Procurement Stewardship Act Report

BID Protest Determinations between April 1, 2019 through March 31, 2020

File Number	Date of Decision	Protestor	Contracting Entity	Decision
SF20190054	04/17/2019	AIDS Center of Queens County	Department of Health	Denied
SF20190068	04/17/2019	Sylvia Rivera Law Project	Department of Health	Denied
SF20190070	04/26/2019	AIDS Center of Queens County	Department of Health	Denied
SF20180264	05/13/2019	BEM Systems, Inc.	Department of Transportation	Upheld
SF20180263	06/20/2019	Total Control Training, Inc.	Department of Motor Vehicles	Denied
SF20190191	12/20/2019	CCI Companies, Inc.	Department of Transportation	Denied
SF20190199	01/03/2020	Hudson Guild Inc.	Office of Children & Family Services	Denied

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Total Control Training, Inc., with respect to the procurement of an administrator for the New York State Motorcycle Safety Program conducted by the New York State Department of Motor Vehicles.

Contract Number – C000893

Determination of Bid Protest

SF–20180263

June 20, 2019

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Motor Vehicles (DMV) for an administrator of the New York State Motorcycle Safety Program (Program). We have determined the grounds advanced by Total Control Training, Inc. (TC) are insufficient to merit overturning the contract award made by DMV and, therefore, we deny the Protest. As a result, we are today approving the DMV contract with the Motorcycle Safety Foundation (MSF) for administrator of the Program.

BACKGROUND

Facts

New York Vehicle and Traffic Law § 410-a requires DMV to establish and administer the Program, consisting of motorcycle rider training courses, motorcycle course instructor training, program promotion and promotion of public awareness. On June 25, 2018, DMV issued Request for Proposals for Motorcycle Safety Program (RFP) seeking a motorcycle riding training coordinating organization to administer the Program (*see* RFP, at Section 1-1). The RFP provided for the selection of an offeror based on, among other things, "(1) the most favorable financial advantage for the state; (2) the greatest utility to the motorcyclist; (3) the comprehensiveness of the program and effectiveness of the provider; and (4) compatibility with existing rider education programs" (RFP, at Section 1-2).

The RFP provided that an offeror's proposal would be scored on the basis of Cost (20%), as well as a review of three technical components, Administration (25%), Program (50%), and Diversity (5%) (*see* RFP, at Section 4-4). The Administrative and Program components consist of mandatory requirements, evaluated on a pass-fail basis, as well as scored criteria (*Id.*). The Diversity component consists of a questionnaire relating to an offeror's diversity practices and is also scored (*see* RFP, at Section 4-4 and Appendix J). For the Cost component, the RFP requires offerors to submit an all-inclusive price-per-student fee based on DMV's forecasted number of clients over the five-year contract term up to a maximum total contract amount of $8 million (*see* RFP, at Section 4-2). The cost proposal with the lowest total cost would receive the full number of available points and other cost proposals with higher costs would receive proportionately

lower cost scores (*see* RFP, at Section 4-5). The cost score would be added to the scores for the other three components of an offeror's technical proposal and the offeror receiving the highest combined score would be awarded the contract (*see* RFP, at Sections 4-4 and 4-5).

DMV received three proposals prior to the proposal due date of September 7, 2018, one from TC and two from MSF.[1] DMV awarded the contract for administrator of the Program to MSF, the offeror submitting the proposal receiving the highest combined score.[2]

TC requested a debriefing on October 30, 2018, and DMV provided the debriefing on November 26, 2018. On December 2, 2018, TC filed a protest with this Office (Protest). On December 11, 2018, MSF responded to the Protest (MSF Answer) and on May 7, 2019, DMV responded to the Protest (DMV Answer). On May 13, 2019, TC replied to the Answers of DMV and MSF (TC 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 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 there was no protest process engaged in at the department level, the Protest is governed by section 24.4 of the OSC Protest Procedure.[4]

In the determination of the Protest, this Office considered:

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

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

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

---

[1] The RFP permitted offerors to propose alternate solutions, however, each proposal was required to fully conform to the requirements of the RFP (*see* RFP, at Section 1-9). MSF submitted two separate proposals, Proposal Number One and Proposal Number Two.

[2] MSF's Proposal Number Two received the highest combined score.

[3] 2 NYCRR Part 24.

[4] MSF claims TC improperly filed an initial protest with this Office instead of complying with the protest procedure set forth in the RFP (*see* MSF Answer, at pg. 2). However, the RFP clearly requires initial protests of the contract award be made to OSC and provides bidders detailed instructions as to the filing of such protests with this Office (*see* RFP, at Section 1-18).

a. TC's Protest dated December 2, 2018;
b. MSF's Answer to the Protest dated December 11, 2018;
c. DMV's Answer to the Protest dated May 7, 2019; and
d. TC's Reply to the Answers of DMV and MSF dated May 13, 2019.[5]

Applicable Statutes

The requirements applicable to this procurement are set forth in SFL Article 11, which provides that contracts for services shall be awarded on the basis of "best value" to a responsive and responsible offerer.[6] 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."[7] A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."[8]

SFL § 163(9)(b) requires that the solicitation issued by the contacting agency prescribe the minimum specifications or requirements that must be met in order to be considered responsive and describe and disclose the general manner in which the evaluation and selection shall be conducted. SFL § 163(7) requires the contracting agency to 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."

ANALYSIS OF THE PROTEST

Protest to this Office

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

1. DMV did not make a best value award as required by the RFP and SFL § 163, but instead awarded the contract on the basis of price alone. Furthermore, this change in method of award represents an impermissible material variance in the RFP's requirements.

---

[5] While DMV submitted additional correspondence dated May 29, 2019, to this Office, this submission was outside the scope of documentation permitted as of right under 2 NYCRR Part 24. Therefore, while considered, that correspondence is not referenced or formally addressed in this Determination. In addition, TC has submitted requests under the Freedom of Information Law (Public Officers Law Article 6, "FOIL") to DMV and this Office seeking information relating to the procurement. In the Protest, TC requests the ability to submit supplemental material which may be later discovered through such efforts (*see* Protest, at pg. 6). Consistent with prior bid protest determinations and the long standing policy of this Office, issues related to an agency's action or inaction on a FOIL request does 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 TC's FOIL requests.
[6] SFL § 163(10).
[7] SFL § 163(1)(j).
[8] SFL § 163(1)(d).

2. Since DMV had already chosen MSF as the winning vendor on the basis of price, DMV failed to consider TC's reference as required by the RFP, and therefore failed to completely evaluate TC's proposal.
3. DMV failed to conduct a reasonable inquiry into TC's claim that MSF is illegally using TC's intellectual property in violation of SFL and against the best interests of New York State.
4. MSF is a conflicted and non-responsible bidder because (i) MSF's relationship with the Motorcycle Industry Council, the national motorcycle industry trade organization, creates a conflict of interest with MSF's ability to properly perform under the contract, (ii) MSF is self-insured which violates the RFP's insurance requirements, (iii) MSF is selling insurance to site sponsors without a valid New York license and profiting thereby, (iv) MSF colluded with DMV, before and during the current procurement process, to eliminate competition and prevent TC from being the successful vendor in violation of the procurement lobbying law (SFL § 139-j), and (v) MSF failed to disclose material information relating to defects in MSF's curriculum that resulted in deaths during class trainings.

DMV's Response to the Protest

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

1. DMV evaluated and scored proposals in accordance with the methodology set forth in the RFP and the contract was awarded on the basis of best value.
2. DMV did not score the references as part of evaluation of the proposals but rather checked references as part of the vendor responsibility review of the tentative awardee.
3. DMV conducted a thorough vendor responsibility review of MSF, including MSF's legal capacity and integrity, and found no substantiation for TC's claims of infringement. Further, TC did not provide any proof, specific accusations, or court findings in support of TC's assertions.
4. The relationship between MSF and MIC is well established and all states that have and currently contract with MSF, including New York State, are aware of this relationship. MSF's relationship with MIC in no way conflicts with MSF's responsibilities under its contract with DMV, nor does it negatively impact the proper discharge of MSF' duty to the public.
5. TC fails to substantiate its allegation that MSF is improperly acting as an insurance broker and, moreover, this is not the appropriate forum for an analysis of those claims.
6. While DMV is required to meet and communicate with MSF in connection with the current contract, none of these meetings or communications were for the purpose of keeping TC from winning. Finally, DMV states MSF was not involved in the development of the RFP, the evaluation process, or consulted in any way.
7. MSF's curriculum has been delivered to New York State continuously since 1996, to over a quarter million motorcyclists, without a single death due to the curriculum or other aspects of the Program. The cause of the sole death associated with the Program was determined to be unrelated to MSF's curriculum, or any aspect of the course itself.

MSF's Response to the Protest

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

1. DMV properly awarded the contract to MSF on the basis of best value. Further, in addition to being the best value, MSF was the low bidder.
2. TC failed to raise its claims that MSF "may be" using TC's intellectual property prior to submitting its proposal and is therefore precluded from raising such claims in the Protest.
3. MSF and MIC are separate organizations with independent boards of directors, separate budgets and different missions.
4. MSF is not self-insured nor does MSF sell insurance. Rather, MSF provides the opportunity to become additional insureds under MSF's insurance policies to those sponsors who cannot obtain reasonably priced insurance on their own.
5. MSF's Basic *RiderCourse* is based on years of scientific research and field experience and has proven successful in developing entry-level skills for riding in traffic.

TC's Reply to the Answers

In its Reply, TC reiterates the original arguments raised in the Protest.

DISCUSSION

A. Best Value Award

TC alleges DMV failed to make a best value award as required by the RFP and SFL § 163 and instead awarded the contract to MSF on the basis of price alone (*see* Protest, at pgs. 8-10). DMV responds that it adhered to the award methodology set forth in the RFP and made the award "on the basis of best value, including a [sic] evaluation and scoring of each bidders [sic] technical proposal" (DMV Answer, at pg. 2). DMV also emphasizes that cost was only worth 20% of the total score (*Id.*). MSF states "[t]he fact that the 'best value' in this instance is also provided by the 'lowest bidder' is not an indication of wrongdoing" (MSF Answer, at pg. 4).

As stated above, SFL § 163(10) requires that service contracts be awarded on the basis of best value. SFL § 163(1)(j) defines best value as "the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers. Such basis shall reflect, wherever possible, objective and quantifiable analysis." Additionally, SFL § 163(9)(b) requires that the solicitation issued by the procuring state agency prescribe the minimum specifications or requirements that must be met in order to be considered responsive and describe and disclose the general manner in which the evaluation and selection shall be conducted. Finally, SFL § 163(7) requires the contracting agency 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."

Here, the RFP issued by DMV sets forth the general evaluation criteria consisting of a review of cost and the technical components of the proposal, and the relative scoring weight of those components (*see* RFP, at Section 4-4). More specifically, the RFP disclosed that cost would be worth 20% of the scoring and the technical review would be worth 80% of the scoring: Administration (25%), Program (50%) and Diversity Practices (5%) (*Id.*). The RFP also stated that the contract would be awarded to the offeror receiving the highest score (*Id.*).

This general description of the evaluation and selection process set forth in the RFP satisfied the statutory requirement of SFL § 163(9)(b). Additionally, the prior record indicates DMV filed its evaluation instrument in the procurement record prior to the initial receipt of bids on September 7, 2018. The evaluation instrument further defined and detailed the evaluation process, establishing a 1000-point scoring plan consistent with the relative weights set forth in the RFP (Cost – 200 points, Administration – 250 points, Program – 500 points, and Diversity Practices – 50 points). Therefore, DMV's evaluation plan satisfied the requirements of SFL § 163(7).

