# Procurement Stewardship Act Report

**BID Protest Determinations between April 1, 2024 through March 31, 2025**

| File Number | Date of Decision | Protestor | Contracting Entity | Decision |
|---|---|---|---|---|
| SF20240077 | 7/8/2024 | Town of Webster | Department of Environmental Conservation | Denied |
| SF20240150 | 12/20/2024 | SRV Constructors, LLC | Department of Transportation | Upheld |
| SF20240174 | 1/22/2025 | OptumRx, Inc. | New York State Department of Civil Service | Denied |
| SF20240179 | 3/6/2025 | Public Consulting Group LLC | Department of Health | Denied |

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Protest filed by the Town of Webster with respect to the grant awards for Water Quality Improvement Projects made by the New York State Department of Environmental Conservation.

Procurement Record – DEC01-0000188-3350000

**Determination of Protest**

**SF–20240077**

July 8, 2024

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

## BACKGROUND

### Facts

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

The RFA set forth requirements applicable to all applicants as well as those based on project type (*Id.*, at pp. 3–8). Additionally, the RFA specified that "[a]pplications are ineligible that . . . [d]o not include required attachments . . . for your project type" and that "[d]o not meet the requirements for that project type" (*Id.*, at p. 7 (emphasis omitted)).

The procurement record reflects that Webster applied for a Wastewater Treatment Improvement project grant for its Water Pollution Control Facility Asset Renewal and Water Resources Recovery Facility Improvements Project (Project). The RFA specified each applicant applying for a Wastewater Treatment Improvement project grant must submit, among other things, a project map, and the applicable floodplain map indicating the location of the project, if the project is in a floodplain (*Id.*, at p. 9).

[1] Project types eligible for funding included Wastewater Treatment Improvement, Non-Agricultural Nonpoint Source Abatement and Control, Vacuum Trucks in Municipal Separate Storm Sewer System (MS4) Areas, Land Acquisition for Source Water Protection, Salt Storage, Dam Safety Repair/Rehabilitation, Aquatic Connectivity Restoration, and Marine District Habitat Restoration (RFA, at pp. 3–5).

Prior to the July 28, 2023, submission deadline, DEC received WQIP applications, including a submission from Webster. On January 2, 2024, DEC notified Webster that its application was ineligible for WQIP funding because it "did not meet the following WQIP eligibility criteria: Required document not attached (floodplain map)." Webster requested a debriefing, which DEC provided on January 12, 2024. Webster filed a protest with this Office on January 24, 2024 (Protest).[2] DEC responded to the Protest on May 3, 2024 (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 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 this Protest, this Office considered:

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

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

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

    a. Protest; and
    b. Answer.

[2] Pursuant to the OSC Protest Procedure, an initial protest must be filed "within 10 business days of receiving notice of the contract award which it seeks to challenge or, if a debriefing has been requested by the interested party, within five business days of the debriefing, whichever is later" (2 NYCRR § 24.2(b)(1)). Accordingly, Webster should have filed its Protest by January 22, 2024. Nevertheless, OSC exercised its discretion under 2 NYCRR § 24.4(i) to waive the filing deadline.

[3] 2 NYCRR Part 24.

## ANALYSIS OF THE PROTEST

### Protest to this Office

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

1. DEC should not have deemed Webster's application non-responsive for its failure to submit a floodplain map, as submission of a floodplain map was not a requirement per the terms of the RFA since the Project is not located within a floodplain.

### DEC Response to the Protest

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

1. DEC properly determined Webster's application was non-responsive for Webster's failure to submit a floodplain map with its application as required by the RFA for projects located in a floodplain, since the Project is partially located within a floodplain.

## DISCUSSION

### Non-Responsive Determination

Webster seeks relief from DEC's determination that its application was non-responsive, contending that since "the project is not located within either a 500-year or 100-year floodplain . . . a floodplain map was not submitted and in accordance with [the RFA] was not required to be submitted" (Protest, at p. 1). Webster asserts that "a map showing the location and layout of the project was included . . . as part of the WQIP application [and t]herefore, the information necessary for [DEC] to have confirmed that a floodplain map was not required was included in the application" (*Id.*, at p. 2).

DEC responds, "[t]he project map provided with [Webster's application] indicated the whole facility was the location of the project" and that "[Webster's] project location is partially located within the 0.2% (500 year) annual chance of occurrence floodplain and 1% (100 year) annual chance of occurrence floodplain" (Answer, at p. 1). Therefore, since "a [floodplain] map was not included... the floodplain map requirement was not met, and the application was deemed ineligible" (*Id.*).

The RFA clearly specified that for Wastewater Treatment Improvement applications "[i]f the project is within a 0.2% (500 year) or 1% (100 year) annual chance of occurrence floodplain, submit with the application a floodplain map with the location of the project indicated" (*Id.*, at p. 5; *see id.* at p. 9). As noted above, the RFA provided that an application that did not include all required attachments and meet all requirements for its project type would be ineligible for grant funding (*Id.* at p. 7).

The procurement record reflects the Project is partially within a 500-year and 100-year annual chance of occurrence floodplain. In fact, the application submitted by Webster contains an Environmental Assessment Form, signed by the Town Supervisor, the same Webster representative

that signed the Protest, indicating that the Project site is in a floodplain, corroborating DEC's assertion in the Answer.[4] DEC provides additional evidence to support this conclusion, specifically a map of the Project site and a corresponding floodplain map showing that the Project site is partially within a 500-year and 100-year annual chance of occurrence floodplain (Answer, at p. 1, 3-4). Accordingly, based on the indisputable evidence, Webster was required by the terms of the RFA to submit a floodplain map with its application, and did not do so. The RFA clearly indicated the consequences for a failure to meet requirements would be ineligibility for grant funding. Moreover, our review of the procurement record confirms that DEC consistently interpreted and applied this mandatory requirement in accordance with the RFA (DEC deemed other applicants ineligible for failing to include floodplain maps in compliance with the RFA). Thus, DEC properly found Webster non-responsive to the requirements of the RFA and, as a result, ineligible for grant funding.

## 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 DEC. As a result, the Protest is denied.

[4] In response to the following questions regarding the Project in Webster's Full Environmental Assessment Form, Part 1, the Town Supervisor answered "yes" and signed and certified that the information provided was true to the best of their knowledge on June 16, 2023:

- Is the project site in the 100-year Floodplain?
- Is the project site in the 500-year Floodplain?

(Full Environmental Assessment Form, Part 1, Questions E.2.j and E.2.k).

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

---

In the Matter of the Appeal filed by SRV Constructors, LLC with respect to the award for construction of the I-81 Viaduct Project, Phase 1, Contract 5, conducted by the New York State Department of Transportation.

Contract Number –D265138

**Determination of Appeal**

**SF–20240150**

December 20, 2024

---

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Transportation (DOT) for construction of the I-81 Viaduct Project, specifically Phase 1, Contract 5 (Project).[1] We have determined the grounds advanced by SRV Constructors, LLC (SRV) are of sufficient merit to overturn the contract award made by DOT and, therefore, we uphold the Appeal. As a result, we are today returning non-approved the DOT contract with Salt City Constructors, LLC (SCC) for construction of the Project.

## BACKGROUND

### Facts

On May 8, 2024, DOT issued a solicitation[2] seeking bids to construct the Project. The solicitation provided for "contract award . . . to the lowest responsible bidder as will best promote the public interest as provided by Section 38 of the Highway Law" (DOT Standard Specifications § 103-01, at p. 60). The solicitation included federal requirements for contracts receiving federal aid, including a federal Disadvantaged Business Enterprises (DBE) participation requirement (*see* 49 CFR Part 26 (Federal DBE Regulations)), and applied a goal of 9% DBE participation (Proposal Book 2, at p. 64).

DOT received two bids by the public bid opening date of July 11, 2024, and, on July 12, 2024, DOT sent a tentative award notice to SRV as the lowest bidder. On August 7, 2024, DOT notified SRV that its bid was being rejected as non-responsive for failure to timely meet DBE

---

[1] Contract 5 involves the following construction work: reconstruction of existing I-81 into Business Loop 81 (BL 81) from E. Brighton Avenue to Burt Street; construction of a new northbound exit to Colvin Street; adding traffic calming to transition freeway to City Street; replacement of the rail bridge over Renwick Avenue; and, constructing a roundabout at Van Buren Street. Information about the Project and its various phases can be found on DOT's website at https://webapps.dot.ny.gov/i-81-viaduct-project-overview.

[2] The solicitation was comprised of Proposal Book 1, Proposal Book 2, DOT Standard Specifications, Construction and Materials, dated May 1, 2024 (as incorporated by reference into the bid documents – *see* Proposal Book 1, at p. 1; Proposal Book 2, at p. 1), as well as various plans, supplemental information including drawings, and applicable amendments.

requirements.[3] SRV made a request for administrative reconsideration[4] of its non-responsive determination by letter dated August 8, 2024 (Protest).[5] A meeting was held between representatives of SRV and DOT's Administrative Reconsideration Panel on August 22, 2024, following which DOT issued a decision on September 4, 2024, affirming their prior non-responsiveness determination (DOT Protest Determination).[6] On September 5, 2024, DOT made a tentative award to the second lowest bidder, SCC. Following submission of DBE participation of 9.23% on September 10, 2024, SCC was awarded the contract. SRV appealed DOT's non-responsiveness determination to this Office on September 10, 2024 (Appeal), SCC responded to the Appeal on September 13, 2024 (SCC Answer), and DOT also responded to the Appeal on October 4, 2024 (DOT Answer). SRV filed a reply on October 7, 2024 (SRV Reply).[7]

**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.[8] This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because this is an appeal of an agency protest decision, the Appeal is governed by section 24.5 of the OSC Protest Procedure.

