# Procurement Stewardship Act Report

**BID Protest Determinations between April 1, 2025 through March 31, 2026**

| File Number | Date of Decision | Protestor | Contracting Entity | Decision |
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| SF-202401111 | 4/7/2025 | R.L. Polk & Company | NYS Department of Motor Vehicles | Denied |
| SF20240178 | 4/25/2025 | Total Control Training, Inc. | New York State Department of Motor Vehicles | Denied |
| SF20240172 | 5/16/2025 | Niagara Falls Water Board | New York State Department of Environmental Conservation | Denied |
| SF20250037 | 7/3/2025 | Technical Safety Services LLC | NYS Department of Health | Denied |
| SF20250101 | 7/8/2025 | ADP Group, Inc | New York State Office of Parks, Recreation and Historic Preservation | Denied |
| SF20250115 | 7/17/2025 | BronxWorks, Inc. | NYS Department of Health | Denied |
| SF20250116 | 8/13/2025 | Coastal Contracting Corp. | NYS Department of Transportation | Denied |
| SF20240180 | 8/20/2025 | Sanghi Consulting, Inc. | Office of General Services | Denied |
| SF20250131 | 9/12/2025 | Rosemar Contracting, Inc. | NYS Department of Transportation | Denied |
| SF20250130 | 9/12/2025 | Bove Industries, Inc. | NYS Department of Transportation | Denied |
| SF20250129 | 10/14/2025 | Save the Michaels of the World, Inc. | New York State Office of Addiction Services and Supports | Denied |
| SF20250169 | 10/24/2025 | Jacobi Medical Center | Office of Victim Services | Upheld |
| SF20250188 | 11/13/2025 | Door Automation Corp. | SUNY at Stony Brook | Upheld |
| SF20250225 | 1/28/2026 | University of Rochester Medical Center | New York State Department of Health | Denied |
| SF20250205 | 1/28/2026 | Martin’s B & A Enterprises LLC d/b/a Martin’s Custom Tidesides | New York State Office of Parks, Recreation and Historic Preservation | Denied |
| SF20250128 | 2/19/2026 | Amneal Pharmaceuticals, LLC | New York State Department of Health | Denied |
| SF-20250222 | 2/19/2026 | Emergent Devices, Inc. | New York State Department of Health | Upheld |
| SF20260019 | 3/13/2026 | Amneal Pharmaceuticals of NY, LLC | New York State Department of Health | Denied |
| SF20250229 | 3/24/2026 | Jackson & Coker LocumTenes, LLC | New York State Office of Mental Health | Denied |

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| In the Matter of the Protest filed by the Niagara Falls Water Board with respect to the grant awards for Water Quality Improvement Projects made by the New York State Department of Environmental Conservation. | **Determination of Protest** |
| | **SF–20240172** |
| Procurement Record – DEC01-0000201-3350000 | May 16, 2025 |

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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 Niagara Falls Water Board (NFWB) are insufficient to merit overturning the grant awards made by DEC and, therefore, we deny the Protest.

**BACKGROUND**

**Facts**

On June 4, 2024, 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 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 NFWB applied for a Wastewater Treatment Improvement project grant for its Sewer Plant Biological Conversion Project (Project). The RFA specified each applicant applying for a Wastewater Treatment Improvement project grant must submit, among other things, a completed and signed Sexual Harassment Prevention Certification Form, and a completed and signed Executive Order No. 16 Certification Form (*Id.*, at p. 9). The RFA also provided links to these required forms (*Id.*, at p. 9, fn. 11, 12).

[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 and Road Salt Reduction, Dam Safety Repair/Rehabilitation and Dam Removal, Aquatic Connectivity Restoration, Marine District Habitat Restoration, and Fish and Wildlife Habitat Restoration and Enhancement (RFA, at pp. 3–5).

Prior to the July 31, 2024, submission deadline, DEC received WQIP applications, including a submission from NFWB. On October 11, 2024, DEC notified NFWB that its application was ineligible for WQIP funding because it "did not meet the following WQIP eligibility criteria: Required documents incomplete (Sexual Harassment Prevention and Executive Order 16 forms outdated and not signed by current director)." NFWB requested a debriefing, which DEC provided on October 29, 2024. NFWB filed a protest with this Office on November 4, 2024 (Protest). DEC responded to the Protest on March 28, 2025 (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 regulations setting forth the procedure (OSC Protest Procedure) to be used by an interested party seeking to challenge a contract award by a State agency (*see* 2 NYCRR Part 24). 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 agency 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.

## ANALYSIS OF THE PROTEST

### Protest to this Office

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

1. DEC's determination that NFWB's application was ineligible for funding because two required forms were not signed by NFWB's current director and were outdated was improper as: (i) those requirements were not disclosed in the RFA; (ii) NFWB submitted the required forms that were previously signed by an NFWB director while they were in such position; and, (iii) in any event, the current director certified to the truth of the entire application.

