

Procurement Stewardship Act Report

BID Protest Determinations between April 1, 2021 through March 31, 2022

<u>File Number</u>	<u>Date of Decision</u>	<u>Protestor</u>	<u>Contracting Entity</u>	<u>Decision</u>
<u>SF20210006</u>	04/30/2021	FSSolutions	State Education Department	Denied
<u>SF20200165</u>	05/28/2021	Island Peer Review Organization (IPRO)	Department of Health	Denied
<u>SF20200102</u>	06/28/2021	Parsons Transportation Group, Inc.	Department of Motor Vehicles	Denied
<u>SF20200114</u>	07/02/2021	Public Consulting Group LLC	Department of Health	Moot
<u>SF20210086</u>	09/24/2021	Blackboard Inc.	State University of New York - Agency-wide	Denied
<u>SF20210070</u>	10/15/2021	The Legal Aid Society of Rockland County, Inc.	Interest on Lawyer Account	Denied
<u>SF20210158</u>	11/10/2021	Springbrook NY, Inc.	Office For People with Developmental Disabilities	Denied
<u>SF20210101</u>	12/01/2021	Softheon, Inc.	Department of Health	Denied
<u>SF20210121</u>	01/07/2022	Continental Service Group, Inc.	SUNY at Albany	Denied
<u>SF20220003</u>	02/17/2022	Explus, Inc.	Office of Parks Recreation & Historic Preservation	Denied
<u>SF20210164</u>	03/22/2022	Q-Matic	Department of Motor Vehicles	Denied

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Parsons Transportation Group, Inc. with respect to the procurement of the New York Vehicle Inspection Program conducted by the New York State Department of Motor Vehicles.

**Determination
of Bid Protest**

SF-20200102

Contract Number – C000879

June 28th, 2021

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Motor Vehicles (DMV) for the New York Vehicle Inspection Program (System). We have determined the grounds advanced by Parsons Transportation Group, Inc. (Parsons) 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 Opus Inspection, Inc. (Opus) for the System.

BACKGROUND

Facts

On November 14, 2019, DMV issued Request for Proposals For New York Vehicle Inspection Program (NYVIP3) (RFP) seeking a vendor to replace the current vehicle inspection and maintenance program and, among other things, manage annual safety/emission inspections performed by approximately 11,500 inspection stations that are licensed by DMV (*see* RFP, at Section 1-1).

The RFP provided that an offeror's proposal would be scored on the basis of Cost (30%), as well as a review of four technical components, Program Requirements (25%), System Design Requirements (25%), Bidder Eligibility and Experience (15%), and Diversity Practices (5%) (*see* RFP, at Section 3-4). The Program Requirements, System Design Requirements and Bidder Eligibility and Experience components consisted of mandatory requirements, evaluated on a pass-fail basis, as well as scored criteria (*Id.*). The Diversity Practices component consisted of a questionnaire relating to an offeror's diversity practices and was also scored (*see* RFP, at Section 3-4 and Appendix F). For the Cost component, the RFP required offerors to submit an all-inclusive transaction fee for each inspection and costs of all hardware, software and equipment required to install, configure and maintain the System (*see* RFP, at Section 3-3.3 and Appendices D-1 and D-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 3-5). The cost score would be added to the scores for the other four components of an offeror's technical proposal and the offeror receiving the highest combined score would be awarded the contract (*see* RFP, at Section 3-4).

DMV received two proposals (Parsons and Opus) prior to the proposal due date of April 17, 2020. DMV awarded the contract for administration and management of the System to Opus, the offeror submitting the proposal receiving the highest combined score.

Parsons requested a debriefing which DMV provided on July 23, 2020. On July 29, 2020, Parsons filed a protest with this Office (Protest) and on February 1, 2021, DMV responded to the Protest (Answer).

Comptroller's Authority and Procedures

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

In carrying out this contract approval responsibility, OSC has promulgated the Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency.¹ This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no protest process engaged in at the department level, the Protest is governed by section 24.4 of the OSC Protest Procedure.

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DMV with the DMV/Opus contract;
2. the correspondence between this Office and DMV arising out of our review of the proposed DMV/Opus contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Parsons' Protest dated July 29, 2020; and
 - b. DMV's Answer dated February 1, 2021.

ANALYSIS OF THE PROTEST

Protest to this Office

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

1. The low technical scores assigned by DMV to the offerors indicate the RFP was poorly established.

¹ 2 NYCRR Part 24.

2. The incumbent, Opus, is charging the same amount per test for the transactional portion of the System as it has been charging under the existing program. Because the scope of work required by the RFP is broader than the scope for the existing program, Opus' technical proposal may not be responsive to the RFP.²

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. Although the technical portion of the RFP was worth a maximum value of 700 points, DMV did not establish a minimum number of points required to be awarded to an offeror.
2. The RFP set forth detailed requirements for the System and offerors were able to propose unit and transaction fees that they determined were reasonable and attainable. DMV does not question the validity of the transaction fee that Opus proposed.

DISCUSSION

Evaluation of Technical Proposals

Parsons alleges the low technical scores awarded by DMV “appear to indicate the RFP was poorly established, as the bidders’ technical scores fall well short of the requirements set forth in the RFP” (Protest, at p. 2).³ DMV responds that it “did not set or specify a minimum number of points that must be reached by a bidder in order to be declared the tentative winner of the technical portion of the RFP” and posits “although it is conceivable that a bidder could have obtained the full percentage points for [the technical proposal components], it is possible that the highest scoring proposal in each of those categories would not receive a maximum score” (Answer, at pps. 1-2). DMV also points out that an average score for the technical portion would equate to 350 (of a total possible value of 700 points) and that each of the offerors received technical scores in excess of that average (*see* Answer, at p. 2).

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 offerors. 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

² Parsons claims it is unable to assess whether Opus was properly awarded the contract without certain documents it requested from DMV pursuant to the Freedom of Information Law (FOIL). 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 bid protests (*see* OSC Bid Protest Determinations SF-20200069, at fn. 5; SF-20180263, at fn. 5). Moreover, in making this Determination, we have reviewed the entire procurement record which includes the documentation related to the procurement that would have been within the scope of Parsons’ FOIL request.

³ In essence, Parsons is alleging either the RFP was flawed or DMV did not evaluate proposals according to the RFP. Therefore, this Determination will address whether the RFP follows SFL requirements and if technical proposals were evaluated in accordance with the RFP.

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 in detail the evaluation criteria used to review the cost and the technical components of the proposal, and the relative scoring weight of those components (*see* RFP, at Sections 3-4, 4 through 4-8). More specifically, the RFP disclosed that cost would be worth 30% of the scoring and the technical review would be worth 70% of the scoring: Program Requirements (25%), System Design Requirements (25%), Bidder Eligibility and Experience (15%) and Diversity Practices (5%) (*see* RFP, at Section 3-4). 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 procurement record indicates DMV developed its evaluation instrument prior to the initial receipt of bids on April 17, 2020. 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 – 300 points, Program Requirements – 250 points, System Design Requirements – 250 points, Bidder Eligibility and Experience – 150 points, and Diversity Practices – 50 points). The RFP does not require an offeror to receive a certain number of points to be susceptible of being selected for contract award, nor does SFL provide for such a requirement. 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 572.93 for the proposal submitted by Parsons and a total score of 672.16 for the proposal submitted by Opus (*see also* Debriefing Summary attachment to DMV’s Answer). DMV made the contract award to Opus, 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 Opus was based on a best value determination.

Responsiveness of Opus’ Technical Proposal

Parsons questions whether Opus’ technical proposal is responsive to the RFP requirements since Opus proposed “the same amount per test for the transactional portion of the program as it did in 2012, when it last bid the work” for a scope of work containing new operational and equipment requirements that were not included in the existing vehicle and inspection program (*see* Protest, at p. 2). DMV responds the RFP set forth DMV’s desired features for the System “and all bidders were provided the opportunity to expand upon their offering in the scoreable responses” (Answer, at p. 2). To support its conclusion that Opus’ overall bid was responsive, DMV points to Opus’ higher technical score (*Id.*). DMV further states offerors were free to propose unit and transaction fees that offerors determined were

reasonable and attainable (other than a not-to-exceed price for the initial computerized vehicle inspection system unit) (*Id.*).

SFL § 163(1)(d) provides that a responsive bidder is an “offerer meeting the minimum specifications or requirements as prescribed in a solicitation for commodities or services by a state agency.” The RFP sets forth the mandatory requirements, in Section 2, Terms and Conditions, and in Sections 4 through 4-8, by identifying mandatory technical criteria that offerors had to satisfy to be responsive with an “M” in the column marked “Type” (*see* RFP, at Sections 2, 3-4, and 4 through 4-8). The RFP further provides that proposals will be reviewed to determine whether the mandatory requirements have been met (*see* RFP, at Section 3-4). As discussed above, DMV evaluated the proposals according to the RFP. Moreover, DMV has stated that it “does not question the validity of the transaction fee that Opus proposed” (Answer, at p. 2). Our review of the procurement record supports DMV’s determination that Opus was responsive to the RFP, as written. Accordingly, there is no basis to disturb DMV’s award of the contract to Opus.

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/Opus contract for the System.

THOMAS P. DiNAPOLI
STATE COMPTROLLER



110 STATE STREET
ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

July 2, 2021

Charles T. Kimmett
1919 M Street NW
Floor Eight
Washington, DC 20036

Re: RFP # 20012 for Cost Study and Operation of
Certified Public Expenditure Reimbursement
Methodology for the Preschool/School
Supportive Health Services Program

Dear Mr. Kimmett:

On September 16, 2020, you filed with this Office a protest challenging the contract award made by the New York State Department of Health (DOH) to Sivic Solutions Group, LLC (Sivic) in the above-referenced procurement.

Pursuant to the requirements of SFL §112, DOH submitted the contract to this Office for review and approval. After conducting our review of the procurement, this Office returned the contract non-approved to DOH, finding that Sivic's technical proposal was non-responsive in that it did not demonstrate the requisite experience in at least three other states, as required by the Request for Proposals. Accordingly, your protest is rendered moot and this Office will not be issuing a formal determination with regard to your protest.

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

Sincerely,

Brian Fuller

Brian Fuller
Director of Contracts

cc: Sue Mantica, New York State Department of Health
Siva Kakuturi, Sivic Solutions Group, LLC

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Island Peer Review Organization with respect to the procurement of Early Intervention Program Monitoring and Quality Improvement Services conducted by the New York State Department of Health.

**Determination
of Bid Protest**

SF-20200165

Contract Number – C036158

May 28, 2021

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Health (DOH) for Early Intervention Program Monitoring and Quality Improvement Services. We have determined the grounds advanced by Island Peer Review Organization (IPRO) are insufficient to merit overturning the contract award made by DOH and, therefore, we deny the Protest. As a result, we are today approving the DOH contract with Keystone Peer Review Organization, Inc. (KePRO) for Early Intervention Program Monitoring and Quality Improvement Services.

BACKGROUND

Facts

DOH is responsible for administering the State's Early Intervention Program (Program), which provides a range of therapeutic and supportive services for eligible children from birth to age three with disabilities and developmental delays, and their families (*see* RFP, Section 2.1, at p. 4). As part of its responsibility, DOH must monitor providers of early intervention services (*Id.*). To assist with carrying out its responsibility, on July 14, 2020, DOH issued a request for proposals (RFP) seeking offerors to provide monitoring and quality improvement services for the Program. DOH intended to award one contract to a responsive and responsible offeror on the basis of best value, with the technical proposal comprising 70% and the cost proposal comprising 30% of a proposal's total score (*see* RFP, Sections 2.0 and 8.0, at pp. 4, 46-47). The technical score and cost score were combined to yield a composite score and the offeror receiving the highest composite score would be awarded the contract (*see* RFP, Sections 8.5 and 8.8, at p. 48). The RFP set forth a detailed scope of work, minimum qualifications offerors had to satisfy to be responsive, and requirements for proposal submission (*see* RFP, Sections 3.1, 4.0, and 6.0, at pp. 6-22, 34-46). DOH provided prospective offerors with the opportunity to submit questions and requests for clarification regarding the RFP by July 28, 2020, and DOH posted responses on its website (*see* RFP, Sections 1.0 and 5.2, at pp. 4, 23).

DOH received three proposals by August 28, 2020, the due date, including those from IPRO (the incumbent contractor) and KePRO. Following DOH's evaluation of the proposals, DOH awarded the contract to KePRO, the offeror with the highest composite score, and all

offerors were notified of same on December 3, 2020. IPRO requested a debriefing, which was held on December 15, 2020. IPRO submitted a protest to this Office on December 22, 2020 (Protest). KePRO filed a response on January 4, 2021 (KePRO Answer), and DOH filed a response to the Protest by letter dated February 5, 2021 (DOH Answer) (collectively, the “Answers”). IPRO replied to the Answers on February 18, 2021 (IPRO Reply).

Comptroller’s Authority and Procedures

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

In carrying out this contract approval responsibility, OSC has promulgated the Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency.¹ This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no protest process engaged in at the department level, the Protest is governed by section 24.4 of the OSC Protest Procedure.

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DOH with the DOH / KePRO contract;
2. the correspondence between this Office and DOH arising out of our review of the proposed DOH / KePRO contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Protest, dated December 22, 2020;
 - b. KePRO Answer, dated January 4, 2021;
 - c. DOH Answer, dated February 5, 2021; and,
 - d. IPRO Reply, dated February 18, 2021.

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 offeror.² 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

¹ 2 NYCRR Part 24.

² SFL § 163(10).

offerers.”³ A “responsive” offeror is an “offeror meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency.”⁴

ANALYSIS OF THE PROTEST

Protest to this Office

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

1. The scope of the RFP, as compared to that of the prior contract, was misstated in the procurement documents, misleading non-incumbent bidders as to the projected gross level of effort and price.
2. Due to the deficiencies in the RFP scope, costs proposed were not an accurate representation of ultimate costs to the State. Specifically, the RFP misled non-incumbent offerors to believe that the level of effort was less than required, and to price their services lower, while the incumbent offeror IPRO priced its services in accordance with the present requirements of DOH under its current contract.
3. DOH did not properly assess the responsiveness of other offeror’s technical proposals, and the other, non-incumbent offerors were likely non-responsive since they lacked the knowledge and experience of IPRO.
4. The RFP did not provide for a sufficient means to assess offerors’ conflicts of interest and KePRO may have a conflict of interest.
5. DOH failed to provide a proper debriefing in that DOH did not provide sufficient information and documents relating to IPRO’s technical score, as well as the scores and proposal of the winning offeror.⁵

DOH Response to the Protest

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

1. The RFP contained a detailed description of the level of effort required to provide the services. Furthermore, the goals and expectations under the existing contract are not the same being procured pursuant to the RFP.
2. DOH conducted a fair, impartial, and competitive procurement.
3. IPRO did not formulate its cost proposal based on the express terms of the RFP, but instead relied on its own assumptions, which led to IPRO’s significantly higher pricing. Although IPRO received the maximum number of points for its technical proposal, the higher pricing cost IPRO the contract.

³ SFL § 163(1)(j).

⁴ SFL § 163(1)(d).

⁵ IPRO also asserts DOH improperly denied a Freedom of Information (FOIL) request seeking the technical and cost proposals of other offerors. 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. Accordingly, the Determination will not specifically address this allegation.

4. Conflicts of interests were addressed in RFP Section 5.22 and Attachment 4.
5. The debriefing was conducted in accordance with the State Finance Law.

KePRO Response to the Protest

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

1. IPRO's protest regarding the content of the RFP is untimely and has been waived as a matter of law.⁶
2. IPRO focuses unreasonably on its own interpretations and assumptions of the RFP requirements, but the RFP, and not IPRO's interpretations, is what governs.
3. KePRO fully understands the level of effort involved in the RFP and there is simply no evidence to support IPRO's assertion that KePRO misunderstood the work required.
4. IPRO identifies no conflicts of interest but merely alleges that one could possibly exist.

IPRO Reply to the Answers

In its Reply, IPRO expounds upon the grounds set forth in the Protest and further argues that:

1. The minimum qualifications in the RFP are defective and do not require sufficient experience to perform the services, as compared to the minimum qualifications for the current contract, for which IPRO is the contract holder.
2. The RFP omitted or misstated some of the Program's statutory, regulatory, and departmental requirements.
3. The technical evaluation may not have been calculated in conformance with the RFP.

DISCUSSION

RFP Requirements/Scope of Work

1. Content of the RFP

IPRO claims that "[t]he RFP explicitly misstated the contract's overall scope and several key level-of-effort projections and failed to fully describe the required services in a number of key areas" (Protest, at p. 6). IPRO claims that some of the "Program's statutory, regulatory and Departmental requirements [] were missing, unstated or misstated" in the RFP (IPRO Reply, at

⁶ KePRO cites to "Section 4 of the adopted OSC Protest Rules" to support this position that protests of the RFP are required to be filed prior to submission of proposals or they are untimely and waived; however, this provision is part of this Office's agency-level protest procedure applicable to OSC procurements. The OSC Protest Procedure that applies in this instance provides that this Office "may summarily deny a protest that fails to contain specifically enumerated factual or legal allegations that set forth the basis on which the protesting party challenges the contract award, or where the protest raises only issues of law that have previously been decided by the courts or by [this Office]" (2 NYCRR § 24.4(h)). The OSC Protest Procedure does not prohibit a protesting party from raising issues relating to the RFP.

p. 10). IPRO further alleges that “[t]he RFP, by its very terms, did not require an experienced provider” in “sharp[] contrast” to the solicitation for the current contract, which IPRO holds (IPRO Reply, at pp. 8-9). To refute IPRO’s allegations, DOH maintains that “[t]he scope of work and the requirements needed by [DOH] to be fulfilled by the successful [offeror] were clearly outlined in [the] RFP” (DOH Answer, at p. 6). Further, DOH contends that “[t]he existing [c]ontract . . . and the goals and expectations thereunder, the deliverables, are not the same as under the current RFP” and “the current RFP [is] vastly more detailed in terms of the description of the level of effort required to provide the services” (DOH Answer, at p. 4). KePRO contends that “IPRO’s assertion that the scope of services in this RFP is identical to the prior contract is misleading and reflects IPRO’s expectations of the work and not the language of the RFP” (KePRO Answer, at p. 6).

SFL § 163(9)(a) requires a State agency to select a formal competitive procurement process which includes, among other things, a clear statement of need and a description of the required specifications governing performance. In addition, SFL § 163(9)(b) provides that the “solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted.”