Finally, our review of the procurement record confirms that DMV evaluated the proposals in accordance with the criteria set forth in the RFP (and the evaluation tool) resulting in a total score of 512.57 for the proposal submitted by TC and a total score of 652.80 for the proposal submitted by MSF (see also Debriefing Summary attachment to DMV's Answer). DMV made the contract award to MSF, the offeror submitting the proposal receiving the highest score. Accordingly, it is clear that the evaluation and selection process conducted by DMV was consistent with the RFP and the requirements of the SFL, and the award made to MSF was based on a best value determination.[9]

B. Evaluation of TC's Proposal/References

TC alleges DMV failed to completely evaluate TC's proposal in accordance with the process set forth in the RFP and that "the only actual evaluation of the Total Control bid appears to have occurred after the award and after the request for debrief" (Protest, at pg. 9). To support its allegation, TC claims DMV neglected to verify TC's past performance with one of the references it submitted as part of its proposal (*see* Protest, at pg. 3).[10] DMV states that it completed the evaluation of TC's proposal in accordance with the RFP on October 5, 2018 (i.e., prior to both DMV's contract award to MSF on October 29, 2018, and TC's debrief on November 26, 2018) (*see* DMV Answer, at pg. 2). DMV explains it did not score references as part of the evaluation of proposals but rather checked references as part of the vendor responsibility review of the tentative awardee (in this instance, MSF) (*Id.*).

As stated above, 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

[9] Having determined that DMV awarded the contract to MSF on the basis of best value (rather than on the basis of cost alone as alleged by TC), we have also rejected TC's associated claim that DMV materially changed the method of award stated in the RFP.

[10] It appears that TC's assertion that DMV failed to evaluate proposals according to the RFP stems from its allegation that DMV awarded the contract solely on the basis of price. However, as stated above, DMV did, in fact, award the contract on a best value basis.

and shall describe and disclose the general manner in which the evaluation and selection shall be conducted." Section 3 of the RFP sets forth, in detail, the requirements to be addressed in an offeror's technical proposal. Each requirement is designated either "M" – mandatory or "S" – scored (*see* RFP, at Section 1-22).[11]

Section 3-1 of the RFP relates to "Bidder Experience" and sets forth certain mandatory experience requirements and instructs bidders to describe their relevant experience which is designated "S" – a scored criterion. This section also requires that offerors submit references verifying that the offeror meets all experience requirements of the RFP. However, the reference requirement is clearly designated "M" – Mandatory, but not scored. Thus, TC's assertion that "the RFP was clear that...references were a mandatory and **scored** requirement (emphasis added)" is not correct (*see* TC Reply, at pg.4).[12] Based on our review of the procurement record, we are satisfied that DMV reviewed the proposals in their entirety and scored those requirements designated "S" in the RFP. Further, DMV's use of the submitted references only to validate the experience requirements of the tentative awardee is not contrary to the RFP, the evaluation tool, or general State procurement practices.

C. Intellectual Property Infringement

TC asserts MSF is illegally using TC's intellectual property and, as a result, DMV cannot properly award the contract to MSF until TC's infringement claim is resolved (*see* Protest, at pg. 12). DMV replies that it conducted a thorough vendor responsibility review of MSF, including a review of MSF's legal capacity and integrity, and found nothing to support TC's claim (*see* DMV Answer, at pgs. 2-3). DMV also asserts TC failed to provide any proof, specific accusations or court findings in the Protest (*see* DMV Answer, at pg. 3).

Initially, we note that TC's assertion appears to arise out of a long standing and apparently ongoing dispute with MSF concerning MSF's use of intellectual property.[13] As to the present claim of infringement, Section 3.5 of the RFP (entitled "Course Ownership/Legal Authority") requires that the offeror (i) have the legal authority to use the proposed course curricula and maintain such authority for the term of the contract; (ii) have the legal authority to

[11] Section 1-22 of the RFP further provides that "[w]here a Mandatory requirement instructs the Bidder to submit material, the Bidder must submit such material with its proposal. The Bidder's failure to do so may result in its proposal being deemed non-responsive."

[12] TC cites OSC Bid Protest Determinations SF20180105 and SF20070056 to support TC's assertion that DMV was required to score TC's references, both of which are distinguishable from the facts present in this case (*see* Protest, at pg. 10; TC Reply, at pg. 4). In SF20180105, the contracting agency refused to accept itself as one of the protester's references and, as a result, found the protester non-responsive due to an insufficient number of references. As the RFP did not preclude offerors from naming the contracting agency as a reference, we concluded the contracting agency had impermissibly changed the reference requirements after the submission of bids. Here, TC is not asserting DMV determined TC to be non-responsive relative to the reference requirement and thus, SF20180105 is inapplicable. In SF20070056, the evaluation methodology required references to be scored, which is not the case here, and therefore, that determination is inapposite to TC's position.

[13] TC asserts DMV had an affirmative duty to investigate similar claims related to MSF's use of intellectual property in connection with DMV's 2013 procurement for administration of the Program and failed to do so (*see* Protest, at pg. 12). TC states that if DMV had conducted an inquiry, TC "would have provided documentation and evidence dating back to at least 2007...of several instances between [sic] MSF's illegal use of Total Control intellectual property" (*Id.*). The Protest does not contain documentary evidence of TC's claims of infringement.

effect changes to the curricula delivered under the contract and maintain such authority for the term of the contract; and (iii) submit evidence of its authority to submit its proposed curricula and use the proposed curricula during the term of the contract including "proof of legal ownership." In response to this requirement, MSF represented that its Basic *RiderCourse*, Basic *RiderCourse* 2, 3-Wheel Basic *RiderCourse* as well as the other 15 *RiderCourses* listed in the MSF curriculum catalog (with variations) are the "intellectual property of the MSF and copyrighted by MFS" and provided a letter from Harley-Davidson Riding Academy (HDRA) granting permission to MSF to use HDRA's curricula, course materials and logos. Based on the documentation submitted by MSF and DMV's own vendor responsibility review, DMV determined that MSF satisfied this requirement. Our review of the procurement record does not provide any basis to disturb DMV's determination that MSF has the legal authority to administer the Program in accordance with its proposal.

D. Conflicts of Interest and Collusion

1. MSF's Relationship with Motorcycle Industry Council

TC alleges MSF's interest in supporting the Motorcycle Industry Council (MIC), the primary trade organization for the national motorcycle industry whose members are motorcycle manufacturers, conflicts with MSF's ability to properly discharge its duties under the contract (*see* Protest, at pgs. 13-14). TC further claims MSF has an emphasis on promoting the motorcycle industry and its members as a whole rather than providing services to individual riders (*Id,* at pg. 13.).[14] DMV replies it is aware of the relationship between MSF and MIC and has determined that such relationship in no way conflicts with, or negatively impacts, MSF's contractual obligations (*see* DMV Answer, at pg. 3). MSF emphasizes that it and MIC are "separate organizations with independent Boards of Directors, separate budgets, and different missions" (MSF Answer, at pg. 6).

The objective of DMV's procurement effort is to acquire the services of a motorcycle riding training coordinating organization to administer the Program, the goals of which are to promote rider education, make rider education affordable and readily available to the public, increase public awareness of the presence of motorcyclists on our roadways, and reduce the number of motorcyclists injuries and fatalities (*see* RFP, at Sections 1-1 and 1-2). "The primary purpose of the [Program] is to promote and encourage the fullest possible access to, and use of a nationally recognized motorcycle training curriculum in order to improve the safety of motorcyclists on the State's streets and highways" (RFP, at Section 1-2). TC has failed to provide evidence that the relationship between MSF and MIC presents an organizational conflict of interest that would impair MSF's ability to perform its obligations as administrator of the Program.

[14] In the Protest, TC seems to suggest that MSF's relationship with MIC and its promotion of the national motorcycle industry will negatively influence MSF's obligation to adequately warn Program participants of the dangers associated with motorcycling (*see* Protest, at pg. 13). However, TC does not provide any support for its proposition.

2. Sale of Insurance

TC claims MSF is selling insurance to site sponsors and students without a valid New York license (*see* Protest, at pg. 14).[15] TC posits that site sponsors may feel pressured to buy insurance from MSF because MSF is the administrator of the Program, thereby creating a conflict of interest (*Id.*). DMV responds TC failed to provide proof that MSF is illegally acting as an insurance broker and furthermore, this is not the appropriate forum for an analysis of those claims (*see* DMV Answer, at pg. 3). MSF states it does not sell insurance but does offer sponsors the option to become additional insureds under MSF's insurance policies if they cannot obtain reasonably priced insurance on their own (*see* MSF Answer, at pg. 7).

TC has failed to provide any documentary evidence to support its allegations that MSF is selling insurance or violating provisions of the Insurance Law.

3. Collusion

TC alleges MSF colluded with DMV before and during the procurement process to prevent TC from being awarded the contract in violation of SFL § 139-j (*see* Protest, at pg. 17). DMV replies that, while DMV and MSF are required to meet and communicate regarding the current contract these meetings and communications were not to develop a strategy to keep TC from winning and MSF was not "involved in the development of the RFP or the evaluation process or consulted in any way" (DMV Answer, at pg. 4).

TC's allegations of collusion are unsupported and are rebutted by DMV's explanation for ongoing communications with MSF as the incumbent service provider.

E. Vendor Responsibility Determination

TC asserts MSF is a non-responsible bidder because MSF failed to disclose material information relating to defects in MSF's curriculum that resulted in deaths during class training, "thereby exposing the state to liability by delivering a proven-dangerous training product" (Protest, at pgs. 20-21). DMV states MSF's curriculum has been delivered in New York State continuously since 1996, to over a quarter of a million motorcyclists, without a single death due to the curriculum or other aspects of the program, and DMV has "no reason to believe that any aspect of the curriculum creates an undue risk to the safety of participants" (DMV Answer, at pg. 4). Furthermore, DMV points out that the cause of the sole death in connection with the Program was unrelated to MSF's curriculum or any aspect of the course itself (*Id.*). MSF maintains its "Basic *RiderCourse* is based on years of scientific research and...[MSF's] current course has been extensively field tested and proven successful in developing the entry-level skills for riding in traffic" (MSF Answer, at pg. 8).

[15] TC also asserts MSF is self-insured in violation of the RFP's insurance requirements (*see* Protest, at pg. 14). MSF replies it is not self-insured (*see* MSF Answer, at pg. 7). The RFP sets forth the insurance requirements for the contractor (*see* RFP, at Section 5-1). The RFP also requires that the contractor provide DMV with copies of certificates of insurance satisfying these requirements (*Id.*). Our review of the procurement record confirms that MSF provided evidence of its compliance with the insurance requirements of the RFP.

SFL § 163(4)(d) provides that "[s]ervice contracts shall be awarded on the basis of best value to a responsive and **responsible** offerer..." (emphasis added). Further, SFL § 163(9)(f) provides 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, "responsible" means the financial ability, legal capacity, integrity, and past performance of a business entity.[16]

DMV states it conducted a thorough vendor responsibility review of MSF, including a review of MSF's legal capacity and integrity (*see* DMV Answer, at pgs. 2-3). As documented in the procurement record, DMV determined MSF to be a responsible bidder that can successfully perform the services required under the contract. As part of our review of the DMV/MSF contract, this Office examined and assessed the information provided in the procurement record and conducted an independent vendor responsibility review of MSF. Our review did not provide any basis to upset DMV's responsibility 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 DMV. As a result, the Protest is denied and we are today approving the DMV/MSF contract for administrator of the Program.