### DEC Response to the Protest

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

1. DEC properly determined NFWB's application was ineligible for funding due to NFWB's failure to submit current required forms signed by the current director.

## DISCUSSION

### Ineligibility Determination

NFWB alleges that DEC arbitrarily applied "unannounced criteria" when it found NFWB's grant application "ineligible for consideration . . . because two required forms submitted as part of the application 'were not signed by current director' and were 'outdated'" (Protest, at pp. 1, 5). NFWB submits that "nowhere [in the WQIP application requirements, State Finance Law § 139-l, or guidance issued on Executive Order No. 16] is there a requirement that the Executive Order No. 16 Certification and Sexual Harassment Prevention Certification forms submitted in connection with a WQIP grant application be signed by a particular individual or dated within a specific time period (*Id.*, at p. 5). NFWB further contends that "the name on the certification forms at issue and their date – absent any requirement that the forms be dated on a particular date – should have no significance, where the correct forms have been completed and the individual signing the application has at the time of submitting it certified the truth and accuracy of the statements and documents submitted" (*Id.*). NFWB asserts that its Sexual Harassment Prevention Certification and Executive Order No. 16 Certification forms were signed by its Executive Director (then Dr. Abderrahman Zehraoui) on August 10, 2023; and, as such, the NFWB's "WQIP application complied in full with the express terms of the WQIP Program Overview" (*Id.*, at pp. 3, 6). Furthermore, NFWB contends that "Notwithstanding the date and signer of the required forms included with the [NFWB]'s WQIP application, its current Executive Director fully endorsed, adopted, and certified the Executive Order No. 16 Certification and Sexual Harassment Prevention Certification forms submitted with its application and the content thereof on July 31, 2024, the date the application was submitted . . . [by certifying] that the entire application – including 'all statements . . . and supporting documents . . . are true, correct and complete'" (*Id.*, at pp. 4, 6).

DEC responds that it "reviewed the Sexual Harassment Prevention Certification Form and Executive Order No. 1[6] Certification Form[2] provided by the Niagara Falls Water Board [and] [b]oth forms were signed and dated on August 10, 2023 by the former Executive Director of the Niagara Falls Water Board, Abderrahman Zehraoui" however "[a]t the time the application was submitted on July 31, 2024, Sean Costello was the Executive Director of the Niagara Falls Water Board and listed as the primary contact on the application" (Answer, at p. 1). DEC contends that "at the time of application, Abderrahman Zehraoui was not authorized [to] certify the [forms] on behalf [of] the Niagara Falls Water Board as they were no longer serving in the Executive Director position and no longer affiliated with the board. Therefore, [DEC] considered the forms as incomplete and deemed the application as ineligible" (*Id.*, at pp. 1-2). DEC further asserts that "the [RFA] states that [DEC] reserves the right to reject any or all applications in response to the [RFA] at the agency's sole discretion" (*Id.*, at p. 2).

The RFA clearly specified that for Wastewater Treatment Improvement project applications a "[c]ompleted and signed Sexual Harassment Prevention Certification Form" and a "[c]ompleted and signed Executive Order No. 16 Certification Form" were required (RFA, at pp. 3, 9). In addition, the RFA provided links to the required forms (*Id.*, at p. 9, fn. 11, 12). As noted above, the RFA provided that an application that did not include all required attachments and did not meet all requirements for its project type would be ineligible for grant funding (*Id.*, at p. 7).

The Sexual Harassment Prevention Certification Form, as provided by DEC in the RFA, contained the following language:

> By submission of this application, each applicant and each person signing on behalf of any applicant certifies, . . . under penalty of perjury, that the applicant has and has implemented a written policy addressing sexual harassment prevention in the workplace and provides annual sexual harassment prevention training to all of its employees.

The Executive Order No. 16 Certification Form, as provided by DEC in the RFA, contained the following language:

> The undersigned certifies under penalties of perjury that they are knowledgeable about the Vendor's business and operations and that the answer provided herein is true to the best of their knowledge and belief.