This Office generally defers to agency determinations where they are properly within the agency’s expertise and supported by the procurement record. DOH, as the State agency responsible for the administration of the Program, possesses the expertise to determine the specific needs and requirements for carrying out the Program, including compliance with any applicable statutory and regulatory requirements. Moreover, DOH is required to develop an RFP and evaluation instrument that effectively meets those needs. Our review of the procurement record confirms DOH complied with the statutory requirements in crafting the RFP and accordingly, we defer to DOH’s expertise and judgment in regards to this matter.

2. Interpretation of RFP Scope

As to IPRO’s allegation that the scope was somehow unclear, (1) DOH provided offerors with the opportunity to ask questions regarding the RFP before submitting a proposal; (2) all three offerors submitted responsive proposals; and, in fact, (3) IPRO itself received the maximum number of points available for the technical score. IPRO claims it relied on DOH’s answer to one of the pre-proposal submission questions, “The scope of services for the [Program] has not changed; however, the Department has incorporated different types of monitoring reviews in this RFP” in preparing its proposal and, as a result, was disadvantaged, relative to other offerors, as to its proposal and pricing (Protest, at pp. 14-15; IPRO Reply, at pp. 19, 24-25). IPRO interprets this statement by DOH to mean that “[DOH] wished those services that have historically been provided to continue to be provided at the same qualitative level of requirements” (Protest, at p. 15). DOH counters that its response was “not intended . . . [to] give [offerors] the permission to introduce personal or historical experience with the State (or any other Jurisdiction’s) [Program]” and this particular question referenced RFP Section 2.1 which

“provided a general background of the services sought to be procured and [DOH’s] response indicated the types of monitoring reviews incorporated therein” (DOH Answer, at p. 4).

Offerors must base their proposals on what is contained within the four corners of the solicitation, and not on any subjective knowledge or assumptions. The RFP set forth a detailed scope of work to guide offerors in the preparation of proposals (*see* RFP, Section 4.0, at pp. 6-22). Permitting an offeror to use knowledge gleaned outside of the RFP would improperly favor that offeror and discourage fair and open competition. Indeed, DOH observed “[i]t would be impossible for the Department to objectively and fairly compare and evaluate Proposals if incumbent bidders were allowed to make untested assumptions about the scope of work that are not stated in the RFP” (DOH Answer, at p. 4).

In sum, the RFP set forth, in detail, the scope of work required to provide DOH with the services it needed in connection with administering the Program. Accordingly, the RFP satisfied the statutory requirements and there is no evidence the RFP failed to accurately describe the scope of work sought by DOH for this procurement.

Technical Proposal Evaluation

IPRO questions whether the technical evaluation was done in conformance with the RFP and asks this Office to “verify that [the technical score] calculation was correctly applied” (*see* Protest, at p. 4; *see also* IPRO Reply, at p. 7). IPRO specifically wonders whether its raw technical score was capped and/or averaged, and, if such formula was likewise applied to the technical scores of the other offerors (*Id.*). DOH contends that it “conducted a fair, impartial, and competitive procurement” and “awarded the Contract to the [offeror] that offered the best value to the State” (DOH Answer, at p. 6). DOH also states that IPRO received the highest score for its technical proposal and was “awarded the maximum number of points” for same (*Id.*).

RFP Section 8.3 provides that evaluators will “independently score each Technical Proposal” and the “individual [] scores will be averaged to calculate the Technical Score for each responsive [offeror]” (RFP, at p. 47). The technical score is “up to 70 points” and comprises 70% of the final score (*Id.*). DOH’s Methodology Overview and Compliance Evaluation document⁷ provided additional detail regarding the technical proposal evaluation, indicating that “[f]or each evaluation item, [DOH] will aggregate the raw scores awarded by all evaluators, compute an average score and then multipl[y] the average by the assigned weighting factor . . . result[ing] in a final score for each evaluation item.” The instructions further provided:

[t]he proposal with the highest Technical Raw Score will receive a Final Technical Score of 70 points. Other bidders will receive a proportionate Final Technical Score according to the following formula:
(x/y) x 70 where:

⁷ IPRO acknowledges that DOH provided the Methodology Overview and Compliance Evaluation, the Technical Proposal Instructions & Evaluation Tool, and the Cost Evaluation Tabulation Tool at the debriefing (*see* Protest, at p. 4).

x = technical score for proposal being scored
y = technical score of the highest scoring proposal
70 = the total technical points available.

IPro received a Technical Raw Score of 81.54, for a Final Technical Score of 70 points.
KePRO received a Technical Raw Score of 69.22, for a Final Technical Score of 59 points.

Our review of the procurement record indicates that DOH evaluated technical proposals according to the criteria set forth in the RFP, the evaluation instructions and scoring tool.

Evaluation of KePRO's Proposal

1. Responsiveness

IPro alleges “[DOH] may have effectively waived full or partial compliance with material specifications” and that “[t]he bids by non-incumbents . . . would not and could not be inclusive of all expected and required services . . .” (Protest, at pp. 16-17).⁸ IPro also claims “[KePRO] likely missed somewhere in the neighborhood of 21% of the available Technical Points” and so “by definition [KePRO] failed to fully or correctly demonstrate the qualifications, competence and capacity and the failure appears to be material, and that degree of a miss necessarily should lead to an assessment as to whether [KePRO] has capacity and the bid was responsive to the RFP” (IPro Reply, at p. 8).⁹ DOH asserts it “delineated in the RFP the minimum specifications and requirements for a[n] [offeror] to be considered responsive as defined in SFL section 163(1)(d)” and that there were “three, competitive, responsive and responsible [offerors],” including KePRO (DOH Answer, at pp. 2-3). KePRO confirms it is aware of the level of effort needed and, furthermore, “[t]here is simply no evidence that KePRO misunderstood the work required in any aspect of the RFP” (KePRO Answer, at p. 5).

SFL § 163(9)(b) provides that the “solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted.” A “responsive” offeror is an “offeror meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency” (SFL § 163(1)(d)). The RFP provides that “[p]roposals will undergo a preliminary evaluation to verify Minimum Qualifications to propose” (RFP, Section 8.3, at p. 47).

DOH conducted a “compliance evaluation” on all proposals prior to the technical and cost evaluations being conducted, to determine whether the proposals met the minimum requirements of the RFP and found all three offerors to be responsive.

⁸ IPro appears to posit that only the incumbent contractor is qualified to continue providing services for the Program. This notion is contrary to the spirit of competitive bidding.

⁹ IPro appears to be conflating the concepts of responsiveness to minimum qualifications and evaluation/scoring of a technical proposal. The RFP set forth minimum qualifications to be met by offerors to be responsive, which DOH reviewed on a pass/fail basis, and determined that all three offerors met same (*see* RFP, Section 3.1, at p. 6). In addition, we determined above that DOH evaluated the technical proposals according to the RFP and scoring tool.

Our review of the procurement record supports DOH's determination that KePRO was responsive to the RFP, as written. Furthermore, there is no evidence that DOH waived any material specifications in the RFP. Accordingly, there is no basis to disturb DOH's award of the contract to KePRO.

2. Cost Proposal

IPro alleges, with respect to various aspects of the scope of services for the RFP, "a non-incumbent [offeror], [like KePRO,] reasonably relying solely on [DOH's] representations [in the RFP] would not and could not have encompassed the full extent of [costs] in their proposal, leading to an underbid and probable request for additional compensation during contract performance" (Protest, at p. 9; *see* Protest, at pp. 10-14; *see also* IPro Reply, at pp. 11-19). IPro also contends that the lack of "experience[] in performance of the current contract" of the other two offerors "explains the wide gap in pricing as between those [offerors] and IPro" (Protest, at p. 8). DOH responds the "Cost Proposals [of the two non-incumbent offerors] were comparable and consistent with [DOH's] prior cost projections for the new [Program] procurement" (DOH Answer, at p. 3). DOH also asserts that "[a] lower price is not an automatic indicator that the chosen vendor cannot perform the services sought to be procured, or is ignorant of the facts, or unqualified by lack of knowledge or experience to understand the scope of work or the terms of [DOH's] RFP" (DOH Answer, at p. 7). KePRO disputes IPro's claim that the RFP misled non-incumbent offerors thereby "[driving] down non-incumbent pricing to make it lower than IPro's excessive price" and reiterates it "fully understands the level of effort involved" (KePRO Answer, at pp. 4-5 (emphasis omitted)).

IPro's argument is based on conclusory assumptions with respect to KePRO's experience and understanding of the scope of services for the RFP. Based on our review of the procurement record, DOH reviewed KePRO's cost proposal according to the evaluation methodology set forth in the RFP. A competitive process is created to ensure fair pricing, and a lower price does not de facto indicate inability to perform. Additionally, DOH specifically determined KePRO's cost proposal was consistent with DOH's cost projections for the Program as described in the RFP and deemed it reasonable (*see* DOH Answer, at p. 3). This Office will generally give deference to an agency's determinations as to the substantive criteria to be evaluated in order to best meet its needs, and we see no reason to depart from such deference here (*see* OSC Bid Protest Determination SF-201700297, at pp. 6-7). Based on the foregoing and our review of the procurement record, we find no reason to question DOH's determination that KePRO can perform the contract at the price it bid.

3. Conflicts of Interest

IPro alleges that DOH did not evaluate potential conflicts of interest of offerors as a minimum requirement under the RFP and that KePRO may have a conflict of interest in providing services under the Program as it "appears to be owned by a hedge fund that in turn appears to own facilities at which children may be receiving Early Intervention Services" (IPro Reply, at p. 4). DOH contends that "[c]onflicts of interest were addressed in Section 5.22 of [the RFP] and Attachment 4" (DOH Answer, at p. 6). KePRO asserts that "IPro identifies no

alleged conflict at all” but “vaguely surmises that one *could possibly exist*” (KePRO Answer, at p. 8).

RFP Section 5.22 provides, “All [offerors] responding to this solicitation should submit Attachment 4 to attest that their performance of the services outlined in this RFP does not create a conflict of interest and that the [offeror] will not act in any manner that is detrimental to any other State project on which they are rendering services.” RFP Attachment 4 requires all offerors to, among other things, “disclose any existing or contemplated relationship with any other person or entity . . . which would constitute an actual or potential conflict of interest or appearance of impropriety . . . in connection with your rendering services.” Our review of the procurement record shows that DOH adhered to the provisions of the RFP and reviewed each offeror’s Attachment 4 submission as part of its initial compliance evaluation. DOH’s review of KePRO, as documented in the procurement record, revealed no conflicts of interest for performing the services under the RFP. IPRO failed to provide any information substantiating this allegation of a conflict. Thus, we find no merit to IPRO’s assertion.

IPRO’s Debriefing

IPRO alleges that DOH failed to comply with SFL requirements for its debriefing as “[n]o specific scoring of IPRO’s own technical proposal, including per-question weighting, or on anything other than a general level as to the Technical proposal, was revealed by [DOH]” and DOH “refused to discuss *anything* with regard to [KePRO’s] proposals, inclusive of raw scores and weighted scores” (Protest, at p. 4). DOH contends that “[t]he debriefing was conducted in accordance with the State Finance Law . . . and was not defective in any respect” (DOH Answer, at p. 6).

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

The procurement record submitted to this Office by DOH contained a debriefing agenda, which was provided to IPRO in advance of/at the debriefing, which indicated that the debriefing would be limited to IPRO’s proposal, but also included the following topics: general evaluation considerations, technical proposal evaluation, and cost proposal evaluation. The debriefing agenda also included IPRO’s technical and cost scores and rankings.

The debriefing provided by DOH was consistent with guidance from the New York State Procurement Council which 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).

IPRO asserts that DOH should have provided more information regarding per-question technical scoring for its proposal as well as information regarding KePRO’s technical and cost scores. However, SFL § 163(9)(c)(iv) does not specifically require agencies to disclose technical scores to that level of detail, nor does it require agencies to provide competitors’ scores during a debriefing. Based on our review of the procurement record, we conclude that the debriefing provided to IPRO was sufficient to satisfy the applicable statutory standard.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the contract award by DOH. As a result, the Protest is denied and we are today approving the DOH / KePRO contract for Early Intervention Program Monitoring and Quality Improvement Services.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by First Hospital Laboratories, Inc. d/b/a FSSolutions with respect to the procurement of a Web-Based Case Management and Toxicology Testing System conducted by the New York State Education Department.

**Determination
of Appeal**

SF-20210006

Contract Number – C014177

April 30, 2021

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Education Department (NYSED) for a Web-Based Case Management and Toxicology Testing System. We have determined the grounds advanced by First Hospital Laboratories, Inc. d/b/a FSSolutions (FSSolutions) are insufficient to merit overturning the contract award made by NYSED and, therefore, we deny the Appeal. As a result, we are today approving the NYSED contract with Affinity eHealth, Inc. (Affinity) for a Web-Based Case Management and Toxicology Testing System.

BACKGROUND

Facts

NYSED issued a request for proposals (RFP) seeking proposals for a vendor to “provide a web-based case management system” and “establish and coordinate toxicology testing for participants throughout New York State” for its Professional Assistance Program, “which assists professionals licensed by the NYSED Office of Professions who have substance abuse problems, but who have not harmed patients or clients” (RFP, Section 1, at pp. 3-4). Proposals were due no later than August 27, 2020 (*see* RFP, at p. 2). The RFP provided that all eligible proposals received by the deadline would be reviewed by an evaluation committee using criteria set forth in the RFP (*see* RFP, Section 3, at p. 9). Proposals were scored on a 100-point scoring system, with the technical score worth a maximum of 70 points and the cost score worth a maximum of 30 points (*see* RFP, Sections 2 and 3, at pp. 7-9).¹ The RFP provided for the contract award to be made on a best value basis to the offeror with the highest aggregate technical and cost score (*see* RFP, Section 3, at p. 10).

¹ The potential 70 points were originally allocated among eight technical criteria, with specific point values for each criterion set forth in Section 2 of the RFP. NYSED issued a notice on August 6, 2020, prior to the proposal due date, stating that “bidders are required to submit a Data Security and Privacy Plan and NIST Cybersecurity Framework. The documents will be reviewed to determine adequacy, but no points will be awarded based on the quality of the plan.” NYSED explained that “[t]he 5 points assigned to this [criterion] will be re-allocated to other [criteria].”

Three offerors submitted responsive proposals by the deadline, including FSSolutions and Affinity. SED awarded the contract to Affinity, the offeror receiving the highest aggregate technical and cost score.

Following notice of non-award on November 10, 2020, FSSolutions requested a debriefing which was held on December 3, 2020. FSSolutions submitted a protest to NYSED on December 22, 2020 which NYSED denied on December 30, 2020. FSSolutions submitted an appeal to this Office on January 12, 2021, and supplemented this filing on March 2, 2021 (Appeal and Appeal Supplement, collectively referred to as Appeal).² NYSED filed an answer to the Appeal by letter dated February 26, 2021 (Answer).

Comptroller's Authority and Procedures

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

In carrying out this contract approval responsibility, OSC has promulgated a Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency.³ This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because this is an appeal of an agency protest decision, the Appeal is governed by section 24.5 of the OSC Protest Procedure.

In the determination of the Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by NYSED with the NYSED / Affinity contract;
2. the correspondence between this Office and NYSED arising out of our review of the proposed NYSED / Affinity contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. FSSolutions' Protest to NYSED, received by NYSED on December 22, 2020 (Protest);
 - b. NYSED's Protest Determination, dated December 30, 2020 (NYSED Protest Determination);
 - c. FSSolutions' Appeal; and
 - d. NYSED's Answer.

² In its supplement, FSSolutions does not raise any new appeal grounds; rather, FSSolutions further expounds on the arguments contained in the January 12, 2021 filing.

³ 2 NYCRR Part 24.

Applicable Statutes

The requirements applicable to this procurement are set forth in SFL Article 11, which provides that contracts for services shall be awarded on the basis of “best value” to a responsive and responsible offerer.⁴ Best value is defined as “the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers” and “[s]uch basis shall reflect, wherever possible, objective and quantifiable analysis.”⁵

ANALYSIS OF THE APPEAL

Appeal to this Office

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

1. FSSolutions alleges NYSED improperly denied the Protest without disclosing Affinity’s technical proposal and scores. As a result, NYSED failed to provide objective and quantifiable analysis as to why Affinity’s technical proposal merited a score higher than FSSolutions’ technical proposal.⁶
2. FSSolutions contends that NYSED made point deductions from FSSolutions’ technical proposal that are largely subjective, conclusory, or unexplained.

NYSED Response to the Appeal

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

1. NYSED contends that FSSolutions’ primary argument based on not having access to the procurement record under FOIL is misguided and moot because NYSED provided the majority of the requested documents to FSSolutions on February 23, 2021.⁷
2. NYSED asserts the technical scoring criteria in the evaluation instrument were objective, NYSED’s evaluation methodology was fair and balanced, and the evaluation committee evaluated each of the technical proposals against the technical criteria set forth in the RFP using a standardized score sheet.

⁴ SFL § 163(10).

⁵ SFL § 163(1)(j).

⁶ FSSolutions’ allegation is based on NYSED’s failure to timely comply with a Freedom of Information (FOIL) request relating to the procurement record, specifically, Affinity’s technical proposal, overall scoring of technical proposals and score sheets of individual evaluators. 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 an appeal of an agency bid protest determination (*See* OSC Bid Protest Determinations SF-20200069, at fn. 5; SF-20180263, at fn. 5). In any event, this argument is now moot as FSSolutions concedes that records were produced by NYSED in response to FSSolutions’ FOIL request on February 23, 2021 which prompted FSSolutions to file a supplement on March 2, 2021 to the Appeal. Accordingly, the Determination will not specifically address this allegation.

⁷ *See* fn. 6, *supra*.

DISCUSSION

Evaluation and Scoring of the Technical Proposals

FSSolutions asserts NYSED made point deductions from FSSolutions' technical proposal that were "largely subjective, conclusory, or unexplained" (Appeal, at p. 6). NYSED counters that technical scoring criteria were objective, the evaluation methodology was fair and balanced, and the evaluators used a standardized score sheet to evaluate each proposal against the technical criteria in the RFP (*see Answer*, at p. 2). Since the grounds for the Appeal solely relate to NYSED's scoring of technical proposals, we will initially determine whether the evaluation methodology for the technical proposals set forth in the RFP satisfied the applicable legal requirements and then assess whether NYSED followed that methodology in its evaluation of the technical proposals.⁸

1. Evaluation Methodology for Technical Proposals

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

The RFP set forth specific criteria required to be addressed in the technical proposal and the maximum number of points assigned to each evaluation criterion (*see RFP*, Section 2, at p. 7, and Section 3, at p. 9).⁹ A committee of three individuals evaluated the technical proposals, each of whom "applied a standardized and pre-defined set of evaluation criteria in order to generate and submit an independent score for each proposal he or she evaluated" (NYSED Protest Determination, at p. 1). The technical scores of the three evaluators were then averaged to arrive at a final technical score for each offeror (*see Answer*, at p. 2).