In the determination of this Appeal, this Office considered:

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

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

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

[3] Namely, as discussed in detail below, DOT found that SRV had failed to timely meet the DBE participation goals or demonstrate adequate good faith efforts to meet the goals.
[4] Pursuant to 49 CFR § 26.53(d), "[i]f [an agency] determine[s] that the apparent successful bidder/offeror has failed to meet the [DBE] requirements . . . [the agency] must, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration." This requirement was also included in the solicitation (*see* DOT Standard Specifications § 102-12, at p. 47).
[5] For purposes of OSC's Protest Procedure, we considered the request for administrative reconsideration to be a protest to the agency.
[6] For purposes of OSC's Protest Procedure, we considered DOT's Administrative Reconsideration Panel Decision to be the protest determination made by the agency.
[7] Pursuant to 2 NYCRR § 24.5(d), the answers to the appeal, as submitted by DOT and SCC, were the final submissions permitted as of right; as such, OSC was not required to consider any additional documentation submitted thereafter, including SRV's Reply. In any event, this Office considered SRV's Reply in this Determination.
[8] 2 NYCRR Part 24.

a. Protest;
b. DOT Protest Determination;
c. Appeal;
d. SCC Answer;
e. DOT Answer; and
f. SRV Reply.

## ANALYSIS OF THE APPEAL

### SRV Appeal to this Office

In both its Appeal and subsequent Reply, SRV challenges DOT's determination that they were non-responsive and DOT's subsequent award to SCC on the following grounds:

1. SRV was responsive to the requirements of the solicitation and Federal DBE Regulations because SRV ultimately met the DBE participation goal;
2. SRV was entitled to "substitutions or deductions" to their DBE commitments because they demonstrated "good cause" pursuant to 49 CFR § 26.53(f)(3); and
3. The award to SCC was improper, because SCC, like SRV, did not meet DBE requirements within five days of bid opening, however, SCC was treated more favorably by DOT.

### DOT Answer to the Appeal

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

1. DOT properly determined that SRV's bid was non-responsive because SRV failed to meet the DBE goals or provide sufficient good faith effort documentation in the timeframe required in the solicitation and Federal DBE Regulations;
2. SRV was not entitled to make substitutions or deductions to their DBE commitments pursuant to 49 CFR § 26.53(f)(3) because this provision only applies to DBE commitments already in place at the time of letting; and
3. Since SRV's bid was non-responsive, DOT properly awarded the contract to SCC, the lowest responsible bidder.

### SCC Answer to the Appeal

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

1. SCC timely exceeded the DBE goal, unlike SRV who was non-responsive to the DBE requirements, and was properly awarded the contract as the lowest responsible bidder.

## DISCUSSION

### DOT's Answer Was Timely and SRV is Not Entitled to Good Cause Substitutions / Deductions

Two of SRV's arguments are readily dismissed.

First, by letter dated September 17, 2024, SRV contends that the DOT Answer is untimely (SRV Reply, at p. 1); however, pursuant to 2 NYCRR § 24.5(c)(1), DOT was required to file its answer "simultaneously with the delivery of the contract to [OSC] for its review, or within seven business days of the filing of the appeal, whichever is later." DOT filed its answer on the same date it submitted the contract to OSC for review; therefore, the DOT Answer was timely.

Second, SRV's argument that it is entitled to make substitutions or deductions to its DBE commitments identified at the time of letting because SRV was "demonstrating good cause per 49 [CFR] 26.53(f)(3)" (Appeal, at p. 1) is misplaced as it elides the distinction between good faith efforts and good cause under the Federal DBE Regulations. The referenced DBE Regulation is only applicable when a bidder has timely met the DBE requirements and secured DBE commitments and is trying to substitute or reduce after the award of the contract based on one of the listed examples of "good cause" in 49 CFR § 26.53(f)(3). As set forth more fully herein, in SRV's case, their continued efforts to meet the 9% DBE goal past the deadline and non-responsive determination were not attempts to deduct or substitute existing DBE commitments, but rather attempts to secure new DBE commitments to retroactively meet the requirements. Accordingly, 49 CFR § 26.53(f)(3) is not applicable and will not be further addressed in this Determination. Rather than "good cause," SRV appears to be claiming that they were entitled to continue trying to establish the adequacy of their "good faith efforts" after the deadline (*see* 49 CFR § 26.53(a); 49 CFR Part 26, Appendix A). As discussed below, applicable federal regulations do not permit such belated efforts.

### Non-Responsive Determination by DOT of SRV

SRV contends that DOT based its non-responsiveness determination on an "overly strict reading of Federal mandates concerning the [DBE] rules and regulations" (SRV Reply, at p. 2). SRV alleges that they "did obtain the DBE goal on August 13, 2024 … [and they] always planned to meet/exceed the DBE goal" (SRV Reply, attached letter dated October 7, 2024, at p. 1). SRV requests that this Office "determine SRV did make a sufficient Good Faith Effort as evident [sic] by them meeting the DBE goal 33 days after the bid date" (*Id.,* at p. 2; *see also* Appeal). SRV asserts that the contract should be awarded to SRV as the undisputed lowest responsible bidder as "[DOT] does not contend, nor has there been any allegation that SRV is not responsible [n]or is there dispute that the SRV bid is the lowest bid as contemplated within Highway Law § 38" (SRV Reply, at p. 2).

DOT responds that "SRV failed to comply with 49 CFR § 26.53(f)(3) and NYSDOT Standard Specification § 102-12 [and such] failure to comply with regulatory and contractual requirements supports [DOT's] determination that SRV's bid was non-responsive" (DOT Answer,

at p. 3). DOT contends that "federal regulations and NYSDOT Standard Specifications require that a contract designee submit its DBE utilization or [good faith efforts (GFE)] evidence within five days of a contract letting [and] SRV failed to do that [rather] SRV conceded that it did not meet the July 16, 2024 deadline to show DBE utilization until August 13, 2024, nearly a month late" (*Id.*). DOT further contends that "[b]ecause SRV's bid was non-responsive, [SCC's] bid was the lowest bid from a responsible bidder, and thus [DOT's] designation of [SCC] as the awardee of [the contract] was proper" (*Id.*).

Highway Law § 38(3) provides that "[t]he contract for the construction or improvement of [a State] highway or section thereof shall be awarded to the lowest responsible bidder, as will best promote the public interest." In addition, a bidder on a procurement for public work must be responsive to the requirements of the solicitation and can be disqualified if non-responsive to a requirement. In furtherance of this and the public interest in fair competitive procurements, the solicitation should be objectively clear in setting forth what is required for a bidder to meet its requirements and be qualified.[9]

The Federal DBE Regulations require that "[w]hen [the agency has] established a DBE contract goal, [the agency] must award the contract **only** to a bidder/offeror who makes [GFE] to meet it" meaning that the bidder either "[d]ocuments that it has obtained enough DBE participation to meet the goal" or "[d]ocuments that it made adequate [GFE] to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so" (49 CFR § 26.53(a) (emphasis added)). The Federal DBE Regulations require "**[a]ll** bidders or offerors" to provide documentation of meeting the goal or making adequate GFE to meet the goal "[n]o later than [5] days after bid opening" (49 CFR §§ 26.53(b)(2), 26.53(b)(3)(i)(B) (emphasis added)).[10] For a bidder to document adequate GFE, "the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal … which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful" and such efforts "should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal" and not "[m]ere pro forma efforts" (49 CFR Part 26, Appendix A, at I, II). Types of actions that may constitute GFE include: "advertising and/or written notices … written notices or emails to all DBEs listed in the State's [DBE directory] that specialize in the areas of work desired [ ] and which are located in the area or surrounding areas of the project" (*Id.*, at IV). The bidder should solicit DBE interest "as early in the acquisition process as practicable to allow the DBEs to respond to the solicitation and submit a timely offer for the subcontract" and "[t]he bidder should determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations" (*Id.*).

---

[9] Highway Law § 38(1) requires DOT to "advertise for proposals for the construction or improvement of [State] highways according to the plans and specifications prepared therefor."

[10] Federal DBE Regulations provide two options that a federal aid recipient (here, DOT) may choose from "[a]t [their] discretion" as the timeframe by which bidders must submit required DBE documentation by: (1) "[u]nder sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures" or (2) "[n]o later than [5] days after bid opening as a matter of responsibility" (49 CFR §§ 26.53(b)(3)(i)(A), (B)). Here, DOT has indicated that it follows the latter, at 49 CFR § 26.53(b)(3)(i)(B); however, the DOT Standard Specifications follow neither option under 49 CFR § 26.53(b)(3)(i), but contain certain aspects of both ("as a matter of responsiveness" and "no later than 5 days after bid opening") but only apply them to low bidders instead of all bidders as required by 49 CFR § 26.53(b)(2).

The solicitation also delineated the DBE requirements, as well as the consequences for failure to meet them. The DOT Standard Specifications provided, "[w]ithin 5 calendar days of notification as apparent Low Bidder, you shall enter … all of the DBE commitments identified [in your bid], into the Equitable Business Opportunity Solution (EBO) … *If you do not meet the DBE Goal and are identified as apparent Low Bidder, you will be required to submit a [GFE] package … within 5 calendar days of notification"* (Proposal Book 1, at p. 16 (emphasis in original); *see* Proposal Book 2, at p. 1; DOT Standard Specifications § 102-12, at p. 43). The Standard Specifications also provided that "[DOT's] acceptance of the Apparent Low Bidder's proposal is conditioned upon the Apparent Low Bidder's fulfillment of the DBE participation requirements. Failure by the Apparent Low Bidder to submit a complete DBE participation package within 5 calendar days after the proposal opening or failure to provide commitments to meet the established goal prior to award without adequate [GFE] may be grounds for rejection of the proposal as non-responsive … " (DOT Standard Specifications § 102-12, at p. 48).

