts as the low bids proposed could not have considered all the costs necessary to provide the required services outlined by the IFB's Scope of Work.[6]

OPWDD Response to the Appeal

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

1. In accordance with its rights reserved under the IFB, OPWDD properly determined not to issue contract awards to PTC, the only bidder, for Clusters 7–10, 14, 16 and 17, because PTC's bid exceeded OPWDD's estimated cost for a contract servicing those Clusters; and[7]

2. OPWDD properly awarded contracts to the responsive and responsible bidders with the lowest cost bids for Clusters 1–6, 11–13, and 15 in accordance with the terms of the IFB.

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[5] OPWDD did not award contracts for Clusters 7–10, 14, 16 and 17 (Answer, at p. 1). On July 28, 2023, this Office informed PTC that OSC Protest Procedures are applicable to contract awards subject to the Comptroller's approval under the provisions of SFL § 112, or otherwise submitted to OSC for approval (*see* 2 NYCRR § 24.1). OPWDD advised this Office that it did not award contracts for Clusters 7–10, 14, 16 and 17, therefore, this Office will not address the issues raised in the Appeal regarding these Clusters in this Determination.

[6] PTC contends that it raised this ground in the Protest and OPWDD failed to address it. OPWDD addressed the merits of this ground in its Answer to the Appeal.

[7] *See* footnote 5, *supra*.

DISCUSSION

Responsiveness of Low Bids

PTC asserts the bids for Clusters 1–6, 11–13, and 15 are so unrealistically low that it would not be feasible for the awardees to perform services required under the IFB. PTC alleges the low bids "create[] a legitimate risk of nonperformance" since "the bid amounts provided by the apparent low bidders represent unrealistic cost proposals that did not accurately or responsibly consider all of the costs to be incurred for snow and ice removal for those Clusters" (Appeal, at pp. 5–6). PTC contends that "[f]or these Clusters, [its] bid – unlike the other, lower bids – accurately and responsibly accounts for cost, weather and scope of work issues, as well as the 'additional level of care' required by the agency's residents" (*Id.*, at p. 6).

OPWDD counters "[it] determined that the other bidders that were tentatively awarded contracts were responsible and responsive bidders with the lowest cost bid for the awarded Clusters in accordance with section 17.1 of the IFB" (Answer, at p. 2). OPWDD asserts that "PTC has not alleged specific facts that would show why any of the three other vendors selected through this IFB would not be capable of satisfactory performance" and furthermore, "none of the other contract awardees have had contract performance issues in the IFB counties or in any other part of the State" (*Id.*).

State agencies are required to award service contracts based on best value to a responsive and responsible offeror (SFL § 163(4)(d); § 163(10)).[8] 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 stated for a bid to be determined responsive "a Bidder should submit complete proposals that satisfy all the requirements stated in this IFB" (IFB, at p. 9). Our review of the procurement record reflects that the IFB clearly set forth the minimum qualification requirements that a bidder had to satisfy to be responsive and that OPWDD conducted a review of each bidders' proposal to determine whether a bidder met the minimum qualifications of the IFB. The procurement record shows that OPWDD concluded that each awarded bidder was responsive as required by the IFB in accordance with the applicable statutory provision. The procurement record further reflects that OPWDD determined that the cost bid by the tentative awardees for each Cluster was reasonable. OPWDD determined that the prices bid by the tentative awardees were comparable to other contracts awarded by OPWDD for similar services, location, and adjusted for property size. Our independent review reflects that there was no evidence to indicate an inability

[8] *See* footnote 3, *supra*.

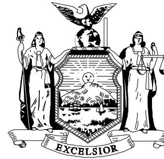
of any tentative awardee to perform the required services at the costs proposed.[9] We find PTC's conclusory allegations with respect to the winning bidders' ability to perform the required services under the IFB meritless. Therefore, there is no basis to disturb OPWDD's determination that the contract awardees are responsive and able to perform the services under the contracts at the prices bid.

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 OPWDD. As a result, the Appeal is denied and we are today approving the OPWDD contracts for snow removal and ice control services awarded under the IFB.

[9] Furthermore, this Office, as part of our review of the procurement record, confirmed with OPWDD that OPWDD was confident that the awarded bidders could fulfill the contract obligations at the price bid and no evidence has been presented that would cast doubt on OPWDD's affirmation.

THOMAS P. DINAPOLI
STATE COMPTROLLER



110 STATE STREET
ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

January 4, 2024

David Hartnagel, Esq.
Senior Legal Counsel
Public Consulting Group LLC
148 State Street
Boston, Massachusetts 02109
E-mail: dhartnagel@pcgus.com

Re: RFP #20012R Cost Study and Operation of Certified Public Expenditure (CPE) Reimbursement Methodology for the Preschool/School Supportive Health Services Program (SSHSP) and Other CPE Services.

Dear David Hartnagel:

On August 3, 2023, you, on behalf of your client Public Consulting Group LLC, filed a protest with this Office challenging the contract award made by the New York State Department of Health (DOH) to Fairbanks LLC in the above referenced procurement.

Pursuant to the requirements of State Finance Law § 112, DOH submitted the contract to this Office for review and approval. After conducting our review of the procurement, this Office returned the contract non-approved to the DOH, finding that DOH failed to evaluate all expected costs under the contract and thus failed to award the contract on the basis of best value. Accordingly, your protest is rendered moot and this Office will not be issuing a formal determination with regard to your protest.

Thank you for taking the time to participate in the State procurement process.

Sincerely,

Brian J Fuller

Brian Fuller
Director of Contracts

cc: Sue Mantica, Department of Health (sue.mantica@health.ny.gov)
Brian Mooney, Fairbanks LLC (bmooney@fairbanksllc.com)

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Kapsch TrafficCom USA, Inc. with respect to the procurements for operation of the Region 1 and 10 Transportation Management Centers conducted by the New York State Department of Transportation.