NYSED submitted the technical evaluation instructions as part of the procurement record to this Office. The instructions provided that once the evaluators turned in their score sheets, they would "meet as a group to discuss the strengths and weaknesses of each [technical] proposal" but that "no numerical scores can be discussed." Following this meeting, the

⁸ Neither party disputes that FSSolutions' financial proposal represented the lowest overall cost. However, NYSED notes that "while FSSolutions' proposal did receive the highest financial score, this was not the sole factor in selecting the successful bidder. The award for this RFP was made on a 'best value' basis, and accordingly, the RFP advised bidders that, 'the contract...will be awarded to the vendor whose aggregate technical and cost score is the highest among all the proposals rated'" (*see Answer*, at p. 2).

⁹ *See* fn. 1, *supra*.

evaluators would have the opportunity to reevaluate each proposal and original score. The instructions advised that “[r]ater comments are required for each component” and “[c]hanges in a score between rounds one and two must be explained.” After the second round of scoring was submitted and the technical scoring completed, NYSED would then score the cost proposals to arrive at a combined technical and cost score for each offeror and award the contract to the offeror with the highest aggregate technical and cost score (*see* RFP, Section 3, at p. 10).

Our review of the procurement record confirmed that NYSED evaluators used a pre-established evaluation instrument to score technical proposals in accordance with the evaluation methodology set forth in the RFP. Thus, we are satisfied the RFP, with respect to the evaluation of the technical proposals, met the applicable legal requirements.

2. Application of Evaluation Criteria to Technical Proposals

In its protest of NYSED’s scoring of the technical proposals, FSSolutions disputes most of the point deductions NYSED made in scoring FSSolutions’ technical proposal, and generally asserts the record does not support the scores awarded to FSSolutions’ technical proposal (*see* Protest, at pp. 4-10).¹⁰ To bolster its claims, FSSolutions points to specific instances where evaluators, allegedly without justification or explanation, scored Affinity higher than FSSolutions with respect to a particular technical criterion or changed a technical score for FSSolutions with respect to a particular technical criterion following the evaluators’ meeting after the first round of scoring.¹¹ NYSED avers that “[e]ach reviewer brings to the process their own perspective and NYSED accounts for that by averaging the scores of the three reviewers from the Evaluation Committee” (Answer, at p. 2).

As an example, FSSolutions states “[t]here is simply nothing here that justifies Evaluator 2’s [] scoring variance between [Affinity and FSSolutions]” and “[t]here is nothing in Evaluator 2’s notes explaining the difference [in scores]” (Appeal Supplement, at pp. 3-4).¹² With respect to an unsupported score change after the first round of scoring, FSSolutions cites to “a very significant change in Evaluator 2’s scores to FSSolutions from Rounds (sic) 1 to Round 2, specifically in [criteria] #2 and 3” (Appeal Supplement, at p. 4).¹³ Our review of the procurement record found Evaluator 2’s evaluation instrument for FSSolutions’ technical

¹⁰ In its Appeal, FSSolutions incorporates by reference specific assertions for all but one of the technical criteria advanced in its Protest (*see* Appeal, at p. 6). In resolving this Appeal, we have considered FSSolutions’ assertions relating to each criterion score although not individually discussed in this Determination.

¹¹ FSSolutions contends its technical proposal scored higher than Affinity’s technical proposal after round 1 and the procurement record fails to explain the change to second place of FSSolutions’s technical proposal after the second round of scoring (*see* Appeal Supplement, fn. 3, at p. 2). However, our review of the procurement record shows FSSolutions’s overall technical score was lower than Affinity’s technical score after round 1 scoring.

¹² In this instance, FSSolutions seems to be claiming that Evaluator 2 should have scored the proposals of different offerors relative to each other and then provided a written justification for the difference in scores, rather than simply scoring proposals individually based on the standards set forth in the SFL as embodied by the technical evaluation criteria of the RFP. This type of comparative evaluation between offerors’ technical proposals, using one offeror’s technical proposal to score another offeror’s technical proposal, does not constitute an objective analysis. Moreover, the technical evaluation instructions required evaluators to independently read and score each proposal.

¹³ With respect to criterion # 2, Evaluator 2 changed FSSolutions’ score from an 8 to a 6, out of 10 possible points. With respect to RFP Requirement # 3, Evaluator 2 changed FSSolutions’ score from a 7 to a 5, out of 11 possible points.

proposal contained comments for every score Evaluator 2 awarded in each of the seven technical criteria. Furthermore, the same evaluator's final Round 2 score sheet contained additional comments to support score changes in both criteria # 2 and 3.¹⁴

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

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

Based on our review of the procurement record, NYSED evaluated technical proposals according to the clearly articulated criteria set forth in the RFP and consistent with the evaluation instructions/instrument. Our review did not reveal any contradictions between an evaluator's written comments and the scores assigned by such evaluator to FSSolutions' technical proposal. Thus, we are satisfied evaluators scored FSSolutions' technical proposal in a manner consistent with the RFP and evaluation instrument and will not disturb the technical scores awarded by NYSED.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the contract award by NYSED. As a result, the Appeal is denied and we are today approving the NYSED / Affinity contract for a Web-Based Case Management and Toxicology Testing System.

¹⁴ At this Office's request, NYSED provided further clarification of the evaluator's comment supporting the score change for category #2.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by The Legal Aid Society of Rockland County, Inc. with respect to the grant awards for the delivery of civil legal services to low-income persons and the improvement of the administration of justice made by the Interest on Lawyer Account Fund of the State of New York.

**Determination
of Bid Protest**

SF-20210070

October 15, 2021

Procurement Record – IOL01-0000022-1210200

The Office of the State Comptroller has reviewed the above-referenced grant awards made by the Interest on Lawyer Account Fund of the State of New York (IOLA) for the delivery of civil legal services to low-income persons and the improvement of the administration of justice. We have determined the grounds advanced by the Legal Aid Society of Rockland County, Inc. (LASRC) are insufficient to merit overturning the grant awards made by IOLA and, therefore, we deny the Protest.

BACKGROUND

Facts

IOLA's mission is to "support those qualified non-profit organizations throughout New York State that will most efficiently and effectively provide stable, economical and high quality civil legal representation to eligible clients and will improve the administration of justice" (IOLA FY 2022 & 2023 Grant Cycle Application Instructions and Forms, hereinafter referred to as the RFP, at p. 2; *see* State Finance Law (SFL) §§ 97-v(3)(a), (f); *see also* 21 NYCRR Part 7000). To further this mission, IOLA is responsible for disbursing grant funds to not-for-profit tax-exempt entities for the purpose of delivering civil legal services (CLS) to low-income persons and for purposes related to the improvement of the administration of justice (AOJ) (*see* SFL § 97-v(3)(a); 21 NYCRR § 7000.5).

In December 2020, IOLA released a request for proposals for the IOLA grant cycle for fiscal years 2022 and 2023 seeking applications to fund not-for-profit providers of CLS and AOJ services across the State (*see* RFP, at pp. 2-3). The RFP specified criteria for CLS and AOJ providers¹ and indicated that IOLA would make the final determination as to whether an applicant

¹ The RFP, which mirrored IOLA's Board of Trustee's regulations, stated that CLS providers would "provide direct civil legal services in multiple substantive areas without charge to low income persons within particular geographical areas in New York State." AOJ providers would:

Provide[] services that seek to:

- (a) enhance civil legal services to low income persons through innovative and cost-effective means;

was CLS or AOJ, using criteria found in 21 NYCRR § 7000.12 and based on a review of the application and supporting documentation submitted (*Id.*, at p. 3).

The RFP provided that IOLA staff and the Board of Trustees would review each applicant's eligibility as well as budget and financial information, and evaluate each application; however, the "full Board of Trustees makes grant decisions" (*Id.*, at p. 17). The RFP made clear that applications would be evaluated as follows: supporting documents (2 points each for a total of 6 points); program specific narrative, including community need (10 points), organizational strength (19 points), and program description (40 points); financial evaluation, including current budget, revenue and staffing (10 points), and financial narrative (10 points); and, existing grantee in good standing (5 points) (*Id.*, at p. 18). An applicant could be awarded up to a total of 100 points, up to 3 points could be deducted for formatting errors, and an application needed to score 85 points or above to be eligible for funding (*Id.*). Potential applicants were provided with the opportunity to ask questions prior to the deadline for application submission, and IOLA provided responses to such questions publicly on January 15, 2021.

Applications that were received by the due date of January 22, 2021 were evaluated by the Executive Director and General Counsel of IOLA. The evaluators presented their recommendations for funding, based on applicants who received scores of 85 and above, to the Board's Grants Committee. Once approved by the Grants Committee, the Committee forwarded the staff recommendations to the full Board which approved the list of applicants on March 17, 2021.

LASRC received notice on March 17, 2021 that it was not awarded a grant. LASRC requested a debriefing, which was held with IOLA on April 20, 2021. Thereafter, LASRC filed a protest with this Office on April 27, 2021 (Protest). IOLA submitted an answer on May 10, 2021 (Answer). LASRC replied to IOLA's answer on May 13, 2021 (Reply).

Comptroller's Authority and Procedures

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

In carrying out this contract approval responsibility, OSC has promulgated the Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency.² This procedure governs

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- (b) provide direct civil legal services either to groups of clients currently underserved by legal services (such as the elderly or disabled), or in an area of representation (whether substantive or geographical) that cannot be or is not effectively served by individual qualified legal services providers;
 - (c) provide legal, management or operational training, or legal, management, support service, or technical assistance, or direct legal assistance, informational advocacy or litigation support to qualified legal services providers; or
 - (d) otherwise promote the improvement of the administration of justice.

(RFP, at p. 3; *see* 21 NYCRR § 7000.12).

² 2 NYCRR Part 24.

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 IOLA with respect to the grant awards;
2. the correspondence between this Office and IOLA arising out of our review of the grant awards; and,
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. LASRC's Protest;
 - b. IOLA's Answer; and,
 - c. LASRC's Reply.

ANALYSIS OF THE PROTEST

Protest to this Office

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

1. IOLA's scoring of applications was arbitrary, subjective, and inconsistent and did not satisfy the requirements of SFL § 163;
2. IOLA abused its discretion by unilaterally and arbitrarily deciding that LASRC's application was for AOJ funding rather than CLS funding; and,
3. The debriefing provided to LASRC by IOLA was deficient because IOLA refused to permit the debriefing to be recorded or transcribed.³

IOLA Response to the Protest

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

1. Grant contracts to non-profit organizations are expressly carved out of the strict competitive bidding rules set out in SFL § 163;

³ It is undisputed that there is no requirement, statutory or otherwise, that a debriefing in this matter be recorded or transcribed (*see* Reply, at pp. 20-21 ("LASRC does not argue that IOLA was *required* to record the debriefing.")). LASRC concedes "the refusal to have the Debriefing recorded or transcribed is not sufficient, in and of itself, to overturn or alter IOLA's contract award" and thus, not proper grounds for protesting the contract award (*see* Protest, at p. 34). Since LASRC's allegation that the debriefing was deficient is based solely on IOLA's refusal to permit the debriefing to be recorded or transcribed, this Determination will not address that allegation.

2. IOLA followed a fair evaluation process for its RFP, and scored LASRC's application consistently with the RFP;
3. IOLA followed the RFP with respect to designating CLS and AOJ and properly determined LASRC should be considered AOJ. Moreover, IOLA's designation of LASRC as AOJ had no effect on LASRC's score; and,
4. IOLA properly handled the debriefing with LASRC.⁴

LASRC Reply to the Answer

In its Reply, LASRC further expounds upon the original arguments raised in the Protest.

DISCUSSION

Scoring Methodology

LASRC contends that "IOLA's scoring system is arbitrary, subjective, and inconsistent" (Protest, at pp. 28-31).⁵ LASRC further contends that "IOLA's evaluation tool is far from specific enough to ensure a fair scoring process" and "[t]he actual scoring sheet . . . uses extremely vague criteria that are capable of significant manipulation" (Reply, at pp. 3, 6). In further support of its position, LASRC alleges that the two IOLA evaluators "were not independent and unbiased enough to ensure a fair evaluation process" due to the lack of any "[training] materials [to] help[] create uniformity in scoring," "the lack of "written comments" by the evaluators, and one evaluator's involvement in "exert[ing] pressure on LASRC to merge with Legal Services of the Hudson Valley" (*Id.*, at pp. 3, 8-9).⁶

IOLA responds "[t]he fairness of IOLA's RFP is based on whether (1) IOLA's scoring system was clear and (2) the scores were reasonable" (Answer, at p. 5 (*citing* OSC Bid Protest Decision SF-20150159)). IOLA claims that it "set out a scoring rubric in its RFP and scored LASRC consistently with that RFP" (*Id.*, at p. 5). To further bolster its position, IOLA states it "employed appropriate legal professionals with extensive experience and expertise" to conduct the evaluations (*Id.*).

⁴ See fn. 3, *supra*.

⁵ A substantial portion of this contention hinges on the allegation that IOLA's scoring of LASRC's proposal was inconsistent with suggestions for improvement provided to LASRC by IOLA at a 2018 debriefing relating to LASRC's application for the same grant program. LASRC presents numerous examples of how the 2021 scoring did not accurately reflect improvements LASRC made to its proposal as a result of guidance from IOLA at the 2018 debriefing; or, conversely, how IOLA did not provide sufficient or complete guidance during the 2018 debriefing for LASRC to improve its scores, identifying certain deficiencies in LASRC's proposal for the first time in 2021 (*see* Protest, at pp. 14-25, 29-30; Reply, at pp. 2-8). The requirements for debriefings in SFL § 163 do not apply to this procurement (*see* fn. 7, *infra*); however, the RFP provided applicants with an opportunity for a debriefing. While debriefings are generally intended to provide guidance to unsuccessful offerors concerning how to improve future proposals, they do not establish precedent that will bind evaluators in future procurements. A debriefing conducted in a past IOLA procurement is outside of the scope of this Protest and, although this Office considered allegations of improvidence based on the content of the 2018 debriefing in its review of the Protest as a whole, same will not be specifically addressed in this Determination.

⁶ LASRC failed to provide support for its allegation that one of the evaluators was exerting pressure on LASRC to merge with Legal Services of the Hudson Valley and thus, this Office will not address this allegation.

Initially, we note that SFL § 163 does not apply to the instant grant awards.⁷ Rather, as this Office has previously pointed out, we review grant awards based on “a fair and balanced process that gives an equal opportunity to all bidders,” as demonstrated by whether: “1) the scoring system itself was clear; and 2) the evaluators, in assigning scores, arrived at reasonable conclusions” (OSC Bid Protest Determination SF-20150159, at p. 3).

The RFP set forth the criteria to be evaluated, the number of available points for each criterion, and the methodology IOLA would use to score applications (*see* Protest, at pp. 17-18). The pre-established scoring tool was consistent with the program information and narrative responses requested in the RFP (*Id.*, at pp. 7-10).

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

Based on our review of the procurement record, we find the scoring methodology employed by IOLA was clearly set forth in the RFP and the IOLA evaluators scored applications according to the clearly articulated criteria set forth in the RFP and used the scoring tool that was crafted prior to the receipt of applications. Accordingly, we will not disturb the IOLA’s scoring of LASRC’s application.

⁷ This Office has previously explained SFL § 163’s inapplicability to the award of grant contracts to not-for-profit organizations:

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

(OSC Bid Protest Determination SF-20110219, at p. 2). Notably, neither IOLA nor LASRC disputes this point (*see* Reply, at p. 2; Answer, at p. 5).

Funding Stream Determination

1. IOLA's Authority to Make CLS/AOJ Determination

LASRC alleges that “IOLA abused its discretion by unilaterally and arbitrarily deciding that LASRC’s application was for AOJ funding rather than CLS funding” (Protest, at p. 31). LASRC claims that, even if IOLA is permitted to determine what funding is being applied for, IOLA staff needed “specific authorization” from the Board of Trustees to do so and the Board of Trustees failed to delegate such authority to the staff (*see* Protest, at pp. 31-33). IOLA contends it “properly followed the RFP with respect to designating CLS and AOJ[,] and the staff recommendations, including as to CLS/AOJ status, were reviewed and approved by the IOLA Board’s Grant Committee and full Board” (Answer, at p. 7).

As an initial matter, we must determine whether the Board of Trustees is permitted to delegate application review duties to the staff and the scope of that authority. The regulations of the IOLA Board of Trustees provide the trustees with the power to “review applications for grants and contracts using staff and other available resources” (21 NYCRR § 7000.5(a)(7)). The regulations further allow the Board of Trustees to “delegate the screening of the funding applications to its staff or other entity it deems appropriate” (21 NYCRR § 7000.15(a)). Accordingly, the IOLA Board acted within its authority when delegating the review of applications to the two evaluators, who are IOLA staff members.

Following evaluation of the applications, the staff prepared recommendations, including designation of the applicants as CLS or AOJ, which were approved by the Grants Committee and, ultimately, the Board (*see* Answer, at p. 7). The regulations described above are broad enough to include staff recommendations for either CLS or AOJ funding as part of the staff’s review of applications, so long as the Board properly makes the final funding determinations (as was the case in this instance). Therefore, we are satisfied IOLA acted consistent with the scope of its authority with respect to the Board’s delegation of duties to IOLA staff members, including the review of applications and the designation of applicants as CLS or AOJ.

2. Designation of LASRC as AOJ

LASRC further contends that IOLA’s “decision was arbitrary and capricious” because “LASRC has never been, nor is it now, a provider of specialized legal services, as contemplated for the providers of AOJ services” (Protest, at p. 32; *see* Reply, at p. 10). IOLA asserts that “LASRC does not offer the depth and breadth of legal services typically found among IOLA CLS grantees . . . [t]hus, IOLA properly determined that LASRC should be considered AOJ and not CLS” (Answer, at pp. 7-8).

The RFP provided that IOLA would determine whether an applicant would be considered for CLS or AOJ funding according to factors set forth in 21 NYCRR § 7000.12 and based on the applications and all supporting documentation submitted by the applicant (*see* RFP, at p. 3; *see also* Questions and Answers, Nos. 8-12). Moreover, in recognition of the fact that available IOLA funding may not be sufficient to fund all applicants, the RFP set forth certain factors to be considered in establishing funding priorities (*see* RFP, at pp. 17-18; *see also* 21 NYCRR §

7000.12(c)). This Office generally defers to an agency on matters within the agency's expertise where supported by the procurement record. Here, the review and classification of legal services and programs to be provided by applicants in furtherance of IOLA's mission are properly within IOLA's expertise. Our review of the procurement record shows that IOLA followed applicable regulations and its RFP in classifying LASRC as an AOJ applicant. As a result, we will not disturb IOLA's determination.