First and foremost, we note the divergence between the DOT's Standard Specifications which require the low bidder to submit its DBE commitments and GFE information, as applicable, "within 5 calendar days of notification as apparent Low Bidder" versus the Federal DBE Regulations which require all bidders to do so "no later than 5 days after bid opening." While this distinction has no practical effect on an initial tentative awardee, such as SRV, as the notification and bid opening dates converge, as articulated more fully below with respect to SCC, this misalignment has substantial implications when the initial awardee is disqualified.

In its notification of tentative award to SRV, DOT indicated that SRV needed to enter their DBE participation into DOT's civil rights reporting software (EBO) or submit all GFE made to meet those goals by July 16, 2024, which was five days from July 11, 2024, the date of the public bid opening (the required date to comply with the Federal DBE Regulations) and also five days from initial notification of tentative award (the required date to comply with the DBE requirements in the solicitation).[11] On July 16, 2024, DOT sent a reminder to SRV of the deadline to submit their DBE participation or GFE documentation. In response, SRV provided DOT with a list of anticipated DBE subcontractors (which amounted to 1.8% participation, well below the 9% DBE goal) and some documentation of GFE to solicit participation, which DOT found deficient for several reasons which were communicated to SRV and are documented in the procurement record. Between July 16, 2024, and DOT's non-responsive determination on August 7, 2024, DOT and SRV exchanged numerous additional emails wherein DOT continued to provide specific guidance regarding deficiencies in SRV's submissions, and SRV failed to satisfactorily address the deficiencies.[12] The procurement record shows that SRV undertook the following efforts which

[11] The procurement record shows that DOT provided SRV with an opportunity to meet the DBE requirements by an extended deadline of July 22, 2024. While there is some question between the parties of the deadline, as SRV's compliance with DBE requirements had not materially changed from July 16 to July 22, 2024, whether the deadline was actually extended has no bearing on the analysis of the propriety of DOT's non-responsive determination.

[12] In both DOT's initial email tentatively awarding SRV the contract and in subsequent communications, DOT provided SRV with reminders of the DBE requirements and informed SRV that failure to meet these requirements could result in SRV losing the contract. In addition to the requirements set out in the Standard Specifications for what qualifies as sufficient GFE documentation, DOT's initial email included a 34-page guidance document including instructions and best practices to help bidders provide sufficient GFE documentation to meet the DBE goals. Despite

DOT determined fell short of GFE: SRV did not contact all of the DBE firms listed in the DBE directory for the relevant geographical area for the specific work needed; for the majority of solicitations of DBEs that SRV contacted prior to the deadline, SRV sent a single form email and there was no documented follow-up; and SRV sought DBE participation via an advertisement in the New York State Contract Reporter for the first time on July 23, 2024, past the deadline.

It is undisputed that SRV did not meet the DBE goals as of the required deadline. Further, the procurement record supports DOT's determination that SRV failed to demonstrate sufficient GFE to meet the DBE goal by the required deadline.[13] SRV's assertions that DOT has implemented the DBE requirements in a more lenient fashion for previous contracts, allegedly allowing SRV to fail to meet DBE requirements by mandated deadlines with no consequence are irrelevant and, regardless, would not cure SRV's non-responsiveness in this instance (*see* SRV Reply, attached letter dated October 7, 2024, at p. 2). Determinations as to whether a bidder demonstrated sufficient GFE are factual determinations which must be made on a case-by-case basis; likewise, whether a bidder is responsive to the requirements of a particular solicitation is dependent on the facts and circumstances of the procurement at issue. Accordingly, prior determinations based on the facts and circumstances of those other procurements are not germane to the matter currently before us. Here, the procurement record shows that DOT appropriately determined that SRV did not meet the 9% DBE participation goal no later than five days after bid opening (consistent with the Federal DBE Regulations) and appropriately applied the DBE requirements to SRV, even going above and beyond in educating SRV about the DBE requirements. Moreover, there is nothing in the Federal DBE Regulations or the solicitation that allows for a waiver of the compliance deadline. Therefore, there is no basis to disturb DOT's determination that SRV was non-responsive to the DBE requirements, a consequence that is clearly articulated in both the Federal DBE Regulations and the solicitation.

**Award to SCC**

SRV contends the award to SCC was improper, claiming SCC "had a similar DBE participation at bid time" as SRV, however, SCC was treated more favorably by DOT (*see* Appeal, attached letter dated September 9, 2024, at p. 2; *see also* SRV Reply, at pp. 2-3). SRV further contends that while SRV met "the DBE goal 33 days after the bid date," SCC submitted a bid that was "$35 million dollars more and [SCC] had 55 days to submit [their DBE documentation]" (SRV Reply, attached letter dated October 7, 2024, at p. 2).

DOT states that "we do not require every bidder to submit their commitments into EBO within 5 days of letting for Federal Aid contracts, only the identified Low Bidder" (Email, dated December 13, 2024).[14] DOT further states that "SRV was the initial low bidder however they were determined to be Non-Responsive by the Department [and then] [SCC] was notified on September

these efforts, SRV asked DOT on July 23, 2024 (after the deadline for submitting the required DBE participation or GFE documentation), for "[a]ny details as to what [DOT is] looking for in our good faith effort."

[13] SRV's assertion that they met the 9% DBE goal as of August 13, 2024, does not cure SRV's non-responsiveness (SRV Reply, attached letter dated October 7, 2024, at p. 1).

[14] This information was provided by DOT in response to the following question posed by OSC: "Please explain and provide documentation to support how DOT determined that Salt City Constructors met the DBE requirements found in 49 CFR § 26.53(b)(3)(i)(B) that require every bidder to submit proof that it either met the DBE goal or documented good faith efforts to meet the DBE goal no later than 5 days 'after the bid opening' here occurring on July 11, 2024."

5, 2024 that they were the apparent low bidder and the deadline to submit their DBE commitments and/or Good Faith Efforts was September 10, 2024" (*Id.*).

SCC asserts that "[u]nlike SRV, SCC timely exceeded the DBE goal … achieving [a] utilization [of 9.24%] by July 11, 2024" (SCC Answer, at p. 2).

Pursuant to the unambiguous language of the applicable Federal DBE Regulations, all bidders, including SCC, were required to provide documentation of meeting the goal or making adequate GFE to meet the goal "[n]o later than [5] days after bid opening," by July 16, 2024 (49 CFR § 26.53(b)(3)(i)(B)). DOT required all bidders to submit a DBE bid form with their bid indicating their DBE commitments, which provided all bidders with the opportunity to identify sufficient DBE participation to meet the goal at bid opening. However, DOT did not require all bidders to submit GFE at the time of bid or within five days of bid opening; DOT only required the low bidder to do so. In fact, the DBE bid form that all bidders were required to complete and submit with their bids contained the following statement: "*NOTE: Bids may be submitted below the DBE Goal. If you submit a bid below the DBE Goal, and you are identified as the apparent Low Bidder, you will be required to either meet the goal or submit a Good Faith Effort package within 5 calendar days of notification*" (emphasis in original).

DOT does not dispute that the Federal DBE regulations require all bidders to either meet the DBE goal or provide sufficient GFE within five days of "bid opening." To the contrary, DOT concedes that "the required [DBE] information must be submitted within five days of bid opening" according to the Federal DBE Regulations (DOT Answer, at p. 2).[15] More specifically, DOT affirmatively states that such documentation is due "within five business days of that letting," and that "[h]ere, the Contract was let on July 11, 2024" (*Id.*, at p. 1). Accordingly, DOT further concedes that July 16, 2024 "was the date for submission of DBE commitments or a GFE package" and that it sent a notification email reminding SRV "that July 16, 2024 was the date for submission of DBE commitments or a GFE package" (*Id.*).

A review of the record reveals that SCC failed to meet the July 16, 2024, deadline. SCC submitted a DBE bid form with its bid that showed 0.35%[16] DBE participation and did not include any documentation of GFE. There is no evidence in the procurement record supporting SCC's claim that they achieved 9.24% DBE participation by July 11, 2024. Notably, there were no limitations placed on SCC for the DBE commitments they could provide with their bid; yet, despite months later claiming that it had achieved 9.24% participation, at the time of the bid opening SCC only submitted notice of 0.35% participation.[17] We note that the DBE bid form submitted by SRV showed 1.35%[18] DBE participation at the time of bid, more than that claimed by SCC at that time, but still less than the requisite 9%. The record further demonstrates that SCC was not asked by DOT to submit additional information regarding DBE compliance and did not submit any relevant information until its tentative award on September 5, 2024, which was well past the July 16, 2024 deadline imposed under the federal regulations. So, although SCC complied with DOT's

[15] DOT cites to "Section 26.53(3)(1)(B)" for this statement; however, it is clear that the intended citation was 49 CFR § 26.53(b)(3)(i)(B).
[16] Rounded to the nearest hundredth.
[17] SRV contends, "[SCC] should have submitted their [DBE] commitment with their bid on July 11, 2024 if they had them" (Email, dated December 16, 2024). We agree.
[18] Rounded to the nearest hundredth.

requirement to submit DBE information within five days of tentative award, SCC did not demonstrate compliance with the Federal DBE Regulations which require all bidders to submit DBE information within five days of bid opening.

DOT does not propose that SCC met the submission deadline under the Federal DBE Regulations or point to any legal authority justifying resetting or extending the deadline until after the second tentative award. Rather, in response to OSC's inquiry as to how its process comported with the Federal DBE Regulations,[19] DOT supplied no documentation and cited no law, regulation, general or specific guidance. Instead, DOT merely advised that it only requires the initial low bidder to submit DBE information within five days of bid opening stating: "[o]ur software (which was approved by FHWA) is only capable of loading one Prime Contractor for each contract. As such, we do not require every bidder to submit their commitments into EBO within 5 days of letting for Federal Aid contracts, only the identified Low Bidder" (Email, dated December 13, 2024). Therefore, as SCC was not the initial low bidder, it was not required by DOT to comply with the DBE requirements at that time.

