

# Procurement Stewardship Act Report

BID Protest Determinations between April 1, 2020 through March 31, 2021

<b><u>File Number</u></b>	<b><u>Date of Decision</u></b>	<b><u>Protestor</u></b>	<b><u>Contracting Entity</u></b>	<b><u>Decision</u></b>
<a href="#"><u>SF20200054</u></a>	6/17/2020	Bio-Reference Laboratories, Inc.	Department of Corrections and Community Supervision	Moot
<a href="#"><u>SF20200069</u></a>	7/8/2020	Amazing Deals, LLC	Office of Parks Recreation & Historic Preservation	Denied
<a href="#"><u>SF20200058</u></a>	10/2/2020	Mid-State Communications & Electronics Inc.	Division of State Police	Upheld

THOMAS P. DiNAPOLI  
STATE COMPTROLLER



110 STATE STREET  
ALBANY, NEW YORK 12236

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

June 17, 2020

Mr. Geoff Monk, President  
Bio-Reference Laboratories, Inc.  
481 Slater Drive  
Elmwood Park, NJ 07407

Re: RFP #2019-25 for Statewide Centralized  
Laboratory Services

Dear Mr. Monk:

On April 7, 2020, you filed with this Office an appeal challenging the protest determination made by the New York State Department of Corrections and Community Supervision (DOCCS) to uphold the contract award to Quest Diagnostics Incorporated (Quest) in the above referenced procurement.

Pursuant to the requirements of SFL §112, DOCCS submitted the contract to this Office for review and approval. After conducting our review of the procurement, this Office returned the contract non-approved to DOCCS, finding that Quest's cost proposal was non-responsive in that it did not commit to the level of pricing required by the Request for Proposals. Accordingly, your appeal is rendered moot and this Office will not be issuing a formal determination with regard to your appeal.

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

Sincerely,

*Brian Fuller*

Brian Fuller  
Director of Contracts

cc: Robin Kuinlan, DOCCS  
Joanne Hughes, DOCCS  
Paul Guenette, DOCCS  
Suzanne Christo, Esq., DOCCS  
Victoria Larson, Quest Diagnostics, Inc.

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

---

In the Matter of Appeal by Mid-State  
Communications & Electronics Inc. with respect to  
the procurement of Tower and Communications  
Facility Maintenance Services conducted by the New  
York State Police.

**Determination  
of Appeal**

**SF-20200058**

Contract Number – C001913\_

October 02, 2020

---

The Office of the State Comptroller (OSC) has reviewed the above-referenced procurement conducted by the New York State Police (NYSP) for tower and communications facility maintenance services, which is Lot 8 (Lot 8) of a multiple-lot procurement conducted by NYSP for public safety communications maintenance, equipment, solutions, services and support. We have determined the grounds advanced by Mid-State Communications & Electronics Inc. (Mid-State) are sufficient to merit overturning the contract award for Lot 8 made by NYSP and, therefore, we uphold the Appeal. As a result, we are today returning non-approved the NYSP contract for Lot 8 with Adesta LLC (Adesta). For the reasons set forth below, we are today approving the NYSP contracts for Lots 1-7 and Lots 9-12.

**BACKGROUND**

**Facts**

On May 10, 2019, NYSP issued Request for Proposal RFP - HQ2020 (RFP) seeking vendors in the public safety communications equipment and services industry to provide equipment and services throughout New York State. The RFP sought proposals for 12 individual lots (Lots) and permitted offerers to submit a proposal for one, several, or all Lots (*see* RFP, at Section 1.3). As relevant for this Determination, for Lot 8, NYSP sought a contractor to provide for “preventive maintenance, remedial maintenance/repairs, installation, alteration, and removal of NYSP communications tower, tower site, communication facility, and microwave network equipment” (RFP, at Section 4.8).

The RFP provided for contract awards to be made “by Lot, on the basis of Best Value, based on a combination of Financial Cost and a Technical Score based on the ability to cover multiple segments of NYSP’s Communications System Support needs at a competitive cost” (RFP, at Section 6). The RFP provided that each offerer’s proposal for a particular Lot would be scored on the basis of cost, worth 75% of the total score (up to a maximum of 75 points), and a technical component, worth 25% of the total score (up to a maximum of 25 points) (*Id.*).