3. Notice to Applicants that IOLA Would Make Designation and Effect on Scoring

Lastly, LASRC contends that since "the focus of the application for CLS funding is very different than the focus of an AOJ application" funding applicants "should be advised that they are not allowed to choose for what source of funding they are applying" (Protest, at p. 33; *see* Reply, at pp. 10-11). LASRC claims the description of services in its application would have been entirely different had it chosen to apply for AOJ funding and "the determination whether LASRC was applying for CLS or AOJ funding is crucial to determining the merits of its application" (Reply, at p. 10; *see* Protest, at p. 33). IOLA contends that "the RFP directly put applicants on notice that IOLA would make the determination [of CLS or AOJ]" and this matter "was further addressed in answers to applicant questions, which were posted and made available to all applicants as indicated in the RFP, and the answers repeatedly reiterated that IOLA would determine the CLS/AOJ issue" (Answer, at p. 7). Regardless, IOLA avers "the same scoresheet and criteria were applied to all applicants and IOLA's designation of LASRC as AOJ had no effect on its score" (*Id.*).

Contrary to LASRC's contention, and as previously noted, applicants were advised in the RFP that IOLA would make the final determination as to whether an applicant was applying for CLS or AOJ funding (*see* RFP, at p. 3). In addition, IOLA's responses to multiple questions submitted by potential applicants reiterated that IOLA would make the final determination regarding CLS or AOJ classification (*see* Questions & Answers, Nos. 2, 9, 11, and 12).

LASRC emphasizes the need for advance knowledge of the stream of funding being applied for in order to properly complete its application and fairly compete for a grant award (*see* Reply, at p. 11). However, the scoring tool submitted as part of the procurement record, which follows the criteria set forth in the RFP, includes, as is relevant here, a description of the organization's principal activities and mission, the kinds of services to be provided, to whom they will be provided, and where the recipients of those services reside (*see* RFP, at p. 8). Thus, LASRC had the opportunity to fully describe its program and proposed services in its application, irrespective of funding stream designation. Therefore, LASRC's contention that not knowing whether IOLA would ultimately designate it as CLS or AOJ affected LASRC's ability to complete its application and fairly compete for the grant award is without merit. Furthermore, the scoresheet does not differentiate between an applicant's potential CLS/AOJ status; therefore, LASRC's contention that IOLA's ability to designate, and its subsequent designation of, LASRC as AOJ affected IOLA's evaluation of its application is also without merit.

CONCLUSION

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

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Blackboard Inc.
with respect to the procurement of a digital learning
environment conducted by the State University of
New York.

Determination of
Appeal

SF-20210086

Contract Number – CM03740

September 24, 2021

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the State University of New York (SUNY) for a digital learning environment. We have determined the grounds advanced by Blackboard Inc. (Blackboard) are insufficient to merit overturning the contract award made by SUNY and, therefore, we deny the Appeal. As a result, we are today approving the SUNY contract with D2L Ltd (D2L) for a digital learning environment.

BACKGROUND

Facts

SUNY issued a request for proposals (RFP) on July 23, 2020 seeking proposals for “an online Digital Learning Environment . . . [that] should meet the online learning and educational needs of all participating SUNY campuses as well as SUNY Online” (RFP, *Overview*, at p. 3).¹ The stated goal was to “establish a university-wide agreement that may be utilized by any participating SUNY institution or affiliates [as identified in the RFP Attachment, *List of SUNY Institutions*]”² (*Id.*).

SUNY intended to award one contract to a responsive and responsible offeror on the basis of best value (*see* RFP, *Method of Award*, at pp. 7-8). Offerors were required to meet minimum qualifications, mandatory technical and data requirements, and functional requirements³ in order to proceed to proposal scoring (RFP, *Minimum Bidder Qualifications Review*, at p. 7; Attachment, *Bidder Qualifications Submission Form; Mandatory and Technical Data Requirements*, at p. 7; Attachment, *Technology Software: Mandatory Technical and Data Requirements*, at pp. 20-24; *Technical Evaluation*, at pp. 7-8; Attachment, *Technology Software:*

¹ The original RFP is not paginated nor are the sections consistently numbered. For purposes of the Determination, this Office includes page numbers as they would have appeared, if included, and identifies the referenced section by heading.

² RFP Attachment, *List of SUNY Institutions* included a list of thirty State-operated SUNY campuses as well as two statutory colleges, thirty community colleges, and other affiliates.

³ This mandatory minimum requirement was included within the technical evaluation and was also scored as part of the technical response score; however, it was determined prior to scoring whether the minimum requirement was met, and failure to meet a requirement precluded a proposal from proceeding to scoring.

Functionality and Accessibility, at p. 24). If an offeror was deemed to be responsive, the evaluation team would review and score its proposal, with the technical proposal comprising 75% (divided into a technical response worth 30% and a vendor presentation and demonstration worth 45%) and a cost proposal comprising 25% of the proposal's total score (RFP, *Method of Award*, at pp. 7-8). The offeror receiving the highest final composite score was eligible for contract award (RFP, *Selection*, at p. 9).

Prospective offerors were given the opportunity to ask SUNY questions prior to proposal submission, and SUNY publicly posted responses to same. Proposals were due on September 11, 2020, and SUNY received three proposals: one each from D2L, Instructure Inc., and the incumbent vendor, Blackboard.

Following evaluation, SUNY awarded the contract to D2L, the offeror receiving the highest final composite score, and notified all offerors on January 21, 2021. Blackboard requested a debriefing which was held with SUNY on February 1, 2021. Subsequently, Blackboard protested the award to SUNY on February 4, 2021 (Protest to SUNY), and SUNY denied the protest on March 17, 2021 (SUNY Protest Determination). Blackboard then appealed to SUNY on March 31, 2021 (Appeal to SUNY), and SUNY upheld its denial on May 6, 2021 (SUNY Appeal Determination). Blackboard appealed to this Office on May 19, 2021 (Appeal).

Comptroller's Authority and Procedures

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

In carrying out this contract approval responsibility, OSC has promulgated a Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency.⁴ This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because this is an appeal of an agency protest decision, the Appeal is governed by section 24.5 of the OSC Protest Procedure.

In the determination of the Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by SUNY with the SUNY / D2L contract;
2. the correspondence between this Office and SUNY arising out of our review of the proposed SUNY / D2L contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):

⁴ 2 NYCRR Part 24.

- a. Protest to SUNY;
- b. SUNY Protest Determination;
- c. Appeal to SUNY;
- d. SUNY Appeal Determination;
- e. Appeal; and,
- f. E-mail from Michele L. Feathers on behalf of SUNY to this Office, dated July 30, 2021 (Feathers E-mail).

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, Blackboard challenges the procurement conducted by SUNY on the following grounds:

1. SUNY materially changed the terms of the procurement after contract award by mandating that all SUNY-affiliated schools use the vendor awarded pursuant to the RFP to obtain a digital learning environment;
2. SUNY is intentionally and improperly withholding procurement records that Blackboard requested pursuant to FOIL in order to hinder Blackboard's challenge to the RFP;⁵
3. SUNY's procurement did not result in a best value award because SUNY's technical scoring methodology was irrational and SUNY improperly failed to disclose its technical scoring methodology in the RFP;
4. SUNY's procurement did not result in a best value award because SUNY failed to consider massive costs and disruption relating to vendor transition;
5. SUNY improperly and unreasonably evaluated various aspects of Blackboard's technical proposal, and should have assigned higher scores to Blackboard based on its capabilities; and,
6. SUNY's failure to seek a "clarification" from Blackboard by allowing Blackboard to submit a revised version of the Functional Requirements form, after Blackboard submitted an incorrect version of the form with its proposal, adversely affected Blackboard's technical score.

SUNY Response to the Appeal

In its Answer,⁶ SUNY contends the Appeal should be rejected and the award upheld on the following grounds:

⁵ See Protest, at pp. 9-10. Consistent with the longstanding 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 an appeal of an agency bid protest determination (see OSC Bid Protest Determinations SF-20200069, at fn. 5; SF-20180263, at fn. 5). Accordingly, the Determination will not specifically address this allegation.

⁶ SUNY determined an answer to the Appeal was unnecessary because the SUNY Protest Determination and the SUNY Appeal Determination "sufficiently covered the substantive issues raised by Blackboard" (Feathers E-mail). SUNY also provided additional relevant information in the Feathers E-mail. These three documents collectively comprise SUNY's "Answer" to the Appeal for purposes of this Determination.

1. Blackboard's claim that SUNY mandated that all SUNY-affiliated schools use the vendor awarded pursuant to the RFP to obtain a digital learning environment is incorrect. SUNY did not provide communication to its campuses specific to any particular contract but rather provided a reminder to its campuses to follow existing New York State procurement rules;
2. SUNY awarded the contract based on best value in accordance with State Finance Law and the RFP disclosed the number of points assigned to the technical and cost components of an offeror's proposal;
3. Cost proposals solicited implementation costs from all offerors which SUNY considered in its evaluation of cost proposals;
4. SUNY properly and comprehensively evaluated Blackboard's technical proposal using a predetermined, rational scoring rubric; and,
5. Allowing Blackboard to submit the correct Functional Requirements form would not constitute a clarification since the revised Functional Requirements form required an offeror to provide new, supplemental, and material information and instead would constitute an impermissible revision to Blackboard's proposal.

DISCUSSION

Change to the Scope of the Procurement After Contract Award

Blackboard asserts that SUNY “dramatically expand[ed] the scope of the RFP after the contract award was made” by “requir[ing] that all SUNY-affiliated schools use the RFP to obtain [learning management system] services, despite being told during the competition that the RFP was not mandatory, and that some schools may elect not to use that vehicle to meet their [] needs” (Appeal, at p. 7).⁷ Blackboard maintains that this “material modification” is one which offerors “would not have reasonably expected” based on the RFP and which requires “a fair and equal opportunity for all offerors to revise their proposals” (*see id.*, at p. 8). SUNY responds that Blackboard's allegation is incorrect in that information provided to SUNY-affiliated schools “[was] not specific to a particular contract, rather a general reminder to follow the hierarchy of existing New York State procurement rules” (Feathers E-mail). SUNY further indicates that the “communication does not apply to non-state campuses” and “some State-operated campuses may have existing campus specific agreements or other reasons why they cannot participate in a system-wide agreement” (*Id.*). As additional support that the scope of work in the RFP did not change after contract award, SUNY maintains that “the RFP clearly states: ‘This process is intended to secure a solution available to all campuses in the SUNY system’” (*Id.*).

SFL § 163(9)(a) requires a State agency to select a formal competitive procurement process which includes, among other things, a clear statement of need and a description of the required specifications governing performance.

Here, SUNY provided sufficient information regarding the scope of services in the RFP, which included use of the services sought in the RFP by any, and potentially all, SUNY

⁷ Blackboard alleges that “during a May 5th conversation with two SUNY attorneys [], Blackboard was told that the RFP was to be an exclusive vehicle to obtain [learning management system] solutions for any SUNY-affiliated school” (*see* Appeal, at p. 8). Aside from this statement, Blackboard has provided no support for this allegation.

institution(s) identified in the RFP (*see RFP, Overview*, at p. 3; Attachment, *List of SUNY Institutions*). The stated goal of the RFP was to “establish a university-wide agreement that may be utilized by any participating SUNY institution or affiliates [as identified in the RFP Attachment, *List of SUNY Institutions*]” (RFP, *Overview*, at p. 3). The RFP reiterated this plan for participation numerous times throughout, providing that the proposed solution would need to be “available to all campuses in the SUNY system listed in [RFP Attachment, *List of SUNY Institutions*],” “[able] to meet the current and future needs of the SUNY Online initiative along with all 64 SUNY campuses,” and “capable of meeting the current needs of SUNY and be scalable for potential future growth to a million or more users” (RFP, *Overview*, at p. 3; *Overview of the SUNY Digital Learning Environment*, at p. 5).

Not only did the RFP provide repeated references to the scope of campuses to be served under this procurement, SUNY also provided prospective offerors with the opportunity to ask questions regarding the scope of the RFP before submitting a proposal. For example, in a response to one question, SUNY indicated that “the resultant agreement will be used by campuses that are part of the SUNY Online program” and “SUNY will work with the Contractor after [contract] execution and throughout the contract term to continuously grow participation throughout the system” (*Implications of RFP Award*, eThink Education, 8/19/2020).⁸ SUNY also indicated that “[t]his Request for Proposal is for a university wide agreement that may be utilized by any SUNY institution as well as SUNY Online” (*Individual Campus Opt-In*, D2L LTD, 8/14/2020).

In addition, the cost proposal itself necessitated tiered pricing based on varying rates of campus participation in the proffered services (*see RFP Attachment, Cost Proposal Submission Form*). Blackboard completed its cost proposal accordingly.

Moreover, even *assuming arguendo*, all eligible SUNY-affiliated schools were required to use the contract awarded under the RFP, as demonstrated above, there was no material change to the scope of the procurement since the RFP already advised offerors that all SUNY campuses identified were eligible to participate and might participate, SUNY’s responses to the prospective offerors’ questions made it clear that all campuses would be encouraged to participate, the full number of campuses were disclosed in an attachment to the RFP, and offerors were even required to submit different costing structures to account for varying levels of participation by campuses. Accordingly, Blackboard’s assertion that SUNY made an impermissible material change to the scope in the RFP after contract award is without merit.

Best Value Determination

1. Technical Proposal Evaluation Methodology

Blackboard contends that SUNY’s technical scoring methodology of “assigning only half of the available points under the Technical and Demonstration factors to offerors who fully complied with the technical requirements” was irrational because “there is no rational basis for

⁸ The posted questions and answers are not numbered. For purposes of the Determination, this Office identifies questions and answers by the subject heading, prospective offeror posing the question, and the date the answer was posted.

[SUNY] to award fewer points to an offerer who meets all the solicitation requirements” (*see* Appeal, at pp. 13-14). Blackboard posits that such scoring methodology “warps the [] ‘best value’ award concept into a ‘most technically advanced’ concept” where SUNY “*overemphasized* [the Technical and Demonstration] factors in violation of the [RFP] criteria” (*Id.*, at p. 14). SUNY responds that it “awarded the contract based on best value in accordance with State Finance Law” (SUNY Appeal Determination, at p. 2 (citing and affirming SUNY Protest Determination)). SUNY further asserts that “[t]o assign the highest score available in the Technical and Demonstration categories on the basis that bidders met the minimum RFP requirements would be akin to a pass/fail checklist of minimum requirements, without an assessment of quality of each requirement” and such “scoring methodology would effectively convert a ‘best value’ RFP into a ‘low cost’ IFB” (*Id.*).

SUNY awarded the contract under the RFP on the basis of best value which “optimizes quality, cost and efficiency, among responsive and responsible offerers” and “[s]uch basis shall reflect, wherever possible, objective and quantifiable analysis” (SFL § 163(1)(j)). A “best value” determination shall “be based on clearly articulated procedures which require . . . a balanced and fair method, established in advance of the receipt of offers, for evaluating offers and awarding contracts” (SFL § 163(2)(b)).

The RFP clearly outlined how the technical evaluation would be conducted and set forth specific criteria to be scored. The RFP provided that the technical proposal would comprise 75% of an offeror’s total score, with a technical response worth 30% and a vendor presentation and demonstration worth 45% (*see* RFP, *Method of Award*, at pp. 7-9). The criteria reviewed in the technical response included functional requirements, accessibility (conformance report), and scope of services (*see* RFP, *Technical Evaluation*, at pp. 7-8). The product demonstration was “highly structured” and “include[d] a series of scripts to verify the system’s functionality, and user experience” (*see* RFP, *Product Demonstration*, at p. 8). Offerors were provided with a demonstration script with detailed instructions and an agenda (*see* RFP Attachment, *Bidder Demonstration Script*). The evaluation team consisted of multiple evaluators who were provided with detailed evaluation instructions and training.⁹ The evaluation worksheets contained detailed instructions and a scoring rubric that guided evaluators’ scoring. SUNY correctly points out that “[a]bsent such a pre-established point scale, the evaluation would not be objective and scoring could be inconsistent among the evaluators” (SUNY Appeal Determination, at p. 5).

The scoring rubrics for the functional requirements and demonstration portions of the technical response generally instructed evaluators to award 50% of the available points for a criterion if a proposal met the relevant requirements of that criterion, leaving latitude to evaluators to award additional points to those proposals that exceeded their expectations. This scoring methodology is not meant to be a cap, but rather a method of allowing evaluators a breadth of points to fully evaluate the strengths and weaknesses of a proposal. Furthermore, this method is consistent with the New York State Procurement Guidelines which provide, “The

⁹ The technical response evaluation was conducted by four evaluation teams. Four evaluators reviewed the scope of services, five evaluators reviewed the technical requirements, five evaluators reviewed accessibility, and eight evaluators reviewed user requirements. The product demonstration evaluation was conducted by three evaluation teams. Five evaluators reviewed the accessibility demonstration, five evaluators reviewed the technical demonstration, and eight evaluators reviewed the functional user demonstration.

technical evaluation measures the extent by which a proposal will meet the agency's needs and relies upon the evaluators' expertise in assessing the strengths and weaknesses of each response" (New York State Procurement Guidelines, Section H, at p. 34).

Based on our review of the procurement record, we conclude that the methodology SUNY used to evaluate and score technical proposals was balanced, fair, and included an objective and quantifiable analysis. Thus, we find no basis to question the evaluation methodology SUNY used for the technical proposals.¹⁰

2. Disclosure of Technical Proposal Evaluation Methodology

Blackboard contends that "nothing in the RFP indicated that . . . [offerors] must exceed requirements to achieve the highest scores, nor were offerors put on notice that failing to propose capabilities in excess of the requirements announced would be treated less preferentially" which violated SFL § 163(9)(b)'s requirement that the RFP apprise offerors of the general manner in which evaluation and selection will be conducted (Appeal, at p. 13). SUNY responds that its "RFP disclosed the number of points assigned to the Technical evaluation [] and the Demonstration []" and "[t]he scoring instrument was established prior to the bid opening" (SUNY Appeal Determination, at p. 4). SUNY maintains that it "was under no obligation to disclose the 'quantification of the application of the criteria to the rating of proposals' in the RFP" (SUNY Protest Determination, at p. 2). SUNY also asserts it "properly applied a predetermined, rational scoring rubric to responsive [technical] proposals" and that its "scoring approach was rationally based and follows NYS procurement practice" (*Id.*).