Contract Numbers – C038048 & C038092

Determination of Appeal

SF–20230155

January 16, 2024

The Office of the State Comptroller has reviewed the above-referenced procurements conducted by the New York State Department of Transportation (NYSDOT) for operation of the Region 1 and Region 10 Transportation Management Centers (TMC).[1] We have determined the grounds advanced by Kapsch TrafficCom USA, Inc. (Kapsch) are insufficient to merit overturning the contract awards made by NYSDOT and, therefore, we deny the Appeal. As a result, we are today approving the NYSDOT contracts for operation of the Region 1 TMC to Gannett Fleming Management Services, LLC (Gannett) and operation of the Region 10 TMC to WSP USA Services, Inc. (WSP).

BACKGROUND

Facts

NYSDOT issued two separate requests for proposals (RFP) seeking qualified consultants to provide personnel for the operation of electronic traffic and information management systems at NYSDOT's Region 10 TMC on March 3, 2023 (R10),[2] and at NYSDOT's Region 1 TMC on April 25, 2023 (R1)[3] (R10 RFP, Section 1.1, at p. 1; R1 RFP, Section 1.1, at p. 1[4]). Both RFPs sought a responsive and responsible offeror "to operate, manage, supervise, maintain [and administer] TMC systems and facilities at the [TMC]" in each region (R1 RFP, Section 3.2, at p. 7; R10 RFP, Section 3.2, at p. 6).

Both RFPs provided that the contract for each region would be awarded on the basis of best value (R1 RFP, Section 6.1, at p. 34; R10 RFP, Section 6.1, at p. 29). An offeror's technical proposal would constitute 70% and the cost proposal 30% of the total evaluation score (R1 RFP, Sections 6.2 and 6.3, at pp. 35–36; R10 RFP, Sections 6.2 and 6.3, at pp. 29–31). Offerors'

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[1] NYSDOT issued separate solicitations for operation of the Region 1 TMC and Region 10 TMC.
[2] NYSDOT's Region 10 TMC operates on Long Island, New York, serving the counties of Nassau, Suffolk, and Queens (R10 RFP, Section 1.1, at p. 1).
[3] NYSDOT's Region 1 TMC is located in Latham, New York, serving the counties of Albany, Essex, Greene, Rensselaer, Saratoga, Schenectady, Warren, and Washington (R1 RFP, Sections 1.1 and 1.2, at pp. 1-2).
[4] The Region 1 RFP is not paginated. For purposes of this Determination, this Office includes page numbers as they would have appeared, if included.

technical scores and cost scores would then be combined to produce a final best value score for each offeror and the offeror with the highest overall score would be tentatively selected for contract award (R1 RFP, Sections 6.7 and 6.8, at p. 36; R10 RFP, Sections 6.7 and 6.8, at p. 32).

Kapsch submitted proposals to NYSDOT in response to the Region 1 and Region 10 TMC RFPs by the respective deadline for each solicitation.[5] On May 19, 2023, Kapsch received a letter from NYSDOT simultaneously notifying Kapsch it was the tentative awardee for operation of the Region 10 TMC, that NYSDOT had identified concerns regarding Kapsch's responsibility, and, accordingly, NYSDOT's Contract Review Unit (CRU) was conducting a review to determine whether Kapsch was responsible and eligible for award of the contract. On July 12, 2023, NYSDOT CRU held a meeting with Kapsch to discuss its responsibility status with respect to both the Region 10 and Region 1 TMC contract awards. On September 7, 2023, NYSDOT notified Kapsch of its non-responsibility determination and that as a result Kapsch was ineligible for contract award under the Region 1 and Region 10 TMC RFPs.[6] On September 8, 2023, NYSDOT notified Kapsch of its non-award for both regions. As a result, NYSDOT awarded the Region 1 TMC contract to Gannett and the Region 10 TMC contract to WSP, as the responsive and responsible offerors with the next highest overall score for their respective regions.

Kapsch filed a joint protest of its non-award of the contracts for operation of the Region 1 and Region 10 TMCs with NYSDOT on September 14, 2023 (Protest). NYSDOT conducted a debriefing regarding both solicitations with Kapsch on September 22, 2023. NYSDOT denied Kapsch's joint bid protest on October 3, 2023 (NYSDOT's Protest Determination). Kapsch filed an appeal of NYSDOT's denial of the Protest with this Office on October 17, 2023 (Appeal), to which NYSDOT responded on October 26, 2023 (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.[7] 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:

[5] Three (3) total firms submitted proposals in response to the Region 10 TMC RFP by the April 6, 2024, submission deadline, while two (2) total firms submitted proposals in response to the Region 1 TMC RFP by the May 24, 2023, submission deadline.
[6] More details regarding the vendor responsibility review and Kapsch's opportunity to be heard are included in the *Discussion* section below.
[7] 2 NYCRR Part 24.

1. the documentation contained in the procurement records forwarded to this Office by NYSDOT with the NYSDOT / Gannett and NYSDOT / WSP contracts;

2. the correspondence between this Office and NYSDOT arising out of our review of the proposed NYSDOT / Gannett and NYSDOT / WSP contracts; and

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

    a. Protest;
    b. NYSDOT's Protest Determination;
    c. Appeal; and
    d. Answer.

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, Kapsch challenges the procurements conducted by NYSDOT on the following grounds:

1. NYSDOT's non-responsibility determination for Kapsch is arbitrary and unsupported by evidence; and

2. NYSDOT failed to provide Kapsch with the requisite due process prior to issuing a determination of non-responsibility.