The language contained in both certifications necessarily requires each of the forms must be signed to reflect the current state of compliance by the entity and by someone currently authorized to sign on behalf of the entity. Instead of submitting required forms that were signed by someone currently authorized to sign on behalf of the NFWB, and that were up-to-date to reflect the current state of compliance by the NFWB with the certifications contained in the forms, NFWB chose to submit required forms that were: (i) signed nearly a year before they were submitted (signed on August 10, 2023 and submitted on July 31, 2024), and (ii) signed by an individual who was no longer employed

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[2] DEC's Answer refers to the "Executive Order No. 18 Certification Form" throughout; however, it is clear that the intended reference was to the Executive Order No. 16 Certification Form.

at the NFWB (the former Executive Director). Accordingly, DEC's conclusion that NFWB's forms did not comply with the RFA requirement to submit a completed and signed form, because the forms were outdated and not signed by the current Executive Director, was a reasonable interpretation of the RFA requirement. Furthermore, our review of the procurement record confirms that DEC consistently interpreted and applied this mandatory requirement in accordance with the RFA; in fact, DEC deemed several other applicants ineligible for submitting outdated required forms.

Nearly three months after the application submission deadline, NFWB tried to correct its error by submitting a Sexual Harassment Prevention Certification Form and Executive Order No. 16 Certification Form signed by its current Executive Director on October 11, 2024, in response to the October 11, 2024 notice from DEC that NFWB's application had been deemed ineligible. However, contrary to NFWB's contentions, there is nothing in the RFA or applicable law requiring DEC to provide NFWB an opportunity to correct a non-compliant submission after DEC's ineligibility determination. Moreover, NFWB's contention that the current Executive Director's execution of the general certification for the application should automatically be allowed to correct any errors in other certifications is unavailing. The RFA clearly specified the requirements, which included executing certain individual certification forms, and consequences for failing to meet them. DEC is not required, either by the RFA or applicable law, to waive strict compliance with a mandatory RFA requirement.

Accordingly, we find no reason to disturb DEC's determination that NFWB was ineligible for grant funding for failure to meet certain eligibility criteria.

**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.

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| In the Matter of the Bid Protest filed by Total Control Training, Inc., with respect to the procurement of an administrator for the New York State Motorcycle Safety Program conducted by the New York State Department of Motor Vehicles. | **Determination of Bid Protest** |
| | **SF–20240178** |
| Contract Number – C000997 | April 25, 2025 |

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

**BACKGROUND**

**Facts**

New York State Vehicle and Traffic Law (VTL) § 410-a requires DMV to establish and administer a motorcycle safety program, consisting of motorcycle rider training courses, motorcycle course instructor training, program promotion, and promotion of public awareness. Accordingly, on May 2, 2024, DMV issued a Request for Proposals for Motorcycle Safety Program (RFP) seeking proposals from "motorcycle rider training coordinating organization[s] [] to administer [the Program] . . . in conformance with [VTL] Section 410-a" (RFP, Section 1-1, at p. 4). Consistent with VTL§ 410-a(2), the RFP provided for an offeror to be selected for contract award "based upon factors including, but not limited to: (1) the most favorable financial advantage for the state; (2) the greatest utility to the motorcyclist; (3) the comprehensiveness of the program and effectiveness of the provider; and (4) compatibility with existing rider education programs (RFP, Section 1-2, at p. 4).

The RFP further provided that an offeror's proposal would be scored on the basis of Cost (20%) as well as three technical components, including Administration Requirements (25%), Program Requirements (50%), and Diversity Practices (5%) *(see* RFP, Section 3-4, at p. 21). The Administration Requirements and Program Requirements components consist of mandatory requirements, evaluated on a pass/fail basis, as well as scored criteria (s*ee id.; see also* RFP, Section 4, at pp. 23-60). The Diversity Practices component consists of a scored questionnaire relating to an offeror's diversity practices (s*ee* RFP, Section 3-4, at p. 21; *see also* RFP, Appendix F). For the Cost component, the RFP requires that an offeror provide an all-inclusive price-per-student fee based on DMV's forecasted number of clients over the five-year contract term, up to a maximum total contract amount of $6.5 million (*see* RFP, Section 3-5.1, at p. 22; *see also* RFP, Appendix D). The cost proposal with the lowest total cost would receive the full number of available points, and other cost proposals with higher costs would receive proportionately lower cost scores (*see* RFP, Section 3-5, at p. 21). The cost score would be added to the score of the other three components of an offeror's technical proposal, and the offeror receiving the highest combined score would be awarded the contract (*see* RFP, Section 3-4, at pp. 20-21).

DMV received a total of two proposals by the due date of July 8, 2024, one from TCTI, and one from MSF. On October 10, 2024, DMV awarded the contract for administrator of the Program to MSF, the offeror whose proposal received the highest combined score.

TCTI requested a debriefing, which DMV provided on November 20, 2024. On November 27, 2024, TCTI filed a protest with this Office (Protest). On December 9, 2024, MSF responded to the Protest (MSF Answer) and on March 7, 2025, DMV responded to the Protest (DMV Answer). On March 12, 2025, TCTI responded to the Answers of MSF and DMV (TCTI Reply).