DOT's response runs directly contrary to guidance from the United States Department of Transportation (USDOT) interpreting whether an extension may be provided to a second lowest bidder under 49 CFR § 26.53(b), which provides,

> **If the recipient determines that the apparent low bidder does not meet the DBE goal or does not document good faith efforts, may the recipient grant the second lowest bidder an additional five days to submit its DBE commitments and/or good faith efforts?**
> •No … 49 CFR § 26.53(b) directs all bidders (or offerors) to submit the required documentation of DBE commitments and/or good faith efforts either with their sealed bid, as a matter of responsiveness; or no later than five days after bid opening, as a matter of responsibility. The DBE program regulations do not authorize recipients to extend the five-day requirement for a bidder/offeror to submit its DBE commitments and/or good faith efforts.

(https://www.transportation.gov/sites/dot.gov/files/docs/mission/civil-rights/disadvantaged-business-enterprise/313071/gfe-guidance.pdf).

DOT's misapplication of the Federal DBE Regulations (much less embedding such in its software) does not alter them: the language of the Federal DBE Regulations is clear that submission of the required DBE information must be made by **all bidders** either with initial bids or no later than five days after bid opening. Notably, DOT concedes this point in reference to SRV, stating, "federal regulations [ ] require that a contract designee submit its DBE utilization or GFE evidence within five days of a contract letting … nothing [ ] extends the time to comply with federal regulations" (DOT Answer, at p. 3). Notwithstanding DOT's procedure to allow five days from tentative award to submit the required documentation, the operative timeframe under the

[19] *See* fn. 14.

federal regulations was five days from bid opening, and neither SRV nor SCC submitted documentation that they either met the DBE goal or made sufficient GFE to meet the goal by July 16, 2024.

To allow SCC to submit DBE information by a deadline of September 10, 2024 would be giving SCC a significant extension of time to comply with DBE requirements, something that is not permitted by the Federal DBE Regulations as supported by their plain language and USDOT's interpretation of its own regulations. In this regard, SRV asserts that due to the extra time SCC was afforded to obtain DBE participation, SCC was able to capitalize on the negotiations that SRV had previously had with potential DBE firms (Email, dated December 16, 2024). In contrast, SRV was found non-responsive for failure to timely comply with DBE requirements. The requirements of the procurement must be applied fairly and evenly to all bidders, likewise DOT's interpretation of the law cannot be altered based on which bidder it is being applied to.[20]

As set forth above, although SCC complied with DOT's requirement to submit DBE information within five days of tentative award, SCC did not demonstrate compliance with the Federal DBE Regulations which require all bidders to submit DBE information within five days of bid opening. Accordingly, we cannot find that the award to SCC was proper, as SCC, like SRV, failed to timely comply with DBE requirements. Accordingly, SCC, like SRV, should also be found non-responsive.

**CONCLUSION**

For the reasons outlined above, we have determined the issue raised in the Appeal relating to the responsiveness of SCC is of sufficient merit to overturn the contract award by DOT to SCC. As a result, the Appeal is upheld and we will not be approving the DOT / SCC contract for construction of the Project.

[20] SRV contends, "the additional time allowed to [SCC] to postpone the effective bid opening date to September 5th allowed them the time SRV was not afforded to continue working towards the goal after the actual bid date. The federal regulations clearly refer to the letting date not notification after a re-rank" (Email, dated December 16, 2024). We agree.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

---

In the Matter of the Appeal filed by OptumRx, Inc. with respect to the procurement of Pharmacy Benefit Services for The Empire Plan, Student Employee Health Plan and NYS Insurance Fund Workers' Compensation Prescription Drug Programs conducted by the New York State Department of Civil Service.

Contract Number – C000753

**Determination of Appeal**

**SF–20240174**

January 22, 2025

---

The Office of the State Comptroller (OSC) has reviewed the above-referenced procurement conducted by the New York State Department of Civil Service (DCS) to provide pharmacy benefit services for The Empire Plan and Student Employee Health Plan Drug Programs (DCS Programs), and NYS Insurance Fund Workers' Compensation Prescription Drug Program (NYSIF Program, and together with the DCS Programs, Programs).[1] We have determined the grounds advanced by OptumRx, Inc. (Optum) are insufficient to merit the overturning of the contract award made by DCS and, therefore, we deny the Appeal. As a result, we are today approving the DCS contract with Caremark PCS Health, L.L.C. (Caremark) to provide pharmacy benefit services for the DCS Programs.[2]

## BACKGROUND

### Facts

On May 1, 2024, DCS, for itself and on behalf of NYSIF, issued a Request for Proposals which was amended June 6, 2024 (RFP) seeking a vendor to administer the prescription drug benefits offered through the Programs, which include coverage for prescription drugs dispensed through retail network pharmacies, mail service pharmacies, designated specialty pharmacies and non-network pharmacies (*see* RFP, Sections 1.4 and 1.5, at pp. 11-15). The Programs include a number of utilization management controls including mandatory generic substitution, prior authorization, physician education and various cost containment provisions (*see* RFP, Section 1.5, at p. 13). The DCS Programs provide benefits to enrollees and covered dependents, and the NYSIF Program provides benefits to injured workers, for covered drugs subject to applicable copayments, supply limits and benefit maximums (*Id.*).

---

[1] The purpose of the RFP is for DCS and the New York State Insurance Fund (NYSIF), as the procuring agencies, to enter into separate contracts with the successful offeror who shall be responsible for providing pharmacy benefit services for the DCS Programs and NYSIF Program, respectively (*see* RFP, Section 1.1, at pp. 7-9).

[2] As of the date of this Determination, NYSIF has not yet submitted its contract with Caremark to this Office for review and approval.

The RFP provided for a contract award for the pharmacy benefit services to the responsive and responsible offeror whose proposal offers the best value to the procuring agencies (*see* RFP, Section 7, at p. 238). Each offeror's proposal was to consist of three distinct parts: the administrative proposal, the technical proposal and the financial proposal (*see* RFP, Section 2.6, at p. 28). The procuring agencies only considered for evaluation and selection those proposals where the offeror met the Minimum Mandatory Requirements set forth in Section 1.8 of the RFP and which satisfied the submission requirements set forth in Section 4 of the RFP (*see* RFP, Section 7.1, at p. 238). The RFP provided "[b]est value will be determined by a weighted point system, with 75 percent allocated to the Financial Proposal and 25 percent allocated to the Technical Proposal" (RFP, Section 7.5, at p. 245). The RFP provided technical proposals would be scored using weighted point values up to a maximum of 1,000 points, with the technical proposal with the highest raw score to receive 250 points and the other proposals to receive a proportionate score according to a predetermined formula (see RFP, Sections 7.2.4 and 7.2.5, at pp. 242-243).[3] Financial proposals were scored, with the offeror proposing the lowest Total Projected Program Cost (sum of claims costs, vaccination network pharmacy pricing, claims administration fees less pharma revenue guarantee) receiving the available 750 points, with other financial proposals receiving a proportionate score calculated using the formula established in the RFP (*see* RFP, Section 7.3.1, at pp. 243-244). The technical and financial scores were combined and the offeror with the highest total combined score would be selected for award (*see* RFP, Sections 7.4 and 7.5, at p. 245). The RFP further provided that an offeror's proposal would be considered substantially equivalent to the proposal with the highest total combined score if that offeror's total combined score "is equal to or less than 1 point below the highest Total Combined Score" (RFP, Section 7.5, at p. 245). In the event of offerors' proposals being deemed substantially equivalent, the offeror with the highest financial proposal score would be selected for contract award (*Id*.).

Three offerors submitted proposals to DCS prior to the July 2, 2024, submission due date: (i) Caremark, (ii) Optum, and (iii) MedImpact Healthcare Systems, Inc. By letter dated August 19, 2024, DCS made a tentative contract award to Caremark, the offeror receiving the highest total combined score after the evaluation and selection process. DCS provided Optum a debriefing on September 3, 2024. Optum submitted a protest to DCS on September 9, 2024 (9/9/2024 Protest Submission) as supplemented on October 1, 2024 (10/1/2024 Protest Submission) and October 14, 2024 (10/14/2024 Protest Submission) (all three Protest Submissions collectively referred to as Protest) in accordance with DCS' Protest Procedure (*see* RFP, Section 2.1.10, at pp. 33-35). DCS denied the protest on November 1, 2024 (DCS Determination) based on the recommendation dated October 30, 2024, of the designated DCS protest reviewer (DCS Recommendation). Optum submitted an appeal to this Office on November 15, 2024 (Appeal), and DCS responded to the Appeal on November 25, 2024 (DCS Answer). Caremark responded to the Appeal on November 26, 2024 (Caremark Answer).

[3] DCS acknowledges technical proposals instead received scores based on a 250-point scale which deviated from the scoring methodology set forth in the RFP. This change and its impact on the procurement are discussed more fully herein.

**Comptroller's Authority and Procedures**

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

In carrying out this contract approval responsibility, OSC has promulgated the Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency.[4] This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because 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 DCS with the DCS/Caremark contract;

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

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

    a. Protest;
    b. DCS Recommendation;
    c. DCS Determination;
    d. Appeal;
    e. DCS Answer; and
    f. Caremark Answer.

**ANALYSIS OF THE APPEAL**

**Appeal to this Office**

In its Appeal, Optum challenges the procurement conducted by DCS on the following grounds:

1. DCS violated New York State law by failing to award the contract to Optum, the lowest priced offeror, since Optum's proposal was substantially equivalent to Caremark's proposal.
2. DCS failed to provide a level playing field for all offerors because only incumbent Caremark had access to complete and accurate historical claims data on which to form its financial proposal, and DCS failed to mitigate Caremark's unfair competitive advantage.

[4] 2 NYCRR Part 24.