NYSDOT Response to the Appeal

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

1. After providing Kapsch with the requisite due process, NYSDOT made a properly supported determination of non-responsibility, rendering Kapsch ineligible for award of the contracts; and

2. A challenge of NYSDOT's non-responsibility determination should be addressed through an Article 78 proceeding and not through this Appeal process.[8]

[8] OSC has the authority to consider vendor responsibility when determining whether to approve or non-approve a State agency's contract award pursuant to SFL § 112, including a review of whether a vendor responsibility determination made by a State agency had a rational basis and was adequately documented (*see In re. Worth Constr. Co. v. Hevesi*, 11 Misc. 3d 513 (S. Ct. Albany Cty. 2006)). Thus, this Determination will address Kapsch's grounds for Appeal as set forth above.

DISCUSSION

Vendor Responsibility

Kapsch asserts that "NYSDOT improperly and unlawfully refused to award the contracts to Kapsch, despite Kapsch being described by NYSDOT itself as the best value contractor for both projects, on the basis that Kapsch is not a responsible contractor" (Appeal, at p. 2). Kapsch alleges that NYSDOT's non-responsibility determination "is grounded in suspicion," "without evidence," and is based on alleged issues that do not "rise[] to the level of what New York courts consider irresponsible" (Appeal, at pp. 3, 6).

NYSDOT contends that the CRU "determined Kapsch was not responsible based on several factors" and "[b]ased on that robust record, the CRU made a non-responsibility determination" (Answer, at p. 1).[9]

SFL § 163(4)(d) provides that "[s]ervice contracts shall be awarded on the basis of best value to a responsive and *responsible* offeror" (emphasis added). SFL § 163(9)(f) states that "[p]rior to making an award of contract, each state agency shall make a determination of responsibility of the proposed contractor." For purposes of SFL § 163, '"[r]esponsible' or 'responsibility' means the financial ability, legal capacity, integrity, and past performance of a business entity" (SFL § 163(1)(c)). "The standard of review of an agency's decision to award or deny a contract is whether there is a rational basis to support that determination" (*Schiavone Constr. Co. v. Larocca*, 117A.D.2d 440, 444 (App. Div. 3d Dep't 1986).

Our review of the procurement record confirms that NYSDOT conducted a vendor responsibility review of Kapsch and reviewed Kapsch's financial ability, legal capacity, integrity, and past performance, as statutorily required. NYSDOT provided this Office with a recording of the July 12, 2023, CRU meeting and a detailed non-responsibility determination, dated September 7, 2023, citing several areas of concern relating to integrity and past performance of Kapsch, which were discussed during the July 12th responsibility meeting and in various communications between the CRU and Kapsch. In this manner, NYSDOT documented in the procurement record a rational basis for NYSDOT's non-responsibility determination for Kapsch. Consequently, we find no reason to disturb NYSDOT's determination.

Due Process

Kapsch contends that NYSDOT did not afford it due process prior to issuing a determination of non-responsibility (Appeal, at p. 8). Kapsch alleges that "[i]n rendering its non-responsibility determination, NYSDOT made incorrect assumptions rather than even bothering to conduct an earnest inquiry" (*Id.*).

NYSDOT responded that "[t]he [non-responsibility] [d]etermination came after NYSDOT made Kapsch aware of its responsibility concerns and Kapsch was given ample opportunity to

[9] CRU is the group of NYSDOT executives charged with making vendor responsibility determinations (Answer, at p. 1).

submit materials for NYSDOT's consideration" and "NYSDOT held a meeting with Kapsch, at which Kapsch was represented by counsel, to discuss the matter" (Answer, at p. 1).

Prior to finding a vendor non-responsible, the contracting State agency must provide the vendor with due process (*see Schiavone Constr. Co. v. Larocca*, 503 N.Y.S.2d 196, 197-98 (App. Div. 3d Dep't 1986) (holding that a vendor non-responsibility finding affects a vendor's ability to carry on its business, therefore implicating a liberty interest and triggering due process protections)). Due process requires the contracting State agency to provide the vendor with notice of concerns surrounding its responsibility and an opportunity to be heard, including presenting relevant information or evidence regarding responsibility. Written submissions have been held to be sufficient to satisfy due process; a formal evidentiary hearing is not required (*see Schiavone Constr. Co.*, 503 N.Y.S.2d at 198; *see also R.W. Granger & Sons, Inc. v. State of N.Y. Facilities Dev. Corp.*, 615 N.Y.S.2d 509, 510 (App. Div. 3d Dep't 1994).

NYSDOT initially notified Kapsch of responsibility concerns via letter dated May 19, 2023. Kapsch responded to that letter on May 25, 2023, providing information and documents in response to the concerns raised by NYSDOT. NYSDOT contacted Kapsch on June 15, 2023, to schedule a hearing with Kapsch to further discuss the concerns and held that hearing on July 12, 2023, providing Kapsch with over three weeks' notice to prepare. During the hearing, a recording of which was provided to this Office as part of the procurement record, NYSDOT once again presented its responsibility concerns and provided Kapsch (who was represented by counsel) with an opportunity to respond. Kapsch requested the opportunity to submit additional written materials following the hearing which NYSDOT granted, accepting a written submission from Kapsch on July 23, 2023. NYSDOT asked additional responsibility questions of Kapsch on July 24, 2023, and Kapsch responded on July 28, 2023. Only after these multiple written and oral opportunities to be heard did NYSDOT issue a non-responsibility determination on September 7, 2023. Contrary to Kapsch's allegations, the procurement record reflects that NYSDOT provided Kapsch with an opportunity to be heard with respect to all of the bases for its non-responsibility determination, as set forth in the September 7th determination. Furthermore, NYSDOT considered a request from Kapsch on September 21, 2023, to reconsider the responsibility determination; NYSDOT responded on October 3, 2023, affirming its prior non-responsibility determination. Accordingly, NYSDOT met, and arguably exceeded, the requirements for providing due process to Kapsch prior to finding Kapsch non-responsible.

Therefore, the procurement record supports that NYSDOT provided Kapsch with the requisite due process prior to issuing a non-responsibility determination, and this Office finds no basis to conclude otherwise.