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

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

In carrying out this contract approval responsibility, OSC has promulgated the Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency (*see* 2 NYCRR Part 24). This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. As there was no protest process engaged in at the agency level, the Protest is governed by Section 24.4 of the OSC Protest Procedure.

In the determination of the Protest, this Office considered:

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

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

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

    a. Protest;
    b. MSF Answer;
    c. DMV Answer; and

d. TCTI Reply.

**ANALYSIS OF THE PROTEST**

**Protest to this Office**

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

1. VTL § 410-a is unconstitutional because the statute names the standard and curricula of MSF and violates the constitutional prohibition on legislation that provides a public benefit to private parties;
2. The contract was not awarded on the basis of best value as required by SFL;
3. DMV violated SFL in that its evaluation methodology failed to take into account conflicts of interest, consider past performance references, compare curricula between offerors, and compare technical, managerial and financial competence and experience between offerors;
4. Previous requests for proposals, contract awards, and bid protest determinations[1] involving DMV's procurement for an administrator of the Program establish a pattern of "hiding true disclosures" and "failure of an entity to act despite obvious issues" and should be considered here;[2] and,
5. DMV refused to identify documents it relied upon during the debriefing with TCTI with sufficient specificity such that TCTI could not effectively request such documents pursuant to New York's Freedom of Information Law.[3]

**DMV's Response to the Protest**

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

1. VTL § 410-a includes the MSF standard because it was the national standard at the time of its enactment; however, the statute also allows a comparable course to be considered, and TCTI's course was deemed by DMV to be comparable;
2. The contract was awarded on the basis of best value as set forth in the RFP and in accordance with SFL;

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[1] The Protest refers to a 2013 DMV RFP, DMV Contract No. C000791, and OSC Bid Protest Determination SF-20140079; and, a 2018 DMV RFP, DMV Contract No. C000893, and OSC Bid Protest Determination SF-20180263 (Protest, at p. 2, fn.3, and p. 7).

[2] OSC's Protest Procedure requires a protest to "contain specifically enumerated factual and/or legal allegations, setting forth the basis on which the protesting party challenges the contract award by the public contracting entity" (2 NYCRR § 24.4(a)). This assertion is vague, lacking "specifically enumerated" allegations, and accordingly will not be addressed in this determination. Moreover, the list of prior procurement documents referenced by TCTI is out of scope of OSC's review of the current contract and will likewise not be considered herein.

[3] 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 protests. Furthermore, in making this Determination, we have reviewed the entire procurement record, which includes any documentation related to the procurement that would have been within the scope of TCTI's FOIL request. Accordingly, the Determination will not address this allegation.

3. DMV considered conflicts during the administrative vendor responsibility reviews, conducted reference checks as part of the vendor responsibility review of the tentatively awarded bidder, and scored proposals independently of one another to promote a fair and competitive procurement process; and,
4. DMV's action or inaction on a FOIL request does not impact OSC's review of the contract award and is not considered as part of OSC's review of a protest; moreover, OSC reviews the entire procurement record, which includes any documentation related to the procurement that would have been within the scope of a FOIL request.[4]

**<u>MSF's Response to the Protest</u>**

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

1. The evaluation and selection process conducted by DMV was consistent with the RFP and the requirements of the SFL, and the award made to MSF was based on a best value determination;
2. TCTI's claims regarding evaluation methodology are devoid of specificity and entirely unsupported;
3. TCTI's allegations of unspecified actions by unidentified parties, which somehow involve prior RFPs for the Program are devoid of specificity and entirely unsupported; and,
4. DMV's action or inaction on a FOIL request does not impact OSC's review of the contract award and is not considered as part of OSC's review of bid protests.[5]

**<u>TCTI's Reply to the Answers</u>**

In its Reply, TCTI reiterates the original grounds set forth in the Protest.

**DISCUSSION**

Herein, we will address grounds for Protest 1, 2, and 3 as identified above in Analysis of the Protest. For discussion of Protest grounds 4 and 5, see footnotes 2 and 3.

**<u>Constitutionality of VTL § 410-a</u>**

TCTI asserts that VTL § 410-a contains "the appearance of favoritism," "presumptive prejudice," and is "unconstitutional[]" because the statute "names the standard and curricula of the presumptive Awardee [MSF], without reference to the NHTSA National Standards" and violates the constitutional "prohibition on legislation that would provide public benefit to private parties" (Protest, at p. 3, fn. 5 and p. 7). DMV responds that VTL § 410-a "was enacted in 1997 [and] the legislature chose to cite what was considered to be the national standard at that time and that resulted in the [MSF] being the standard written in law" (DMV Answer, at p. 2). DMV further responds that VTL § 410-a "provides that a course 'comparable' to the specified standard

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[4] *See supra* fn. 3.
[5] *See id.*

may be considered" and "[TCTI] was deemed 'comparable' by the [DMV] for the purposes of being eligible to compete for this contract" (*Id.*).