SFL § 163(7) provides that "[w]here the basis for award is the best value offer, the state agency shall document, in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria, which whenever possible, shall be quantifiable, and the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted." SFL § 163(9)(b) provides that the "solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the *general manner* in which the evaluation and selection shall be conducted. Where appropriate, the solicitation shall identify the *relative importance and/or weight of cost and the overall technical criterion* to be considered by a state agency in its determination of best value" (emphases added).

¹⁰ Blackboard claims that "[w]hile best value does not require award to be made to the lowest priced offeror, it does require SUNY to fully consider and document why a higher price solution is technically superior to the degree that it justifies a higher cost" (Appeal, at p. 23). Blackboard, however, misconstrues what is required for an award based on best value under New York State law. SFL § 163(10)(a) requires state agencies to include the basis for determining the award and a written determination of selection and award in the procurement record submitted to this Office. As previously stated, best value "means the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerors" (SFL § 163(1)(j)). A best value award is a flexible concept based on a balancing of the cost and the technical benefits that turns on the particular circumstances of a given procurement. Moreover, agencies are not required to ascribe equal weights, or any other fixed weights, to cost and technical. For purposes of the RFP, the best value was the offeror whose proposal received the highest total combined score for the categories of cost (25 points), technical (30 points) and demonstration (45 points). As a result, an offeror, like Blackboard, with a superior cost proposal may not be the best value offeror, dependent upon such offeror's technical proposal in relation to other offerors.

As set forth above, the RFP clearly outlined how the technical evaluation would be conducted, including specific criteria to be scored, and the weight to be allocated to the technical components. Contrary to Blackboard's assertions, further specifics regarding SUNY's evaluation method and selection process were not required to be disclosed in the RFP (*see* OSC Bid Protest Determination, SF-20170111, at pp. 5-6). Moreover, as we concluded above, the scoring methodology, including the scoring rubric, SUNY developed as part of this procurement, was sufficient to meet the applicable legal requirements.

3. Cost Proposal Evaluation Methodology

Blackboard alleges SUNY failed to consider the significant costs and disruption caused by a transition to D2L and that "the minimum total migration costs" for D2L would be over \$3 million more than for Blackboard (*see* Appeal, at pp. 15-16). Blackboard further contends that "[t]here are substantial additional costs in time, money and goodwill of a D2L migration" including, among others, "at least 24 months" for all schools to migrate, "system-wide training required when introducing a new system," and "lost functionality and required workarounds where D2L is unable to seamlessly migrate or offer seamless functionality" (Appeal, at pp. 16-17).¹¹ To refute Blackboard's allegation, SUNY states "Part 3 of the Cost Proposal Submission Form solicited Implementation Costs from all bidders . . . and such costs were factored into the overall Cost Proposal scores" (SUNY Appeal Determination, at p. 7). SUNY further points out "[a]lthough Blackboard received the full 25 points allocated to the Cost Proposal which undoubtedly reflected that as the incumbent vendor its implementation costs might be lower, Blackboard was not the highest scoring bidder overall" (*Id.*).

As stated above, SUNY awarded the contract under the RFP on the basis of best value which "optimizes quality, cost and efficiency, among responsive and responsible offerers" and "[s]uch basis shall reflect, wherever possible, objective and quantifiable analysis" (SFL § 163(1)(j)). A "best value" determination shall "be based on clearly articulated procedures which require . . . a balanced and fair method, established in advance of the receipt of offers, for evaluating offers and awarding contracts" (SFL § 163(2)(b)).

The RFP specified that the cost proposal would comprise 25% of an offeror's score (*see* RFP, *Cost Evaluation*, at p. 8). Offerors were provided with a Cost Proposal Submission Form with detailed instructions and a comprehensive list of specific categories to submit pricing for (*see* RFP Attachment, *Cost Proposal Submission Form*).¹² Notably, costs for implementation were sought, including for initial training, data conversion, and implementation costs on a per-campus basis (*Id.*). SUNY advised that the pricing provided in the cost proposal would be "applied to a conceptual model of projected use and based on a phased implementation" (RFP,

¹¹ As an initial matter, if we were to accept Blackboard's argument that the costs of transitioning to a new vendor are insurmountable, an agency would never be permitted to award a procurement contract to any vendor other than the incumbent. This runs contrary to State procurement requirements that a State agency employ a "reasonable process for ensuring a competitive field" and provide "a fair and equal opportunity for offerers to submit responsive offers" (SFL § 163(9)(a)).

¹² Specific categories of pricing included: software license cost, hosting service cost, content storage costs, environment costs per year, annual costs for client support manager, support services costs, implementation costs, etc. Within these categories, additional pricing categories were itemized further.

Cost Evaluation, at p. 8). The offeror with the lowest cost would receive the maximum available points and other offerors would be scored proportionately using a predetermined formula (*Id.*). Clearly, SUNY considered implementation costs applicable when migrating to a new vendor in its cost proposal evaluation. Blackboard has provided nothing to support its additional claim that SUNY failed to account for disruption caused by transition to D2L. Thus, we are satisfied SUNY evaluated the cost proposals according to the RFP.

Technical Proposal Scoring

Blackboard asserts SUNY's evaluation of Blackboard's technical proposal demonstrates SUNY's "irrational failure to recognize the unparalleled capabilities of Blackboard Data" (Appeal, at p. 23). More specifically, Blackboard contends that SUNY "made a number of [] arbitrary findings when it evaluated various aspects of Blackboard's technical proposal" including,

- (1) SUNY "fail[ed] to reasonably consider [Blackboard's] independent third party-validated reports and unique Ally solution" when evaluating Blackboard's accessibility proposal. Blackboard contends that it should have been awarded "full credit" (4.0 points) and "it was unreasonable for the evaluators to conclude otherwise" (awarding 2.5 points);
- (2) SUNY "fail[ed] to fully credit Blackboard's demonstrated capabilities" when evaluating Blackboard's demonstration. Blackboard contends that, as it "fully executed each of the required scripts, it was unreasonable for the evaluators to conclude that Blackboard should only receive 28.9 points [out of 45.0 possible] for its demonstration because it executed them in the most logical sequence for Blackboard's platform [rather than in the demonstration script order provided by SUNY]";¹³
- (3) The low rating¹⁴ Blackboard received for its multi-tenant hosting capability was irrational (*see id.*, at pp. 18-23).

In essence, Blackboard claims that, based on these shortcomings in SUNY's technical evaluation, Blackboard was awarded fewer technical points than it deserved. SUNY responds that it "used a robust instrument to comprehensively evaluate the technical aspects of each bidder's accessibility options . . . [and Blackboard] achiev[ed] a score that exceeded the RFP's requirements for enhanced functionality" (SUNY Appeal Determination, at p. 8). SUNY further responds, with respect to the demonstration, that "the script instructions contained in the RFP . . . cautioned bidders that any failure 'to follow scripts may not provide evaluators an accurate view of Solution's functionality which may negatively impact scoring'" and "any points that Blackboard may have lost were due to [Blackboard's] actions and not a result of any improper, unreasonable or negligent act on SUNY's part" (*Id.*, at pp. 9 (citing and affirming SUNY Protest Determination)). With respect to Blackboard's multi-tenant hosting capabilities, SUNY responds that "evaluators provided positive comments" and "a reduction in Blackboard's score, if any, is more likely due to Blackboard's Demonstration deficiencies" (*Id.*, at p. 12).

¹³During Blackboard's demonstration, SUNY made multiple requests to Blackboard to follow the script and Blackboard's failure to follow the order of the script caused confusion among the evaluators (*see* SUNY Protest Determination, at p. 3).

¹⁴ Blackboard received 2.0 out of 3.0 possible points for the "Multi-Tenant" criterion, and 1.0 out of 2.0 possible points for the "Hosting" criterion.

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

Our review of the procurement record indicates SUNY scored Blackboard's technical proposal according to the clearly articulated criteria set forth in the RFP and used the detailed scoring rubric that was crafted prior to receipt of proposals. Therefore, we will not disturb the technical scores SUNY awarded to Blackboard.

Clarification of Functional Requirements Form

Blackboard alleges that when it "erroneously submitted an earlier version of the amended Functional Requirements form with its proposal" SUNY should have "alert[ed] Blackboard to the clerical error" by requesting "clarification" from Blackboard (Appeal, at p. 22). Blackboard asserts that SUNY's failure to seek such "clarification" from Blackboard was "not a fair process" and resulted in a lower technical score for Blackboard (*Id.*). SUNY responds that the amended form "sought new, supplemental and material information" and "could not be characterized as a clerical matter;" instead, "a revision to the Form would be a material change in Blackboard's proposal" (SUNY Appeal Determination, at p. 11). SUNY further provides that pursuant to State Finance Law 163(9)(c), "[r]evisions . . . can only be sought from 'all offerers'" (*Id.*).

The State Finance Law provides State agencies with the authority to seek clarifications from proposers "for purposes of assuring a full understanding of responsiveness to the solicitation requirements" and SUNY reserved the right to seek clarifications in the RFP (*see* SFL § 163(9)(c); RFP, *Cost Proposal Submission Instructions*, at p. 10). Moreover, an agency's decision as to whether to seek a clarification is discretionary.

SUNY stated the amended Functional Requirements form contained new, supplemental, and material information, and "Blackboard's submission of the incorrect [Form] could not simply have been rectified by a clarification" (SUNY Protest Determination, at p. 5). Furthermore, SUNY determined "[t]he difference between the original and amended [Forms] was a request for additional information to support some of the stated requirements" (*Id.*). Therefore, allowing Blackboard to submit a revised Functional Requirements form would not have been a clarification of its initial bid, but rather a supplementation of its bid to conform the bid to the RFP requirements. It is fully within SUNY's discretion not to seek a clarification in this instance. Additionally, our review of the procurement record confirmed the amended Functional Requirements form sought additional information from offerors. Based on the foregoing, we have no basis to disturb SUNY's decision not to seek a clarification.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the contract award by SUNY. As a result, the Appeal is denied and we are today approving the SUNY / D2L contract for a digital learning environment.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Softheon, Inc. with respect to the procurement of an Asset Verification System conducted by the New York State Department of Health.

**Determination
of Bid Protest**

SF-20210101

Contract Number – C036155

December 1, 2021

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Health (DOH) for a web-based Asset Verification System (System). We have determined the grounds advanced by Softheon, Inc. (Softheon) are insufficient to merit overturning the contract award made by DOH and, therefore, we deny the Protest. As a result, we are today approving the DOH contract with Public Consulting Group, LLC (formerly known as Public Consulting Group, Inc.) (PCG) for the System.

BACKGROUND

Facts

DOH is responsible for overseeing the New York State Medicaid Program, the State's largest payer of health care and long-term care (*see* Request for Proposals (RFP), Section 2.1, at pp. 4-5). To assist with this responsibility, DOH is also tasked with verifying Medicaid Program eligibility, which includes asset and real property verification (*Id.*). On February 10, 2020, DOH issued an RFP seeking to award one contract to a vendor to develop, implement, and operate the System for the New York State Medicaid Program which would search for and provide verification of assets and real property owned by Medicaid applicants and recipients and/or their spouses (*see* RFP, Section 4.1, at p.7).

The RFP provided that the contract would be awarded on the basis of best value, with the technical proposal worth 70% of the offeror's total score and the cost proposal worth 30% of the offeror's total score (*see* RFP, Section 8.1, at pp. 30-31). A Technical Evaluation Committee would score all responsive proposals, and each individual Committee member's scores would be averaged to calculate the technical score for each offeror (*see* RFP, Section 8.3, at p. 31). A Cost Evaluation Committee would score cost proposals based on a maximum of 30 points, with the maximum number of points (30) given to the proposal with the lowest all-inclusive not-to-exceed maximum price (*see* RFP, Section 8.4, at p. 31). Other responsive cost proposals would receive a proportionate cost score based on their relation to the lowest priced cost proposal, using a predefined formula provided in the RFP (*Id.*). The offeror with the highest composite score, a

combination of the technical and cost scores, would be awarded the contract (*see* RFP, Sections 8.5 and 8.9, at pp. 31-32).

DOH received responsive proposals from Softheon and PCG prior to the proposal due date of May 7, 2020. DOH awarded the contract for the System to PCG, the offeror receiving the highest composite score.

Softheon requested a debriefing which DOH provided on June 18, 2021. On June 25, 2021, Softheon filed a protest with this Office (Protest) and on October 1, 2021, DOH responded to the Protest (Answer).

Comptroller's Authority and Procedures

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

In carrying out this contract approval responsibility, OSC has promulgated the Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency.¹ This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no protest process engaged in at the department level, the Protest is governed by section 24.4 of the OSC Protest Procedure.

In the determination of the Protest, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by DOH with the DOH/PCG contract;
2. The correspondence between this Office and DOH arising out of our review of the proposed DOH/PCG contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
 - a. Softheon's Protest; and
 - b. DOH's Answer.

¹ 2 NYCRR Part 24.

ANALYSIS OF THE PROTEST

Protest to this Office

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

1. PCG is not a sole source provider of Asset Verification System services and, therefore, this contract award should be the result of an open bid;²
2. The RFP did not comply with New York State Procurement Guidelines because DOH did not conduct a service demonstration and presentation, reference check, vendor site inspection or interview with Softheon, and, as a result, Softheon did not have the opportunity to fully present its products and services to DOH;
3. PCG received an unfair advantage since PCG, as incumbent, had full opportunity to present its services while working with DOH under the current contract; and,
4. In its Protest, Softheon provides detailed responses to feedback DOH provided at the debriefing, and requests that its technical proposal be rescored.

DOH's Response to the Protest

In its Answer, DOH contends the Protest should be rejected and the award upheld on the following grounds:³

1. DOH awarded the contract based on best value with allocations of 70% for the technical score and 30% for the cost score in accordance with the RFP;
2. DOH's prior contract extension with PCG for Asset Verification Services was not protested and is not related to this current procurement;⁴
3. New York State Procurement Guidelines do not require DOH to provide bidders in any procurement with an opportunity for a demonstration and DOH was able to successfully evaluate written technical proposals without a presentation or interview;

² Softheon contends that it had recently "unsuccessfully protested the 'sole source' of AVS services award made previously to [PCG by DOH]" and that "[f]ar from being a single viable source, PCG is simply a competitor of Softheon" (Protest, at p. 2). While this Office has not granted a sole source exemption for PCG to contract with DOH for AVS services, this Office did approve an extensions of DOH's current contract with PCG on a single source basis to allow DOH additional time to conduct a competitive procurement pursuant to the RFP. Furthermore, no protest was filed with this Office in connection with the approval of the extension, and, in any event, approval to extend the current contract is outside the scope of this Protest. Since the contract under the RFP that is the subject of the current Protest was awarded pursuant to a competitive process, this claim will not be addressed herein.

³ DOH also alleges Softheon submitted additional documentation with its Protest in violation of SFL § 139-j ("Procurement Lobbying Law"), including a marketing document entitled "Softheon -We Are New York" and a letter from New York State Assemblyman Steven Englebright (*see* Answer, at p. 7). However, such items are not violations of Procurement Lobbying Law. Softheon's marketing document is exempt from the requirements of the Procurement Lobbying Law because it was submitted to OSC with a protest, pursuant to the exemption set forth in SFL § 139-j (3)(a)(7)(c). Likewise, the requirements of the Procurement Lobbying Law do not apply to the Assemblyman's letter per SFL § 139-j(4). In any event, DOH's allegations of violations of SFL § 139-j against Softheon do not impact our review of Softheon's Protest grounds in this determination.

⁴ *See* fn. 2, *supra*.

4. DOH scored technical proposals solely on the information provided therein, a fair opportunity was provided to all offerors, and PCG did not have an unfair advantage; and,
5. Softheon may not submit a revised proposal to DOH using feedback DOH provided at the debriefing.

DISCUSSION

RFP Compliance with SFL

Softheon “request[s] a re-review” of its proposal alleging that “[a] second review may easily change the outcome of the bid, particularly since **Softheon submitted the lower cost bid**” (Protest, at p. 1 (emphasis in original)). DOH asserts that “the award from this procurement was based on best value[,]” “consistent with New York State Procurement Guidelines and State Finance Law[,]” and “with allocations of 70% [for] [t]echnical [scoring] and 30% [for] [c]ost [scoring]” (Answer, at p. 5). DOH notes that “[b]est value . . . is [] not solely based on price” and therefore, “just because a lower priced proposal is received [] does not indicate the proposal will be awarded the contract” (*Id.*).

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 offerors” and “[s]uch basis shall reflect, wherever possible, objective and quantifiable analysis.” Thus, best value does not require a contract be awarded to the lowest-priced offeror even though cost is considered as part of the evaluation process.

A best value determination shall “be based on clearly articulated procedures which require . . . a balanced and fair method, established in advance of the receipt of offers, for evaluating offers and awarding contracts” (SFL § 163(2)(b)). Furthermore, [w]here the basis for award is the best value offer, the state agency shall document, in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria, which whenever possible, shall be quantifiable, and the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted” (SFL § 163(7)).

Here, the RFP provided for the contract to be awarded on the basis of best value pursuant to the requirements of the SFL (*see* RFP, Section 8.1, at p. 30). In addition, the RFP issued by DOH clearly sets forth the evaluation criteria for the cost and technical components, and the relative scoring weight of each of these components, with 70% for technical and 30% for cost (*see* RFP, Sections 6.2, 6.3 and 8.1, at pp. 24-29, 30-31).

Our review of the procurement record confirms that DOH evaluated the proposals in accordance with the criteria set forth in the RFP and, as required by the RFP, awarded the contract to PCG, the offeror submitting the proposal receiving the highest composite score. Based on the above, the RFP met the applicable statutory requirements.

RFP Compliance with New York State Procurement Guidelines

Softheon “protests the fact that standard NYS procurement guidelines [for evaluating technical proposals] have not been met [by the RFP]” because Softheon was not permitted “product or service demonstrations and presentations . . . and interviews of key proposed managers and technical experts” (Protest, at p. 2). As a result, Softheon claims it “was not granted the opportunity to fully present its products and services to the procurement team” (*Id.*). In response, DOH asserts it “is not required to allow bidders, in any procurement, to provide a demonstration of the organization’s ideas and/or, in this case, software/technology products or solutions” (Answer, at p. 6). DOH further contends that “[it was] able to successfully evaluate and grasp all bidders’ written proposals without a need for a presentation or interview” (*Id.*).⁵

The New York State Procurement Guidelines state:

As a preliminary step, proposals should be reviewed for compliance with the minimum mandatory technical requirements set forth in the RFP. After the preliminary review, the technical proposal evaluation must be conducted as documented in the RFP and the evaluation instrument. The evaluation team members apply scores to the pre-determined criteria and subcriteria if applicable. Scoring is based on information provided in the submitted proposal. However, additional factors, as established in the RFP and/or the evaluation instrument, *may* be considered. Examples include:

- Product or service demonstrations and presentations;
- Reference checks (staff and/or company performance);
- Vendor site inspections;
- Interviews of key proposed managers and technical experts;
- Written proposal clarifications; and
- Rating services (such as Moody’s or Dun & Bradstreet)

(see New York State Procurement Guidelines, at pp. 36-37 (emphasis added)).