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 made by NYSDOT. As a result, the Appeal is denied and we are today approving the NYSDOT / Gannett contract and the NYSDOT / WSP contract for the operation of the Region 1 and Region 10 TMCs, respectively.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Health Management Systems, Inc. with respect to the Procurement of Medicaid Recovery Audit Contractor Services conducted by the Office of the Medicaid Inspector General Contract Number – C202302	**<u>Determination of Bid Protest</u>** **SF–20230156** March 15, 2024

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Office of the Medicaid Inspector General (OMIG) for Medicaid Recovery Audit Contractor (RAC) Services. We have determined the grounds advanced by Health Management Systems, Inc. (HMS) in its Protest of the award are of sufficient merit to overturn the contract award made by OMIG and therefore, we uphold the Protest. As a result, we are today returning non-approved the OMIG contract with Performant Recovery, Inc. d/b/a Performant Healthcare Solutions (Performant) for RAC services.

BACKGROUND

Facts

OMIG was established "to improve and preserve the integrity of the New York State Medicaid Program by conducting and coordinating fraud, waste, and abuse control activities for all State agencies responsible for services funded by Medicaid" (OMIG Request for Proposals for New York State RAC Services, issued July 10, 2023 (RFP), Section I.C, at p. 7). Accordingly, OMIG established the RAC program to "reduce improper payments through the efficient detection and collection of overpayments, the identification of underpayments, the reporting of suspected fraudulent and/or criminal activities, and the implementation of actions that will prevent future improper payments" (RFP, Section I.F, at p. 9). OMIG issued the RFP seeking proposals for a vendor to "assist and supplement OMIG's mission of the RAC Program, as directed . . . includ[ing] the identification and recovery of improper payments" (*Id.*).

The RFP provided that OMIG would award one contract on the basis of best value to a responsive and responsible offeror (RFP, Section VIII.A, at p. 38; RFP, Section IX.D, at p. 43). Proposals deemed to be responsive following an initial compliance evaluation would proceed to technical and cost evaluations (RFP, Section VIII.C, at pp. 38-39). The Technical Proposal would be worth 75% of the offeror's final score and would be evaluated according to criteria specified in the RFP (RFP, Section VIII.C, at pp. 39-40).

The Cost Proposal would be worth 25% of the offeror's final score (RFP, Section VIII.C, at p. 41). OMIG would score Cost Proposals by awarding the offeror submitting the lowest total

Cost Proposal the full 25 points and awarding other offerors a proportionate score based on their relation to the proposal offering the lowest cost (*Id.*). The RFP provided that OMIG would select the responsive and responsible offeror who "provides the best value" to the State, meaning the highest combined technical and cost score (RFP, Section IX.D, at p. 43).

Prior to the proposal due date of August 28, 2023, OMIG received two proposals it deemed responsive (from HMS and Performant). Following evaluation of proposals, OMIG awarded the contract to Performant, the offeror it determined to be the responsive and responsible offeror who received the highest combined score. Subsequently, HMS requested a debriefing, which OMIG provided on October 11, 2023.

HMS filed a protest with this Office on October 18, 2023 (Protest). Performant responded to the Protest on November 14, 2023 (Performant Answer). OMIG responded to the Protest on December 19, 2023 (OMIG Answer). HMS filed a reply to Performant's and OMIG's Answers on December 22, 2023 (Reply). HMS filed a supplemental protest on February 9, 2024 (Supplemental Protest).[1] Performant responded to the Supplemental Protest on February 16, 2024 (Performant Answer to Supplemental Protest).[2] OMIG also responded to the Supplemental Protest on February 16, 2024 (OMIG Answer to Supplemental Protest).[3] HMS replied to Performant's and OMIG's Answers to the Supplemental Protest on February 20, 2024 (Supplemental Reply).[4]

<u>Comptroller's Authority and Procedures</u>

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.[5] 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 OMIG with the OMIG / Performant contract;

[1] Pursuant to 2 NYCRR § 24.4(f), this filing is not permitted as of right. However, this Office exercised its discretion under 2 NYCRR § 24.4 to consider this submission in this determination.
[2] Pursuant to 2 NYCRR § 24.4(f), this submission is not permitted as of right. However, this Office exercised its discretion under 2 NYCRR § 24.4 to consider this submission in this determination.
[3] Pursuant to 2 NYCRR § 24.4(j), this Office requested that OMIG submit a response to the grounds raised in the Supplemental Protest.
[4] Pursuant to 2 NYCRR § 24.4(f), this submission is not permitted as of right. However, this Office exercised its discretion under 2 NYCRR § 24.4 to consider this submission in this determination.
[5] 2 NYCRR Part 24.

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

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

    a. Protest;
    b. Performant Answer;
    c. OMIG Answer;
    d. Reply;
    e. Supplemental Protest;
    f. Performant Answer to Supplemental Protest;
    g. OMIG Answer to Supplemental Protest; and,
    h. Supplemental Reply.

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest and Supplemental Protest, HMS challenges the procurement conducted by OMIG on the following grounds:

1. Performant's proposal was non-responsive to a material requirement of the RFP giving Performant an unfair competitive advantage and therefore should have been disqualified from contract award;
2. Performant is not a responsible vendor because it does not have the financial ability to perform the contract and OMIG's vendor responsibility review of Performant was flawed;
3. HMS's proposal was unreasonably penalized because the technical evaluation was based on unstated criteria; and,
4. OMIG's scoring of HMS's Technical Proposal had no rational basis because OMIG deducted a significant number of points despite HMS addressing every element of the technical proposal in detail.

OMIG Response to the Protest

In its Answers to the Protest and Supplemental Protest, OMIG contends the Protest, as supplemented, should be rejected and the Award upheld on the following grounds:

1. Performant's proposal met all material mandatory requirements and was therefore deemed responsive and eligible for contract award;
2. OMIG conducted an independent vendor responsibility review of Performant, including reviewing Performant's financial ability to perform the contract, and found Performant to be a responsible vendor;
3. OMIG scored Technical Proposals using only technical evaluation criteria disclosed in the RFP; and,

4. OMIG's scoring of HMS's Technical Proposal was based on weaknesses in specific scoring areas where HMS failed to provide sufficient details.