[16] SFL § 163(1)(c).

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by BEM Systems, Inc. with respect to the procurement of a Right of Way and Real Estate Information Technology System for the New York State Department of Transportation.

Contract Number – C037711

Determination of Appeal

SF–20180264

May 13, 2019

The Office of the State Comptroller (OSC) has reviewed the above-referenced procurement conducted by the New York State Department of Transportation (DOT) for consultant services to install and implement a modern right of way and real estate information technology system (System). We have determined the grounds advanced by BEM Systems, Inc. (BEM) are sufficient to merit the overturning of the contract award made by DOT and, therefore, we uphold the Appeal. As a result, we are today returning non-approved the DOT contract with Flairsoft, Ltd. (Flairsoft).

BACKGROUND

Facts

On February 26, 2018, DOT announced its intention to release a Request for Proposals (RFP) seeking a consulting firm to install and implement a System to be used by DOT's Office of Right of Way (OROW).[1] OROW is responsible for "acquiring real estate in a timely manner for transportation purposes and managing or disposing of transportation property on terms beneficial to the people of the State of New York" and maintains information on right of way assets such as leases, signs, surplus property and right of way acquisitions (*see* RFP, at Section 1.2).

Consistent with the requirements of State Finance Law (SFL) § 163, the RFP provided for a contract award based on best value (*see* RFP, at Sections 2.2 and 5.3).[2] Each offeror's proposal was to consist of: a technical and management proposal (technical proposal), a cost proposal, and an administrative proposal (*see* RFP, at Section 5.1). The technical and cost

---

[1] The RFP text was released on March 14, 2018 to a list of potential vendors who had expressed interest as instructed by the February 26, 2018 New York State Contract Reporter announcement. BEM's contention that DOT failed to include BEM in the initial distribution of the RFP is discussed later in this Determination.

[2] SFL § 163(1)(j).

proposals were evaluated on a 1450 total point scale, 1000 points allocated to the technical proposal and 450 points allocated to the cost proposal.[3]

Proposals were pre-screened to determine whether each satisfied the RFP's Minimum Responsiveness Requirements (*see* RFP, at Section 5.2). The RFP provided that responsive proposals would be evaluated by members of a Technical Evaluation Committee (TEC) comprised of technical, program and management subject matter experts (*see* RFP, at Section 5.4). The evaluators would review technical proposals and award scores ranging from 0-10 for each criterion, and then these individual scores would be averaged to produce a raw score for a particular criterion (*Id.*). The RFP permitted evaluators to revise initial scores after discussing the technical proposals as a committee (*Id.*). The raw scores for the criteria would be added together for a total raw technical score for each technical proposal (*Id.*). The cost proposal with the lowest total fixed cost to deliver the System would receive the maximum 450 points and other cost proposals with higher total fixed costs would receive proportionately lower cost scores (*see* RFP, at Section 5.5). Initial raw scores for the technical proposals would be added to the cost proposal scores to arrive at an initial best value score (*see* RFP, at Section 5.6). The proposals with the top three initial best value scores would produce a shortlist of offerors that would advance to the interview/demonstration phase of the evaluation process (*Id.*).

By the proposal due date of May 30, 2018, DOT received five proposals. All five proposals passed the pre-screening process and underwent a technical evaluation. On July 20, 2018, DOT announced the shortlist of three offerors determined to be mathematically susceptible for contract award: Flairsoft, BEM and PCC Technology, Inc. (PCC). The shortlisted offerors were invited to provide a demonstration of their proposed System. On July 24, 2018, DOT announced a corrected shortlist; while Flairsoft and BEM remained on the shortlist, PCC was replaced with GeoAMPS, LLC. After the interview/demonstration (demonstration), evaluators independently rescored the technical proposals of the shortlisted offerors, met as a group and were again permitted to revise their scores as a result of the group discussion (*see* RFP, at Sections 5.7 and 5.8).

Subsequently, DOT determined to provide the shortlisted offerors with the opportunity to submit best and final offers (BAFO) (*see* RFP, at Section 5.9). The BAFO process afforded the three shortlisted offerors the opportunity to revise their technical and/or cost proposals (*see* RFP, at Section 5.9). All three shortlisted offerors submitted a BAFO. Evaluators were allowed to revise their technical scores based on their consideration of any new or changed technical proposal information (*Id.*). After this final opportunity for evaluators to rescore offerors' technical proposals, the technical proposal with the highest-rated raw score was adjusted to 1000 points (i.e. the maximum technical points available) and the other technical proposals were adjusted proportionately downward (*see* RFP, at Section 5.10). The cost proposals resulting from the BAFO were rescored, and, as before, the lowest cost proposal was awarded the maximum

[3] The RFP incorrectly stated that the maximum number of points available was 1500, with 1050 points allocated to the technical proposal and 450 points allocated to the cost proposal. However, the RFP also contained a further breakdown of the categories to be used to evaluate the technical proposals and the associated points for each category, and the total of the points allocated under this breakdown equaled 1000 (*see* RFP, at Section 5.3 and 5.4). Our review of the procurement record shows DOT, in fact, used a maximum score of 1000 to evaluate and score the technical proposals.

450 points and the higher cost proposals received proportionately lower scores (*Id.*). The RFP provided that the final perfected technical scores were combined with the final perfected cost scores to produce a final best value score for each offeror, and the offeror with the highest final best value score would be chosen for award (*Id.*).

On September 14, 2018, DOT informed BEM that it was the tentative awardee. On October 2, 2018, DOT informed BEM that DOT made an error and the tentative award was being made to Flairsoft. On October 3, 2018, DOT formally announced that Flairsoft was the tentative awardee. BEM thereafter requested a debriefing which was conducted by DOT on October 9, 2018.

By letter dated October 22 2018, BEM filed a protest with DOT challenging DOT's award. DOT denied BEM's protest by letter dated November 6, 2018. BEM appealed DOT's denial by letter dated November 14, 2018. DOT denied BEM's appeal by letter dated November 20, 2018.

BEM filed an appeal with this Office by letter dated December 10, 2018 (Appeal) and DOT responded by letter dated January 7, 2019 (Answer).

Comptroller's Authority and Procedures

Under 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, this Office has issued a Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency.[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 DOT with the DOT/Flairsoft contract;

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

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

    a. BEM's protest to DOT, dated October 22, 2018;

[4] 2 NYCRR Part 24.

b. DOT's protest determination, dated November 6, 2018 (Agency Level Protest Determination);
c. BEM's appeal to DOT dated, November 14, 2018;
d. DOT appeal determination, dated November 20, 2018 (Agency Level Appeal Determination);
e. BEM's Appeal to OSC, dated December 10, 2018; and
f. DOT's Answer to Appeal, dated January 7, 2019.

Applicable Statutes

The requirements applicable to this procurement are set forth in SFL Article 11 which provides that contracts for services shall be awarded on the basis of "best value" to a responsive and responsible offerer.[5] Best value is defined as "the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers."[6] Furthermore, "[w]here provided in the solicitation, revisions may be permitted from all offerers determined to be susceptible of being selected for contract award, prior to award. Offerers shall be accorded fair and equal treatment with respect to their opportunity for discussion and revision of offers."[7]

SFL § 163(9)(b) requires that "[t]he solicitation...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." Additionally, agencies are required to have a reasonable and fair process for procurements and specifically "...a reasonable process for ensuring a competitive field; a fair and equal opportunity for offerers to submit responsive offers; and a balanced and fair method of award. Where the basis for the award is best value, documentation in the procurement record shall, where practicable, include a quantification of the application of the criteria to the rating of the proposals and the evaluations results, or, where not practicable, such other justification which demonstrates that best value will be achieved."[8]

Where the basis for award is best value, State agencies "shall document, in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria . . . 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."[9] A state agency is required to maintain a procurement record for each procurement "identifying with supporting documentation, decisions by [the state agency] during the procurement process."[10] "Procurement record" is defined as "documentation of the decisions made and the approach taken in the procurement process."[11]

---

[5] SFL § 163(10).
[6] SFL § 163(1)(j).
[7] SFL § 163(9)(c).
[8] SFL § 163(9)(a).
[9] SFL § 163(7).
[10] SFL § 163(9)(g).
[11] SFL § 163(1)(f).

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, BEM challenges the procurement conducted by DOT on the following grounds:

1. DOT failed to notify BEM of the release of the RFP at the same time as the other bidders, resulting in less time for BEM to prepare its proposal.
2. DOT improperly provided Flairsoft with an advantage by affording Flairsoft additional time to prepare for the demonstration presentation and scheduling Flairsoft as the final demonstration.
3. DOT failed to comply with the requirements of the SFL when DOT did not provide BEM with the scores of the other bidders during the debriefing.
4. DOT failed to follow the scoring process set forth in the RFP, as shown by DOT's mistakes in the selection of the shortlisted offerors eligible for award and the contract awardee.
5. The evaluation/scoring process established by the RFP was flawed because allowing offerors to revise their proposals after the demonstration and as part of a best and final offer raises questions as to the fairness of the process. This process potentially provided an unfair advantage to one offeror over another and failed to result in a best value award.

DOT Response to the Appeal

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

1. While DOT cannot be sure when BEM first had access to the RFP, it appears BEM was in receipt of the RFP for a minimum of 45 business days prior to the date proposals were due, which was more than enough time to prepare a proposal of sufficiently high quality to rank BEM among the three finalists.
2. DOT did not provide Flairsoft additional time to prepare for the demonstration presentation. Each proposer received the demonstration presentation agenda one week in advance of its scheduled presentation, giving each finalist equal time to prepare.
3. The SFL requirements for debriefings do not require DOT to provide BEM with scores of the other offerors, but rather requires only "the application of the selection criteria to the unsuccessful offerer's proposal" prior to final award.
4. While DOT initially made two incorrect announcements with regard to selections during the procurement, these errors were corrected as soon as DOT realized the announcements were incorrect. Moreover, DOT submitted the entire procurement record, including all scoring, to OSC for review.
5. DOT determined to allow all shortlisted offerors the opportunity to make best and final offers as specifically permitted by the SFL and the RFP. All shortlisted offerors,

including BEM, improved their proposals. After a review of the best and final offers, Flairsoft's proposal was selected as providing the best value to the State.

DISCUSSION

A. Notice of Issuance of the RFP

BEM asserts DOT failed to notify BEM of the issuance of the RFP at the same time such notification was provided to many of the other potential bidders, resulting in BEM having less time to prepare its proposal (*see* Appeal, at pg. 2). DOT states that it is not aware of the exact date in which BEM first saw the RFP, but BEM was in receipt of the RFP for at least 45 business days prior to the proposal due date. DOT further notes that BEM had adequate time to prepare a proposal of sufficiently high quality to rank BEM among the three finalists (*see* Answer, at pg. 1).

SFL § 163(2) sets forth the operating principles intended to guide the state procurement process, stating: "[t]he objective of state procurement is to facilitate each state agency's mission while protecting the interests of the state and its taxpayers and promoting fairness in the contracting with the business community." SFL § 163(9)(a) further requires agencies to have a reasonable and fair process for procurements and specifically "...a reasonable process for ensuring a competitive field; a fair and equal opportunity for offerers to submit responsive offers; and a balanced and fair method of award."