At the outset, we note that TCTI's Protest appears to refer to the requirement in VTL § 410-a(1) that provides, "[a]pproved rider training courses shall meet nationally recognized standards for motorcycle rider training courses, or standards for motorcycle rider safety programs which are approved by the [DMV] and are comparable to the standards of the [MSF]'s motorcycle rider safety program."

OSC's authority to review the DMV / MSF contract for the Program, and the instant Protest, is derived from SFL § 112. However, SFL § 112 does not bestow OSC with the authority to review the constitutionality of a duly enacted State statute. Therefore, we will not be addressing the constitutionality of VTL § 410-a in this determination.

In any event, TCTI fails to show how it suffered any harm by the application of the above-referenced statutory requirement to this procurement. In fact, the procurement record shows TCTI was not harmed: the RFP incorporated the VTL § 410-a requirement as a mandatory requirement to be evaluated on a pass/fail basis, determining the responsiveness of an offeror; and the procurement record reflects that TCTI's program was found responsive by DMV (*see* RFP Section 4-4, CRR016, at p. 33).

**<u>Best Value Determination</u>**

TCTI contends "[t]he evaluation methodology utilized by NY DMV [] [w]as not in accordance with the State Finance Law because it was not based on merit or 'best value'" (Protest, at p. 7). DMV responds that "award was made on the basis of best value as provided in Section 3-4 of the RFP and in accordance with the State Finance Law and the NYS Procurement Guidelines" and "[t]he RFP outlines the best value evaluation methodology that established the evaluation criteria . . ." (DMV Answer, at p. 1). MSF responds "the evaluation and selection process conducted by DMV was consistent with the RFP and the requirements of the SFL, and [ ] the award made to MSF was based on a best value determination" (MSF Answer, at p. 3).

State agencies are required to award service contracts based on best value (SFL § 163(10)). Best value is defined as "the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers" (SFL § 163(1)(j)). The basis must "reflect wherever possible, objective and quantifiable analysis" (*Id.*). Additionally, the solicitation issued by the procuring State agency must "prescribe the minimum specifications or requirements that must be met to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted" (SFL § 163(9)(b)). Finally, the contracting agency must document "in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria, which whenever possible, shall be quantifiable, and the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted" (SFL § 163(7)).

VTL § 410-a(2) provides, "The contract shall be awarded following the consideration of factors which shall include, but not be limited to, the most favorable financial advantage for the state, the greatest utility to the motorcyclist, the comprehensiveness and effectiveness of such organization and its compatibility with the existing rider education programs." As noted above, the RFP contains requirements for contract award that mirror these statutory requirements (*see* RFP, Section 1-2, at p. 4).

Here, the RFP issued by DMV sets forth the general evaluation criteria, consisting of a review of cost and the technical components of the proposal, along with the respective scoring weight of each component (*see* RFP, Section 3-4, at p. 21). The RFP provides that cost would be worth 20% of scoring, and that a technical review of Administration Requirements (25%), Program Requirements (50%), and Diversity Practices (5%) account for the remaining score (*see id.*). The cost score would be calculated by a formula set forth in the RFP, then added to the offeror's technical scores (*see* RFP, Section 3-5, at p. 21). The RFP also provides that the contract would be awarded to the offeror with the highest combined score (*see* RFP, Section 3-4, at pp. 20-21). This description of the evaluation and selection process set forth in the RFP satisfies the statutory requirements of SFL § 163(9)(b).

Additionally, the procurement record indicates DMV finalized its evaluation tool prior to the initial receipt of bids. The evaluation tool further defined and detailed the evaluation process, establishing a 1000-point scoring plan consistent with the relative weights set forth in the RFP (Cost - 200 points, Administration Requirements - 250 points, Program Requirements - 500 points, and Diversity Practices - 50 points). Therefore, DMV's evaluation process satisfied the requirements of SFL § 163(7).

Finally, our review of the procurement record confirms that DMV evaluated the proposals in accordance with the criteria set forth in the RFP and evaluation tool. DMV made the contract award to MSF, the offeror submitting the proposal receiving the highest combined score. Accordingly, the evaluation and selection process conducted by DMV was consistent with the RFP and the requirements of the SFL, and the award made to MSF was based on a best value determination.