3. DCS deviated from the RFP's stated evaluation criteria in multiple ways, rendering DCS' contract award to Caremark arbitrary and capricious. Specifically, DCS (i) impermissibly relied on a projection of costs based on Caremark's current contract cost rather than the costs provided with Caremark's proposal; (ii) failed to disclose in the RFP the role of a steering committee in evaluating proposals; (iii) made the contract award prior to all technical evaluation score sheets being complete; (iv) impermissibly revised the Evaluation Instrument after bids had been submitted; and (v) failed to score the technical proposals according to the RFP.
4. DCS failed to adequately document and explain its tentative award and non-selection decisions as required by State law.
5. DCS frustrated Optum's right to protest by failing to provide timely responses to Optum's Freedom of Information Law (FOIL) requests.[5]

**DCS Response to the Appeal**

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

1. DCS properly awarded the contract to Caremark on the basis of best value because Optum's and Caremark's proposals were not "substantially equivalent" according to the objective criterion set forth in the RFP.
2. DCS provided all offerors with the most available information to achieve a competitive field.
3. DCS evaluated and scored offerors' financial proposals as set forth in the RFP and in accordance with the evaluation instrument.
4. The steering committee did not evaluate any scoring performed by the evaluators but instead served in an oversight capacity to provide consistent guidance to evaluators as needed.
5. Two minor changes made to one evaluator's technical proposal scores after the rating sheets were submitted did not alter the ranking of proposals and accordingly, did not affect the draft recommendation that the contract be awarded to Caremark which was finalized upon resubmission of the revised rating sheets.
6. DCS corrected the evaluation instrument after bids were received in relation to certain calculations used to score financial proposals, and while such correction resulted in non-material differences in Optum's total evaluated cost, it did not affect Optum's financial proposal score of 750.
7. The technical proposals were scored using a 250-point scale which deviated from the methodology set forth in the RFP; however, this deviation did not materially impact the outcome of the evaluation nor was Optum or any other offeror put at a competitive disadvantage.

[5] Consistent with the longstanding policy of this Office enunciated in prior bid protest determinations, issues related to the procuring agency's action or inaction on a FOIL request do not impact our review of the contract award and are not considered as part of our review of appeals. Furthermore, in making this Determination, we have reviewed the entire procurement record, which includes any documentation related to the procurement that would have been within the scope of Optum's FOIL request. Accordingly, the Determination will not address this allegation.

8. At Optum's debriefing, DCS provided the reasons Optum was not selected for contract award, as required by State law and DCS' debriefing guidelines, but DCS was not required to provide specific information regarding selection of the winning bidder's proposal.
9. DCS provided information in response to Optum's FOIL requests in compliance with the time periods specified in FOIL.[6]

**Caremark Response to the Appeal**

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

1. Caremark's proposal and Optum's proposal were not substantially equivalent as DCS defined the term in the RFP, and thus DCS appropriately awarded the contract to Caremark because it had the highest combined score of cost and technical.
2. DCS provided all offerors with multiple years of various data involving the prescription drug program and Caremark prepared its proposal based on the same claims data provided to Optum through the RFP.
3. DCS appropriately based the contract award to Caremark on evaluation of Caremark's financial proposal rather than the cost projections based on Caremark's current contract.
4. DCS' technical proposal scoring deviation did not materially or negatively impact Optum.

**DISCUSSION**

**Substantially Equivalent Proposals**

Optum contends that based on "the immaterial difference in total combined scores and the plain language of the State Finance Law, [DCS] should have deemed [Optum] and [Caremark] to be substantially equivalent and awarded [Optum]—the least expensive offeror—the contract under State Finance Law § 163(10)(a)" (Appeal, at p. 9). Optum asserts Optum's proposal was substantially equivalent to Caremark's, emphasizing that there was "**a marginal 1.65 points difference out of 1,000 points, or just 0.165%**" between the total combined scores of the two offerors (*Id.*, at p. 8 (emphasis in original)). Optum also contends DCS's position that "it followed its own interpretation of 'substantially equivalent' set forth in RFP § 7.5 … is entitled to no deference whatsoever because it conflicts with the State Finance Law" (*Id.*, at p. 9).

DCS responds "neither SFL nor the Procurement Council Guidelines define 'substantially equivalent'" instead such "determination is left to the expertise of the procuring agency" (DCS Answer, at p. 3). DCS asserts it "established an objective criterion which it followed in awarding the contract to [Caremark]" which defined "substantially equivalent" in RFP Section 7.5 as when "an Offeror's Total Combined Score *is equal to or less than 1 point* (emphasis added) below the highest Total Combined Score" (*Id.*). DCS further asserts it "made a determination that the proposals [of Optum and Caremark] were not 'substantially equivalent' based on the objective criteria established in the RFP and therefore the price was not the 'tie breaker' or determining factor in awarding the contract" (*Id.*, at p. 4).

[6] See fn. 5, *supra*.

Caremark responds "RFP § 7.5 specifically established the standard of substantially equivalent [and] DCS made this bright line rule known to all offerors from the moment the RFP was released" (Caremark Answer, at p. 7). Caremark asserts "[Caremark's] score was [ ] more than 1 point higher than Optum[']s] [and] [a]ny score differential which is greater than one (1) point, even 1.01, does not qualify as substantially equivalent under the terms of the RFP and thus cannot be treated as such" (*Id.*, at p. 8).

State Finance Law § 163(10)(a) provides that "[i]n the event two offers are found to be substantially equivalent, price shall be the basis for determining the award recipient" and that "[s]election and award shall be a written determination in the procurement record made by the commissioner or a state agency in a manner consistent with the provisions of the solicitation." RFP Section 7.5 provided how substantial equivalency would be determined, as follows: "If an Offeror's Total Combined Score is equal to or less than 1 point below the highest Total Combined Score, the Offeror's Proposal will be determined to be substantially equivalent to the Offeror holding the highest score" (RFP, Section 7.5, at p. 245).

SFL §163(10)(a) does not prescribe criteria for two proposals to be found substantially equivalent; rather, SFL indicates that award should be made "by the commissioner or a state agency in a manner consistent with the provisions of the solicitation" indicating that a determination of substantial equivalency is left to the discretion of the procuring agency (SFL § 163(10)(a)). In this case, DCS determined, and documented in the RFP, that two proposals were substantially equivalent if their total combined scores were within one point of each other. Applying the standard set forth in the RFP, DCS determined that because the total combined scores of the proposals diverged by more than one point from each other, they were not substantially equivalent. Accordingly, there is no basis to disturb the contract award made by DCS to Caremark on the basis of best value.

**Unfair Competitive Advantage to Incumbent**

Optum alleges that "as the incumbent contractor, [Caremark] has detailed knowledge of a vast range of information about [DCS] policy and operation of the incumbent contract [which Optum] does not have" and this "created an unlevel playing field" and gave Caremark "an unfair competitive advantage in its Financial Proposal" (Appeal, at p. 10). Optum further alleges "there is no evidence that DCS attempted to account for [Caremark's] advantage in its evaluation—much less to affirmatively mitigate [Caremark]'s advantage over all other offerors" (*Id.*).

DCS responds that it "provided all Offerors with the most available information to achieve a competitive playing field to achieve the best result for the State" (DCS Answer, at p. 4). DCS further responds by "stress[ing] that over 60 million rows of claims data in total (across two years: 2022 and 2023) was provided to Offerors in this procurement [including] [i]nformation on all facets of prescription drug claims" and "ten other attachments to the 2024 RFP contained more years of data than prior RFPs for these services" (*Id.*, at p. 5). DCS also asserts that Optum "had the opportunity to submit a question to request additional information to [DCS] if [Optum] had a need for more data" (*Id.*).

Caremark alleges it had no advantage as the incumbent because it "relied on the same RFP information that was available to every other offeror to construct its proposal" (Caremark Answer, at p. 1). Caremark contends "Optum provides no evidence to support [its] allegation … [that] Caremark had an unfair advantage over other offerors because it is the incumbent contractor" (*Id.*, at p. 3).

Pursuant to SFL§ 163(9)(a), DCS was required to conduct a procurement that provided "a reasonable process for ensuring a competitive field; a fair and equal opportunity for offerers to submit responsive offers; and a balanced and fair method of award." We must determine, however, whether Caremark's status as the incumbent pharmacy benefits manager gave Caremark an unfair advantage in their financial proposal.

Initially, we recognize that an incumbent service provider will generally possess more information with respect to providing services and working with DCS on a contract than other prospective offerors. However, the procurement record does not contain evidence to support Optum's claim[7] that Caremark used knowledge not available to other offerors to strategically propose rebates to exaggerate its financial proposal and gain an unfair advantage. To the contrary, the RFP includes provisions designed to create a level playing field for all offerors. Under the process set forth in the RFP, DCS provided informational claim data files containing claims paid from January 1, 2022, through December 31, 2023, to all offerors (RFP, Section 6.1, at p. 187). In addition, the RFP provides that "[t]he evaluation of Financial Proposals will be conducted by applying each Offeror's cost quotes to normalized claim data" (RFP, Section 6.2, at p. 187).

Thus, there is no basis to support Optum's claim that Caremark had an unfair advantage in the procurement process.

**Deviations from RFP Scoring Methodology**

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.[8] 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."[9] A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."[10]

---

[7] Specifically, Optum alleges that "[Caremark] relies on exclusions to reduce the claims subject to rebates, resulting in less money back to DCS" and Optum posits that Caremark "could rely on its unequal access to information to propose, for example, a mix of rebate eligible and rebate non-eligible claims that contradicts its actual performance … which would exaggerate the performance of its Financial Proposal" (Appeal, at pp. 10-11). DCS responds that "[DCS] would not expect a material impact to total claims volume based on the number of exclusions" and "[e]ven for members who continue to receive excluded drugs, those will still result in a 'Final Paid Claim' under the requirements of the RFP which would generate rebate revenue for [DCS]" (DCS Answer, at p. 6). Further, DCS contends that "under the requirements of Section 6.12 of the RFP, 'the Pharma Revenue guarantee per Final Paid Claim quoted applies to rebate eligible and non-rebate eligible claims'" therefore "the number of exclusions proposed by an Offeror would not have an impact on the pharma revenue due to the State during the contract period, nor would it impact the State's award determination" (*Id.*).