DOT acknowledges that it did not notify BEM of the issuance of the RFP when DOT communicated this information to other offerors that submitted a letter of interest in the RFP but contends DOT was "under no obligation to separately notify businesses of the opportunity and did so in this case as a courtesy" (*see* Agency Level Protest Determination, at pg.1; Agency Level Appeal Determination, at pg. 1).[12] However, the procurement record submitted to this Office shows DOT took several steps to remedy an initial communication error to ensure all competitors had a fair opportunity to submit proposals. When DOT discovered the initial error in communicating the issuance of the RFP, DOT notified those overlooked by DOT's communication error, extended the due date, held a second pre-proposal webinar and entertained a second round of questions on the RFP. Moreover, while BEM claims it had less time to prepare its proposal, BEM did, in fact, submit a timely proposal and does not describe how the shorter period negatively affected the preparation of its proposal. Thus, we are satisfied DOT provided all interested offerors with a fair and equal opportunity to submit proposals.

B. Demonstration Preparation Time

BEM asserts DOT improperly provided Flairsoft with an advantage by affording Flairsoft additional time to prepare for the demonstration presentation and scheduling Flairsoft as the final

[12] On February 26, 2018, DOT announced its intention to issue the RFP on its website and in the New York State Contract Reporter. DOT issued the RFP on March 14, 2018 and proposals were due on May 30, 2018, which exceeded the minimum time period of 15 business days between initial publication of the RFP and the proposal due date required by New York State Economic Development Law § 143 (*see* Agency Level Protest Determination, at pg. 1.)

demonstration, while the other two shortlisted offerors presented about one week prior to Flairsoft (*see* Appeal, at pgs. 4-6).[13] BEM also suggests that the "apparently substantial swing in points" after the BAFO raises questions as to whether "DOT, during the demonstration, may have inadvertently disclosed to Flairsoft information regarding the relative capabilities of its competitors [who presented earlier demonstrations]" (Appeal, at pg. 6). DOT states each proposer was provided with the demonstration presentation agenda one week in advance of its scheduled presentation, giving each finalist equal time to prepare and BEM's assertion with regard to the sharing of information is pure speculation and has no basis in fact (*see* Answer, at pgs. 1 and 2).

The procurement record submitted to this Office confirms DOT provided the agenda to each of the shortlisted offerors one week before its scheduled demonstration presentation, thereby giving each offeror equal time to prepare.[14] As to BEM's suggestion that DOT may have "inadvertently disclosed" competitor's information to Flairsoft providing Flairsoft with an unfair advantage, in addition to DOT's denial that any such disclosure took place, our review of the procurement record provides no evidence to support BEM's assertion. Accordingly, we are satisfied no offeror was provided an unfair advantage in the scheduling of, or preparation for, the demonstration presentation.

C. Debriefing

BEM contends DOT's failure to provide BEM with the scores of the other offerors during the debriefing violated the SFL (*see* Appeal, at pg. 5). DOT responds that the SFL requires a debriefing include the application of the selection criteria to the unsuccessful offeror's proposal and, only after award, the reasons for selection of the winning proposal (*see* Answer, at pg. 1).

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

The procurement record submitted to this Office contained a debriefing agenda which DOT distributed to the offerors when the tentative award was announced. The agenda was clear the debriefing would focus only on the proposal of the offeror being debriefed, but also listed the following topics: overview of the RFP and the proposal evaluation process, the technical

[13] The shortlist demonstration presentations were held as follows: GeoAMPS on August 6, 2018, BEM on August 7, 2018, and Flairsoft on August 14, 2018.

[14] Correspondence in the procurement record shows BEM made a request to have its presentation moved to the week of August 13-17 due to a presenting team member's medical situation, but as the demonstration presentation agenda had already been shared with BEM at that point, DOT denied BEM's request. DOT explained all shortlisted offerors must receive fair and equitable treatment and release of the detailed demonstration agenda was staggered to give all shortlisted offerors the same amount of time to prepare.

evaluation results and the cost proposal and best value evaluation results. During BEM's debriefing, DOT informed BEM of its own score and that Flairsoft's technical proposal had scored higher (*see* Appeal, at pg. 4).

Recent guidance from the New York State Procurement Council directs agencies conducting debriefings to provide "at a minimum, the strengths and weaknesses of a vendor's bid/proposal and...information as to the relative ranking of that bidder's bid/proposal in each of the major evaluation categories as provided for in a bid solicitation document" (NYS Procurement Bulletin Debriefing Guidelines effective January 30, 2019). This information is consistent with the goal of a debriefing: to make the procurement process more transparent and assist vendors in becoming more viable competitors in State procurements (*Id.*).

BEM does not assert that the debriefing provided by DOT was wholly deficient, but instead asserts DOT was legally required to provide BEM with the other offerors' scores. However, SFL § 163(9)(c)(iv) does not specifically require agencies to provide competitors' scores during a debriefing. Based on our review of the procurement record, we conclude that the debriefing provided to BEM was sufficient to satisfy the applicable statutory standard.

D. Evaluation and Selection Process

BEM's remaining challenge to the procurement relates to the evaluation methodology used by DOT to review and score proposals. More specifically, BEM asserts that DOT's mistakes in the selection of the shortlisted offerors and contract awardee are evidence that DOT failed to follow the scoring process set forth in the RFP, and surmises "there could be other errors in the evaluation process that may have affected the award of the bid" (Appeal, at pg. 5). BEM also expresses "doubts as to whether the [shortlisting and final awardee] scores were correctly tabulated" (Appeal, at pg. 7). BEM further asserts the evaluation and scoring process established by the RFP was flawed because allowing offerors to revise their proposals after the demonstration as part of a best and final offer potentially provided an unfair advantage to one offeror over another and thus failed to result in a best value award (*Id.*).[15]

DOT acknowledges two erroneous announcements with regard to selections during the course of the procurement which DOT corrected as soon as it became aware of the errors (*see* Answer, at pg. 1).[16] DOT claims it properly allowed all shortlisted proposers an opportunity to

[15] BEM does not allege any improper intent or behavior by DOT staff, but questions the "construct of the process" which provided offerors a further opportunity to amend their cost and technical proposals *after* the demonstration (*see* Appeal, at pg. 7).

[16] The first error occurred in the selection of the three shortlisted offerors when DOT incorrectly transferred data into the scoresheet for one of the offerors. The second error occurred when DOT initially awarded the contract to BEM and, after discovering an error in the calculation of the final BAFO scores during a debriefing being provided to Flairsoft, awarded the contract to Flairsoft. In DOT's Agency Level Appeal Determination, DOT states "it was discovered that the final ranking scoresheet incorrectly included Flairsoft's 'after-demo' technical score in the ranking formula. It should have included the 'after-BAFO' technical score instead. Once this transcription error was discovered, and the 'after-BAFO' technical score was included in the ranking formula, the ranking changed; Flairsoft's score then became the highest, and Flairsoft appeared correctly in the rank order as the Best Value Proposer."

make best and final offers (BAFOs) in accordance with the RFP and the SFL which resulted in Flairsoft being selected as providing the best value to the State (*see* Answer, at pg. 2).

SFL § 163(9)(b) requires that "[t]he solicitation...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." Additionally, "[w]here provided for in the solicitation, revisions may be permitted from all offerers determined to be susceptible of being selected for contract award, prior to award. Offerers shall be accorded fair and equal treatment with respect to their opportunity for discussion and revision of offers" (SFL § 163[9][c]). Finally, where the basis for award is best value, State agencies "shall document, in the procurement record and in advance of the initial receipt of offerers, the determination of the evaluation criteria . . . 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]).

As a threshold matter, the evaluation process set forth in the RFP satisfied the statutory requirements of SFL §163(9)(b) and SFL § 163(9)(c) which permits revisions of proposals from offerors susceptible to award as part of a BAFO process when the solicitation so provides. Here, in Section 5.9 of the RFP, DOT reserved the right to request a BAFO from shortlisted offerors. In the event DOT opted to request a BAFO, Section 5.9 of the RFP permits responding firms to submit revisions to their technical and/or cost proposals and describes the evaluation process with respect to the BAFOs received. Thus, DOT's determination to provide shortlisted offerors an opportunity to revise their technical and cost proposals as part of the BAFO was authorized under the SFL and the terms of the RFP.

However, our review of the procurement record identified various discrepancies between the evaluation process set forth in the RFP and the more detailed evaluation instrument developed by DOT prior to the receipt of initial offers, and the evaluation actually conducted by DOT. These discrepancies include:

- While not provided for in either the RFP or the evaluation instrument, when an evaluator was unable to comprehend the proposer's technical solution to a given criterion, the evaluator was allowed to consult with a group of individuals, DOT's Information Technology Staff (ITS), to interpret the proposal. In addition, the evaluators did not consult with ITS staff on the same criteria for all proposals, raising concerns as to the whether the evaluation was consistent. Additionally, five members of ITS, as a group, also served as one of the evaluators on the TEC. Neither the RFP nor the evaluation instrument describe how this group was to score proposals collectively.
- The total number of available points listed throughout the procurement documentation was inconsistent, contributing to confusion as to the scoring of the proposals.
- While the RFP required evaluators to document the reasons for changes to their evaluation scores, this did not always occur and the comments that were recorded

were difficult to attribute to a specific score revision (*see* RFP, at Sections 5.4, 5.7 and 5.8).

- Certain evaluators provided scores for references when no reference checks were conducted and no process for independently scoring reference checks existed in the technical evaluation plan.

In light of the discrepancies between the evaluation conducted by DOT and the evaluation process described in the RFP and the evaluation instrument, the evaluation and selection process did not satisfy the requirements of SFL §§ 163(9)(b), 163(7).

E. Procurement Record Requirements

SFL § 163(9)(a) requires that "where the basis for the award is best value, documentation in the procurement record shall, where practicable, include a quantification of the application of the criteria to the rating of the proposals and the evaluations results, or, where not practicable, such other justification which demonstrates that best value will be achieved." Furthermore, SFL § 163(9)(g) requires that "[a] procurement record shall be maintained for each procurement identifying, with supporting documentation, decisions made by the . . . state agency during the procurement process."

The procurement record submitted to this Office by DOT with the proposed DOT/Flairsoft contract does not adequately support the evaluation and selection decisions made by DOT in the procurement process and, therefore, does not provide a basis for this Office to confirm that the evaluation process conducted by DOT was consistent with its evaluation plan and resulted in the selection of the "best value" proposal.

Specifically, the multi-stage evaluation methodology established by DOT provided for an initial technical score and three potential score changes during the evaluation process (*see* RFP, at Sections 5.4 and 5.6). These scoring stages set forth in the RFP consist of (i) the initial independent score, (ii) the after group discussion re-score (to determine initial best value), (iii) the after demonstration re-score, and (iv) the after BAFO re-score. However, the scoresheets provided to the evaluators did not have adequate spacing for evaluators to record the various score changes during the multi-stage evaluation process and related comments in support of the reasons for such score changes. Furthermore, even when the scoresheets contained evaluators' comments, the comments could not be matched with the corresponding scoring stage of the process. As a result of this inability to confirm evaluators' scores during each stage of the process, this Office was unable to discern the rationale of changes by the evaluators in order to verify DOT's selection of shortlisted offerors and contract awardee.

Additionally, there is insufficient documentation to support the significant increase in Flairsoft's technical score as a result of its BAFO. All three shortlisted vendors offered certain BAFO technical clarifications, yet the evaluators only made changes to Flairsoft's technical score. Flairsoft's after-BAFO technical score increased in 14 out of the 31 rated criteria, resulting in an increase in Flairsoft's raw technical score from 762.3 to 827.0 points out of 1000 possible points. In one criterion (System Training) Flairsoft's score increased from 90 to 132 points out of 150 possible points. The BAFO resulted in enough additional technical points to

substantially change the final award from BEM to Flairsoft, but the documentation supporting this change is vague and ambiguous. And when this Office specifically requested an explanation for the changes in Flairsoft's technical score after the BAFO, the only further information provided by DOT was that Flairsoft significantly reduced the number of customizations required and committed to the addition of a search capability to allow users to access historic comparable sales.