For the cost component, the RFP required offerers to submit a cost proposal using the Bid Cost Proposal form designated for the particular Lot attached to the RFP (*see* RFP, at Section 7.2

and Attachment 2B). The cost proposal with the lowest total cost would receive the full number of available points (75) and other cost proposals with higher costs would receive proportionately lower cost scores according to a predetermined mathematical formula.<sup>1</sup>

For the technical component, the RFP provided that additional points would be awarded to offerers submitting a “qualifying bid” for more than one Lot in the following manner: an offerer would receive (i) two points for each additional Lot if such offerer submitted proposals for multiple Lots (up to a maximum of 22 points), and (ii) three additional points if such offerer submitted proposals for more than six Lots (*see* RFP, at Section 6).<sup>2</sup> The technical score was added to the cost score and the offerer receiving the highest combined score would be awarded the contract for that particular Lot (*Id.*).

NYSP received four proposals, including Mid-State’s proposal, for Lot 8 by the proposal due date of November 27, 2019. Mid-State submitted the lowest cost proposal and Adesta’s cost proposal was the second lowest. As a result, NYSP awarded Mid-State the maximum 75.0 points for the cost component of its proposal and awarded Adesta 74.0499 points for the cost component of its proposal.

In addition to its proposal for Lot 8, Adesta submitted an unsuccessful proposal for one other Lot and NYSP awarded Adesta two points for the technical component of its proposal for Lot 8, for a total combined score of 76.0499 points. Mid-State did not submit any additional proposals and was therefore awarded 0.0 points for the technical component of its proposal, for a total combined score of 75.0 points. NYSP awarded the contract for Lot 8 to Adesta, the responsive proposer whose proposal received the highest combined score.

Mid-State requested a debriefing on April 9, 2020, which NYSP provided by telephone conference on April 17, 2020. By letter dated April 17, 2020, Mid-State filed a protest with NYSP challenging NYSP’s award. NYSP denied Mid-State’s protest by letter dated April 23, 2020. Mid-State appealed NYSP’s denial by letter dated April 30, 2020 and NYSP denied Mid-State’s appeal by letter dated May 15, 2020. Mid-State filed an appeal with this Office (Appeal) by letter dated May 20, 2020. On August 7, 2020, NYSP reaffirmed its position from the prior agency-level determinations, but did not file a separate answer to the Appeal.

### **Comptroller’s Authority and Procedures**

Under State Finance Law (SFL) § 112(2), with certain limited exceptions, before any contract made for or by a state agency that exceeds \$50,000 dollars becomes effective, it must be approved by the Comptroller.

---

<sup>1</sup> The RFP did not set forth the mathematical formula used by NYSP to award points to the cost proposals other than the cost proposal offering the lowest total cost.

<sup>2</sup> The RFP does not explain what makes a bid “qualifying.” The Collins English Dictionary defines “qualifying,” when used in connection with a contest or competition, as “played in order to decide which person or team will progress to the final stages; preliminary.” Therefore, we interpret qualifying bid to mean one which is responsive to the minimum requirements of the RFP.

In carrying out this contract approval responsibility, OSC has promulgated the Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency.<sup>3</sup> 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 NYSP with the NYSP/Adesta contract;
2. the correspondence between this Office and NYSP arising out of our review of the proposed NYSP/Adesta contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
  - a. Mid-State's protest to NYSP, dated April 17, 2020;
  - b. NYSP's protest determination, dated April 23, 2020 (NYSP Protest Determination);
  - c. Mid-State's appeal to NYSP, dated April 30, 2020;
  - d. NYSP's appeal determination, dated May 15, 2020 (NYSP Appeal Determination); and
  - e. Mid-State's Appeal to OSC, dated May 20, 2020.

### **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.<sup>4</sup> 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."<sup>5</sup> A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."<sup>6</sup>

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."

---

<sup>3</sup> 2 NYCRR Part 24.

<sup>4</sup> SFL § 163(10).

<sup>5</sup> SFL § 163(1)(j).

<sup>6</sup> SFL § 163(1)(d).

## **ANALYSIS OF THE APPEAL**

### **Appeal to this Office**

In its Appeal, Mid-State challenges the procurement conducted by NYSP, as it relates to the contract award for Lot 8, on the following grounds:

1. NYSP did not make a best value award as required by the RFP and SFL § 163, as the procurement's technical criteria bore no reasonable relationship to the optimization of quality, cost, and efficiency among responsive and responsible offerers.
2. The technical criteria of the RFP effectively steered awards away from MWBE and small business enterprises in disregard of the State Finance Law's definition of "best value" which may include quantitative factors for such businesses.<sup>7</sup>
3. NYSP's evaluation criteria ran afoul of the requirements of Article 15-A of the Executive Law and Parts 140-145 of Title 5 of the NYCRR in that the criteria effectively minimized the likelihood of participation by MWBEs, by, among other things, encouraging bundled contract bids, with no corresponding benefit to NYSP, relating to cost or otherwise.
4. The debriefing provided by NYSP did not satisfy the requirements of the State Finance Law.