[8] SFL § 163(10).

[9] SFL § 163(1)(j).

[10] SFL § 163(1)(d).

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) requires the solicitation to "prescribe the minimum specifications or requirements that must be met in order to be considered responsive and [to] describe and disclose the general manner in which the evaluation and selection shall be conducted."

1. Disclosure of Role of Steering Committee in Evaluation

Optum asserts that, pursuant to SFL § 163(9)(b), "the involvement of the undisclosed Steering Committee, uniquely positioned to influence the evaluation process and outcomes (which it did), required disclosure" however "[t]he RFP does not provide for a Steering Committee's involvement in any step of the evaluation or award decision – the phrase does not appear in the RFP" (Appeal, at p. 13).

DCS responds "the role and membership of the Steering Committee is documented in the Evaluation Instrument … which is part of the procurement record and was sealed prior to the opening of any bids" (DCS Answer, at p. 9). DCS asserts "[t]he Steering Committee did not evaluate any scoring performed by the evaluators but were there in an oversight capacity to provide consistent guidance to evaluators as needed" and "[t]he Procurement Record clearly shows that the Technical and Financial Evaluation Teams were solely responsible for the outcome of this procurement" (*Id.*).

The Evaluation Instrument, Attachment 3 to the RFP, provided for a Steering Committee, as follows:

> Due to the complexity of the procurement, a Steering Committee has been established for this RFP to provide review, respond to questions from the evaluators and provide general guidance during the evaluation process. Members will consist of upper-level staff from [DCS] who are not part of the Technical or Financial Evaluation Teams.

(Evaluation Instrument, at p. 2). The Steering Committee is mentioned several other times in the Evaluation Instrument, identifying specific roles it may play, consistent with this description.[11]

Our review of the procurement record reflects that the Steering Committee acted in accordance with the role established for it as disclosed in the RFP's Evaluation Instrument. There is no evidence in the procurement record to support Optum's contention that the Steering Committee influenced the evaluators' scoring of proposals. Therefore, DCS complied with the RFP in the utilization of the Steering Committee. Additionally, as the Steering Committee did not

[11] For example, "If not previously identified by an evaluator, members of the Steering Committee will perform a review of the Offerors' financial proposal to ensure that no contingencies or extraneous language is included in the Offeror's Financial Proposal that would make the Financial Proposal non-responsive" (Evaluation Instrument, at p. 92).

participate in "the evaluation and selection," it was not required to be disclosed under applicable law, which only requires disclosure of "the general manner in which the evaluation and selection shall be conducted" (SFL § 163(9)(b)).

2. Technical Evaluation Deviations

a. Timing of Completion of Technical Evaluation in relation to Award Determination

Optum contends "not all evaluator scoresheets were complete until **after** the Award Memo [recommending the contract awardee] was prepared and issued [which] is a substantial procedural irregularity," a "fatal flaw," "arbitrary and capricious, and contrary to the RFP," and "raises concerns that scoring was manipulated to achieve a pre-determined result" (Appeal, at pp. 14-15 (emphasis in original)). To support this contention, Optum points to the Technical Proposal Rating Sheets for Caremark and Optum completed by one evaluator, dated August 13, 2024, and the DCS Award Recommendation memo, dated August 12, 2024 (*Id.*).

DCS responds that "prior to finalizing the Award Recommendation Memo, the Steering Committee … noticed two technical scores that needed to be sent back to the Performance Guarantee Evaluator because they did not follow the scoring methodology in RFP Section 7.2.2. of the RFP" (DCS Answer, at p. 10). DCS specifies that "Based on the oversite [*sic*] the evaluator changed [Caremark]'s score under RFP Section 5.4.9.b from a 3 to a 4 and changed [Optum]'s score for RFP Section 5.10.A.6 (NYSIF Rural) from a 3 to a 2" (*Id.*). DCS asserts "[t]he Award Memo was drafted on August 12, 2024, did not need adjustments due to the minor nature of the August 13, 2024, revisions, and was finalized on August 13, 2024" (*Id.*, at p. 11). DCS contends "[t]he net result was [ ] Caremark's winning margin increased from 1.59 points to 1.65 points, a de minimis impact … The final scores follow the Evaluation Instrument and RFP Section 7.2.2" (*Id.*, at p. 10).

RFP Section 7.2.2, *Performance Guarantee Ratings,* provided a scoring rubric to apply to the performance guarantees in RFP Attachment 6. RFP Section 7.2.2 provided for the following scores:

- Excellent (4): "(i) The Offeror's proposed Performance Guarantee exceeds the Program's service level standard contained within this RFP; and (ii) The Offeror's proposed credit amount is 125% or more of the Standard Credit Amount stated within this RFP";
- Good (3): "(i) The Offeror's proposed Performance Guarantee equals the Program's service level standard contained within this RFP, and the Offeror's proposed credit amount is 125% or more of the Standard Credit Amount stated within this RFP; or (ii) The Offeror's proposed Performance Guarantee equals or exceeds the Program's service level standard contained within this RFP; and the Offeror's proposed credit amount is greater than 100% but less than 125% of the Standard Credit Amount stated within this RFP";
- Meets Criteria (2): "(i) The Offeror's proposed Performance Guarantee equals or exceeds the Program's service level standard contained within this RFP; and (ii) The Offeror's proposed credit amount equals the Standard Credit Amount stated within this RFP"; and,

- Poor (1): "The Offeror's proposed Performance Guarantee is below the Program's service level standard contained within this RFP regardless of the credit amount proposed by the Offeror; or (ii) The Offeror's proposed credit amount is less than 100% of the standard credit amount stated within this RFP regardless of the level of performance the Offeror pledges."

(RFP, Section 7.2.2, at pp. 239-240).

Service level standards for each guarantee were provided in RFP Attachment 6. In response to Evaluation Instrument Section 5.4.9.b, Website Update Timeliness Guarantee, Caremark proposed a service level of 4 business days and a $32,000 credit, which exceeded the service level standard of 5 business days and was 125% or more of the Standard Credit Amount of $25,000, earning Caremark a score of Excellent (4). Therefore, it was appropriate that the evaluator changed their score from a 3 to a 4 for this question. In response to Evaluation Instrument Section 5.10.A.6, Network Pharmacy Access Guarantee, Optum proposed a service level of 80% access and a $7,500 credit, which exceeded the service level standard of 70% access and equaled the Standard Credit Amount of $7,500, earning Optum a score of Meets Criteria (2). Therefore, it was appropriate that the evaluator changed their score from a 3 to a 2 for this question. In order to earn a Good (3), Optum would have had to propose a greater credit amount.

Accordingly, the procurement record objectively supports the revised scores that were awarded to Caremark and Optum for RFP Sections 5.4.9.b and 5.10.A.6, respectively. The Evaluation Instrument and RFP Section 7.2.2 clearly delineate what score to award to an offeror in response to each of these proposal questions based on how the response compares to a service level standard established in advance by DCS. A comparison of the objective criteria set forth in the Evaluation Instrument and RFP Section 7.2.2 and the content of the offerors' proposals clearly shows that the revised scores were proper. Notwithstanding the foregoing, even if the revision of scores was improper, the change to the offerors' overall scores did not have a material impact on the outcome of the procurement, and in fact, Caremark would have been awarded the contract whether the scores were revised or not. Therefore, we find no basis to disturb the technical scores awarded by DCS based on these assertions by Optum.

b. Scoring of Technical Proposals

Optum contends DCS "admitt[ed] the agency deviated from the RFP's scoring scale for Technical Proposals" asserting that while "the RFP contemplates that the Technical Proposals, which were worth 250 of the available 1,000 points, be scored using a 1,000-point scale . . . the agency admits that it improperly scored the technical proposals by failing to apply the 1,000-point scale" (Appeal, at p. 16; 10/1/2024 Protest Submission, at p. 6).

DCS responds "[b]oth parties agree that [RFP] section 7.2.5 provides that Offerors' proposals will be initially scored using a 1,000-point scale with that score then reduced to a score between 0.01 and 250 [and] that this was not done … [i]nstead, the Offerors' proposals were rated on a 250-point scale at the outset … [but even though DCS] used an alternate scoring method than the one described in the RFP [it did not change the end result]" (DCS Recommendation, at p. 21; *see* DCS Answer, at pp. 12). DCS contends "the overall weighting of the technical proposal would still have amounted to 25 percent of the total combined score … [and] each of the technical

requirements were weighted consistently with section 7.2.4 of the RFP" (*Id.*). DCS further contends that "[a]lthough not material, the deviation in the technical scoring and resulting total score was to [Optum]'s benefit [because] had the 1,000-point scale been used for the technical evaluation, the delta between [Caremark] and [Optum]'s Total Combined Scores would have been 4.8 points instead of 1.65" (DCS Answer, at pp. 12-13).

As noted above, the RFP provided technical proposals would be scored using weighted point values up to a maximum of 1,000 points, with the technical proposal with the highest raw score to receive 250 points and the other proposals to receive a proportionate score according to a predetermined formula (*see* RFP, Sections 7.2.4 and 7.2.5, at pp. 242-243). DCS acknowledges technical proposals instead received scores based on a 250-point scale which deviated from the scoring methodology set forth in the RFP, and did not follow the requirements of SFL.

Although DCS admittedly deviated from a portion of the technical scoring methodology established in the RFP, this Office has long recognized the doctrine of excusable, harmless error in the procurement process. That is, while there may have been an error in the procurement process, the correction of the error would not change the outcome (i.e., the award) and, therefore, the error is harmless. Our review of the procurement record shows that whether DCS used a 1000-point scale and later converted it to 250 points, as described in the RFP, or initially used a 250-point scale, Caremark would have earned the highest technical proposal score, and the highest total combined score, and, as a result, been awarded the contract in either case. Therefore, as there was no material impact on the outcome, we will not disturb the technical scores awarded by DCS in this instance. Based on the foregoing, to the extent DCS scored technical proposals inconsistently with the RFP and Evaluation Instrument, such error was harmless.