Based on the procurement record maintained by DOT, this Office was unable to confirm that DOT's evaluation and selection decisions were in accordance with the evaluation methodology set forth in the RFP and the evaluation plan and whether the evaluation conducted resulted in a best value award.

CONCLUSION

For the reasons set forth in Sections D and E above, we have determined the issues raised in the Appeal are of sufficient merit to overturn the contract award by DOT. As a result, the Appeal is upheld and we are today returning non-approved the DOT/Flairsoft contract.

THOMAS P. DiNAPOLI
STATE COMPTROLLER

110 STATE STREET
ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

April 17, 2019

Jeffrey Blend, Esquire
AIDS Center of Queens County
161-21 Jamaica Avenue
Jamaica, NY 11432

Re: SF20190054 – Request for Applications Number 17640 (RFA)

Dear Jeffrey Blend:

This letter of determination is in response to the protest (Protest) filed on March 20, 2019 by AIDS Center of Queens County (ACQC) of the awards made by the Department of Health (DOH) for the Health and Human Services for Lesbian, Gay, Bisexual and Transgender Individuals, Families and Communities – Component A (Services) pursuant to Request for Applications Number 17640 (RFA).

The Office of the State Comptroller (Office) has considered the Protest as well as the procurement record submitted to this Office by DOH related to the awards for the Services under the RFA. As detailed below, we have determined that the issues raised in the Protest are not of sufficient merit to overturn DOH's awards for the Services under the RFA.

In the Protest ACQC asserts that DOH failed to follow the process set forth in the RFA to evaluate proposals and award funds. ACQC further asserts that the process used by DOH violates State and federal procurement law prohibiting arbitrary and capricious decisions. In a letter dated April 2, 2019, DOH responds to the Protest stating "the Department followed its evaluation plan and pre-established tool for this RFA" and made awards according to the terms of the RFA.

The RFA set forth the methodology that would be used to score the applications, including the maximum number of available points (106 points), a breakdown of the points allocated to each of the four sections to be scored (preference factors – 6 points; community and organization description – 20 points; program design and implementation – 60 points, and budget and justification – 20 points) and the information to be provided for each section (*see* RFA, at pgs. 26-31). The RFA also sets forth the available funding amount and anticipated number of awards allocated to each geographical region. The RFA provided that for Queens County, the region for which ACQC submitted an application, the annual award amount would be $133,000 and 2-3 awards would be made (*see* RFA, at pgs. 7-8). The RFA stated "awards will be made to the highest scoring applicants in each region, up to the minimum number of awards indicated for that region.

Remaining funding will be awarded to the next highest acceptable scoring applicant(s) from any region until the remaining funding is exhausted or awards have been made to all acceptable scoring applicants" (RFA, at pg. 9).[1] DOH received eight applications for Queens County and the applications receiving the highest three scores were funded.

After reviewing the procurement record, including the RFA, the instructions to evaluators, the evaluation instrument and the final scoring sheets, we are satisfied that DOH evaluated the applications in accordance with the terms of the RFA and the evaluation methodology DOH established in advance of receipt of the applications. Moreover, we find DOH's funding determinations not to fund ACQC's application neither arbitrary nor capricious.

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

Sincerely,

Brian Fuller
Director of Contracts

cc: Julie M. Harris, Director, Division of HIV/STD/HCV Prevention
Elizabeth Wood, New York State Department of Health

[1] In the RFA, DOH acknowledged that the currently available funding might not be sufficient to fund all acceptable applications. In case additional funding became available in the future, the RFA identified three categories of applications: 1) approved and funded, 2) approved, but not funded, and 3) not approved. While DOH approved ACQC's application, ACQC was not funded.

THOMAS P. DiNAPOLI
STATE COMPTROLLER

110 STATE STREET
ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

April 17, 2019

Adelaide Matthew Dicken
Director of Grassroots Fundraising and Communications
Sylvia Rivera Law Project
147 W. 24th St. 5th Floor
New York, NY 10011

Re: SF20190068 – Request for Applications Number 17640 (RFA)

Dear Adelaide Matthew Dicken:

This letter of determination is in response to the protest (Protest) filed on March 22, 2019 by Sylvia Rivera Law Project (SRLP) of the awards made by the Department of Health (DOH) for the Health and Human Services for Lesbian, Gay, Bisexual and Transgender Individuals, Families and Communities – Component A (Services) pursuant to Request for Applications Number 17640 (RFA).

The Office of the State Comptroller (Office) has considered the Protest as well as the procurement record submitted to this Office by DOH related to the awards for the Services under the RFA. As detailed below, we have determined that the issues raised in the Protest are not of sufficient merit to overturn DOH's awards for the Services under the RFA.

By letter dated March 15, 2019 (Debrief Letter), DOH provided SRLP with a summary of the strengths and weaknesses DOH identified after evaluating SRLP's application. In the Protest, SRLP disputes certain weaknesses cited by DOH in the Debrief Letter. In a letter dated April 9, 2019, DOH responds to the Protest stating "the Department followed its evaluation plan and pre-established tool for this RFA" and made awards according to the terms of the RFA. Further, DOH addresses each weakness questioned by SRLP in the Protest.

The RFA set forth the methodology that would be used to score the applications, including the maximum number of available points (106 points), a breakdown of the points allocated to each of the four sections to be scored (preference factors – 6 points; community and organization description – 20 points; program design and implementation – 60 points, and budget and justification – 20 points) and the information to be provided for each section (*see* RFA, at pgs. 26-31). The RFA also sets forth the available funding amount and anticipated number of awards allocated to each geographical region. The RFA provided that for New York City - Manhattan,

the region for which SRLP submitted an application, the annual award amount would be $133,000 and 9-11 awards would be made (*see* RFA, at pgs. 7-8). The RFA stated "awards will be made to the highest scoring applicants in each region, up to the minimum number of awards indicated for that region. Remaining funding will be awarded to the next highest acceptable scoring applicant(s) from any region until the remaining funding is exhausted or awards have been made to all acceptable scoring applicants" (RFA, at pg. 9).[1] DOH received twenty-seven applications for New York City - Manhattan and the applications receiving the highest ten scores were funded.

After reviewing the procurement record, including the RFA, the instructions to evaluators, the evaluation instrument and the final scoring sheets, we are satisfied that DOH evaluated the applications in accordance with the terms of the RFA and the evaluation methodology DOH established in advance of receipt of the applications.

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

Sincerely,

Brian Fuller
Director of Contracts

cc: Julie M. Harris, Director, Division of HIV/STD/HCV Prevention
Elizabeth Wood, New York State Department of Health

[1] In the RFA, DOH acknowledged that the currently available funding might not be sufficient to fund all acceptable applications. In case additional funding became available in the future, the RFA identified three categories of applications: 1) approved and funded, 2) approved, but not funded, and 3) not approved. While DOH approved SRLP's application, SRLP was not funded.

THOMAS P. DiNAPOLI
STATE COMPTROLLER

110 STATE STREET
ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

April 26, 2019

Jeffrey Blend, Esquire
AIDS Center of Queens County
161-21 Jamaica Avenue
Jamaica, NY 11432

Re: SF20190070 – Request for Applications Number 17650 (RFA)

Dear Mr. Blend:

This letter of determination is in response to the protest (Protest) filed on April 1, 2019 by AIDS Center of Queens County (ACQC) of the awards made by the Department of Health (DOH) for Comprehensive HIV/STD/HCV Prevention and Related Services for Women and Young Women within Communities of Color – Component C (Services) pursuant to Request for Applications Number 17650 (RFA).

The Office of the State Comptroller (Office) has considered the Protest as well as the procurement record submitted to this Office by DOH related to the awards for the Services under the RFA. As detailed below, we have determined that the issues raised in the Protest are not of sufficient merit to overturn DOH's awards for the Services under the RFA.

In the Protest ACQC asserts that DOH failed to follow the process set forth in the RFA to evaluate proposals and award funds. ACQC further asserts that the process used by DOH violates State and federal procurement law prohibiting arbitrary and capricious decisions. In a letter dated April 16, 2019, DOH responds to the Protest stating "the Department followed its evaluation plan and pre-established tool for this RFA" and made awards according to the terms of the RFA.

The RFA set forth the methodology that would be used to score the applications, including the maximum number of available points (105 points), a breakdown of the points allocated to each of the four sections to be scored (preference factors – 5 points; community and organization description – 25 points; program design and implementation – 55 points, and budget and justification – 20 points) and the information to be provided for each section (*see* RFA, at pgs. 66-71). The RFA also sets forth the available funding amount and anticipated number of awards allocated to each geographical region. The RFA provided that for Queens County, the region for

which ACQC submitted an application, the annual award amount would be $200,000 and 1-2 awards would be made (*see* RFA, at pgs. 8-9). The RFA stated "awards will be made to the highest scoring applicants in each region, up to the minimum number of awards indicated for that region. Remaining funding will be awarded to the next highest acceptable scoring applicant(s) from any region until the remaining funding is exhausted or awards have been made to all acceptable scoring applicants" (RFA, at pg. 11).[1] DOH received two applications for Queens County. The application submitted by ACQC received a score of 85.67 points and the other application received a score of 94 points and was funded.

After reviewing the procurement record, including the RFA, the instructions to evaluators, the evaluation instrument and the final scoring sheets, we are satisfied that DOH evaluated the applications in accordance with the terms of the RFA and the evaluation methodology DOH established in advance of receipt of the applications. Moreover, we find DOH's funding determinations consistent with the process set forth in the RFA.

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the awards for Services made by DOH. As a result, the Protest is denied, and we are today approving the awards for Services made by DOH.[2]

Sincerely,

Brian Fuller
Director of Contracts

cc: Julie M. Harris, Director, Division of HIV/STD/HCV Prevention
Elizabeth Wood, New York State Department of Health

[1] In the RFA, DOH acknowledged that the currently available funding might not be sufficient to fund all acceptable applications. In case additional funding became available in the future, the RFA identified three categories of applications: 1) approved and funded, 2) approved, but not funded, and 3) not approved. While DOH approved ACQC's application, ACQC was not funded.

[2] ACQC has submitted requests under the Freedom of Information Law (Public Officers Law Article 6, "FOIL") to DOH and this Office seeking information relating to the RFA. In the Protest, ACQC asks this Office to delay acting on the awards made under the RFA and issuing this protest determination until ACQC receives documentation in response to its FOIL requests. Consistent with prior bid protest determinations and the long standing policy of this Office, issues related to the procuring agency's action or inaction on a FOIL request does 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 documents related to the procurement that would have been within the scope of ACQC's FOIL request.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by CCI Companies, Inc., with respect to the Procurement for Construction of the Empire State Trail Extension including Bicycle Lanes and Sidewalks in the Town of Dewitt and City of Syracuse conducted by the New York State Department of Transportation.

Determination of Bid Protest

SF–20190191

December 20, 2019

Contract Number – D264077

The Office of the State Comptroller (OSC) has reviewed the above referenced procurement conducted by the New York State Department of Transportation (DOT) for construction of an extension to the Empire State Trail in the Town of Dewitt and the City of Syracuse (Project).[1] We have determined the grounds advanced by CCI Companies, Inc. (CCI) are insufficient to merit the overturning of the contract award made by DOT and, therefore, we deny the Protest. As a result, we are today approving the DOT contract with Crane Hogan Structural Systems, Inc. (Crane Hogan) to provide the construction work for the Project.