**Evaluation Methodology**

TCTI further contends "State Finance Law was violated when NY DMV failed to consider (a) established conflicts, (b) past performance references, and (c) compare curricula and the technical, managerial and financial competence and experience of TCTI [versus MSF] . . . especially when the MSF curricula has been proven defective and has caused, by MSF admission, deaths in class)" (Protest, at p. 7). DMV responds that "any stated conflicts [were] considered in relation to the administrative review and Vendor Responsibility Review and Determination," "reference checks [were conducted] as part of the vendor responsibility review of the tentatively awarded bidder," and "[a]s outlined in Section 3-4 of the RFP, proposal evaluations [were] scored independent of one another to promote a fair and competitive procurement process, in accordance with NYS Procurement Guidelines and State Finance Law" (DMV Answer, at pp. 2-3). Lastly, DMV asserts that it "has no reason to believe that any aspect of the curriculum creates an undue risk to the safety of participants and disagrees with the assertion that the MSF curriculum products that have been and are currently being delivered in this state are defective in such a way as [to] result[] in fatalities" (*Id.*, at p. 3). MSF responds TCTI "fails to specifically enumerate such allegations [and] does not provide any support for any of these propositions" (MSF Answer, at p. 3). MSF further responds, "[f]or the record, MSF rejects all of TCTI's accusations regarding conflicts of interest [and] TCTI's unspecified claims regarding past performance or curricular deficiencies" (*Id.*, at p. 4).

The procurement record shows that DMV did in fact consider conflicts of interest, past performance references, and the curricula of MSF, in accordance with the RFP (*see* RFP, Section 1-18, at pp. 12-13; Section 4-1, at p. 24; Section 4-2, at p. 24; Section 4-4, at pp. 28-34). As noted above, proposals were evaluated in accordance with the RFP and the evaluation tool. With respect to any allegations that particular aspects that were not evaluated should have been, this Office generally defers to agency determinations where they are properly within the agency's expertise and supported by the procurement record. DMV, as the State agency responsible for the administration of the Program, possesses the expertise to determine the specific needs and requirements for carrying out the Program, including compliance with any applicable statutory and regulatory requirements. Moreover, DMV is required to develop an RFP and evaluation instrument that effectively meets those needs. Our review of the procurement record confirms DMV complied with the statutory requirements in crafting the RFP and accordingly, we defer to DMV's expertise and judgment in regards to this matter.

**CONCLUSION**

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

STATE OF NEW YORK
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| In the Matter of the Appeal filed by Sanghi Consulting, Inc. with respect to the procurement of Project-Based Information Technology Consulting Services conducted by the New York State Office of General Services. | **<u>Determination of Appeal</u>** |
| | **SF–20240180** |
| OGS Solicitation Number – 23269 | |
| | August 20, 2025 |

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The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Office of General Services ("OGS") for Statewide project-based information technology consulting services ("PBITS"). We have determined the grounds advanced by Sanghi Consulting, Inc. ("SCI") are insufficient to merit overturning the centralized contract awards made by OGS and, therefore, we deny the Appeal. As a result, we are today approving 149 OGS' centralized contracts for PBITS.[1]

## BACKGROUND

### <u>Facts</u>

OGS is "a New York State Agency authorized by law to issue Centralized Contracts for use by NYS Agencies and other Authorized Users"[2] (PBITS Request for Proposals ("RFP"), Section 1.1, at p. 7). Accordingly, on September 29, 2023, OGS issued the RFP to "establish Centralized Contracts with Vendors to provide [PBITS] to NYS Authorized Users on a statewide basis" (*Id.*).

The RFP establishes a non-exhaustive PBITS scope that includes "projects requiring analysis, data classification, design, development, testing, quality assurance, security and associated customized training for IT based applications" (RFP, Section 1.2, at p. 8). "Services available under the resultant Contracts will be separated into four (4) lots" with each Lot having minimum qualifications for offerors and project value ranges (RFP, Section 1.1, at p. 7; *see* RFP, Section 3.1, at pp. 18-20).

According to the RFP, there is a "two-step process for each transaction" as follows: "[t]he first step is the establishment of the Centralized Contract, through a non-competitive

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[1] This Office is approving 149 out of 154 PBITS centralized contracts submitted for review. The non-approved contracts were not approved for reasons unrelated to the grounds raised by SCI in its Appeal; accordingly, such non-approval determinations have no relevance to this Determination of Appeal.
[2] Pursuant to SFL § 163(1)(k), an Authorized User is an entity, including but not limited to State agencies, public authorities, and political subdivisions, authorized to make purchases of commodities, services and technology through OGS centralized contracts.

multiple-award procurement process [and] [t]he second step will be competitive, based on the development of a specific project by an Authorized User in accordance with the contract terms" (RFP, Section 1.1, at p. 7). The RFP anticipates multiple centralized contract awards being made by Lot to "responsive and responsible bidders who meet the minimum qualifications specified in Section 3.1 and offer reasonable rates as determined by OGS" (RFP, Section 5.1, at p. 27; *see* RFP, Section 4.3, at p. 23). The RFP provides that an Authorized User will document "IT project needs . . . in a statement of work (SOW) [that] will be distributed to Contractors based on specific lot(s), via the mini-bid process" (RFP, Section 1.1, at p. 7). Thereafter, "[a]n Authorized User will make a mini-bid award based on best value[,] . . . result[ing] in an Authorized User Agreement for Project Based IT Consulting Services" (*Id.*; *see* RFP, Attachment 16).