Contrary to Softheon’s claim, the New York State Procurement Guidelines do not require that the listed opportunities (including product/service demonstrations or presentations, and interviews) be provided to bidders. Moreover, the Guidelines “are designed to assist State agencies in making procurements efficiently and effectively by providing agency program and fiscal staff with a source of basic, systematic guidance about State procurement policies and practices” and do not have the same legal authority as statutes, rules and regulations (see New York State Procurement Guidelines, at p. 1). As determined above, the RFP met all applicable statutory requirements. Consequently, there is no merit to this claim.

⁵ DOH did, in fact, reserve the right “to interview proposed project participants...to allow evaluators to validate the Bidder’s experience and qualifications” although whether to conduct such interviews was entirely within DOH’s discretion (RFP, Section 8.6, at p. 31).

Unfair Advantage

Softheon further alleges that unlike Softheon, “PCG would have had full opportunity to present its version of [the System] while interacting with NYS on other projects” (Protest, at p. 2). In response, DOH contends that it “provided a fair opportunity to all bidders, and rejects the allegation that PCG had an unfair advantage” (Answer, at p. 7). DOH asserts that “evaluators review[ed] and score[d] written technical proposals based solely on the information provided in those proposals and no other outside information or knowledge [was] considered during this process” (*Id.*).

There is no evidence in the procurement record, nor has Softheon provided any evidence, to indicate that the awardee, PCG, had any additional opportunity to present its version of the System to DOH while working on other projects. As stated above, System demonstrations were not required by the RFP. Furthermore, review of the procurement record indicates that all offerors’ technical proposals were scored using the same criteria as outlined in the RFP and DOH’s Technical Proposal Instructions, all offerors’ technical proposals were scored using the same technical evaluation tool, none of the offerors had any additional opportunity to present their version of the System to DOH outside of the procurement process, and evaluators did not consider any outside criteria in their evaluations. Therefore, there is no evidence to support Softheon’s claim that PCG received an unfair advantage in the evaluation process.

Technical Proposal Evaluation

Softheon devotes the majority of the Protest to providing detailed responses to DOH’s debriefing feedback and further requests a “re-review and re-scoring of [its proposal]” (*Id.*, at pp. 2-6). In response, DOH contends that “[u]sing [DOH evaluator] feedback, . . . Softheon attempts to submit a revised proposal for reconsideration” (Answer, at p. 7). DOH further contends that it “would be flatly prohibited from considering a proposal that has been revised based on [DOH’s] feedback” and doing so would “violate the letter and intent of [State Finance Law §] 163” (*Id.*).

First and foremost, Softheon’s request for a re-review and re-scoring of its proposal, to the extent Softheon has submitted additional technical proposal information in the Protest, is inconsistent with the competitive bidding requirements of SFL § 163 as well as the explicit terms of the RFP.⁶

Next, we turn to whether DOH properly scored Softheon’s technical proposal. As we have enunciated in prior bid protest determinations, this Office is unwilling to substitute its judgment for that of an agency in matters within an agency’s realm of expertise where the agency scored technical proposals “according to the pre-established technical proposal evaluation tool” (see OSC Bid Protest Determination SF-20170192, at p. 7). We have long recognized that evaluators bring their own subjective views to the evaluation process and may interpret information in proposals differently. However, this Office “will generally not disturb a

⁶ The RFP directs that “**The proposal must be received by [DOH] no later than [May 7, 2020]. Late bids will not be considered**” (RFP, Section 7.0, at p. 30). The RFP also indicates “ . . . no Bidder will be allowed to alter its proposal or add information after [May 7, 2020]” (RFP, Section 8.1, at p. 30).

rationally reached determination of a duly constituted evaluation committee” unless “scoring is clearly and demonstratively unreasonable” (OSC Bid Protest Determination SF-20160188, at p. 8 (upholding evaluation committee’s technical scores where “review of the procurement record confirms the evaluators scored the proposals in a manner consistent with the evaluation/scoring instructions”); *see* OSC Bid Protest Determination SF-20200069, at p. 6; *see also* OSC Bid Protest Determination SF-20210006, at p. 6).

The RFP sets forth specific criteria to be scored in technical proposals (*see* RFP, Section 6, at pp. 24-29). DOH crafted detailed technical proposal evaluation instructions and an evaluation tool, including a scoring rubric, prior to receipt of proposals. DOH, as the State agency responsible for the administration and management of the Medicaid Program for which the System is needed, possesses the expertise to score proposals submitted in response to the RFP. Our review of the procurement record indicates that DOH scored Softheon’s technical proposal according to the clearly articulated criteria set forth in the RFP and consistent with DOH’s Technical Proposal Instructions & Evaluation Tool. Therefore, this Office will defer to DOH regarding its scoring of Softheon’s technical proposal and we will not disturb the technical scores DOH awarded to Softheon.

CONCLUSION

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

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Continental Service Group, Inc. with respect to the procurement of collection agency services conducted by the State University of New York at Albany.

**Determination
of Appeal**

SF-20210121

Contract Numbers – C210002, C210003, C210004
and C210005

January 7, 2022

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the State University of New York at Albany (UAlbany) for certain collection agency services, as described below. We have determined the grounds advanced by Continental Service Group, Inc. (ConServe) are insufficient to merit overturning the contract awards made by UAlbany and, therefore, we deny the Appeal. As a result, we are today approving the contracts with National Credit Management (NCM) and Recovery Management Services, Inc. (RMS) for collection agency services.

BACKGROUND

Facts

The State University of New York Student Loan Service Center (SLSC) operates under the administration of UAlbany and is responsible for servicing Federal campus-based student loans awarded at twenty-nine SUNY campuses (*see* RFP, Section 1, at p. 1). UAlbany issued a request for proposals (RFP) on April 7, 2021, on behalf of itself and the SLSC, seeking “to contract with two collection agencies for the referral of delinquent Federal campus-based student loans and past-due education receivable accounts” (RFP, Section 1, at p. 1 and Section 16, at p. 16).

UAlbany employed a best value methodology to achieve the stated goal of the RFP, which was to “enable [UAlbany] to determine which contractors are best able to provide collection services for the campus-based loan programs and delinquent [accounts receivable] in compliance with all applicable rules and regulations” (RFP, Section 20, at p. 22). The RFP provided proposals would be scored based on the following criteria: contractor sustainability (15%); references (15%); information security (20%); collection procedures and example correspondence (20%); and experience in education-related and multi-campus collections services (30%) (*see* RFP, Section 20, at p. 22). The RFP noted that “an award will be made to the two contractors with the highest aggregate score” based on these criteria (*see* RFP, Section 20, at p. 22). UAlbany also established “a preset collection fee structure” that would apply uniformly to all awarded contractors; as such, this was not part of the proposal evaluation (*see* RFP, Section 2, at p. 5).

UAlbany received responsive proposals from multiple offerors including ConServe, NCM, and RMS prior to the proposal due date of May 7, 2021. UAlbany awarded contracts for collection agency services to NCM and RMS, the two offerors receiving the highest aggregate scores. NCM and RMS were each awarded two contracts, including one contract each with UAlbany, on behalf of SLSC, for collection services for delinquent Federal campus-based student loans and one contract each with UAlbany for past-due accounts receivable.

ConServe requested a debriefing which UAlbany provided on July 1, 2021. Subsequently, ConServe protested the awards to UAlbany and SLSC on July 8, 2021 (Protest to UAlbany), and UAlbany denied the protest on July 23, 2021 (UAlbany Protest Determination). ConServe then filed an Appeal with this Office on August 10, 2021 (Appeal), and on August 24, 2021, UAlbany responded to the Appeal (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 UAlbany with the NCM and RMS contracts with UAlbany or UAlbany, on behalf of SLSC, as the case may be;
2. the correspondence between this Office and UAlbany arising out of our review of the proposed NCM and RMS contracts with UAlbany or UAlbany, on behalf of SLSC, as the case may be; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Protest to UAlbany;
 - b. UAlbany Protest Determination;
 - c. Appeal; and

¹ 2 NYCRR Part 24.

d. Answer.²

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, ConServe challenges the procurement conducted by UAlbany on the following grounds:³

1. UAlbany impermissibly used criteria to evaluate ConServe's proposal that were not disclosed in the RFP, contrary to New York State Finance Law; and
2. UAlbany unreasonably and arbitrarily scored ConServe's proposal based on evaluation criteria that was different from those disclosed in the RFP.

UAlbany Response to the Appeal

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

1. The RFP and its evaluation criteria comply with applicable State law, policy, and guidelines governing UAlbany procurements; and
2. ConServe was not penalized, downgraded or otherwise excluded from a fair, competitive evaluation and UAlbany correctly scored ConServe's proposal based on the proposal responses.

DISCUSSION

RFP Disclosure of Evaluation Criteria

ConServe first alleges that UAlbany "applied evaluation criteria different than those identified in the RFP" (Appeal, at p. 7). Specifically, ConServe maintains that UAlbany "used unquantifiable and unstated evaluation criteria when evaluating proposals under the RFP" (*Id.*). ConServe further expounds "[t]he RFP is clear that UAlbany was able to evaluate proposals of qualified offerors based on only: (1) the Five Evaluation Criteria [identified in the RFP]; and (2) the Mandatory Requirements [set forth in the RFP]. The evaluation of proposals based on any factors beyond these specifically stated evaluation criteria constitutes the application of unstated and unidentified evaluation criteria, which equates to procurement error" (Appeal, at p. 6, emphasis in original). In response, UAlbany asserts the RFP adhered to applicable New York State law, policy, and guidelines (*see* Answer, at p. 2). UAlbany maintains it was "not required

² UAlbany's Answer was not paginated. For purposes of this Determination of Appeal, this Office includes page numbers as they would have appeared, if included.

³ ConServe also asserts the UAlbany Protest Determination is fatally flawed on several grounds and requests such Determination be overturned. We note that this Office conducts a *de novo* review of the procurement record and conducts its own analysis of the facts pertaining to the procurement.

to clearly state nor specifically identify or quantify the evaluation criteria further in the RFP solicitation than what was presented within the RFP solicitation” (UAlbany Protest Determination, at p. 3).

SFL § 163(9)(b) provides that the “solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the *general manner* in which the evaluation and selection shall be conducted. Where appropriate, the solicitation shall identify the *relative importance and/or weight of cost and the overall technical criterion* to be considered by a state agency in its determination of best value” (emphases added).

Additionally, the New York State Procurement Guidelines indicate:

The RFP must present the criteria that will be used for the evaluation of proposals. At a minimum, the agency must disclose in the RFP the relative weights that will be applied to the cost and technical components of the proposals. An example would be: 30 percent for cost and 70 percent for technical.

An agency may elect to include in the RFP a more detailed breakdown of the evaluation criteria, such as specifying the relative weights for detailed categories (e.g., Experience = 20 percent, Staffing = 15 percent, energy efficiency = 10 percent, and so forth).

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

The RFP requires offerors to meet or exceed the mandatory requirements set forth throughout the RFP in order to be responsive (*see* RFP, Section 21, at p. 22). In addition, the RFP clearly outlined the general manner in which the evaluation method and selection process would be conducted, including the criteria to be scored, and the weight to be allocated to each criterion. Specifically, the RFP lists five general categories and the relative weight in the overall evaluation each area will be given: 15% for contractor sustainability, 15% for references, 20% for information security, 20% for collection procedures and example correspondence, and 30% for experience in education-related and multi-campus collections services (*see* RFP, Section 20, at p. 22).

Contrary to ConServe’s assertions, applicable law and guidelines do not require further specifics regarding the criteria used in UAlbany’s evaluation method and selection process to be disclosed in the RFP. Thus, we are satisfied the RFP complies with applicable law and guidelines set forth above.

Evaluation of Proposals

Next, ConServe alleges that UAlbany “failed to comply with applicable State Finance Law when it evaluated proposals...” (Appeal, at p. 7). As support, ConServe claims “UAlbany

unreasonably and arbitrarily downgraded ConServe's proposal based on evaluation criteria different than those disclosed in the RFP" (Appeal, at p. 2). UAlbany states "[n]o responder was penalized, downgraded or otherwise excluded from a fair, competitive evaluation [and] ConServe provided no legitimate, sustainable, or tangible law, policy or guideline to support . . . its appeal" (Answer, at p. 2).

SFL § 163(10) requires that service contracts be awarded based on 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" and "[s]uch basis shall reflect, wherever possible, objective and quantifiable analysis."

SFL § 163(7) provides that "[w]here the basis for award is the best value offer, the state agency shall document, in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria, which whenever possible, shall be quantifiable, and the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted." A best value determination shall "be based on clearly articulated procedures which require . . . a balanced and fair method, established in advance of the receipt of offers, for evaluating offers and awarding contracts" (SFL § 163(2)(b)).

As stated previously, the RFP outlines how the evaluation of proposals would be conducted and sets forth five general categories of criteria to be scored with each category's corresponding weight. Furthermore, our review of the procurement record shows the proposals were scored using an evaluation tool based on the five general categories in the RFP and crafted in advance of the initial receipt of proposals. Thus, UAlbany evaluated the proposals in accordance with applicable law.

Scoring of ConServe's Proposal

ConServe further asserts UAlbany scored ConServe's proposal in an arbitrary and capricious manner (*see* Appeal, at pp. 2-3, p. 7 and p. 20). In essence, ConServe claims that UAlbany awarded fewer points to ConServe's proposal in three criteria than it deserved. As to the first criteria, UAlbany responds it "was within [UAlbany's] right to assign all, some or none of the 15 credits for [the contractor sustainability] category based on ConServe's response [and] ...no subjectivity to the merits were applied, simply that ConServe identified 4 current litigations" (Answer, at p. 1). With respect to the second criteria, UAlbany states "ConServe did not provide a response to the question as to whether or not it ever had an internal or external data breach [in the information security category]" (*Id.*, at 2.). As to the third criteria, UAlbany responds "ConServe's aggregate experience, in 'this business' as identified in [ConServe's] proposal response [in the experience in education-related and multi-campus collections category] was less than 30%" (*Id.*). UAlbany asserts ConServe's entire proposal was "scored solely based on the information ConServe submitted in their proposal in relation to RFP documented criteria for proposal submission" (UAlbany Protest Determination, at p. 5).

Generally, this Office gives significant deference to a State agency in matters within that agency's expertise and, furthermore, is unwilling to substitute its judgment for that of an agency in matters within an agency's realm of expertise where the agency scored technical proposals in

accordance with a pre-established technical proposal evaluation tool (*see* OSC Bid Protest Determination SF-20170192, at p. 7). We have long recognized that evaluators bring their own subjective views to the evaluation process and may interpret information in proposals differently. However, this Office “will generally not disturb a rationally reached determination of a duly constituted evaluation committee” unless “scoring is clearly and demonstratively unreasonable” (OSC Bid Protest Determination SF-20160188, at p. 8 (upholding evaluation committee’s technical scores where “review of the procurement record confirms the evaluators scored the proposals in a manner consistent with the evaluation/scoring instructions”); *see* OSC Bid Protest Determination SF-20200069, at p. 6; *see also* OSC Bid Protest Determination SF-20210006, at p. 6).

Our review of the procurement record indicates UAlbany scored ConServe’s proposal according to the criteria set forth in the RFP and used the evaluation tool that was crafted prior to receipt of proposals. Moreover, the procurement record reasonably supports the scores the evaluators assigned to ConServe’s proposal. Therefore, we have no basis to disturb the scores UAlbany awarded to ConServe.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the contracts awarded by UAlbany. As a result, the Appeal is denied and we are today approving the NCM and RMS contracts with UAlbany and UAlbany, on behalf of SLSC, for collection agency services.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

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

**Determination
of Appeal**

SF-20210158

Procurement Record – OPD01-0000292-3660243

November 10, 2021

The Office of the State Comptroller has reviewed the above-referenced grant award made by the New York State Office for People with Developmental Disabilities (OPWDD) for Crisis Services for Individuals with Intellectual and/or Developmental Disabilities and Resource Center(s) for OPWDD’s Region 2 (CSIDD). We have determined the grounds advanced by Springbrook NY, Inc. (Springbrook) are insufficient to merit overturning the grant award made by OPWDD to Young Adult Institute, Inc. (YAI) and, therefore, we deny the Appeal.

BACKGROUND

Facts

On June 18, 2021, OPWDD issued a request for applications (RFA) seeking applications from not-for-profit providers of CSIDD for its Region 2 (*see* RFA, Section 1.1.1, at p. 5).¹ Region 2 includes twenty New York State counties, covering the Broome, Central New York, and Sunmount areas (*Id.*, Section 1.3.1.2, at p. 6). OPWDD intended to award one grant contract as a result of the RFA (*Id.*, Section 1.1.1, at p. 5). The awardee would be required to become certified by the Center for START Services at the Institute on Disability at the University of New Hampshire (START Center) (*Id.*, Section 1.3.2, at p. 6).

A team of OPWDD staff evaluated applications and were permitted to seek technical assistance from representatives of the START Center, if needed (*Id.*, Section 7.1.3, at p. 34). The RFA provided for a contract to be awarded based on a “combination of technical merit and cost that would most benefit OPWDD” (*Id.*). The applicant with the highest final composite score (up to 100 points, including the technical, cost, and interview scores minus any penalty points) would be awarded the grant contract (*Id.*, Sections 7.7 and 7.8, at pp. 37-38). The technical proposal was worth up to 70 points, and included the following scoring criteria: philosophy and mission (4 points); vision and goal (4 points); proposed staff (4 points); experience (6 points); description of services (30 points); technology (4 points); development plan for services (4 points); property for

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

resource center use (10 points); and, diversity practices (4 points) (*Id.*, Sections 6.7 and 7.3, at pp. 27-32, 35). The cost proposal was worth a maximum of 20 points and considered the following factors: lowest cost (5 points); understanding of annual expenditure requirements for clinical team, start-up and non-personal costs (5 points); whether the applicant utilized correct and reasonable NPS/Admin fees (5 points); and, whether the applicant's budget reflected an adherence to a phased-in staffing pattern (5 points) (*Id.*, Sections 6.8 and 7.4, at pp. 32-33, 35). Penalties could be imposed in the form of a points deduction² if an applicant's required cover letter was incomplete in any material respect (*Id.*, Sections 6.6.2.1 and 7.2.2, at pp. 26, 35). Applicants whose proposals earned the three highest intermediate scores (up to 90 points including the technical and cost scores minus any penalty points) would advance to an interview, worth up to 10 points (*Id.*, Sections 7.5 and 7.6, at p. 36). OPWDD also reserved the right to adjust the technical score based on material differences OPWDD identified between the technical proposal and the substance of the interview (*Id.*, Section 7.6.7, at p. 37).