### **NYSP's Response to the Appeal**

In its answer, NYSP reaffirmed its position stated in the NYSP Protest Determination and the NYSP Appeal Determination; to wit, on the following grounds:

1. The RFP provided a limited incentive for vendors to attempt to satisfy multiple Lots, which is a clearly established objective fully aligned with the definition of "best value" set forth in SFL § 163(1)(j). Furthermore, the specific methodology that was included in the RFP and applied in the scoring of the bids, ties to a tangible public benefit, is rational in its basis and was applied as described in the RFP.
2. The granting of technical points to vendors who bid on multiple Lots, regardless of their MWBE status, does not disadvantage MWBE vendors. Furthermore, the MWBE goals are for subcontractors, not prime vendors like Mid-State, and therefore even if MWBE goals had been assigned to Lot 8, it would not have affected the outcome of the award for Lot 8.
3. The encouragement of bundled contract bids does not discriminate against MWBEs as 12 independent contracts were awarded pursuant to the RFP, and potential vendors were indiscriminately provided the opportunity to bid on all twelve Lots.

## **DISCUSSION**

### **Best Value Award**

---

<sup>7</sup> Mid-State states it is a New York State certified women-owned business (WBE) enterprise and small business enterprise (SBE) (*see* Appeal, at pg. 4). Consistent with the terminology used in the Appeal, for purposes of this Determination, we refer to MWBEs (New York State certified minority- and women-owned business enterprises).

Mid-State asserts the criteria used by NYSP to evaluate the technical component of its proposal for Lot 8 has no reasonable or rational basis towards achieving NYSP's stated objective of minimizing the number of vendors ultimately servicing equipment across all of the Lots (*see* Appeal, at pg. 12). Specifically, Mid-State contends that "awarding 'Technical' points to a bidder for its proposal on one particular lot based on its mere submission of bids for additional lots, without consideration as to whether those additional bids were, for example, the low bids on any such lots – and without any regard for the content, substance, cost, or success of such bids – bears absolutely no relationship to the goal of minimizing the number of vendors ultimately awarded contracts," nor does it "contribute to 'the ultimate goal of determining which proposal presents the best value to the State,' as is the point of utilizing a Technical component in the evaluation" (Appeal, at pgs. 12-13). Further, Mid-State asserts that "[w]hile this criteria may incentivize additional bids, it plainly does not incentivize additional bids 'at a competitive cost,' nor, more importantly, does it award additional points based on submitting multiple bids 'at a competitive cost,'" and therefore fails to provide NYSP with best value (Appeal, at pg. 13).<sup>8</sup>

NYSP asserts the methodology set forth in the RFP used to score the technical component of a proposal "was not arbitrary, as it was designed to solicit responses from bidders providing services and solutions across multiple classes of public-safety communications technologies" so as to "reduce the number of vendors servicing systems and equipment and [those] necessary to respond to and remedy outages" in order to minimize down-time (NYSP Protest Determination, at pg. 1). To achieve this objective, NYSP contends that awarding additional points to offerers submitting proposals for multiple lots "provided a limited incentive for [offerers] to attempt to satisfy multiple lots" (NYSP Protest Determination, at pg. 2). NYSP further asserts that the methodology used to score the technical component "ties to a tangible public benefit, is rational in its basis and was applied in the manner described in the RFP" (*Id.*). As a result, NYSP states "[t]his clearly established objective [is] fully aligned with the definition of 'best value' set forth in State Finance Law" (NYSP Appeal Determination, at pg. 1).

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." Finally, 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."

This Office has consistently required that a state agency, making an award under SFL § 163 on the basis of best value, use a cost evaluation methodology bearing "a reasonable

---

<sup>8</sup> In response to Mid-State's contention that NYSP should only award points when an offerer submits the lowest cost proposal for another Lot, NYSP asserts that this methodology "is not allowed, as it would have resulted in the financial component being considered twice" (NYSP Appeal Determination, at pg. 1). We find this assertion without merit since evaluating the technical component of the particular Lot in question and awarding points for a successful proposal for another Lot does not involve reconsideration of the cost component of that other Lot since each cost component evaluation for a Lot is being determined independently. Moreover, had NYSP considered the merit of each offerer's proposal on additional Lots, the cost score of each offerer's proposal on the particular Lot being evaluated would have remained unchanged.

relationship to the anticipated costs that will be incurred under the terms of the resulting contract” (OSC Bid Protest Determination SF-20080408, at pg. 9; *see also* OSC Bid Protest Determination SF-20100156, at pg. 6 [finding that the State agency’s cost scoring methodology was flawed since it “did not necessarily award the greatest number of points to the bidder whose proposal was likely to provide the lowest cost to the State”]; OSC Bid Protest Determination SF-20150153, at pg. 11 [“To make a true ‘best value’ determination, SFL § 163 implicitly requires that the cost evaluation methodology have a reasonable relationship to the anticipated *actual* costs to be incurred by the State under the terms of the contract”])).