On February 6, 2024, SCI filed a protest with OGS ("SCI's Pre-Award Protest to OGS"), which OGS accepted pursuant to its Dispute Resolution Policy.[3] OGS received 176 proposals, including a proposal from SCI, by the submission deadline of February 7, 2024. OGS evaluated proposals and notified all tentative awardees.[4] On March 18, 2024, OGS issued a determination denying SCI's Protest ("OGS' Determination of SCI's Pre-Award Protest"). On August 9, 2024, OGS notified SCI that it was awarded Lots 1A and 1B but not awarded Lot 2. On August 14, 2024, SCI submitted another protest to OGS ("SCI's Post-Award Protest to OGS"), which OGS denied on October 3, 2024 ("OGS' Determination of SCI's Post-Award Protest"). SCI appealed the denial to OGS on October 18, 2024 ("SCI's Appeal to OGS"), and OGS denied the appeal on November 13, 2024 ("OGS' Determination of SCI's Appeal").

On November 27, 2024, SCI submitted an appeal to this Office ("SCI's Appeal"). OGS submitted an answer on January 10, 2025 ("OGS' Answer"). SCI replied on January 15, 2025 ("SCI's January 15, 2025 Letter").[5] SCI requested a debriefing, which OGS provided on May 6, 2025. On June 18, 2025, SCI submitted additional documentation to this Office in support of its Appeal ("SCI's June 18, 2025 Letter").[6] The complete procurement record, including 154 contracts, was submitted by OGS to this Office on or about May 23, 2025.[7] On July 21, 2025, OGS submitted additional documentation to this Office in response ("OGS' July 21, 2025 Letter").[8] On July 31, 2025, SCI submitted another letter to this Office in support of its Appeal ("SCI's July 31, 2025 Letter").[9]

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[3] The RFP did not contain a protest procedure; however, OGS' Dispute Resolution Policy is published on its public website at
https://ogs.ny.gov/system/files/documents/2023/12/dispute_resolution_policy.pdf

[4] Due to the volume of proposals received, evaluation and notification took place over an extended period of time.

[5] The letter is dated January 15, 2024; however, it is clear from the record that it was issued in 2025 and the 2024 date reference was a mere typographical error. In addition, pursuant to 2 NYCRR § 24.5(d), the final submission of right under OSC's Protest Procedure was OGS' Answer. Nonetheless, this Office considered SCI's January 15, 2025 Letter.

[6] Pursuant to 2 NYCRR § 24.5(d), the final submission of right under OSC's Protest Procedure was OGS' Answer. Nonetheless, this Office considered SCI's June 18, 2025 Letter.

[7] OGS previously submitted the procurement record to this Office on November 8, 2024 and February 6, 2025; however, as the procurement record was incomplete at the time of those prior submissions, this Office returned the record to OGS non-approved.

[8] Pursuant to 2 NYCRR § 24.5(d), the final submission of right under OSC's Protest Procedure was OGS' Answer. Nonetheless, this Office considered OGS' July 21, 2025 Letter.

[9] Pursuant to 2 NYCRR § 24.5(d), the final submission of right under OSC's Protest Procedure was OGS' Answer. Nonetheless, this Office considered SCI's July 31, 2025 Letter.

## **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 regulations setting forth the procedure ("OSC Protest Procedure") to be used by an interested party seeking to challenge a contract award by a State agency (*see* 2 NYCRR Part 24). The OSC Protest 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 determination, the Appeal is governed by 2 NYCRR § 24.5.

In the determination of the Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by OGS with the proposed OGS PBITS centralized contracts;

2. the correspondence between this Office and OGS arising out of our review of the proposed OGS PBITS centralized contracts; and,

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

    a. SCI's Pre-Award Protest to OGS;
    b. OGS' Determination of SCI's Pre-Award Protest;
    c. SCI's Post-Award Protest to OGS;
    d. OGS' Determination of SCI's Post-Award Protest;
    e. SCI's Appeal to OGS;
    f. OGS' Determination of SCI's Appeal;
    g. SCI's Appeal;
    h. OGS' Answer;
    i. SCI's January 15, 2025 Letter;
    j. SCI's June 18, 2025 Letter;
    k. OGS' July 21, 2025 Letter; and,
    l. SCI's July 31, 2025 Letter.