BACKGROUND

Facts

On August 9, 2019, DOT announced Contract D264077 seeking bids to construct the Project.[2] Thereafter, DOT released bid documents and on August 27, 2019, DOT amended the specifications to add a Project Labor Agreement (PLA). In response to a bidder's question, DOT clarified on September 10, 2019, that bidder acceptance of the PLA was a requirement of the contract.

Consistent with the requirements of Highway Law §38, the DOT bid documents provide for a contract to be awarded to the lowest responsible bidder as will best promote the public interest (*see* DOT Standard Specifications, Construction and Materials, dated January 1, 2019, at pg. 70). The lowest bid must state the lowest gross sum for which the entire work will be performed, including all the items specified in the estimate, and the resultant award is determined

[1] The Empire State Trail is a 750-mile multi-use trail proposed in January 2017, which will connect and join several existing trail segments throughout New York State. The envisioned trail would run from Manhattan to the northern tip of Lake Champlain and from Buffalo to Albany. The extension work for the Project consists of a 3.1 mile stretch of bike lanes and sidewalks in Syracuse and the Town of Dewitt.

[2] In May 2019, DOT conducted an earlier procurement for the project (Contract D264000) in which CCI was the apparent low bidder. However, on June 28, 2019, DOT announced that all bids for Contract D264000 had been rejected.

by the DOT Commissioner on that basis (*Id.*). DOT received three bids by the due date of September 12, 2019, and awarded the contract to Crane Hogan, the lowest responsible bidder with a proposed total project cost of $18,999,949. CCI did not submit a bid for Contract D264077.

CCI filed a protest with OSC by letter dated September 24, 2019, and supplemented this filing on October 8, 2019 (collectively referred to as Protest).[3] DOT filed an answer to the Protest by letter dated October 11, 2019 (Answer) and CCI replied to the Answer by letter dated October 18, 2019 (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 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 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 DOT with the DOT/Crane Hogan contract;

2. the correspondence between this Office and DOT arising out of our review of the proposed DOT/Crane Hogan contract; and

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

    a. CCI's Protest dated September 24, 2019, as supplemented by CCI's October 8, 2019 filing;
    b. DOT's Answer to the Protest dated October 11, 2019; and
    c. CCI's Reply dated October 18, 2019.

Applicable Statutes

The requirements applicable to this procurement are set forth in Highway Law §38. Specifically, Highway Law §38(3) provides that "[t]he contract for the construction or

[3] In its supplemental filing, CCI does not raise any new protest grounds; rather, CCI further expounds on the arguments contained in the September 24, 2019 filing.
4 2 NYCRR Part 24.

improvement of such highway or section thereof shall be awarded to the lowest responsible bidder, as will best promote the public interest."[5] Highway Law § 38(3) further provides that the lowest bid:

> shall be deemed to be that which specifically states the lowest gross sum for which the entire work will be performed, including all the items specified in the estimate thereof. The lowest bid shall be determined by the commissioner of transportation on the basis of the gross sum for which the entire work will be performed, arrived at by a correct computation of all the items specified in the estimate therefor at the unit prices contained in the bid.

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, CCI challenges the procurement conducted by DOT on the following grounds:

1. DOT's decision to use a PLA is not supported by the record. Moreover, DOT's determination to incorporate a PLA based on a consultant report that did not evaluate the actual terms of a negotiated PLA is defective, discriminatory, arbitrary and capricious.
2. The fact that the bids received for Contract D264000, where no PLA was required, were lower than the bids received for Contract D264077 demonstrates that the PLA fails to achieve savings, does not meet the standards set forth in Labor Law § 222, and thus, is not in the best interest of the public.
3. The PLA may not legally modify a prevailing wage or supplement. Therefore, the deviations from the prevailing wage schedules contained in the PLA are unenforceable and incapable of providing savings.
4. DOT's negotiation of the PLA with union representatives during the restricted period violates State Finance Law § 139-j and Legislative Law § 1-n(1).

DOT Response to the Protest

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

1. CCI is not an "interested party" under the OSC Protest Procedure because CCI did not bid and was not significantly involved in the procurement process. Additionally, CCI was not foreclosed from bidding on Contract D264077.
2. DOT's determination to use a PLA was proper and Labor Law § 222 does not require a PLA be negotiated *prior* to consideration of a PLA's potential benefits.

---

[5] The Empire State Trail is a multi-use path for pedestrians and bicyclists (*see* Empire State Trail Plan, Final - June 2018, at pg. 3). Highway Law § 22 authorizes DOT to construct such multi-use areas "and the expense of such work may be a proper charge against funds available for the construction, reconstruction, improvement or maintenance of state highways."

3. The PLA does not achieve any of its anticipated savings from violations of the prevailing wage laws.
4. PLA negotiations between DOT and trade representatives did not violate the Procurement Lobbying Law because trade representatives are not considered 'offerors' under the law, and therefore there were no illegal or improper communications during the restricted period.
5. The increase in costs from the prior solicitation, Contract D264000, is attributable to economic factors such as scope, time and schedule, rather than the addition of a PLA.

CCI Reply to the Answer

In its Reply, CCI reiterates the arguments contained in the Protest and further argues that:

1. Although CCI did not submit a bid for Contract D264077, CCI had significant involvement in the early stages of the procurement. Further, the PLA requirement had an anticompetitive impact on the bidding process and deterred CCI from submitting a bid. Thus, CCI is an "interested party" under the OSC Protest Procedure.

DISCUSSION

CCI's Status as an Interested Party

DOT asserts CCI is not an "interested party" under the OSC Protest Procedure because CCI did not bid on Contract D264077 and, therefore, was not a participant in the procurement process (*see* Answer, at pg. 2). DOT further asserts CCI was not significantly involved in the procurement nor was CCI foreclosed from bidding on Contract D264077 (*Id.*). CCI avers it participated in the procurement process by submitting the low bid on DOT's earlier letting of the Project (Contract D264000) and "being a plan holder, attending meetings, working to prepare a bid and asking a question with regard to the PLA requirement" for Contract D264077 (*see* Protest, at pg. 4). CCI also alleges the PLA requirement is "discriminatory to open-shop contractors, such as CCI" and, as a result, deterred CCI from submitting a bid (*see* Reply, at pgs. 4-5).

OSC Protest Procedure defines an "interested party" as "a participant in the procurement process, and those who can establish that their participation in the procurement process was foreclosed by the actions of the public contracting entity and have suffered harm as a result of the manner in which the procurement was conducted."[6] Initially, we note that this Office is not bound by a court's determination of "standing" for purposes of a judicial challenge, in our consideration of whether an entity is an "interested party" under the OSC Protest Procedure (*see* OSC Bid Protest Determination SF-20140300, at pg. 5). Rather "[t]o determine whether a party qualifies as an 'interested party,' we examine a number of factors on a case-by-case basis and assess whether the party has a significant involvement in the procurement and a demonstrable potential harm as a result of the manner in which the procurement was conducted" (*Id.*, at pg. 6).

[6] 2 NYCRR section 24.2(e).

Since CCI did not submit a bid on Contract D264077, we must determine whether CCI had significant involvement in the procurement and suffered a demonstrable potential harm as a result of the manner in which DOT conducted the procurement.[7] DOT characterizes CCI's involvement with the procurement as minimal (*see* Answer, at pg. 2). However, CCI was the apparent low bidder on the earlier letting of the Project, and states that it was a plan holder and was preparing its bid at the time DOT issued Amendment 1 adding the PLA requirement to the Project (*see* Protest, at pg. 2; Reply, at pg. 4). CCI also participated in the question and answer period for the procurement (*see* Protest, at pg. 3; Reply, at pg. 4). Based on the foregoing, in our view, CCI had significant involvement in the procurement.

As to whether CCI suffered a demonstrable potential harm, we note that CCI was the apparent low bidder on the earlier letting of the Project, Contract D264000, which did not require a PLA, and CCI claims the inclusion of a PLA specification restricted competition on Contract D264077 by precluding the participation of open shop contractors like CCI (*see* Protest, at pg. 5; Reply, at pg. 4). To support its claims, CCI states "the four open-shop contractors representing 80% of the bids for the first letting (D264000) declined to bid on the second letting (D264077)" (Reply, at pg. 6). CCI further notes that all three bidders for the current procurement are union contractors (*see* Protest, at pg. 5). In our view, CCI, as the apparent low bidder for DOT's earlier procurement for the Project, and based on its claims that DOT's improper inclusion of a PLA on the current letting of the Project deterred open-shop contractors such as CCI from bidding, has demonstrated potential harm from the actions of DOT.

For the factors discussed above, we find CCI is an interested party and will address the issues raised in the Protest.

DOT's Determination to Use a PLA – Labor Law § 222

CCI asserts DOT's determination to use a PLA is not supported by the record, and DOT's reliance on a consultant report that did not evaluate the actual terms of a negotiated PLA is improper (*see* Protest, at pg. 7).[8] DOT counters that its determination to use a PLA was proper and Labor Law § 222 does not require that a PLA be negotiated prior to consideration of a PLA's potential benefits (*see* Answer, at pg. 3).

Labor Law § 222 provides that a State agency having jurisdiction over a public work may require the awarded contractor to enter into a PLA during and for the work involved in the

[7] DOT relies on *Lancaster Dev., Inc. v. McDonald*, 112 A.D.3d 1260 (3rd Dept 2013), *lv. denied* 22 N.Y.3d 866 (2014) ("*Lancaster*") to support its position that, as a matter of law, a PLA does not preclude a nonunion bidder like CCI from bidding and, therefore CCI is not an "interested party." In *Lancaster*, the Appellate Division denied a nonunion contractor standing to maintain an Article 78 proceeding and declaratory judgment action challenging DOT's inclusion of a PLA because the contractor failed to submit a bid (*Id.*). The court held that "the PLA itself did not preclude [a nonunion shop] from bidding altogether" (*Lancaster*, at pg. 1263). However, as discussed in further detail in the text of the Determination, an entity need not submit a bid to be considered an interested party for purposes of the OSC Protest Procedure.

[8] For purposes of Labor Law § 222, a PLA is defined as "a pre-hire collective bargaining agreement between a contractor and a bona fide building and construction trade labor organization establishing the labor organization as the collective bargaining representative for all persons who will perform work on a public work project, and which provides that only contractors and subcontractors who sign a pre-negotiated agreement with the labor organization can perform project work" (Labor Law § 222[1]).

project when such requirement is part of the solicitation issued by the State agency for the project and when the State agency "determines that its interest in obtaining the best work at the lowest possible price, preventing favoritism, fraud and corruption, and other considerations such as the impact of delay, the possibility of cost savings advantages, and any local history of labor unrest, are best met by requiring a project labor agreement."

In deciding whether to adopt a PLA for the Project, DOT hired an independent consultant experienced in the development and implementation of PLAs to study and evaluate the appropriateness of a PLA for the Project (Report – Project Labor Agreement - Benefit Analysis, hereinafter Study). The Study included: (i) an assessment of the economic and non-economic considerations of a PLA, including an analysis of the existing applicable area collective bargaining agreements of nine labor craft unions (with ten agreements) to identify areas of improvement that may be realized through the use of a PLA to achieve potential labor cost reductions; and (ii) a review of the general labor climate, labor unrest and labor employment statistics.