The technical evaluation methodology should similarly have a reasonable relationship to the technical, or non-cost, benefits desired by the agency. NYSP stated the methodology of awarding points solely for the submission of proposals for more than one Lot is rationally related to attaining the consolidation of services, thereby minimizing resource down-time (*see* NYSP Protest Determination, at pg. 2). Generally, this Office accords deference to an agency in matters within that agency’s expertise, such as the criteria to be evaluated to achieve its desired objective. Here, Mid-State’s cost proposal was the undisputed low bid for Lot 8. However, in accordance with the technical evaluation methodology, NYSP awarded the Lot 8 contract to Adesta as the result of a single, unsuccessful proposal submitted by Adesta for Lot 12. In essence, Adesta was awarded Lot 8 for submitting two bids that were the highest cost, and absent the additional points for the technical component, would have been unsuccessful. Thus, in this instance, applying NYSP’s methodology resulted in a higher cost to NYSP and the State. In our view, awarding additional points to an offerer with respect to one Lot simply because that offerer submits a proposal on another Lot, no matter how high-cost that other proposal might be, bears no reasonable relationship to the application of best value, i.e., the optimization of quality, cost and efficiency. Moreover, as confirmed by the award which resulted from this methodology in regard to Lot 8, this evaluation methodology neither achieves NYSP’s stated objective nor promotes best value, since the procurement resulted in the same number of vendors providing services as if the contracts had been awarded on the basis of cost alone and the award resulted in higher costs to the State.

For these reasons, the technical evaluation methodology used by NYSP failed to achieve best value.

### **MWBE Vendors**

Mid-State alleges that NYSP’s technical evaluation criteria “steered contract awards away from MWBE and Small Business Enterprises,” despite the fact that “best value,” as defined by SFL § 163(1)(j), allows the use of quantitative factors for such offerers (*see* Appeal, at pgs. 17-18). Mid-State contends NYSP’s determination that the number of potentially qualified MWBEs and SBEs were insufficient to warrant inclusion of quantitative factors for the Lots (other than Lot 3), combined with NYSP’s award of additional points based on the number of Lots for which proposals were submitted, further disadvantaged MWBEs and SBEs who lacked the capacity to bid on more than one Lot (*see* Appeal, at pg. 18). Mid-State also alleges that the technical evaluation criteria ran afoul of New York State Executive Law Article 15-A and Parts 140-145 of Title 5 of the NYCRR “in that the criteria effectively minimized the likelihood of



participation by Minority and Women-Owned businesses by, among other things, encouraging bundled contract bids” (Appeal, at pgs. 1-2, 20).

NYSP asserts awarding technical points to offerers submitting proposals for multiple Lots, regardless of MWBE status, does not disadvantage MWBE vendors (*see* NYSP Protest Determination, at pg. 2). In support, NYSP claims that even if MWBE participation goals had been established for Lot 8, such goals would have required a successful offerer to make good faith efforts to achieve participation of MWBEs as subcontractors, not prime vendors, and thus would not have impacted the contract award for Lot 8 (*see* NYSP Appeal Determination, at pg. 2). Finally, in response to Mid-State’s claim that the technical evaluation methodology encouraged bundled contract bids, NYSP states the RFP “will result in the award of twelve *independent* contracts” and “potential vendors were indiscriminately provided the opportunity to bid on all 12 Lots,” regardless of MWBE status (*Id.*).

SFL § 163(1)(j) provides that best value methodology “may also identify a quantitative factor for offerers that are small businesses, certified minority- or women-owned business enterprises...or service-disabled veteran-owned business enterprises...to be used in evaluation of offers for awarding of contracts for services” (emphasis added). Executive Law Article 15-A was enacted to promote “maximum feasible participation in the performance of state contracts” by certified MWBEs and state agencies are required to make a good faith effort to meet designated participation goals (*see* Executive Law 313[1], [2]; 5 NYCRR § 141.7).