Applications were due on July 28, 2021, a one-week extension of the original due date of July 21, 2021. YAI, Springbrook, and another vendor submitted applications by the due date and OPWDD awarded the grant contract to YAI, the applicant with the highest final composite score. Springbrook requested a debriefing, which was held with OPWDD on August 25, 2021.

Thereafter, on August 31, 2021, Springbrook submitted a protest of the grant award to OPWDD (Protest to OPWDD) pursuant to OPWDD's bid protest policy, as contained in the RFA (*Id.*, Section 8.16, at pp. 49-50). OPWDD denied Springbrook's protest in a written determination on September 28, 2021 (OPWDD Determination). Springbrook then appealed such denial to this Office on October 12, 2021 (Appeal). OPWDD submitted a response to the appeal on October 25, 2021 (OPWDD Answer).

Comptroller's Authority and Procedures

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

In carrying out this contract approval responsibility, OSC has promulgated a Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency.³ This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because this is an appeal of an agency protest decision, the Appeal is governed by section 24.5 of the OSC Protest Procedure.

In the determination of the Appeal, this Office considered:

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

² The RFA provided that "[t]wo points will be deducted for each missing element and for each instance where the prescribed format is not followed" (RFA, Section 7.2.2, at p. 35).

³ 2 NYCRR Part 24.

2. the correspondence between this Office and OPWDD arising out of our review of the proposed OPWDD/YAI grant award; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Springbrook's Protest to OPWDD;
 - b. OPWDD's Determination;
 - c. Springbrook's Appeal; and
 - d. OPWDD's Answer.

ANALYSIS OF THE APPEAL

Appeal to this Office

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

1. The timeframe provided by OPWDD within which to submit applications provided an unfair advantage to providers with CSIDD contracts in regions other than Region 2, such as YAI, who could utilize a prior, successful technical proposal as part of their current application;
2. The RFA provided an advantage to providers with CSIDD contracts in regions other than Region 2 by failing to evaluate regional linkages and the ability to sustain services after the contract term;
3. The fact that OPWDD conducted interviews on the same day OPWDD planned to award the contract makes the interviews appear to be a formality and therefore, the contract would be awarded based on the technical and cost scores;
4. YAI's existing relationships with OPWDD evaluation team members, as a current CSIDD provider in Region 4, and the START Center, provided YAI with an unfair advantage and undermined the independence of OPWDD evaluators in the review of YAI's technical proposal;
5. YAI is not a current Region 2 CSIDD provider and therefore may not have taken into account the need for additional travel and/or personnel costs necessitated by the geography of the region in its cost proposal; and,
6. The appeals process set forth in the RFA does not provide applicants with the proper information needed to appeal a determination.⁴

OPWDD Response to the Appeal

⁴ It is undisputed that Springbrook submitted a timely protest of contract award to OPWDD, OPWDD denied the protest, and Springbrook subsequently submitted a timely appeal of that denial to OSC in accordance with the OSC Protest Procedure. Therefore, because Springbrook has availed itself of all administrative procedures in connection with protesting the contract award, this allegation is rendered moot.

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

1. The timeframe provided by OPWDD within which to submit grant applications was adequate for all interested providers, regardless of whether an applicant had prior experience providing CSIDD;
2. The RFA did evaluate community linkages as part of the technical scoring, and, while not scored, the ability to sustain services for the duration of the contract period was implicit in the RFA;
3. The RFA permitted evaluators to adjust technical scores when the interview revealed a discrepancy with the written technical proposal and adjustments could be made prior to contract award;
4. The OPWDD evaluation team did not seek technical assistance from the START Center for this procurement;
5. OPWDD evaluated the reasonableness of applicants' costs as part of the cost proposal scoring rubric and confirmed with YAI during contract negotiations that it will be providing CSIDD services in Region 2 at the costs in its proposal; and,
6. An error in the RFA regarding the initial bid protest deadline did not prejudice Springbrook since Springbrook timely filed both an initial bid protest with OPWDD and an appeal with OSC.⁵

DISCUSSION

Application Submission Deadline

Springbrook contends that “[t]he timing [] of the technical proposal created an advantage for [YAI] since they currently hold the CSIDD contract in Region 4 [] and were able to utilize their prior successful response as part of their submission to provide CSIDD in Region 2[;]” whereas, “Springbrook had to create a response from scratch” (Appeal, at pp. 2-3). Springbrook further contends that “[f]our weeks was insufficient to truly let providers in Region 2 be able to compete with providers in other Regions who have CSIDD contracts with OPWDD” and “[w]hile OPWDD did provide a one week extension . . . it provided a disadvantage to Springbrook” because “additional time [was not provided] from the outset” (*Id.*, at p. 4). OPWDD maintains the “RFA’s response timeframe provided an adequate response period for all interested providers, regardless of whether they already had experience providing CSIDD services” (OPWDD Answer, at p. 2). OPWDD further submits that “[t]he timeline in the RFA was extended from four (4) weeks to almost six (6) weeks, which is one (1) week shorter than the timeline that was used for the CSIDD RFA in Region 4” (*Id.*).

First and foremost, three applicants submitted applications within the timeframe provided by the RFA, including Springbrook. Despite claiming that the RFA timeframe of nearly 6 weeks was not sufficient, Springbrook did, in fact, complete and submit an application within that allotted timeframe. Springbrook itself concedes that it “met all timelines and requirements” and does not articulate exactly why more time was needed, other than it “would have allowed [Springbrook] more time to work on the technical proposal” (Appeal, at p. 4). Accordingly, we will not disturb

⁵ See fn. 4 *supra*.

OPWDD's determination that the timeline for submission of applications set forth in the RFA, including the extension, was adequate for all interested providers.

Next, Springbrook alleges that the application submission timeline afforded current CSIDD contract holders, such as YAI, an advantage since those applicants could use prior technical proposals to quickly craft a response to the RFA. However, as OPWDD correctly points out, "the technical scoring rubric was not created from previous bidders' responses to previous RFAs. The technical scoring rubric was designed to match the technical score weighting and the overall weight of the technical evaluation contained in [] the RFA" (OPWDD Answer, at p. 1). Thus, an applicant under this RFA could not simply copy a prior technical proposal without assessing whether the proposal was actually responsive to the numerous elements required to be addressed under the RFA (*see* RFA, Section 6.7, at pp. 27-32). Inasmuch as all applicants were given the same time to prepare a technical proposal responsive to the particular criteria set forth in the RFA, we find the application submission timeline did not advantage current CSIDD providers.

Technical Evaluation Criteria

Springbrook states the "description of services and experience counted for more than half of the technical score [] and did not require an applicant to provide community linkages or evidence of sustainability to be successful, even though those factors were clearly outlined in . . . the RFA" (Appeal, at p. 2). Springbrook alleges that, as a result, "[t]he lack of prioritization and/or evaluation [of sustainability beyond the three-year contract] provides an advantage to providers out of Region 2 who are currently offering these services in other OPWDD Regions" (*Id.*, at p. 5). OPWDD contends that it "did score the provision of community linkages, among many other criteria, as part of the technical scoring rubric that was consistent with the scoring weights in the RFA" and "the sustainability of bidders' services was implicit in the RFA – the RFA requested, and bidders proposed to provide sustained CSIDD services for the duration of the contract period" (OPWDD Answer, at pp. 1-2).

The RFA required the technical proposal to include the following regarding community linkages, which was evaluated and scored by OPWDD:

Linkages, outreach and follow-ups. Describe how your agency will:

- Develop formal linkages with local providers in the field;
- Utilize various methods of outreach to become a visible part of the existing network of supports and services; and
- Implement follow-up methods to evaluate effects of treatment strategies.

(RFA, Section 6.7.5.2.2, at p. 28). Thus, the RFA clearly shows that applicants were required to describe community linkages as part of the technical proposal and our review of the procurement record confirms OPWDD scored such criteria.

We now turn to Springbrook's assertion that OPWDD's failure to evaluate an applicant's ability to sustain services after the term of the contract ends advantaged CSIDD providers in other regions. Springbrook's assertion is premised upon the supposition that, without requiring an

applicant to demonstrate sustainability in Region 2, the applicant may discontinue providing CSIDD in Region 2 at the end of the contract (*see* Appeal, at p. 5). By this, Springbrook is assuming that its ability to sustain services in Region 2 is somehow superior to others merely because it currently provides services there; and, by not including sustainability as a technical criterion to be scored, Springbrook is being divested of such recognition. However, CSIDD providers, like YAI, who have been successfully providing services in other regions and showing the ability to sustain such services also demonstrate sustainability. In fact, evaluating sustainability in Region 2 after the contract terminates may actually favor those CSIDD providers that have already been successfully providing these services through established networks, albeit in other regions.

OPWDD notified applicants that “[f]unds made available through this RFA are intended to provide gap funding for a period of three years while the successful applicant matures its program, establishes and builds their caseload” and “will cover the operating cost differences between the successful applicant’s total spending and the amount the agency will receive in Medicaid payments” (RFA, Section 1.3.5.1, at p. 8). Consistent with its stated goal, OPWDD evaluated an applicant’s ability to strengthen its program during the relevant contract period. Moreover, this Office generally defers to agencies in structuring procurements to meet their needs, including choosing evaluation criteria and assigning appropriate point values thereto. In this case, we find no reason to disturb OPWDD’s technical scores.

Interview Process

Springbrook asserts the fact that OPWDD conducted interviews on the same date OPWDD intended to make the contract award undermined the interview process and “makes it seem as though the interview process was a formality and that the contract would be awarded based on the intermediary score which was the combination of the technical and financial” (Appeal, at p. 5). OPWDD responds the RFA permitted evaluators to “adjust the technical scores when information gathered during the interview reveals a discrepancy with the scored written proposal” and, to the extent evaluators noted discrepancies, “they could have adjusted the technical scores that day” (OPWDD Answer, at p. 3). OPWDD states “evaluators did not adjust Springbrook’s technical score because the information shared during the interview did not create a discrepancy with the scored written proposal” (*Id.*).

As stated above, the RFA required OPWDD to interview applicants with the three highest intermediate scores (*see* RFA, Section 7.6, at p. 36). The RFA further provided evaluators “will conduct interviews using a prepared set of questions based on the criteria listed in section 6.7 of this RFA. Each question will be worth a pre-defined number of points” (*Id.*, Section 7.6.4, at p. 36). Finally, the RFA provided OPWDD may, in its sole discretion, adjust a technical score if it determines material differences exist between information elicited at the interview and an applicant’s written technical proposal (*Id.*, Section 7.6.7, at p. 37).

Our review of the procurement record confirms OPWDD conducted the interviews in accordance with the RFA requirements, scored the interviews using a pre-established evaluation tool consistent with the RFA, and included such scores in the final composite score for each

applicant. Moreover, if OPWDD determined an applicant's technical score required adjustment, OPWDD could do so prior to calculating the final composite scores.

Bias in Technical Evaluation Process

Springbrook alleges that “the [OPWDD] Evaluation Team consisted of two individuals [] that would have a relationship and knowledge of CSIDD providers” like YAI, and further, YAI is certified by the START Center, who is able to provide technical assistance to the OPWDD Evaluation Team (Appeal, at pp. 5-6). Springbrook asserts YAI received “an unfair advantage in the review of the technical proposal” as a result of these relationships (*Id.*). OPWDD counters that “[w]hile [the RFA] allowed OPWDD’s evaluators to seek technical assistance from [START Center], none of them did so for this procurement” (OPWDD Answer, at p. 3).⁶ OPWDD adds that “the RFA neither required applicants to be current CSIDD providers nor prohibited current CSIDD providers from submitting applications” and “[p]rohibiting current CSIDD providers from applying would have unnecessarily limited the pool of qualified applicants” (*Id.*).

This allegation is based on the assumption that an evaluator who knows an applicant is de facto biased in favor of such applicant and will therefore not be able to objectively evaluate applications. To the contrary, the RFP and evaluation process was structured so as to provide every applicant with an equal opportunity to describe how it would meet the requirements of the RFA. All applications were scored in accordance with a predefined evaluation instrument consistent with the criteria set forth in the RFA. Springbrook provides no support for this allegation of bias, nor is there any evidence in the procurement record to suggest that evaluation of the applications involved any bias towards a particular applicant. Therefore, we find no merit to Springbrook’s claim.

Reasonableness of YAI’s Cost Proposal

Based on its understanding that YAI submitted a lower cost proposal, Springbrook asserts YAI’s cost proposal “may not have taken into account the need for additional travel and/or personnel costs, especially since the pandemic and the current staffing shortages are being experienced across Region 2” (Appeal, at p. 3). OPWDD counters that it “evaluated the reasonableness of applicants’ costs as part of the cost proposal scoring rubric” (OPWDD Answer, at p. 2). In addition, OPWDD states it “confirmed during contract negotiations that [YAI] will be providing CSIDD services in Region 2 at the costs that were in its proposal” (*Id.*).

Applicants were required to complete the cost proposal form attached to the RFA (Attachment E, Expenditure Based Budget) which detailed categories of expenses, including personal services and non-personal services, including travel, required to perform the contract. Our review of the procurement record confirms OPWDD reviewed all cost proposals according to the evaluation methodology set forth in the RFA. Here, Springbrook concludes YAI’s lower cost proposal indicates YAI lacks an understanding of Region 2, yet fails to provide support for its assumption. As stated above, OPWDD is satisfied that YAI’s cost proposal is reasonable.

⁶ Our review of the procurement record supports OPWDD’s claim that the evaluators did not seek assistance from the START Center in connection with the RFA. Accordingly, this Determination will solely address Springbrook’s allegation of unfair advantage resulting from the relationship between YAI and OPWDD’s Evaluation Team.

Without more, “a lower price does not de facto indicate inability to perform” (*see* OSC Bid Protest Determination SF-20200165, at p. 8). Based on the foregoing and our review of the procurement record, we find no reason to question OPWDD’s determination that YAI can perform the contract at the price it bid.

CONCLUSION

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

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Q-Matic Corporation with respect to the procurement of a Reservation and Customer Flow System conducted by the New York State Department of Motor Vehicles.

**Determination
of Bid Protest**

SF– 20210164

Contract Number – C000975

March 22, 2022

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Motor Vehicles (DMV) for a fully integrated queuing, reservation and customer flow management system to support DMV’s operations throughout New York State (System). We have determined the grounds advanced by Q-Matic Corporation (Q-Matic) 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 Applus Technologies, Inc. (Applus) for the System.

BACKGROUND

Facts

On May 28, 2021, DMV issued a Request for Proposals (RFP) seeking a vendor to provide the System (*see* RFP, Section 1.1, at p. 6). The System was to include “hardware, software, applications, communications and any related services” in order to replace the current systems used at DMV’s thirty-six offices statewide (*see* RFP, Sections 1.1 and 1.2, at p. 6).

The RFP provided that proposals would indicate compliance with mandatory requirements which would be necessary for a proposal to be deemed responsive and explain in detail how a proposed solution would meet scored requirements (*see* RFP, Section 1.22, at pp. 15-16). The evaluation team reviewed proposals to ensure all mandatory requirements were met, and, if so, evaluated technical proposals using the following criteria: Experience and Expertise (10%); Overall System and Hardware Requirements (10%); Reservation Functionality, Customer Check-In and Customer Flow Requirements (20%); Security Requirements and Data Management (5%); Reporting and Data Requirements (10%); Test Requirements, Training Requirements, and Installation and Implementation (5%); Change Control Process and System Maintenance and Support Requirements (10%); Diversity Practices (5%); and, Compensation and Service Level Agreement (5%) (*see* RFP, Section 5.3, at p. 80). DMV awarded points to the technical proposals according to a pre-determined rating scale. DMV scored the cost proposals, worth 20%, by awarding the offeror submitting the lowest cost for each item the full points for that item and other offerors received a proportionate score based on their relation to the proposal offering the lowest cost for an item (*see* RFP, Section 5.4, at p. 80). Cost scores

were then added to the technical scores to produce a final composite score (*Id.*). The RFP provided that the contract would be awarded to the offeror with the highest composite score (*Id.*).

DMV received responsive proposals from multiple offerors, including Q-Matic and Applus, prior to the proposal due date of July 27, 2021. DMV awarded the contract for the System to Applus, the responsive and responsible offeror achieving the highest final score.

Q-Matic requested a debriefing which DMV provided on October 27, 2021. On November 3, 2021, Q-Matic filed a protest with this Office (Protest). On January 24, 2022, DMV responded to the Protest (Answer).

Comptroller's Authority and Procedures

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

In carrying out this contract approval responsibility, OSC has promulgated the Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency.¹ This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no protest process engaged in at the department level, the Protest is governed by section 24.4 of the OSC Protest Procedure.

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by the DMV with the DMV / Applus contract;
2. the correspondence between this Office and the DMV arising out of our review of the proposed DMV / Applus contract; and,
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Q-Matic's Protest; and,
 - b. DMV's Answer.

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, Q-Matic challenges the procurement conducted by DMV on the following grounds:

¹ 2 NYCRR Part 24.

1. The winning offeror, Applus, scored less than 55% of available points resulting in high risk and poor value and return on investment for DMV;
2. All offerors, including Applus, received the same points for the “Information Security and Data Requirements”² category of technical criteria which indicates offerors were not provided with a clear opportunity to differentiate their proposals;
3. DMV’s determination to award Applus the same number of total points as Q-Matic for the Security Requirements and Data Management category shows DMV failed to take into account Applus’ recent, serious security incidents when scoring Applus’ proposal; and,
4. DMV acted arbitrarily and capriciously when it scored Q-Matic’s technical proposal, as evidenced by the inconsistency of the debriefing comments.

DMV Response to the Protest

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

1. The methodology used by DMV in scoring proposals is rational and has been used consistently and successfully by DMV;
2. Applus was deemed responsive and tentatively awarded the contract in accordance with the evaluation criteria developed by DMV, which did not specify a minimum number of points required to be declared winner of the technical portion of the RFP;
3. All offerors were provided with the opportunity to expand upon their offering in their scoreable technical proposal responses, and proposals were evaluated independently;
4. DMV conducted a thorough vendor responsibility review of Applus and deemed Applus to be responsible; and,
5. The debriefing comments Q-Matic lists as inconsistent originate from two unrelated sections of Q-Matic’s technical proposal.