The Study identified potential cost savings in multiple areas based upon projected craft labor hours, wage rates currently in effect, and contractual provisions routinely negotiated into PLAs in the region. The Study estimated that a PLA could result in an aggregate cost savings of $133,700 (three percent of the project labor costs for the Project estimated to be $4,393,714).[9] The Study also identified other economic savings attributable to a PLA, including the use of strong management rights language which could provide additional value given the need to coordinate the efforts of multiple labor crafts in an efficient manner at an estimated additional savings of $18,300. As a result, the Study projected that the total savings from use of a PLA could exceed $152,000 (approximately 3.5 percent of the total labor costs). The Study also found that the use of a PLA may offer additional non-economic benefits that, while difficult to precisely quantify in monetary terms, could nonetheless be significant factors in the overall success of the Project, including labor stability and enhanced workforce diversity and training objectives.[10]

In sum, the Study concluded that, based on the size and scope of the Project, the proposed schedule and the anticipated mix of craft labor, a PLA could provide DOT with measurable economic benefit equal to a total projected savings in excess of $152,000, as well as non-quantifiable benefits including: avoiding costly delays and promoting labor harmony; standardizing the terms and conditions governing employment; providing a comprehensive and standardized mechanism for settling work disputes; ensuring a reliable source of skilled and experienced labor; and enhancing Minority/Women Business Enterprise Participation.

---

[9] Projected labor costs savings were estimated as follows: $43,900 for a four-day 10-hour work schedule; $39,900 for standardizing holidays; $900 for eliminating Industry Fund payments; $11,400 for use of apprentices; $6,100 for eliminating guaranteed pay and replacing with travel allowance; $17,700 for eliminating premiums for night shift work; $2,100 for reduction of foreman rate premiums; $1,000 for off-site fabrication; and $10,700 for work-break time reductions.

[10] The Study found that during the Project's anticipated 16-month construction period two of the local labor contracts will be renewed and any significant disruption during the contract renewal negotiations, or job actions over the use of non-union or non-local labor, could disrupt the Project and jeopardize the timely completion of all Project components. The Study notes, however, given the current state of the labor market in the Central New York area, the likelihood of any disruption to the Project is minimal.

Based on its assessment of the Study, the DOT Commissioner determined "the inclusion of a PLA is appropriate because of, among other things, the timeline of the Project, the composition of the workforce in both the public and private contracting history, the high level of ongoing and projected construction in the area, the need for securing a skilled labor pool, and the number of trades and contractors involved" (Answer, Exhibit A, at pg. 4). In addition to the estimated cost savings from a PLA, DOT specifically references the benefits of a "No Strike" provision that would prevent delays, and provide a guaranteed supply of skilled labor for the duration of the Project (*Id.*, at pg. 5). Accordingly, the DOT Commissioner directed that a PLA be drafted and executed between the Design-Builder and the Building Construction Trades Council of Greater New York, and included in the bid specifications for the Project (*Id.*).[11]

A. Timing of DOT's Determination

CCI alleges DOT's determination to adopt an "as-yet-unnegotiated" PLA was contrary to law (*see* Protest, at pg. 7). More specifically, CCI argues that since the Study predated the negotiation of the PLA with the trade unions, the Study could not have assessed negotiated concessions (*Id.*). As a result, CCI contends DOT determined to incorporate a PLA without evaluating whether the PLA achieved the savings identified in the Study (*Id.*). DOT responds that CCI's position (requiring that a PLA be negotiated and executed before a public entity could consider whether a PLA would be beneficial) is a "cart-before-the-horse" approach that has no basis in law or logic (*see* Answer, at pg. 3). DOT further states that the process suggested by CCI would lead to unnecessary delays and expenditure of resources regardless of whether a PLA were to be used on a project (*see* Answer, at pgs. 3-4).

Before including a specification requiring the use of a PLA for the Project, Labor Law § 222 required DOT to make a determination consistent with the factors set forth in the statute. However, nothing in the language of Labor Law § 222 can be read to require that DOT negotiate a "proposed PLA" prior to making such a determination. Nor has CCI cited any legal support for this position. Furthermore, as pointed out by DOT, the court decisions addressing the use of PLAs have not suggested such a requirement (*see* Answer, at pg. 3).

B. Cost Savings Under the PLA

CCI asserts that the use of a PLA will cost the State and its taxpayers over $1.6 million in additional costs (*see* Protest, at pg. 10; Reply, at pg. 12). CCI supports this assertion by comparing its apparent low bid submitted under Contract D264000, which did not contain a PLA requirement ($17,311,989.17), to the low bid submitted by Crane Hogan under Contract D264077, which did contain a PLA requirement ($18,999,949.49) (*see* Protest, at pgs. 3-5, as supplemented, at pgs. 2-3).[12] More specifically, CCI posits that Contract D264077 is a reletting of the earlier contract and, therefore, the higher bid price is attributable to the PLA (*see* Protest,

[11] We note that the DOT Commissioner incorrectly refers to a "Design-Builder." However, as previously stated, the contract was awarded to the low bidder pursuant to Highway Law § 38.

[12] With regard to CCI's bid under Contract D264000, DOT states "[w]hile the Department rejected all bids for unrelated matters, at the time of the rejection CCI's bid was considerably more than the Department's estimate, and CCI's commitments on MWBE utilization did not meet the required goals or good faith effort requirements" (Answer, at pg. 1).

at pgs. 2 and 10). In response, DOT states that while some of the estimated quantities may have been lower in the subsequent letting, DOT decided to keep the project completion date the same which could have increased the Project costs (*see* Answer, at pg. 2).

As discussed in the preceding section, Labor Law § 222 required DOT to make a determination that the PLA was in its best interest for the reasons set forth in the statute before including a specification for a PLA on the Project. Based on our review of the procurement record, DOT satisfied this statutory requirement when it made its determination based, among other things, on the $152,000 in projected labor cost savings identified in the Study.[13]

Alleged Violation of Article 8 of Labor Law – Prevailing Wage Law

CCI asserts a PLA may not legally modify prevailing wage or supplements for public work projects established by the Department of Labor (DOL) under Article 8 of the Labor Law (*see* Protest, at pgs. 8-9; Reply, at pgs. 8-9). CCI further asserts it is not permissible for a union agreement with a contractor to deviate from prevailing wage requirements and any such deviations in the PLA are "unenforceable and incapable of providing legal savings" (*see* Protest, at pg. 8). CCI states "[t]he bottom line is that the [Study's] reported analysis of purported 'cost savings' is seriously flawed in that it is premised, at least in part, on violations of state law" (Reply, at pg. 9). To support its position, CCI relies on a 1987 DOL opinion letter[14] wherein DOL stated "the law will always take precedence . . . Article 8 [of the Labor Law] establishes the minimum requirements for compliance, less stringent terms contained in a union agreement cannot be enforced" (*see* Protest, at pg. 8; Reply, at pg. 9).

DOT counters that none of the anticipated savings from the PLA would come from a change to prevailing wages and, therefore, CCI's claims of violation of the prevailing wage law have no basis in fact (*see* Answer, at pg. 4). DOT states that the 1987 DOL opinion predates the 1996 Court of Appeals decision in *Thruway Authority*[15] (which established the legality of PLAs on public works projects in New York), and the 2008 adoption of Labor Law § 222. DOT asserts that a later November 14, 2005 opinion letter from DOL is directly on point and supports its position (*Id.*)[16]

---

[13] CCI also questions the significance of the anticipated savings attributed to the use of a PLA (*see* Reply, at pgs. 11-12). While this Office exercises independent judgment in reviewing contracts under SFL § 112, this Office generally gives significant deference to agency determinations regarding factual issues which are within the agency's expertise (*see* OSC Bid Protest Determination SF-20110086, at pg. 6). The factual issues regarding DOT's determination to require a PLA for the Project, including evaluating the sufficiency of potential cost savings, are within DOT's expertise *(Id.)*. Giving appropriate deference to DOT's expertise, this Office reviewed the procurement record to determine whether it reasonably supports DOT's determination.

[14] *See* Protest, Exhibit G; Letter dated December 24, 1987, from Barbara C. Deinhardt, Deputy Commissioner of Labor for Legal Affairs, N.Y.S. Department of Labor, to Stephen L. Schaurer, Executive Director, Associated Builders and Contractors, Inc. Empire State Chapter, responding to a request for clarification of certain issues regarding Labor Law § 220.

[15] *In the Matter of New York State Chapter, Inc., Associated General Contractors, v. N.Y. State Thruway Authority,* 88 N.Y. 2d 56 (1996).

[16] *See* Answer, Exhibit B; Letter dated November 14, 2005, from Jerome Tracy, Associate Attorney, N.Y.S. Department of Labor, to Joel Howard, Esq. of Couch White, LLP, regarding Clifton Park Library Project Labor Agreement (2005 DOL opinion letter).

Initially we note that of the approximately $152,000 in projected cost savings identified by the Study, approximately $94,400 in savings are attributable to productivity gains, and/or other adjustments to the terms of certain collective bargaining agreements (CBAs) with the nine labor unions that do not implicate the prevailing wage law: (i) employing four 10-hour days - $43,900; (ii) eliminating CBA-required industry fund payments - $900; (iii) access to non-union apprentices - $11,400; (iv) replacing guaranteed pay with travel allowance - $6,100; (v) foreman rate adjustments - $2,100; (vi) off-site fabrication - $1,000; (vii) work break time reduction - $10,700; and (viii) a strong Management Rights clause - $18,300.

In its Reply, CCI refers to two specific areas of projected cost savings which CCI claims deviate from the prevailing wage and supplement schedule: (i) holiday pay, and (ii) night work differential (*see* Reply, at pg. 9). These two areas are referenced in the wage/supplement schedules for certain worker classifications and are adjusted under the PLA to achieve additional savings. Projected savings by eliminating the requirement of certain paid holidays for five of the labor trade/worker classifications (so as to standardize all the trades/workers to six unpaid holidays) are estimated to be $39,900.[17] The estimated cost savings for eliminating the hourly premium for night work for two of the labor trade/worker classifications are estimated to be $17,700.[18]

As stated earlier, in support of DOT's position that a cost savings identified in the Study does not run afoul of the prevailing wage law, DOT relies on a 2005 DOL opinion letter wherein DOL was asked "whether a properly supported PLA supersedes certain provisions of the State's prevailing wage law or a prevailing wage schedule issued thereunder." In response, DOL found:

> When, in the context of a PLA, employee representatives contractually agree to rates and benefits on behalf of their workers, they usually do so as part of a business decision in which the workers gain in terms of the acquisition of additional work or other benefits. When such terms are incorporated into a PLA for a public work project, they become 'prevailing' for the life of that project. . . Project Labor Agreements which meet [legal standards] negotiated between labor organizations and public authorities, are in the public interest, represent the public policy of this State and by their very purpose satisfy the requirements of Article 8 of the Labor Law. To the extent that there may appear to be a conflict, the PLA represents a collective bargaining agreement upon which the Commissioner bases the wage and rate schedules. In this sense, the PLA becomes the collective bargaining agreement by which the specific project is governed. The affected parties have chosen to waive any rights that they may have acquired under the prevailing wage law for purposes of obtaining other benefits which they believe to be more beneficial to themselves. There is, therefore, no conflict between an authorized PLA and the prevailing wage law (2005 DOL opinion letter, at pgs. 1-2, emphasis added).

[17] Carpenters, Electrical Linemen, Laborers, Operating Engineers and Teamsters.
[18] Laborers and Operating Engineers.