The RFP did not include a quantitative factor (awarding points based on an offerer’s status as an MWBE or SBE). The quantitative factor for SBEs and MWBEs in SFL§163(1)(j) is permissive, not mandatory, for best value procurements and thus, there is no basis to disturb NYSP’s determination not to include a quantitative factor in its RFP. The RFP did set forth goals for MWBE participation for Lot 3, requiring the successful offerer for Lot 3 to document good faith efforts to provide meaningful participation by MWBEs as subcontractors and suppliers (*see* RFP, at Section 8). While Lot 8 did not contain MWBE participation goals, the presence or absence of MWBE participation goals, or a particular offerer’s ability to meet such goals, was not part of the evaluation criteria used to score the technical proposal (*see* RFP, at Section 6[B]). Instead, the goals requiring participation by MWBEs as subcontractors and suppliers applied to the successful offerer following award; therefore, the MWBE participations goals, or the lack thereof, for a particular Lot had no bearing on the award. Moreover, in light of the determination set forth above that NYSP’s technical evaluation methodology failed to achieve a best value award for Lot 8, Mid-State’s remaining assertions questioning the validity of the technical evaluation methodology, based on potential disadvantages to MWBE or SBE offerers from awarding additional points for submitting proposals for multiple Lots are moot.

### **The Debriefing**

Mid-State asserts NYSP failed to provide Mid-State with the qualitative and quantitative analysis used by NYSP to score the cost proposals during its debriefing as required by the State Finance Law (*see* Appeal, at pg. 21). Specifically, Mid-State claims NYSP failed to provide the formula used to convert the cost proposal to a “points” score (*Id.*).

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.”

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.*).

The procurement record submitted to this Office shows that NYSP provided the cost and technical scores for each proposer for Lot 8 in response to Mid-State’s debriefing request. Furthermore, NYSP provided the formula used to convert the cost proposal to a points score, prior to submitting the contract to this Office (*see* NYSP Appeal Determination, at pg. 2). While NYSP provided only a portion of the qualitative and quantitative information requested by Mid-State at the debriefing, in our view, the debriefing provided to Mid-State was sufficient to satisfy the applicable statutory standard.

### **The Remaining Lots**

This Office has long recognized the notion of excusable harmless error in the procurement process, involving both scoring errors and flawed evaluation methodology (*see* OSC Bid Protest Determinations SF-20070368, SF-20080185, SF-20090314, SF-20090447, SF-20100130, SF-20100338, SF-20140222, SF-20150080 and SF-20160248). That is, while there may have been an error/ flaw in the procurement process, the correction of the error/ flaw would not have affected the outcome (i.e., the award) and, therefore, the error/ flaw is harmless.

In this instance, our review of the procurement record reveals that while NYSP received multiple proposals for seven of 12 Lots awarded pursuant to the RFP, only Lot 8 was awarded to an offerer other than the low bidder. We therefore conclude that, although as determined above, the technical evaluation methodology failed to achieve best value for the Lot 8 contract award, any errors related to awarding technical points to proposals on other Lots would not have changed the outcome of the contract awards for those Lots.

### **CONCLUSION**

For the reasons outlined above, we have determined the issues raised in the Appeal are of sufficient merit to overturn the contract award for Lot 8 by NYSP. As a result, the Appeal is

upheld and we will not be approving the proposed NYSP contact with Adesta for Lot 8, tower and communications facility maintenance services.

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

---

In the Matter of the Bid Protest filed by Amazing Deals, LLC, with respect to the procurement of retail concessions at Robert Moses and Jones Beach State Parks conducted by the New York State Office of Parks, Recreation and Historic Preservation.

**Determination  
of Bid Protest**

**SF-20200069**

Contract Number – X001372

July 8, 2020

---

The Office of the State Comptroller (OSC or this Office) has reviewed the above-referenced procurement conducted by the New York State Office of Parks, Recreation and Historic Preservation (Parks) for retail concessions at Robert Moses and Jones Beach State Parks. We have determined the grounds advanced by Amazing Deals, LLC (Amazing), are insufficient to merit overturning the contract award made by Parks and, therefore, we deny the Protest. As a result, we are today approving the Parks concession license agreement (License) with J&B Restaurant Partners Top Flight Foods LLC (J&B) for retail concessions.

**BACKGROUND**

**Facts**

On November 15, 2019, Parks issued Request for Proposals X001372 (RFP) for retail concessions at Jones Beach State Park in Wantagh, New York and Robert Moses State Park in Babylon, New York (*see* RFP, at pg. 1). The RFP provided that the resulting License would be awarded “to the respondent that achieves the highest score best demonstrating relevant experience and expertise; best responds to this RFP; offers the best value to New York State; and will serve the public interest” (RFP, at pg. 11). Parks received six proposals by the due date of January 8, 2020.<sup>1</sup>

Parks reviewed the proposals for completeness and compliance with mandatory requirements of the RFP and invited all proposers to make an oral presentation to Parks’ Review Panel to assist in its evaluation and scoring of proposals (*see* RFP, at pg. 10). Proposals were scored on a 100-point scoring system, with the technical score worth a maximum of 75 points per evaluator and the financial score worth a maximum of 25 points per evaluator (*see* RFP, at pgs. 11-12).<sup>2</sup> The Review Panel, consisting of five evaluators, scored technical proposals on the criteria set forth in the RFP and were permitted to adjust such scores following oral presentations (*see* RFP, at pg. 11).