3. Cost Evaluation Deviations

a. Reliance on Current Contract Costs versus Cost Proposal in Award Determination

Optum contends DCS "ignored [Caremark]'s Financial Proposal score and instead relied on a predicted actual cost of a contract to [Caremark], relying on 'the current contract' and the 'discounts and administrative fees to the current contract' to project that [Caremark]'s actual cost would be lower than [Caremark]'s bid price" (Appeal, at p. 12). Optum further contends DCS "revised the price offered by [Caremark] … based on assumed future performance … [which] was an undisclosed and unstated evaluation criteria … [that] contradicts the RFP's evaluation process" (*Id.*).

DCS responds "financial proposals were scored according to [ ] RFP Section 7.3.1 and [ ] the Evaluation Instrument" (DCS Answer, at p. 7). DCS asserts that Optum's contention "is illogical on its face, as [DCS] awarded [Optum] with the highest Financial Proposal Score" (*Id.*). DCS posits that, for its contention, Optum "rel[ies] on redactions made under the 'Contract Value' section of the Award Recommendation Memo [alleging] that the redactions point to [DCS] following an alternative methodology … [however] [t]he unredacted Award Recommendation Memo shows the projected value of claims and administrative costs over a five-year period [and] does not include the value of pharma revenue because when funds are encumbered against the contract in the future, pharma revenue will not be credited against it … [h]owever, this has no relationship to the award recommendation" or to "spending [which] will be net of pharma revenue"

(*Id.*, at pp. 8-9). DCS further contends "[t]he Award Recommendation Memo also includes a comparison of current program discounts, fees, and rebate guarantees to the guarantees included in the winning bid … this information is required by the Division of the Budget (DOB) [and] has no bearing on the selection [of contract awardee]" (*Id.*, at p. 9).

Caremark asserts "DCS did not use cost projections based on the current PBM contract as a basis for which the tentative award to [Caremark] was made and/or determined. DCS properly utilized [Caremark]'s proposal to simply project an estimated cost to the Division of the Budget" (Caremark Answer, at p. 6). Caremark further assets "the cost projections of [Caremark]'s proposal was not used as a basis for the RFP Tentative Award … the savings statement in the award recommendation memorandum has nothing to do with how the bids were scored, but is simply a comparison to how much the current PBM contract is costing the State" (*Id.*, at p. 7).

The procurement record shows evaluators evaluated and scored each financial proposal prepared by an offeror and combined that score with the technical proposal score to arrive at a total combined score for an offeror, which was used to determine contract award. There is nothing in the procurement record to support the contention that DCS ignored offerors' financial proposals in favor of projecting costs on behalf of offerors. Optum's contentions regarding DCS's Award Recommendation Memo, dated August 12, 2024, are based on a misconstruction of a section of the internal DCS memo which provides contract value estimates, minus rebates and subsidies, to determine the amount of agency funds sufficient for encumbrance purposes, and compares Caremark's proposal pricing to the current contract for informational purposes. Therefore, we find no evidence in the procurement record to support Optum's assertions.

b. Revision of Financial Evaluation Instrument after Receipt of Proposals

Optum alleges "[DCS] claimed the Evaluation Instrument was 'sealed' and finalized 'prior to the opening of any bids,' … yet critical changes were made on July 26—**during the evaluation process** … [as reflected in] an internal [DCS] memorandum dated July 29, 2024" (Appeal, at pp. 15-16 (emphasis in original)).

DCS asserts it "corrected original Financial Evaluation Attachments J and J.2 [as disclosed] in a memo to the Procurement Record dated July 29, 2024 … to apply the intended Specialty calculation methodology to all Offerors [and that] [s]uch correction resulted in non-material differences in [Optum]'s Total Evaluated Cost (less than $3,000 difference, on $3 billion, or a difference of 0.0000876%) … [and] [t]his change did not affect [Optum]'s Financial Cost Score of 750" (DCS Answer, at pp. 11-12). DCS further asserts "the Evaluation Instrument was finalized on June 25, 2024 and revised on July 26, 2024 to [make] a technical correction, not a change in the criteria or the weight applied to the scoring of the Financial Proposals … [and] the use of the revised formula did not have a material impact on the Financial Proposal scores for either [Optum] or [Caremark] (the winning bidder)" (DCS Recommendation, at p. 31).

DCS acknowledges that a change was made to financial evaluation attachments subsequent to receipt of proposals; specifically, DCS indicates that "… Financial Evaluators discovered that the calculations in Attachment J for the percentages of non-Specialty drugs filled through retail pharmacies erroneously included both non-Specialty and Specialty drugs, when it should have

only included the non-Specialty Drugs filled through retail pharmacies. To correct this calculation error, changes [were] made to Attachments J and J.2 and the Evaluation Instrument to only include the non-Specialty drugs filled through retail pharmacies" (DCS Recommendation, at p. 30).

Here, the change made to the financial evaluation attachments was made to ensure the attachments were consistent with the financial evaluation methodology established in the RFP and Evaluation Instrument. The Evaluation Instrument finalized before the receipt of proposals, dated June 25, 2024, provided "The cost evaluator will compare the Specialty Drugs proposed by each Offeror to the drugs dispensed under the DCS Program in 2023. Attachment J contains the 2023 claims file that will be used for this specialty drug adjustment … [Attachment J.2] will include … drugs that do not appear on the Offeror's proposed specialty drug list but are included on the Empire Plan's 2023 Specialty Drug List and were dispensed through the Specialty Pharmacy …" (RFP, Attachment 3, Evaluation Instrument, at pp. 88-89).

In an internal memorandum, dated July 29, 2024, DCS explains,

> During the financial evaluation, the designated Financial Evaluators discovered that the calculations in Attachment J for the percentages of non-Specialty drugs filled through retail pharmacies erroneously included both non-specialty and specialty drugs, when it should have only included the non-Specialty Drugs filled through retail pharmacies. In order to correct this calculation error, changes must be made to Attachments J and J.2 and the Evaluation Instrument to only include the non-Specialty drugs filled through retail pharmacies … The Department has determined this correction is necessary to correct the error in the Attachment J so the financial scores are accurately calculated.

Consistent with the explanation provided by DCS, original Attachment J, dated June 25, 2024, does not distinguish between specialty and non-specialty drugs, resulting in the inclusion of specialty drugs in Attachment J.2. The revised Attachment J, dated July 29, 2024, delineates between specialty and non-specialty drugs, excluding specialty drugs from inclusion in Attachment J.2. Based on this, the changes made to the evaluation attachments were not changes to the evaluation methodology but mere technical corrections to ensure that the evaluation methodology was carried out properly. Thus, such changes did not violate applicable law, as the evaluation methodology that was used was established prior to the receipt of proposals.[12]

**Documenting Contract Award Decision / Deficiency of Notice of Non-Selection of Proposals**

Optum contends DCS failed to adequately document and explain its decision to award the contract to Caremark and other procurement decisions in violation of State law (*see* Appeal, at p. 16).[13] Optum states DCS affirmed, at the debriefing, that DCS had fulfilled those requirements,

[12] Notwithstanding the foregoing, our review of the procurement record further shows that whether DCS altered the financial evaluation attachments or not, Optum would have still earned the highest financial proposal score, and Caremark would have still earned the highest total combined score, i.e., the outcome would have been the same in either case.

[13] To support this assertion, Optum cites the requirement in SFL § 163(4)(b)(ii)(D) to maintain a procurement record identifying procurement decisions for each centralized contract procurement conducted by the New York State Office of General Services. Although a centralized contract procurement is not at issue here, state agencies are similarly required to maintain a procurement record for the purchase of goods and services as discussed below (*see* SFL § 163(9)(g)).

but alleges "[DCS] cannot rely on the debriefing to satisfy its statutory documentation obligations, as the debriefing occurred after the decisions were made" (*Id*., at p. 17). Optum also claims DCS' notice of non-selection to Optum was deficient since it "lacks reasons or rational bases for the agency's non-selection decision or its decision to move ahead with another Offeror" and further fails to "inform [Optum] of 'the possibility that failed negotiations could result in an alternative award'" as required by the RFP (Appeal, at p. 5; *see* RFP, Section 2.1.8, at p. 33).[14]

DCS states it "provided the reasons that [Optum's] proposal was not selected [for contract award]" at Optum's debriefing, including how Optum's technical and financial proposals ranked in comparison to other offerors (DCS Answer, at p. 13). DCS asserts that while it was not required by law or its debriefing guidelines to provide Optum with specific information regarding tentative awardee Caremark's proposal at the debriefing, DCS "has been clear throughout the process that the contract award was based on a Best Value determination where both financial and technical scores contribute to a Total Combined Score" (*Id*., at pp. 13-14). DCS does not dispute the notice of non-selection to Optum did not contain the statement regarding the possibility of an alternative award but contends the RFP already alerted offerors to this process and the statement is not legally required to be included in the notice (DCS Recommendation, at p. 7). To refute Optum's claim that the lack of bases for DCS' procurement decisions in the notice rendered it deficient, DCS states substantiating documentation is required to be in the procurement record, not the notice (*Id*.).

1. Statutory Requirements for Documenting Award Decision

SFL § 163(9)(g) requires state agencies to maintain a procurement record for each procurement "identifying, with supporting documentation, decisions made by [ ] a state agency during the procurement process." Furthermore, when the contract is awarded on a best value basis, SFL § 163(9)(a) provides "documentation in the procurement record shall, where practicable, include a quantification of the application of the criteria to the rating of proposals and the evaluation results, or, where not practicable, such other justification which demonstrates that best value will be achieved." Finally, SFL § 163(10)(a) provides "[s]election and award shall be a written determination in the procurement record made by the [ ] state agency in a manner consistent with the provisions of the solicitation" and "the basis for determining the award shall be documented in the procurement record." Indeed, procurement record means "documentation of the decisions made, and the approach taken in the procurement process" (SFL § 163(1)(f)).