Our review of this issue has not uncovered any current guidance from DOL (or elsewhere) that would lead us to question the findings contained in the 2005 DOL opinion letter. In fact, Executive Order No. 49 (dated February 12, 1997) requires a State agency that enters into a project labor agreement and enters into one or more contracts for work to be performed under such agreement, to submit the project labor agreement to the Commissioner of Labor who "shall determine the interaction, if any, between Article 8 of the Labor Law and the agreement."[19]

Based on the foregoing, we find no basis to conclude that the cost savings identified in the Study result from violations of the prevailing wage law.

DOT's negotiation of the PLA with Union Representatives

CCI asserts DOT's negotiation of the PLA with union representatives during the restricted period violates SFL § 139-j and Legislative Law § 1-n(1) (*see* Protest, at pg. 10). Specifically, CCI alleges the trade signatories to the PLA, some of whom may have been registered lobbyists, are "offerers" and, as a result, such discussions with DOT relating to the PLA were prohibited (*Id.*).[20] DOT contends those trade representatives that engaged in PLA negotiations are not "offerers" since SFL § 139-j "is intended to capture the universe of potential bidders and those advocating on their behalf" (*see* Answer, at pg. 5). CCI responds that "offerer" is not limited to those individuals and entities intending to submit a bid (*see* Reply, at pg. 12).

SFL § 139-j(1)(h) provides that an "offerer" means an "individual or entity, or any employee, agent or consultant or person acting on behalf of such individual or entity, that contacts a governmental entity about a governmental procurement during the restricted period of such governmental procurement whether or not the caller has a financial interest in the outcome of the procurement." SFL § 139-j(1)(f) establishes the "restricted period" as "the period of time commencing with the earliest posting...of written notice, advertisement or solicitation of ...for soliciting a response from offerers intending to result in a procurement contract with a governmental entity and ending with the final contract award and approval by the governmental entity and, where applicable, the state comptroller." An offerer that "contacts" a governmental entity about a procurement during the restricted period may only make permissible contacts which are defined in SFL § 139-j(3). Finally, SFL § 139-j(1)(c) defines "contacts" as "any oral, written or 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."

The definition of "offerer" in SFL§ 139-j is comprehensive and applies regardless of whether the individual or entity has a financial stake in the procurement's outcome.

[19] *See* 9 NYCRR § 5.49 Governor Pataki Executive Order No. 49, 2/12/97; continued by Governor Spitzer Executive Order No. 5, 1/1/2007; continued by Governor Paterson Executive Order No. 9, 6/18/2008; continued by Governor Cuomo Executive Order No. 2, 1/1/2011.

[20] CCI suggests that "[s]ome of the signatories [of the PLA] may also be registered lobbyists, which would make any contacts during the 'restricted period' also in violation of Legislative Law § 1-n(1)" (Protest, at pg. 10, emphasis added). Since CCI did not provide further support for this allegation, our discussion of this issue is limited to alleged violations of SFL § 139-j.

Accordingly, we are not constrained to agree with DOT's assertion that trade representatives are not "offerers" for purposes of the restrictions on communications in SFL§ 139-j. Neither are we persuaded, however, by CCI's argument that DOT's negotiations with union representatives in respect of the PLA per se violate SFL § 139-j. While it is indisputable that such negotiations took place during the "restricted period" of this procurement, it is not clear whether these communications were "contacts" (i.e., intended to influence DOT) for purposes of SFL § 139-j.

Guidance issued by the Advisory Council on Procurement Lobbying provides that a communication is "intended to influence" when "a reasonable person would believe that the activity, regardless of the form, is intended to make the Governmental Entity take or not take affirmative action with respect to the Governmental Procurement" (Advisory Council on Procurement Lobbying FAQ 8.10, last updated 6/14/2010). On July 12, 2019, DOT's Commissioner directed that a PLA be included in the bid specifications for the Project and further authorized the drafting and executing of the PLA (*see* Answer, at Exhibit A). Therefore, by the time Contract D264077 was first advertised on August 9, 2019, DOT had already determined to use a PLA for the Project. Consistent with the foregoing guidance, a reasonable person could conclude that DOT's negotiations with union representatives were not intended to influence DOT's determination with respect to the use of a PLA (since this determination had already been made), and thus, did not result in a violation of SFL § 139-j.

Nevertheless, this issue need not be settled for purposes of resolving the Protest or approving DOT's contract award to Crane Hogan. Pursuant to SFL § 139-j(10-b), a finding (which would be made by the procuring governmental entity, in this instance DOT) that an offerer has knowingly and willfully violated the provisions of SFL § 139-j related to permissible contacts would result in a determination of non-responsibility of such offerer and the offerer would not be awarded the procurement contract. Here, the alleged violations concern communications with union representatives and would not impact the validity of the award to Crane Hogan (*see* OSC Bid Protest Determination SF-20110086, at pg. 5).

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 DOT. As a result, the Protest is denied and we are today approving the DOT/Crane-Hogan contract to provide the construction work.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Hudson Guild Inc., with respect to the grant awards for the Advantage After School Program.

Determination of Appeal

Procurement Record – CFS01-0000164-3400000

SF–20190199

January 3, 2020

The Office of the State Comptroller has reviewed the above-referenced grant awards for the Advantage Afterschool Program made by the New York State Office of Children and Family Services (OCFS). We have determined the grounds advanced by Hudson Guild Inc. (Hudson) are insufficient to merit overturning OCFS' decision to disqualify Hudson's grant application from consideration and, therefore, we deny the Appeal.

BACKGROUND

Facts

OCFS's mission is to serve New York's public by promoting the safety, permanency and well-being of New York's children, families and communities. As part of its mission, OCFS administers the Advantage After School Program (Program). OCFS issued a Request for Proposals (RFP) on May 3, 2019, seeking proposals "for the development and/or continuation of quality after-school programs in partnership with local schools/school districts for the [Program]" (RFP, at pg. 1). Offerors could be awarded up to three contracts under the RFP and were required to submit separate proposals for each region (*see* RFP, Section 2.3, at pg. 10). In addition, offerors could identify a maximum of two program sites within the same region/proposal (*Id.*; *see also* RFP, Section 6.2, at pg. 51). The RFP required offerors to submit a separate partnership agreement for each site (*see* RFP, Section 3.1, at pg. 12).

OCFS scored proposals according to an evaluation instrument established prior to the receipt of proposals and those proposals receiving an average score of at least 75 points were considered for award (*see* RFP, Section 6.2, at pg. 51). Funding was awarded based on highest to lowest average score within a region, or, in the case of New York City, within each borough (*Id.*).

Hudson submitted a proposal by the due date set forth in the RFP. However, on July 31, 2019, OCFS notified Hudson it was unable to accept Hudson's proposal because Hudson failed to submit a partnership agreement for each site to be served. By letter dated August 21, 2019, Hudson filed a protest with OCFS challenging OCFS' rejection of Hudson's proposal. OCFS denied Hudson's protest by letter dated September 16, 2019. Hudson appealed OCFS' denial by letter dated October 1, 2019 and OCFS denied Hudson's appeal by letter dated October 21, 2019.

Hudson filed an appeal with this Office by letter dated November 4, 2019 (Appeal) and OCFS responded to the Appeal by letter dated December 5, 2019 (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.[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.

In the determination of the Appeal, this Office considered:

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

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

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

    a. Hudson's Appeal dated November 4, 2019; and
    b. OCFS' Answer dated December 5, 2019.

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, Hudson challenges the decision of OCFS to disqualify Hudson's proposal on the following grounds:

1. While Hudson does not dispute it failed to submit a partnership agreement for the second site identified in its proposal in error, OCFS failed to apply the provisions in the RFP which were designed to address such a mistake.

[1] 2 NYCRR Part 24.

OCFS Response to the Appeal

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

1. The RFP required offerors to submit a partnership agreement for each site, which Hudson did not do, and therefore, OCFS disqualified Hudson's proposal as non-responsive for failing to meet the minimum requirements set forth in the RFP. Furthermore, offerors not meeting the minimum qualifications to bid are not permitted to submit new materials after the deadline for submission of proposals.

DISCUSSION

Partnership Agreement for each Site as a Minimum Qualification

Hudson acknowledges it failed to submit a partnership agreement for one of two sites contained in its proposal but regards this oversight as a technical error attributable to a misunderstanding of the RFP's instructions (*see* Appeal, at pg. 1). OCFS responds Hudson's proposal did not include a partnership agreement for the second site and thus, did not meet the RFP's minimum qualifications, and, as a result, OCFS disqualified Hudson's proposal (*see* Answer, at pg. 2).

Hudson claims it misread the instructions for Attachment #7 (Partnership Agreement between Community-based Organization and School) to the RFP as requiring an agreement for each partner (instead of each site) (*see* Appeal, at pg. 1). However, Attachment #7 clearly instructs an offeror to "[c]omplete a separate Attachment 7 **for each site** the applicant proposes to serve" (RFP, Attachment #7, emphasis added). Furthermore, the RFP contains four additional instructions to applicants directing the submission of a partnership agreement for each site (*see* RFP, Sections 3.1, 5.4 and 10.0, at pgs. 12, 43 and 71).

The RFP describes the partnership agreement as "the relationship between the school and the applicant organization [which] is one of the most critical elements in operating a successful program" (RFP, Section 5.3, at pg. 43). Further, the RFP clearly listed the partnership agreement as a minimum qualification to be eligible to apply (*see* RFP, Section 3.1, at pg. 12). Finally, the RFP provided that "[b]idders must meet the Minimum Qualifications to submit a Proposal [and] Bidders not meeting these requirements will be disqualified from further consideration" (RFP, Section 6.1, at pg. 51).

Based on the foregoing, it appears clear that the OCFS deemed the submission of a partnership agreement for each site as a minimum qualification to be eligible to apply for funding. Since Hudson failed to satisfy this requirement, we have no basis to upset OCFS's decision to find Hudson's proposal nonresponsive and disqualify it from consideration.

Waiver of Partnership Agreement Specification

Hudson further claims OCFS "failed to apply its own provision designed to address such mistakes, which exists to ensure that children are not denied service because otherwise meritorious proposals contain a ministerial error" (Appeal, at pg. 2). Hudson asserts its oversight warranted clarification or technical correction since the mistake did not affect the structure of its proposal or the design or quality of the services proposed.

(*Id.*). OCFS contends the rights to clarify or correct errors it reserved in the RFP do not apply to Hudson's proposal since its proposal did not meet the minimum qualifications to bid, rendering the proposal nonresponsive (*see* Answer, at pgs. 2-3).

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

In this case, Hudson argues that "correcting [the omission of a partnership agreement for the second site] does not prejudice any other competing proposer. A non-substantive correction in the Minimum Qualifications section creates no harm to any other program. Moreover, all proposers are notified that OCFS has reserved itself the right clarify and seek correction of a non-substantive, ministerial error in a proposal" (Appeal, at pg. 2).

However, as discussed above, OCFS found that the partnership agreement requirement was a material or substantial requirement that was not correctable. Furthermore, even if we were to assume that the partnership requirement was not a material requirement, an agency's decision as to whether or not to waive a non-material deviation is within its discretion (*see L. J. Coppola, Inc. v. Park Mechanical Corp.*, 131 AD2d 641 [2nd Dept 1987], OSC Bid Protest Determination SF20120222). An agency may decline a bid which fails to comply with the literal requirements of the specifications (*see Le Cesse Bros. Contracting, Inc. v. Town Board of the Town of Williamson, supra*, OSC Bid Protest Determination SF20010182).

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the determination of OCFS to disqualify Hudson's grant application from consideration. As a result, the Appeal is denied.