---

<sup>1</sup> NYC Deals LLC submitted a proposal but withdrew its proposal prior to award. As a result, Parks scored the five proposals submitted by the due date.

<sup>2</sup> The RFP required proposers to propose a minimum License Fee of 8% of gross receipts payable monthly (*see* RFP, at pg. 12).

Parks' Concessions Management Bureau reviewed the financial proposals and the financial proposal offering the highest return to the State was awarded the maximum 25 points per evaluator with other proposals receiving a relative proportionate score (*see* RFP, at pgs. 12-13). The financial score was added to the total technical score for each evaluator, and individual combined evaluator scores were added together to produce a total combined score for each proposal (*see* RFP, at pg. 13). By letter dated February 7, 2020, Parks awarded the License to J&B, the proposer receiving the highest total combined score.

Amazing requested a debriefing which was provided by Parks on February 14, 2020. Amazing filed a protest with OSC by letter dated February 21, 2020 (Protest) and Parks filed an answer to the Protest by letter dated May 26, 2020 (Answer).<sup>3</sup>

### **Comptroller's Authority and Procedures**

Under State Finance Law (SFL) § 112(3), before any revenue contract made for or by a state agency which exceeds twenty-five thousand dollars becomes effective, it must be approved by the Comptroller.

In carrying out this contract approval responsibility, OSC has promulgated a Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency.<sup>4</sup> 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 Parks with the Parks/J&B License;
2. the correspondence between this Office and Parks arising out of our review of the proposed Parks/J&B License; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
  - a. Amazing's Protest dated February 21, 2020; and
  - b. Parks' Answer dated May 26, 2020.

### **Applicable Statutes**

---

<sup>3</sup> Amazing filed a protest with Parks on February 19, 2020, and, before Parks responded to Amazing's protest, Amazing filed a substantially identical protest with this Office on February 21, 2020. Parks, in a letter dated February 26, 2020, stated it would respond to the protest Amazing filed with Parks "through the formal bid protest proceeding before OSC only." Thus, we are treating Amazing's protest as an initial protest to this Office.

<sup>4</sup> 2 NYCRR Part 24.

This procurement is not subject to the competitive bidding requirements of State Finance Law § 163, as this is not an expenditure contract involving the purchase of goods or services but, rather, is a revenue contract, i.e. a contract which generates revenue for the State. However, in fulfilling this Office's statutory duty under SFL §112, we generally require that revenue contracts be let pursuant to a reasonable competitive process. We will proceed to analyze the issues raised in the Protest under these non-statutory standards.

## **ANALYSIS OF THE PROTEST**

### **Protest to this Office**

In its Protest, Amazing challenges the procurement conducted by Parks on the following grounds:

1. Amazing's financial proposal received the highest financial score and, as a result, would provide a higher return to the State than J&B.
2. Amazing received the maximum points available for the financial score yet received unjustified low scores for several other evaluation categories. These low scores appear to be intended to ensure Amazing would not be awarded the contract and reflect impermissible bias or favoritism toward J&B, the incumbent contractor.
3. Parks failed to comply with New York State law with respect to Minority and Women-Owned Business Enterprise (MWBE) goals in connection with this procurement.<sup>5</sup>

### **Parks' Response to the Protest**

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

1. Amazing did not submit a proposal and thus, is not an interested party and does not have grounds to challenge the contract award resulting from the RFP.
2. The RFP provided that proposals would be scored on a best value basis, using a combined technical and financial score. While Amazing's proposal did receive the highest financial score, the total combined score was not the highest total score.
3. Parks' evaluation methodology is fair and balanced and evaluators scored proposals against criteria established in the RFP and, as a result, such scores are not the result of bias or subjectivity.
4. The contract resulting from the RFP is not a "state contract" within the definition and meaning of Article 15-A of the Executive Law, establishing the MWBE program for State agencies, and is not subject to any MWBE requirements.

---

<sup>5</sup> Amazing also asserts Parks failed to timely comply with Freedom of Information Law (FOIL) requests relating to matters of the historical relationship between Parks and J&B. Consistent with the long standing policy of this Office enunciated in prior bid protest determinations, issues related to a 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 a bid protest.