Thus, DCS was required to document and explain its decision to award the contract to Caremark instead of other offerors in the procurement record which is not required to be shared with offerors. The only information relating to DCS' selection or non-selection of proposals that DCS must provide is set forth in the law governing debriefings.[15] Our review of the procurement record shows DCS satisfied the applicable legal requirements for documenting its determination to award the contract to Caremark rather than another offeror.

[14] Optum further objects that "[this notice] contains no information about the number of awards, much less the reason for making one or more awards" (Appeal, at p. 5). The RFP clearly provides "the Procuring Agencies intend to select that responsive and responsible Offeror whose Proposal offers the 'Best Value' to the Procuring Agencies … for the purpose of entering into negotiations for two separate standalone contracts" (RFP, Section 7, at p. 238).
[15] *See* fn. 16, *infra.*

2. Requirements for Notice of Non-Selection of Proposals

As an initial matter, there is no statutory requirement that dictates what language agencies must use to notify offerors that they have not been selected for award; statute merely requires that State agencies provide "all unsuccessful offerers" with "a notice in writing or electronically that the offerer's offer is unsuccessful" (SFL § 163(9)(c)). Here, the RFP provided for notification to unsuccessful offerors of "the tentative award and the possibility that failed negotiations could result in an alternative award" and nothing more (RFP, Section 2.1.8, at pp. 32-33).

Most importantly, and despite Optum's assertions to the contrary, DCS, in its August 19, 2024, notice to Optum, did provide the fundamental reason Optum's proposal was not selected for award: "based on the RFP's evaluation criteria, [Optum's] proposal did not provide the best value to the State." While the notice specified a tentative award had been made, the parties concede the notice did not address the process DCS would follow in the case of unsuccessful negotiations with the tentative awardee. Regardless, the RFP had already made offerors aware of this process in multiple sections, thus making such statement in the notice of non-selection superfluous (*see* RFP, Section 7.5, at p. 246; *see also* RFP, Section 2.1.11(q), at p. 36). In fact, the notice was sufficient to satisfy statutory requirements in advising Optum of its non-award such that Optum both requested a debriefing[16] and submitted a protest to DCS timely, demonstrating that Optum was not harmed by any minor technical deficiencies. Accordingly, we find the notice of non-selection complied with applicable law and substantially complied with the RFP requirement by providing the requisite notice.

**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 DCS. As a result, the Appeal is denied, and we are today approving the DCS/Caremark contract for pharmacy benefit services for the DCS Programs.

[16] In addition to the notice of non-selection that Optum received, DCS elaborated on the evaluation and selection process at Optum's debriefing. 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.

Accordingly, while such information was not required by law or the RFP to be set forth in the notice of non-selection, DCS was statutorily required to provide the reasons why Optum's proposal had not been selected for award at the debriefing.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

---

In the Matter of the Bid Protest filed by Public Consulting Group LLC with respect to the procurement of Cost Study and Operation of Certified Public Expenditure Reimbursement Methodology for the Preschool/School Supportive Health Services Program conducted by the New York State Department of Health.

Contract Number – C040635

**Determination of Bid Protest**

**SF-20240179**

March 6, 2025

---

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Health (DOH) for Cost Study and Operation of Certified Public Expenditure Reimbursement Methodology for the Preschool/School Supportive Health Services Program (Services). We have determined the grounds advanced by Public Consulting Group LLC (PCG) 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 Fairbanks LLC (Fairbanks) for the Services.

## BACKGROUND

### Facts

On March 28, 2024, DOH issued a Request for Proposals (RFP) seeking a vendor to "conduct annual cost studies to determine actual direct and indirect costs incurred by public school districts and counties (preschools) for medical care, services, and supplies, including related special education services furnished to children with disabilities [and] operate a certified public expenditure reimbursement methodology for public school districts and counties for services delivered under the Preschool/School Supportive Health Services Program" (RFP, Section 2.1, at pp. 3-4).

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. 26-27). 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. 27). 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. 27-28). 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 8.8, at p. 28).

DOH received responsive proposals from Fairbanks, PCG and Sivic Solutions Group, LLC, prior to the proposal due date of May 23, 2024. DOH awarded the contract for the Services to Fairbanks, the offeror receiving the highest composite score. DOH provided PCG a debriefing on November 25, 2024, and PCG submitted a protest to this Office on December 2, 2024 (Protest). DOH responded to the Protest on February 7, 2025 (Answer).

**Comptrollerös 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/Fairbanks contract;

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

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

    a. Protest; and
    b. Answer.

[1] 2 NYCRR Part 24.

## ANALYSIS OF THE PROTEST

### Protest to this Office

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

1. Fairbanks' unreasonably low bid indicates that Fairbanks will be unable to perform the Services required under the RFP.
2. DOH failed to evaluate all expected costs under the RFP and therefore failed to award the contract on the basis of best value.[2]

### 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 provided detailed requirements needed for a bidder to understand the scope of work which Fairbanks fully understood in submitting its cost proposal.
2. The RFP required bidders to submit all-inclusive deliverable prices and, as a result, DOH evaluated all expected costs to perform the Services under the RFP.[3]

## DISCUSSION

### Responsiveness of Fairbanksö Proposal

PCG asserts Fairbanks' proposed cost is "unreasonably low and once again[4] places [DOH] at risk that Fairbanks will be unable to satisfy its ultimate contractual requirements" (Protest, at p. 1). PCG further contends DOH's award to Fairbanks based on an "unreasonably low offer is counter to [DOH's] mandate to select a bidder that presents a proposal that is in the 'best interests of the state'" (*Id.*, at p. 3). DOH responds "it is clear that Fairbanks fully understood the RFP's scope when submitting its proposed Cost" and, furthermore, by submitting its proposal, "agreed that its submitted prices reflected 'all costs…required to complete all deliverables and adhere to all standards of [the] RFP'" (Answer, at p. 4). In addition, DOH asserts "[a] lower price is not an automatic indicator that the vendor cannot or will not be able to perform [but rather] an indicator that the vendor is perhaps willing to accept less profit, which is in the best interests of the State" (*Id.*).

---

[2] On January 4, 2024, this Office non-approved a contract award to Fairbanks under a 2023 solicitation issued by DOH for a scope of work similar to that in the RFP because DOH failed to evaluate all associated costs (namely, two specific items of work that were included in the 2023 solicitation and absent from the RFP at issue here) thereby failing to award the contract on a best value basis. At that time, PCG had protested the award to Fairbanks on the basis that Fairbanks' pricing was not aligned with the scope of the project (*see* Protest, at p. 2). Our review of the current procurement record shows DOH evaluated all costs associated with the RFP's scope of work. Accordingly, the Determination will not further address this allegation.

[3] See footnote 2, *supra*.

[4] See footnote 2, *supra*.

State agencies are required to award service contracts based on best value to a responsive and responsible offeror (SFL § 163(4)(d); § 163(10)). SFL § 163(9)(b) provides that the "solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted." A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency" (SFL § 163(1)(d)).

The RFP set forth the minimum qualifications required to be considered responsive (*see* RFP, Section 3.1, at pp. 6-7). Our review of the procurement record reflects that DOH conducted a review of each offeror's proposal to determine whether an offeror met the minimum qualifications of the RFP.

In addition to the minimum qualifications discussed above that an offeror must meet in order to be responsive pursuant to SFL § 163, the RFP sets forth the scope of work that the awarded offeror will be required to provide throughout the contract term (*see* RFP, Section 4.0, at p. 7; *also see* RFP, Sections 4.1, 4.1.1, 4.1.2, 4.1.3, 4.1.4, 4.2, 4.3, and 4.6 for specific requirements). Each offeror was required to "provide responses that address all of the requirements of this RFP as part of its Technical Proposal" which DOH would evaluate and score (RFP, Section 4.0, at p. 7).

This Office is unwilling to substitute its judgment for that of an agency in matters within an agency's realm of expertise where the agency scored technical proposals "according to the pre-established technical proposal evaluation tool" (*see* OSC Bid Protest Determination SF-20170192, at p. 7). OSC "will generally not disturb a rationally reached determination of a duly constituted evaluation committee unless scoring is clearly and demonstratively unreasonable" (*see* OSC Bid Protest Determination SF-20210164, at p. 5 (*citing* OSC Bid Protest Determination SF-20160188, at p. 8)). The procurement record shows, prior to the receipt of proposals, DOH developed an evaluation tool consistent with the evaluation criteria relating to the scope of work described in the RFP. Based on our review of the procurement record, DOH evaluated Fairbanks' technical proposal according to the clearly articulated criteria set forth in the RFP and consistent with the evaluation instructions/instrument and determined Fairbanks' technical proposal met the requirements of the RFP.

Additionally, DOH concluded Fairbanks' cost proposal was reasonable (Answer, at p.3). PCG's contentions regarding Fairbanks' cost proposal are based on conclusory assumptions with respect to Fairbanks' experience and understanding of the scope of services for the RFP. Based on our review of the procurement record, DOH reviewed Fairbanks' 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. 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; *see also* OSC Bid Protest Determination SF-20200165, at p. 8). In addition, this Office, as part of our review of the procurement record, confirmed with DOH that DOH was confident that Fairbanks could fulfill

the contract obligations at the price bid and nothing has come to our attention during our review that would cast doubt on DOH's affirmation.

Based on the foregoing and our review of the procurement record, we find no reason to question DOH's determination that Fairbanks can perform the contract at the price bid.

**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/Fairbanks contract for the Services.