DISCUSSION

Best Value Determination

Q-Matic alleges this procurement provides “[h]igh risk, [p]oor value and return on investment” for DMV because “[t]he winning bid scored less than 55% of the available points” (Protest, at p. 1). Q-Matic further claims this “is an extremely low performance metric to justify replacing a working solution for close to \$1.8M in costs” (*Id.*). In response, DMV asserts it “did not specify a minimum number of points that must be achieved by a bidder in order to be declared the tentative winner of the technical portion of the RFP” (Answer, at p.1). DMV further states that the “evaluation methodology . . . is not only rational but has been used consistently and successfully by DMV” and, in this case, “Applus was deemed responsive . . . and the Contract was tentatively awarded in accordance with the evaluation criteria developed” (Answer, at p. 2). DMV further points out that an average technical score would equate to 400 (out of a

² Q-Matic here refers to the “Security Requirements and Data Management” category of criteria from the RFP (*see* RFP, Section 3.11, at pp. 56-71). For purposes of this Determination, we will hereafter refer to “Security Requirements and Data Management.”

total possible 800 points), and that Applus received a technical score (451.19) in excess of that average (*Id.*).

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.”

Q-Matic is essentially claiming DMV failed to award the contract on the basis of best value. Here, the RFP sets forth in great detail the mandatory minimum requirements as well as the evaluation criteria used to review various categories of the technical proposal, and the relative scoring weight of those categories (*see* RFP, Sections 2-4 and 5.3, at pp. 17-77, 80). The RFP also provides for a separate cost proposal form requiring offerors to propose prices for separate items, worth 20% of the total combined score (*see* RFP, Section 5.4, at pg. 80). The RFP states that the contract would be awarded to the offeror achieving the highest combined score for the technical and cost proposals (*see* RFP, Section 5.3, at p. 80).

Additionally, the procurement record indicates that DMV developed its technical evaluation tool prior to the initial receipt of proposals. This technical evaluation tool matched the evaluation criteria for each category set forth in the RFP and further defined and detailed the evaluation process, establishing a scoring plan consistent with the relative weights for each category set forth in the RFP (Experience and Expertise - 100 points; Overall System and Hardware Requirements - 100 points; Reservation Functionality, Customer Check-In and Customer Flow Requirements - 200 points; Security Requirements and Data Management - 50 points; Reporting and Data Requirements - 100 points; Test Requirements, Training Requirements, and Installation and Implementation - 50 points; Change Control Process and System Maintenance and Support Requirements - 100 points; Diversity Practices - 50 points; and, Compensation and Service Level Agreement - 50 points. Notably, the RFP does not require an offeror to receive a certain number of points to be selected for contract award, nor does the SFL provide for such a requirement.

Our review of the procurement record confirms that DMV evaluated the proposals in accordance with the evaluation criteria set forth in the RFP and its technical evaluation tool. Accordingly, the RFP satisfied the requirements of the SFL, and DMV’s award of the contract to Applus, the offeror with the highest combined score, was based on a best value determination.

Evaluation of Technical Proposals

In the Protest, Q-Matic raises several issues pertaining to DMV's technical proposal evaluation. At the outset, we provide our standard of review of agency determinations and will then address each specific issue below.

This Office is unwilling to substitute its judgment for that of an agency in matters within an agency's realm of expertise where the agency scored technical proposals "according to the pre-established technical proposal evaluation tool" (*see* OSC Bid Protest Determination SF-20170192, at p. 7). Nor will we question an agency's determinations regarding the specific needs and requirements for a procurement when same is in that agency's expertise. Accordingly, this Office "will generally not disturb a rationally reached determination of a duly constituted evaluation committee" unless "scoring is clearly and demonstratively unreasonable" (OSC Bid Protest Determination SF-20160188, at p. 8 (upholding evaluation committee's technical scores where "review of the procurement record confirms the evaluators scored the proposals in a manner consistent with the evaluation/scoring instructions"))).

1. Security Requirements and Data Management Category

Q-Matic asserts that because all vendors received the same score for the Security Requirements and Data Management category of technical criteria, "vendors were not provided a clear opportunity to differentiate their offering" (Protest, at p.1). DMV responds that "DMV's desired features were detailed in the RFP and all bidders were provided the opportunity to expand upon their offering in the scoreable responses" (Answer, at p. 3). DMV further claims that "Qmatic's response was evaluated independently from all other bids and the scores were based solely on the responses provided in the bids" (*Id.*).

As explained more fully above, the RFP sets forth in detail the evaluation criteria used to review the categories of the technical proposal and the relative scoring weight of those categories, all in compliance with the State Finance Law (*see* RFP, Sections 2-4, at pp. 17-77, 80).

DMV, as the State agency responsible for administration and use of the procured System, possesses the expertise to determine its needs and requirements for the System, as well as select criteria corresponding to its requirements and use such criteria to score proposals submitted in response to the RFP. Despite all offerors receiving the same score for one of eight general technical categories, our review of the procurement record indicates that DMV followed its evaluation method as prescribed by the RFP, along with its pre-established technical evaluation tool to score all categories of the technical proposals. The RFP and the procurement record further demonstrate that all offerors were provided with the same opportunity to submit technical proposals responding to the RFP's requirements. Consequently, our review does not provide any basis to disturb the technical proposal scores awarded by DMV.

2. Overall System and Hardware and Experience and Expertise Categories

Q-Matic further asserts that “the inconsistency of [DMV’s debriefing] comments suggests DMV acted arbitrarily and capriciously when it scored Qmatic’s Technical Proposal” (Protest, at p. 3). Specifically, Q-Matic claims that DMV’s debriefing comments regarding the strengths and weaknesses of Q-Matic’s technical proposal for the “Overall System and Hardware” category conflict with DMV’s debriefing comments regarding the strength of Q-Matic’s demonstration provided as part of the “Experience and Expertise” category (*Id.*). In response, DMV asserts that “[w]hen preparing a debriefing document, DMV provides both strengths and weaknesses for each section of the evaluated proposal” and the comments at issue “were regarding two unrelated sections of the proposal.” (Answer, at p. 3). DMV further noted that “QMatic was encouraged to submit a FOIL request for the evaluation documents, to garner a more complete picture of how the individual evaluators scored their proposals including the justification behind each score” (*Id.*).

DMV’s comments regarding the strengths and weaknesses of Q-Matic’s responses to particular technical categories were based on the criteria unique to each category. For example, the comment on the strength of Q-Matic’s response to the “Experience and Expertise” category, in which Q-Matic ranked first, relates specifically to Q-Matic’s demonstration of its system. DMV’s debriefing also included a comment on the weakness of Q-Matic’s response to the “Experience and Expertise” category because Q-Matic’s description of its system failed to address certain minimum requirements set forth in the RFP. The comments on Q-Matic’s responses to the “Overall System and Hardware” category, in which Q-Matic ranked fourth, relate to the strength of Q-Matic’s response regarding the visual means of display and ability to integrate with current equipment and the lack of sufficient detail in Q-Matic’s responses regarding the overall system. In sum, each category has its own distinctive requirements and applicable evaluation criteria. As a result, there can be no reasonable expectation of consistency between DMV’s comments on these separate and distinct categories.

Based on a review of the procurement record, this Office finds the scores provided to Q-Matic for the “Overall System and Hardware” and the “Experience and Expertise” categories to be both reasonable and supported by the evaluators’ comments. Therefore, we again find no basis to disturb the technical proposal scores awarded by DMV.

Vendor Responsibility

Q-Matic asserts that “the winning vendor has had well reported, serious security incidents recently” and thus should not have received the same score as Q-Matic for the Security Requirements and Data Management category of the technical proposal (Protest, at p. 1). DMV responds by stating that it “has conducted a thorough vendor responsibility review of Applus which included a review of Applus’ financial and organizational capacity, legal capacity, integrity and past performance and DMV has found Applus to be responsible” (Answer, at p. 3).

Above, we addressed the appropriateness of DMV’s scoring of technical proposals; here, we will address the allegation against Applus of “serious security incidents” which bears on the responsibility of Applus. 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*). SFL § 163(9)(f) states that “[p]rior to making an award of contract, each state agency shall make a determination of responsibility of the proposed contractor” (*see also* RFP, Section 5.6, at p. 81). For purposes of SFL § 163, “responsible” means the financial ability, legal capacity, integrity, and past performance of a business entity” (SFL § 163(1)(c)).

Our review of the procurement record confirms that DMV conducted a vendor responsibility review of Applus, which consisted of review of Applus’ financial and organizational capacity, legal capacity, integrity and past performance. As documented in the procurement record, DMV determined Applus to be a responsible offeror that can successfully perform the services required under the contract. Additionally, as part of our review of the DMV / Applus contract, this Office examined and assessed the information provided in the procurement record and conducted an independent vendor responsibility review of Applus. 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 / Applus contract for the System.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by EXPLUS, Inc.
with respect to the procurement of construction of
Philipse Manor Hall State Historic Site Exhibits
conducted by the New York State Office of Parks,
Recreation, and Historic Preservation.

**Determination
of Appeal**

SF-20220003

Contract Number – C003539

February 17, 2022

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Office of Parks, Recreation, and Historic Preservation (OPRHP) for the construction of a series of new exhibits and exterior interpretive signage at the Philipse Manor Hall State Historic Site (Philipse Manor Hall Exhibits). We have determined the grounds advanced by EXPLUS, Inc. (Explus) are insufficient to merit overturning the contract award made by OPRHP and, therefore, we deny the Appeal. As a result, we are today approving the OPRHP contract with Sommerville-Wilson, Inc. d/b/a Split Rock Studios (Split Rock) for the Philipse Manor Hall Exhibits.

BACKGROUND

Facts

On October 21, 2021, OPRHP issued an Invitation for Bids (IFB) seeking “proposals from Exhibit Fabrication firms that specialize in the construction of interpretive exhibits” to provide the Philipse Manor Hall Exhibits (*see* IFB, Section 1.2, at p. 7). The resulting contract would be awarded to “a responsive, responsible, and qualified bidder who offer[ed] the lowest Grand Total bid to perform work as outlined in [the IFB]” (IFB, Section 2.5, at p. 18). To be considered qualified, bidders were required to submit “(3) successful exhibit projects (Project References) produced within the last five (5) years for which the Bidder was the prime contractor” (IFB, Sections 1.3-1.3.1, at pp. 7-8). Using a combination of the three Project References, bidders were required to illustrate performance of ten functions, including “[h]ighly realistic human figures” (IFB, Section 1.3.1, at p.8). The IFB provided that the Project References would be scored on a pass/fail basis for the highest ranked bidder (i.e., the bidder submitting the lowest bid) (*see* IFB, Section 1.3.2, at p. 8). If a bidder was unable to meet the minimum qualifications, including experience requirements as illustrated by Project References, the bidder would be disqualified (*see* IFB, Section 1.3, at p. 7).

OPRHP received bids from multiple bidders including Explus and Split Rock prior to the proposal due date of December 6, 2021. Following review of bids, OPRHP found Explus to have the lowest Grand Total bid and conducted a Project Reference check. OPRHP determined Explus’s Project References did not demonstrate that Explus met all ten functions and therefore,

Explus failed to meet the minimum qualifications set forth in the IFB. OPRHP thereafter awarded the contract to Split Rock, the responsive and qualified bidder submitting the next lowest Grand Total bid.

By letter dated January 4, 2022, Explus filed a protest with OPRHP challenging the disqualification of its proposal and the contract award to Split Rock (Protest). By letter dated January 11, 2022, OPRHP denied the protest (Protest Determination). By email dated January 18, 2022, Explus filed an appeal with this Office (Appeal). By letter dated January 25, 2022, OPRHP provided our Office with an answer to Explus's appeal (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 OPRHP with the OPRHP / Split Rock contract;
2. the correspondence between this Office and OPRHP arising out of our review of the proposed OPRHP / Split Rock contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Protest;
 - b. Protest Determination;
 - c. Appeal; and,
 - d. Answer.

Applicable Statutes

The requirements applicable to this procurement are set forth in Public Buildings Law § 8. Specifically, Public Buildings Law § 8(6) provides that

¹ 2 NYCRR Part 24.

[a]ll contracts for amounts in excess of five thousand dollars for the work of construction, reconstruction, alteration, repair or improvement of any state building . . . must be offered for public bidding and may be awarded to the lowest responsible and reliable bidder, as will best promote the public interest, by the said department or other agency with the approval of the comptroller

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, Explus challenges the procurement conducted by OPRHP on the following grounds:²

1. OPRHP used project reference requirements that were not disclosed in the IFB, specifically that OPRHP would contact references and require them to fill out a form; and
2. OPRHP improperly deemed Explus non-responsive based on undisclosed project reference requirements.

OPRHP Response to the Appeal

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

1. The IFB provided for project reference requirements which were apparent; and
2. To verify a bidder met the project reference requirements, OPHRP used a standard reference check form. Although OPHRP provided ample opportunities to Explus to fulfill the project reference requirements, Explus failed to meet the minimum qualifications to bid and OPHRP properly determined Explus was non-responsive.

DISCUSSION

IFB Disclosure of Reference Requirements

Explus alleges that OPRHP “did not specify . . . [Project Reference] requirements in [the IFB] and attempted to create an ad hoc process to make up for the absence of a clear and concise process” (Protest, at p.1). More specifically, Explus contends that “there is nothing noted in the [IFB] that says [Project] [R]eferences would be contacted and asked to fill out a form” (*Id.*). In response, OPRHP points to the Project Reference requirements that are included in Section 1.3.1 and 1.3.2 of the IFB (*see* Answer, at pp. 1-2). OPRHP further states that it “uses a standard Reference Check Form...for each reference of a qualifying bid to ensure that [OPRHP] obtain[s]

² In the Appeal, Explus incorporates by reference the grounds advanced in its Protest to OPRHP. Thus, in resolving the Appeal, we considered the arguments advanced in the Protest to OPRHP.

the same information for each reference...[and] to verify the bidder successfully completed projects in the ten functions [set forth in the IFB]” (Answer, at p. 2).

At the outset, we note that the standard for awarding a contract for public work, such as the contract at issue, is whether the apparent low bidder is “responsible and reliable” and whether the award will “best promote the public interest,” as opposed to whether the bidder is “responsive” (*compare* Public Buildings Law § 8(6) to SFL §§ 163(1)(d) and 163(9)(b)). Clearly, however, a bidder on a procurement for public work must be responsive to the requirements of the IFB and must be disqualified if non-responsive to a material requirement. In furtherance of this and the public interest in fair competitive procurements, the IFB should be objectively clear in setting forth what is required for a bidder to meet its requirements and be qualified.

Here, the IFB sets forth unambiguous minimum qualifications that bidders needed to meet to be considered qualified (*see* IFB, Section 1.3, at p. 7).³ Specifically, the IFB notes that bidders must provide three Project References collectively illustrating ten functions, with one such function being “highly realistic human figures” (*see* IFB, Sections 1.3-1.3.1, at pp. 7-8). The IFB goes on to state that these Project References “will be scored on a pass/fail basis...[i]f a reference is not accepted for evaluation, the reference will be scored as a fail” (IFB, Section 1.3.1, at p. 8). Finally, “Bidders not meeting the [minimum] qualifications [] will be disqualified” (IFB, Section 1.3, at p. 7). Although Explus claims that requesting a Project Reference complete a standard reference check form verifying that the bidder did, in fact, execute certain services for the particular Project Reference should have been identified as a minimum qualification in the IFB, we view this more appropriately as OPRHP’s internal process of verifying that the bidder actually met the minimum requirements.

Therefore, we are satisfied that the IFB adequately discloses the minimum requirements a bidder needed to meet to submit a bid.

Non-Responsive Determination

Explus contends that its “proposal...met all the requirements outlined in the [IFB]” (Protest, at p.1). Explus asserts that OPRHP “deemed [Explus’s] proposal non-responsive and removed [it] from further consideration because [Explus’s Failed Reference] could not comply with a process that was not specified in the [IFB], or in any subsequent addendum or Q & A portion of this [IFB]” (*Id.*).

In response, OPRHP contends that “Explus’s only reference in their proposal that demonstrated [Explus] had project experience in ‘[h]ighly realistic human figures’...was the [Failed Reference]” (Answer, at p. 2). OPRHP elaborates that “[t]he practice for all bids reviewed by OPRHP’s [] staff is to verify all references independently of the contractor” and “OPRHP made several attempts to secure verification of references to the [Failed Reference] using the [] Reference Check Form, to which the reference was unable to respond (Protest

³ The terms “responsive” and “qualified” are used interchangeably for purposes of this Determination to describe a bidder who has met the minimum qualifications to bid set forth in Section 1.3 of the IFB.

Determination, at p. 1). Since the reference was unable to reply to our reference check, OPRHP considered [Explus] as failing the reference check” (*Id.*).

Public Buildings Law § 8(6) requires contract award to a “reliable and responsible” bidder who is qualified to meet the requirements in the IFB. As explained above, the IFB sets forth minimum qualifications for a bidder to be considered qualified (*see* IFB Sections 1.3, 1.3.1 and 1.3.2, at pp. 7-8). As part of its determination that a bidder is reliable and responsible, OPRHP followed its regular practice of contacting Explus’s listed references to conduct a reference check with a standard reference check form in order to verify that Explus met the minimum requirements.

Here, one of Explus’s Project References (the Failed Reference), the only Project Reference provided by Explus that was able to illustrate Explus’s experience with “highly realistic human figures,” was unable to complete OPRHP’s reference check form either verbally or in writing, despite OPRHP’s willingness to deviate from its standard reference check procedure (*see* OPRHP/Explus Emails, dated December 16-17, 2021).⁴ Thus, Explus was unable to demonstrate that it met the minimum qualification of the “highly realistic human figures” function. As a result, Explus was not qualified to submit a bid and OPRHP’s determination that Explus was non-responsive to the IFB was proper.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the contract award by OPRHP. As a result, the Appeal is denied and we are today approving the OPRHP / Split Rock contract for the Philipse Manor Hall Exhibits.

⁴ Our review of the procurement record shows OPRHP did the following to assist Explus in completing the Project Reference check: extended the time for the Failed Reference to complete the Project Reference form by two business days; offered the Failed Reference the option to respond to the Project Reference form questions verbally rather than in writing; and, offered Explus the option of providing a different individual to contact at the Failed Reference to provide the Project Reference information instead.