## DISCUSSION

### A. Status of Amazing Deals, LLC as an Interested Party

Parks asserts that Amazing is not an “interested party” under the OSC Protest Procedure because Amazing “was not a proposer in response to the RFP or a participant in the procurement,” and therefore has no grounds to challenge the award of the License to J&B (*see* Answer, at pgs. 2-3). In support of its assertion, Parks claims Amazing Deals, Inc., not Amazing Deals, LLC, submitted the proposal (*see* Answer, at pg. 2).<sup>6</sup>

The OSC Protest Procedure defines an “interest 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 public contracting entity and suffered harm as a result of the manner in which the procurement was conducted.”<sup>7</sup> When determining whether an entity is an “interested party” under the OSC Protest Procedure, this Office is not bound by the same standard a court uses to determine “standing” for purposes of a judicial challenge (*see* OSC Bid Protest Determination SF-20190191, at pg. 4, citing 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” (OSC Bid Protest Determination SF-20140300, at pg. 6).

The procurement record evidences confusion as to the particular entity that submitted the proposal in question. While the proposal was submitted by and for Amazing Deals, Inc., the information provided on the proposal forms was completed in the name of Amazing Deals, LLC. In addition, the financial proposal form references Amazing Deals, LLC. In light of this discrepancy, Parks sought clarification from Mr. Mahmood as to his role with Amazing Deals, Inc. and Amazing Deals, LLC, and the identity of the actual proposing entity. Mr. Mahmood provided an organizational chart to Parks and explained that he owns and controls both entities. By email dated January 15, 2020, Mr. Mahmood stated that the proposal was submitted by Amazing Deals, Inc. and that “LLC is simply an error and should be replaced with INC. (We do own rights to both INC and LLC names under Amazing Deals, this should explain any errors made.).”

After some initial confusion as to which of Mr. Mahmood’s Amazing Deals entities submitted the proposal in response to the RFP, Mr. Mahmood clarified that Amazing Deals, Inc. was the proposing entity. However, our review of the procurement record shows Parks was aware that one of Mr. Mahmood’s Amazing Deals entities had significant involvement in the procurement and suffered a demonstrable potential harm as a result of the manner in which Parks conducted the procurement. In addition, notwithstanding Parks’ position that Amazing Deals, LLC was not the proposing entity, Parks, in a letter dated February 7, 2020, thanked Amazing

---

<sup>6</sup> NYC Deals LLC and Amazing Deals, Inc. submitted separate proposals, both of which were signed by Asad Mahmood; however, Mr. Mahmood signed the proposal submitted by Amazing Deals, Inc., on behalf of Amazing Deals, LLC. Mr. Mahmood withdrew the proposal submitted by NYC Deals LLC prior to award.

<sup>7</sup> 2 NYCRR section 24.2(e).

Deals, LLC for submitting a proposal in response to the RFP and notified Amazing Deals, LLC that it had not been awarded the License. Finally, Parks prepared a debriefing agenda in the name of Amazing Deals, LLC and attached “Exhibit B1- X001372 Amazing Deals LLC Evaluation Results.” Thus, in light of the apparently ongoing confusion as to the identity of the proposing entity, we will address the issues raised in the Protest.

### **B. Best Value Determination**

Amazing asserts its financial proposal received the highest financial score and awarding the License to J&B “will produce significantly lower revenue to the State of New York” (Protest, at pg. 1). Parks avers that the RFP provided for proposals to be scored on a best value basis, using a combined technical and financial score, and, while Amazing received the highest financial score, its total combined score was not the highest total score (*see Answer*, at pgs. 3-4).

The RFP advised that the resulting License would be awarded “to the respondent that achieves the highest score best demonstrating relevant experience and expertise; best responds to this RFP; offers the best value to New York State; and will serve the public interest” (RFP, at pg. 11). Thus, the RFP clearly indicates that return to the State would not be the sole consideration for award, but rather the award would be made on a “best value” basis after assessing the proposals’ technical and financial merit. Indeed, the RFP identifies objective, measurable technical criteria by which the proposals would be evaluated and the available points associated with each category of criteria (Category A: Background and Experience – 30 points; Category B: Response to the RFP – 45 points, *see RFP*, at pgs. 11-12). Finally, the RFP clearly states that the “respondent submitting the proposal with the highest aggregate point score for all three categories will be selected for award” (RFP, at pg. 13). While Amazing did receive the highest financial score, this was not the sole factor in determining the award of the License.

### **C. Evaluation of Amazing’s Technical Proposal**

Amazing asserts that its technical proposal received low scores from certain evaluators in some criteria which “appear to be intended to ensure that Amazing Deals would not be selected which also appears to have been a result of bias or favoritism toward the incumbent contractor” (Protest, at pg. 2). Further, Amazing claims the discrepancy in scoring between one of the five evaluators and the other evaluators “is so great as to call into question the entire scoring and selection process” (Protest, at pg. 2). As support, Amazing cites certain criteria where Amazing alleges its technical proposal received unjustified low scores (*Id.*). Parks counters that its evaluation methodology is fair and balanced (*see Answer*, at pg. 4). Parks maintains its five-person panel evaluated proposals against the criteria set forth in the RFP using a standardized score sheet and that the scores given to Amazing’s technical proposal are not the result of bias or subjectivity (*see Answer*, at pg. 6).