Performant Response to the Protest

In its Answers to the Protest and Supplemental Protest, Performant contends the Protest, as supplemented, should be rejected and the award upheld on the following grounds:

1. Performant met all material RFP requirements and was found responsive by OMIG; to the extent that Performant did not meet an RFP requirement, it was immaterial;
2. Performant is a responsible vendor because it has the financial ability to perform the awarded contract, including sufficient liquidity and access to capital; and,
3. The scoring metrics were clearly and adequately disclosed by OMIG in the RFP.

HMS Reply to the Answers

In its Reply and Supplemental Reply to OMIG's and Performant's Answers to the Protest and Supplemental Protest, HMS expounds upon the grounds set forth in the Protest and Supplemental Protest.

DISCUSSION

Responsiveness of Performant

HMS contends "Performant's proposal must be deemed non-responsive and Performant should be disqualified from the RAC procurement" because Performant "violated, time and time again, the RFP's express prohibition against referring to the monetary value of services rendered" in its Technical Proposal (Supplemental Protest, at pp. 4-5). HMS further contends that "[i]n so doing, Performan[t] enjoyed a material unfair competitive advantage" (*Id.*, at p. 3). HMS alleges that "Performant admits that its Technical Proposal included at least three references to 'the monetary value of Performant's services'" and "[t]he RFP explicitly warned that violation of the information submission requirements would lead to a proposal being 'automatically disqualified'" (Supplemental Reply, at p. 2). HMS posits that, in contrast, "HMS complied with [OMIG's] direction and did not include in its proposal 'the monetary value of services rendered' (Supplemental Protest, at p. 2).

OMIG responds that "Performant's proposal was deemed responsive and therefore eligible for award because its proposal met all material mandatory requirements" (OMIG Answer to Supplemental Protest, at OMIG Answer #1). OMIG explains "[t]he language in question, 'although it is acceptable for the Offeror to use its experience in providing similar services to complete this section [Section II], the Offeror must not refer to the monetary value of the services rendered,' was not intended to dissuade or even disallow an Offeror from including prior performance metrics, such as the value of successful payment recoveries, but rather to ensure that the Offeror's financial proposal, or 'cost to render services under the contract in question, C202302,' was kept separate from its Technical Proposal" (*Id.*). OMIG further contends that "[b]oth [HMS and Performant] included information regarding prior performance metrics within

their proposals which neither advantaged nor disadvantaged the Offerors" (*Id.*, at OMIG Answer #2).

Performant responds "'Section II' is the only 'section' referenced in the [RFP requirement not to refer to the monetary value of the services rendered]" and "Performant's Technical Proposal, Section II, Scope of Work . . . contains just three passing references to the monetary value of Performant's services . . . [which] should therefore be viewed as immaterial to any evaluation of that section" (Performant Answer to Supplemental Protest, at p. 2). Performant asserts "OMIG already made an express determination that Performant was a responsible offeror and that its proposal met all of the material requirements of the RFP . . . [t]o the extent there were a few technical deviations from the [RFP requirement not to refer to the monetary value of the services rendered] in Section II of Performant's Technical Proposal, OMIG necessarily deemed them to be immaterial . . ." (*Id.*, at p. 2). Performant concludes that "HMS was not prejudiced because Section IV [Program Integrity Experience] of the Technical Proposal portion of the RFP provided both HMS and Performant the opportunity to disclose the monetary value of their services" and "there was no disadvantage to HMS even if it failed to disclose that monetary value in its Technical Proposal because OMIG was already aware of that information" since HMS is the incumbent contractor for RAC services (*Id.*, at pp. 3-4).

The RFP provided, in Section VII, "Proposal Submission Guidelines," subsection B, "Technical Proposal,"

> "The Technical Proposal must contain the Offeror's response to each of the required portions from Section II, 'Scope of Work.' An Offeror's Checklist has been included as Attachment 1 and may be used to ensure that all mandatory requirements are met. All aspects of the Technical Proposal must be sent as a separate document labeled 'RFP# OMIG 23-02 Technical Proposal.' Although it is acceptable for the Offeror to use its experience in providing similar services to complete this section, **the Offeror must not refer to the monetary value of the services rendered.**"

(RFP, Section VII.B, at p. 36 (emphasis added)). The RFP specifically prescribed requirements for proposal submission and stated that "[a]n Offeror must meet the requirements of Section VII, Proposal Submission Guidelines in order to have its financial proposal considered for final Contract Award" (RFP, Section VII, at p. 34). The RFP also provided that "[a] proposal that does not comply with the requirements and does not include all the information requested **may** be negatively affected in the overall evaluation and **could** be subject to rejection" (*Id.* (emphasis added)). The RFP further provided "OMIG reserves the right . . . to waive technicalities, irregularities, and omissions if, in its sole judgment, such action will be in the best interest of the State" and "[i]f there are no satisfactory proposals, which fully comply with the proposal specifications, OMIG reserves the right to consider late or non-conforming proposals" (RFP, Section VII.I, at p. 38).

1. Interpretation of Plain Meaning of RFP Requirement

Here, OMIG, HMS, and Performant all have varying views on the interpretation of the RFP requirement that "the Offeror must not refer to the monetary value of the services rendered" (Requirement).[6]

"In interpreting a contract, the court must read the document as a whole 'to determine the parties' purpose and intent, giving a practical interpretation to the language employed so that the parties' reasonable expectations are realized'" (*Gutierrez v. State of New York*, 58 A.D.3d 805, 807 (App. Div. 2d Dep't 2009) (quoting *Snug Harbor Sq. Venture v. Never Home Laundry*, 252 A.D.2d 520, 521 (App. Div. 2d Dep't 1998)). "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (N.Y. 2002); *see also W.W.W. Assocs.*, 77 N.Y.2d 157, 162-163 (N.Y. 1990)). Notably, "ambiguity in [contract] language will not be found to exist merely because two conflicting interpretations may be suggested;" instead "where the parties differ concerning the meaning of [a] contract, the court will be guided by a reasonable reading of the plain language of the [contract]" (*Westchester Fire Insur. Co. v. Schorsch*, 186 A.D.3d 132, 140 (App. Div. 1st Dep't 2020).