The RFP set forth detailed evaluation criteria for the technical proposal in two main categories: Background & Experience and Response to the Proposal (*see RFP*, at pgs. 11-12). The RFP also provided the total number of points allocable to each main category and a breakdown of the points for each subcategory (*Id.*). The score sheet used by the evaluators contained the same criteria set forth in the RFP. After reviewing a technical proposal, each



evaluator completed a score sheet, assigning a preliminary point award and providing written comments for each criterion within a category. After oral presentation, evaluators were given the opportunity to adjust the point awards and provide further comments.

We recognize that evaluators bring their own subjective views to the evaluation process and may interpret information in proposals differently. However, this Office will generally not disturb a rationally reached determination of a duly constituted evaluation committee (*see* OSC Bid Protest Determination SF-20160188, at pg. 8). “Only when scoring is clearly and demonstratively unreasonable will we overturn the actions of an evaluator or an evaluation committee” (*Id.*, citing OSC Bid Protest Determination SF0898058, at pg. 7). Thus, so long as the scoring is supported by the procurement record, and is consistent with the instructions, we will generally not disturb the evaluators’ allocation of points. Our review did not reveal any contradictions between an evaluator’s written comments and the score assigned by such evaluator to Amazing’s technical proposal. We are satisfied evaluators scored Amazing’s technical proposal in a manner consistent with the RFP and score sheet.

We now turn to Amazing’s assertion that the low scores given to its technical proposal, particularly from one evaluator, reflect bias and favoritism. At the outset, we find no such evidence in the procurement record. Moreover, this Office has long recognized the notion of excusable harmless error in the procurement process (*see* OSC Bid Protest Determinations SF-20070368, SF-20080185, SF-20080412, SF-20090314; SF-20090447, SF-20100130, SF-20100338, SF-20110203, SF-20140222, SF-20150080, SF-20160139, SF-20160248, and SF-2018224). That is, while there may have been an error/ flaw in the procurement process, the correction of the error/ flaw would not change the outcome (i.e., the award) and, therefore, the error/ flaw is harmless. In this instance, assuming *arguendo* there was a concern with this evaluator’s scoring, removing that particular evaluator’s scores for all technical proposals would not have changed the outcome of the award and J&B would still have received the highest total combined score.

#### **D. MWBE Goals**

Amazing alleges the procurement “does not appear to be in compliance with current New York State Law and Regulations with respect to MWBE goals” (Protest, at pg. 3). Parks asserts that since the contract resulting from the RFP is not a “state contract” within the meaning in Executive Law Article 15-A (Article 15-A), the RFP and the License are not subject to any MWBE requirements under Article 15-A (*see* Answer, at pgs. 6-7).

Article 15-A was enacted to promote “maximum feasible participation in the performance of state contracts” by *certified* MWBEs (*see* Executive Law 313[1], [2]; 5 NYCRR § 141.7). State agencies are required to structure procurement procedures to aspire to meet designated participation goals and to report to the New York State Department of Economic Development (DED) with respect to activities undertaken to increase participation in state contracts for *certified* MWBEs (*see* Executive Law § 315; 5 NYCRR § 142.2).

MWBEs are certified pursuant to a procedure managed by DED’s Division of Minority and Women’s Business Development (DMWBD) (*see* Executive Law § 314; 5 NYCRR Part

144). DMWBD prepares a directory of certified MWBE businesses to assist agencies in carrying out the directive of Article 15-A (*see* Executive Law § 314[2]; 5 NYCRR § 141.2[b]).

As relevant to the instant matter, Article 15-A defines “state contract” as “a written agreement...whereby a contracting agency is committed to expend or does expend funds in return for labor, services..., supplies, equipment, materials or any combination of the foregoing, to be performed for, on behalf of, or rendered or furnished to the contracting agency” (Executive Law § 310[13]). As previously stated, the License is a revenue contract, not a contract involving the expenditure of State money for the purchase of goods or services. Accordingly, the License resulting from the RFP is not a “state contract” under Article 15-A and, therefore, not subject to the MWBE requirements.

Furthermore, we note that Amazing acknowledges in its Protest that it is not a certified MWBE (*see* Protest, at pg. 3). Thus, in this instance, Amazing cannot assert any harm as a result of Parks purported non-compliance with the requirements of Article 15-A.

## **CONCLUSION**

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the award of the License by Parks. As a result, the Protest is denied and we are today approving the Parks/J&B License for retail concessions.