Here, we will apply the standards of contract interpretation set forth by the courts in interpreting the Requirement; like contract terms, the terms of a solicitation must be interpreted according to their plain meaning. First, we must determine the practical interpretation of the plain language of the Requirement. The RFP permits offerors to include "experience in providing similar services" but prohibits reference "to the monetary value of the services rendered" (RFP, Section VII.B, at p. 36). Based on the plain language, the prohibition is referring to services similar to those being solicited by the procurement (namely, RAC services) and use of the words "experience" and "rendered" indicate that the RFP is referring to the offeror's past experience performing RAC services. Contrary to OMIG's interpretation, the plain language of the Requirement cannot be read to refer to the "cost to render services under the contract in question C202302" as it does not point to the present services at all. While it is indisputable that including Cost Proposal information in the Technical Proposal is prohibited, this is achieved through separate, unambiguous RFP provisions.[7] "The monetary value of the services rendered" could reasonably mean fees paid to the offeror for performing past RAC services and/or any monetary

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[6] OMIG interprets the Requirement to prohibit offerors from including financial proposal information, namely the "cost to render services under the contract in question C202302," in their Technical Proposal (OMIG Answer to Supplemental Protest, at OMIG Answer #1). HMS interprets the Requirement to prohibit offerors from including the monetary value of "prior recoveries" in their entire Technical Proposal (Supplemental Reply, at p. 3). Performant interprets the Requirement to prohibit offerors from including "the monetary value of their [other] RAC contracts" in only Section II of their Technical Proposal but emphasizes that this was permitted in Section IV of the Technical Proposal (Performant Answer to Supplemental Protest, at pp. 2-3).

[7] S*ee* RFP, Section VII, at p. 34 ("The Technical Proposal and the Financial Proposal, including Financial Statements, should be sent separately with the subject 'RFP# OMIG 23-02 Technical Proposal' or 'RFP# OMIG 23-02 Financial Proposal'"); *see also* RFP, Section VII.C, at p. 36 ("All aspects of the Financial Proposal should be sent as a separate document labeled 'RFP# OMIG 23-02 Financial Proposal.' Complete the Cost Proposal Form and submit it only with your Financial Proposal.").

values associated with the offeror performing past RAC services (including, but not limited to, monetary values identified for recovery and monetary values ultimately recovered).[8]

Next, we reviewed the Requirement in the context of the entire RFP to determine whether the Requirement applied to only Section II of the Technical Proposal or the Technical Proposal as a whole. The Requirement includes a reference to "this section" which suggests a potential reference back to Section II of the Technical Proposal which is mentioned earlier in the paragraph.[9] However, such a narrow reading of the applicability of the Requirement is not reasonable in the context of the RFP as a whole.[10] The RFP provides that the entire Technical Proposal is to be submitted together as one package (*see* RFP, Section VII.B, at p. 36); the procurement record shows that the entire Technical Proposal was evaluated by the same team of evaluators. As the Technical Proposal was both submitted and evaluated as a whole, not by section, to prohibit the inclusion of monetary values in one section of the Technical Proposal but allow it in other sections would render the prohibition contained in the Requirement meaningless.

Accordingly, the practical interpretation of the plain language of the Requirement, interpreted in the context of the RFP as a whole, prohibited reference, in the entirety of an offeror's Technical Proposal, to fees paid to the offeror for performing past RAC services and any monetary values associated with the offeror performing past RAC services.

2. <u>Responsiveness of Performant to Plain Meaning of Requirement</u>

Next, we will look to whether Performant was responsive to the Requirement, according to the practical interpretation of the plain language of the Requirement set forth above.

State Finance Law provides that contracts for services shall be awarded on the basis of best value to a responsive and responsible offeror (SFL § 163(4)(d); § 163(10)). 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" offeror 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)).

As Performant itself admits, it was not responsive to the Requirement. Performant concedes that its "Technical Proposal, Section II, Scope of Work . . . contains [ ] three [ ] references

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[8] HMS contends that the references to monetary values in its Technical Proposal did not constitute services rendered because they referred to the identification of monies that could potentially be recovered but did not indicate that they were recovered (HMS Supplemental Reply, at p.3 ("In its Technical Proposal, HMS explained that it had leveraged data mining in order to identify a potential source of overpayments. HMS never said it recovered those funds. To the contrary, and as the Agency knows, identifying possible overpayments is only the first step in a lengthy and complex process that may or may not result in a recovery. Thus, HMS never referenced 'the monetary value of services rendered.'")). Such a narrow reading of the Requirement is not reasonably supported by its broad language. Indeed, the RFP's Scope of Work refers to both the identification and recovery of payments as required services under the contract; "similar services" would include the same (*see* RFP, Section II).

[9] This is Performant's position (*see* Performant Answer to Supplemental Protest, at pp. 1-2).

[10] We agree with HMS's position that "the only logical reading of that provision is that it applies to the entire Technical Proposal" (Supplemental Reply, at p. 3, fn. 2 (internal quotations omitted)).

to the monetary value of Performant's past RAC services (on pages 19, 43, and 49)" (Performant Answer to Supplemental Protest, at p. 2). This Office identified an additional five references to the monetary value of Performant's services in its Technical Proposal, for a total of eight references.[11]

We also note that HMS was not responsive to the Requirement. This Office identified two references to the monetary value of HMS's past RAC services in its Technical Proposal.[12]

Accordingly, OMIG erred in finding Performant responsive to the Requirement.

Although Performant was non-responsive to the Requirement, as discussed above, the RFP does not automatically require disqualification from contract award and, moreover, OMIG "reserve[d] the right . . . to waive technicalities, irregularities, and omissions . . . [and] consider [ ] non-conforming proposals (RFP, Section VII.I, at p. 38).

In order to determine whether OMIG was able to properly waive the proposal defects of Performant, we must determine whether the defects were material.

3. Materiality of Performant's Proposal Defects

It is generally understood that a procuring entity may waive technical non-compliance with bid specifications or requirements if the defect is a mere irregularity and it is in the best interest of the procuring agency to do so (*Le Cesse Bros. Contracting, Inc. v. Town Board of Williamson*, 62 A.D.2d 28, 31-32 (App. Div. 4th Dep't 1978)). However, the procuring entity may not waive a material or substantial requirement (*Id.*). A defect is material if it would impair the interests of the contracting public entity, place the successful bidder in a position of unfair economic advantage or place other bidders or potential bidders at a competitive disadvantage (*see id.*; *see also Cataract Disposal, Inc. v. Town Board of Newfane*, 53 N.Y.2d 266, 272 (N.Y. 1981); *Fischbach & Moore, Inc. v. NYC Transit Authority*, 79 AD.2d 14, 20 (App. Div. 2nd Dep't 1981)).

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[11] The eight references are as follows:

(1) "For example, Performant identifies $[ ] in over payments on . . ." (Performant's Technical Proposal, at p. 11);
(2) "Performant processes over $[ ] in successful payment recoveries per year" (*Id.*, at p. 19);
(3) "For example, Performant identifies $[ ] in over payments on . . ." (*Id.*, at p. 31);
(4) ". . . on all $[ ] in direct recovery payments processed by Performant each year" (*Id.*, at p. 43);
(5) " . . . for the receipt and reconciliation of over $[ ] in recovery payments" (*Id.*, at p. 49);
(6) "Total Contract Value $[ ] per annum" (*Id.*, at p. 56);
(7) "Performant has delivered approximately $[ ] in healthcare savings to our clients in the past decade" (*Id.*, at p. 62); and,
(8) "Total Contract Value $[ ] per annum" (*Id.*, at p. 67).

[12] The two references are as follows:

(1) "For instance, for one of our RAC clients we recently identified [$] of dollars in overpayments . . ." (HMS's Technical Proposal, at p. 24); and,
(2) "For instance, when analyzing [ ] cost for one client, we saw payments of [$] of dollars . . . which is significantly outside of general benchmarks . . ." (*Id.*).

Despite OMIG's assertion that "the inclusion of prior performance metrics, such as the value of successful payment recoveries, would not have impacted the evaluation, as it was not a component of review," the procurement record indicates otherwise (OMIG Answer to Supplemental Protest, at OMIG Answer #2). Here, the procurement record shows that OMIG's Technical Proposal evaluators considered the monetary values Performant included in its Technical Proposal in scoring such proposal. In fact, despite the prohibition in the Requirement, one evaluator included explicit reference to monetary values in its comments to support a score given to Performant's Technical Proposal. Although the precise influence on overall Technical Proposal scoring is impossible for this Office to quantify, we attempted to determine the impact by revising the Technical Proposal scores of both Performant and HMS to neutralize scores given on responses that included reference to monetary values in violation of the Requirement: Performant received a revised score of zero for eight Technical Proposal responses and HMS received a revised score of zero for two Technical Proposal responses. By removing the potential advantage afforded by including monetary values, the Technical Proposal scores sufficiently changed as to change the outcome of the procurement.[13] As a result, HMS was disadvantaged by the defects in Performant's proposal, and Performant was likewise advantaged by such defects;[14] accordingly, the Requirement was material.

Accordingly, OMIG could not waive the material defects in Performant's Technical Proposal and consequently erred in finding Performant eligible for contract award.

Notwithstanding the merit of the foregoing protest ground, we will address the additional contentions raised by HMS in the Protest.

Vendor Responsibility

HMS alleges that "Performant is not a responsible offeror" based on "Performant's own public filings with the U.S. Securities and Exchange Commission ('SEC') [which] demonstrate a deteriorating financial situation, whereby Performant itself admitted that any new contract awards may be adversely impacted by its lack of access to capital and credit" (Protest, at pp. 1-2). HMS contends that OMIG's responsibility assessment was "materially flawed because it apparently overlooked the publicly-disclosed statements in Performant's most recent [SEC filings]" and "[OMIG] did not examine Performant's financial statements, as it is required to do when conducting a responsibility determination" (*Id.*, at pp. 2, 8).

OMIG asserts that HMS's references to Performant's SEC filings were "taken out of context from a section wherein the company discusses all potential risks associated with its

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[13] Notably, even if we limit our revised scoring to Section II of the Technical Proposal, the outcome of the procurement still changes.

[14] Performant contends that HMS was not disadvantaged because as the incumbent contractor, OMIG "was already thoroughly familiar with the monetary value of the RAC services that HMS was providing" (Performant Answer to Supplemental Protest, at p. 4). There is no support in the record for the speculation that OMIG's technical evaluators were aware of monetary values associated with HMS's performance of RAC services. Additionally, technical evaluators were specifically instructed to rely on the content of the technical proposals in scoring, specifically to "write a justification for each area [of the technical proposal scored], citing specific criteria within the [technical] proposal that demonstrated the strengths and weaknesses that led to the rating." No evidence has been presented to show that the evaluators did not follow these instructions.

operations as a course of general business . . . even if those risks are not imminent, or even likely" (OMIG Answer, at p. 1). OMIG responds that "Performant actually states in its [SEC] filing that it is well-positioned to take on additional work in the healthcare space and document[s] [its] numerous federal RAC contracts [ ] to support its assertion" (*Id.*). OMIG further states it "conducted an independent Vendor Responsibility review" of Performant and "[t]he financial portion of the review consisted of, but was not limited to, OMIG researching Performant's most recent SEC filings" (*Id.*, at p. 2). OMIG contends that this review "resulted in no adverse findings" (*Id.*).

Performant responds that the referenced statements in their SEC filings were made "to comply with SEC requirements about disclosing all possible material risks to investors, even if the likelihood of such risks actually occurring were remote" and adds that "[t]hese disclosures do not signify imminent 'financial peril' or 'dire financial straits' as HMS suggests" (Performant Answer, at pp. 1-2). Performant asserts it is "well capitalized and has sufficient cash flow to manage both its existing business and the new OMIG contract" (*Id.*, at p. 2).

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 OMIG conducted a vendor responsibility review of Performant, which included Performant's financial and organizational capacity, legal capacity, integrity, and past performance as statutorily required. The procurement record specifically shows that OMIG reviewed Performant's 2022 SEC filing (including financial statements). As a result, OMIG determined that there was no adverse information that would impact Performant's ability to perform the contract.

Moreover, as part of our review of the OMIG / Performant contract, this Office examined and assessed the information provided in the procurement record related to vendor responsibility. Our review did not provide any basis to overturn OMIG's responsibility determination and thus we will not disturb the responsibility determination made by OMIG.

Evaluation and Scoring of HMS' Technical Proposal

1. Evaluation Methodology for Technical Proposals

HMS contends that OMIG "penalized HMS by applying unstated evaluation criteria to HMS' Technical Proposal" (Protest, at pp. 1, 14). OMIG replies that its "technical and financial evaluators . . . meticulously assessed each proposal against the established criteria, assigning scores as outlined in the RFP" and proposals "were evaluated solely on [their] merits and adherence to the predefined criteria" (OMIG Answer, at p. 2). Performant asserts "[t]he scoring metrics were adequately disclosed in OMIG's RFP, and there was no lack of clarity and no questions from a bidder's perspective" (Performant Answer, at p. 16).

The RFP provided for the award of the OMIG contract on the basis of best value which shall "reflect, wherever possible, objective and quantifiable analysis" and "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(1)(j)); § 163(2)(b)). "Where 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" (SFL § 163(7)). The solicitation shall "describe and disclose the general manner in which the evaluation and selection shall be conducted" (SFL § 163(9)(b)).

The RFP set forth specific criteria required to be addressed in the Technical Proposal and the maximum number of points assigned to each evaluation criterion (*see* RFP, Section VIII.C, at pp. 39-41; RFP, Attachment 1, at pp. 67-85). The technical evaluation consisted of the following criteria worth up to a total of 75 points: Scope of Work: Sections B-O (worth up to 20 points); Secure Web-Based Provider Portal (worth up to 10 points); Free-Standing Recovery Claims Database (worth up to 10 points); Collections & Case Tracking System (worth up to 10 points); Receipt and Documentation of Recovered Funds (worth up to 10 points); Provider Education and Outreach Program (worth up to 5 points); and Program Integrity Experience (worth up to 10 points) (RFP, Section VIII.C, at pp. 39-40). RFP Attachment 1, *Offeror's Checklist*, provided further details regarding what would be scored within each of the criteria (RFP, Attachment 1, at pp. 67-85). The RFP further provided that each response would be scored on a scale of 0-3 (RFP, Section VIII.C, at p. 40). The RFP provided that, following scoring by a team of evaluators, "evaluators' scores will be totaled together, per section [and] [o]nce the section is calculated, all seven (7) sections will be added together to obtain the composite technical score for each Offeror" (*Id.*).

The procurement record shows that OMIG established an evaluation instrument that was consistent with the Technical Proposal requirements and the *Offeror's Checklist* set forth in the RFP. The procurement record shows that OMIG's technical evaluators were provided with the pre-established technical evaluation instrument and used same to evaluate and score proposals in accordance with the requirements of the RFP.

Our review of the procurement record confirmed that OMIG evaluators scored written Technical Proposals in accordance with the clearly articulated criteria set forth in the RFP. Thus, notwithstanding the discussion on responsiveness above, we are satisfied OMIG met the applicable legal requirements with respect to the methodology used to evaluate the Technical Proposals.

2. Application of Evaluation Criteria to Technical Proposals

HMS contends that OMIG had "no rational basis to materially down-score HMS" in its technical evaluation (Protest, at p. 15). HMS further contends that the RFP contained "numerous individual technical requirements, all of which needed to be addressed in the proposal" and that "HMS' proposal addressed each of these proposal elements in substantial detail" (*Id.*). HMS found it "impossible to determine from the evaluation material the State has provided which particular portion of HMS' response in these areas generated the weakness" resulting in "apparent significant technical deductions" (*Id.*). OMIG asserts that HMS's Technical Proposal contained "notable

weaknesses, wherein its responses failed to elaborate on the solutions to provide comprehensive details on how the work was to be performed or illustrate a novel approach" (OMIG Answer, at p. 2).

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 solicitation document and corresponding 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, OMIG evaluators scored HMS's written Technical Proposal consistent with the RFP and evaluation instrument. Further, every score was supported by a written explanation from the evaluator and our review did not reveal any contradictions between an evaluator's written comments and the scores assigned by such evaluator to HMS's written Technical Proposal. Thus, notwithstanding the discussion on responsiveness above, there is no basis to disturb the technical scores awarded by OMIG to HMS' Technical Proposal.

CONCLUSION

For the reasons outlined above, we have determined the issue raised in the Supplemental Protest relating to OMIG's improper finding that Performant is responsive is of sufficient merit to overturn the contract award by OMIG to Performant. As a result, the Protest, as supplemented, is upheld and we will not be approving the OMIG / Performant contract for the procurement of RAC services.