## ANALYSIS OF THE APPEAL[10]

**SCI's Appeal to this Office**

In its Appeal, SCI challenges the procurement conducted by OGS on the following grounds:

1. Multiple award contracts for services are required to be awarded on the basis of best value; therefore, OGS misinterprets the SFL when claiming that multiple award contracts are not subject to best value but only to the "most practical and economical alternative" standard of SFL § 163(10)(c);

2. OGS failed to award the PBITS centralized contracts on the basis of best value, instead OGS violated the SFL by making unjustified non-competitive single source awards; and,

3. An Authorized User is unable to award a contract on the basis of best value as a result of a mini-bid under the OGS' PBITS centralized contracts, because OGS' method of award for the PBITS centralized contracts arbitrarily limits competition, in the following ways:
    a. OGS established arbitrary minimum qualifications for centralized contract award that are not rationally related to the procurement scope, do not necessarily assure project performance, and are based only on unsubstantiated and unquantified beliefs;
    b. OGS subjectively evaluated minimum qualifications for centralized contract award; and,
    c. OGS' method of establishing reasonableness of price for the centralized contracts leads to excessively high pricing at the Authorized User mini-bid level.

**OGS' Answer to the Appeal**

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

1. SFL does not require best value for multiple-award centralized contracts for services, instead the "most practical and economical alternative" standard set forth in SFL § 163(10)(c) applies to multiple-award contracts;

2. Even if best value were required for multiple-award contracts, OGS met the applicable standard through its two-step method of award; and,

3. The minimum qualifications established by OGS in the RFP:
    a. did not unfairly or artificially limit competition;
    b. were rationally related to the scope of services and contract value; and,
    c. were applied fairly and consistently to all bidders.

[10] We will not elaborate on the content of SCI's January 15, 2025, June 18, 2025, or July 31, 2025 Letters, or OGS' July 21, 2025 Letter herein, as such documents reiterate similar contentions to those presented in previous submissions.

## DISCUSSION

**<u>Statutory Standard for Multiple Award Procurements</u>**

SFL § 163(4)(d) provides, "[s]ervice contracts shall be awarded on the basis of best value to a responsive and responsible offerer; or, in the case of multiple awards, in accordance with paragraph c of subdivision ten of this section." SFL § 163(10) provides, "[c]ontracts for services shall be awarded on the basis of best value from a responsive and responsible offerer [and] [m]ultiple awards for services and commodities shall be conducted in accordance with paragraph c of this subdivision." SFL § 163(10)(c) provides, "[t]he [OGS] commissioner or state agency may elect to award a contract to one or more responsive and responsible offerers provided, however, that **the basis for the selection among multiple contracts at the time of purchase** shall be the most practical and economical alternative and shall be in the best interests of the state . . ." (emphasis added).

SCI contends that OGS "was wrong to boldly assert that 'Best Value is not required for multiple-award contracts under SFL § 163(10)(c)'" (SCI's Appeal, at p. 5). SCI asserts that "SFL § 163(10)(c) is an additional requirement to be applied by OGS in the case of multiple Best Value awards[,] not a clear exemption that OGS can exploit for their own benefit as they suggest" (*Id.*). "OGS's interpretation that the SFL exempts multiple award contracts from Best Value sets a dangerous future precedent that forever deprives purchasers, taxpayers, and vendors of the public benefits of fair and honest competition . . . [because] [o]nce OGS secures the multiple award form, it can forever substitute the lower 'practical and economical' standard for the higher Best Value standard" (*Id.*, at pp. 5-6).

OGS contends that SFL "does not require Best Value evaluation for multiple-award contracts" (OGS' Determination of SCI's Post-Award Protest, at p. 3). OGS asserts that "SFL § 163(10)(c) only requires that 'at the time of purchase' the basis for the selection of a contractor 'shall be the most practical and economical alternative and shall be in the best interests of the state' [and] OGS achieves compliance with SFL § 163(10)(c) [ ] by establishing [a] Two-Step Process [ ], where, in the First Step, initial awards are made to Bidders who meet certain minimum qualifications and demonstrate reasonableness of price, and then, as a Second Step, Authorized Users issue mini-bids to all qualified Contractors and award the project to one of those Contractors on the basis of Best Value" (*Id.*).

Accordingly, as a threshold matter, we must determine what statutory standard applies to the award of multiple-award centralized contracts for services: "best value" and/or "most practical and economical alternative in the best interests of the state."

It is a well-settled rule of statutory construction that "a statute must be construed as a whole and that its various sections must be considered with reference to one another" (*Matter of Albany Law School v. State Off. of Mental Retardation & Dev. Disabilities*, 19 N.Y.3d 106, 120 (N.Y. 2012)). Moreover, "the plain language used in a statute should be construed in its natural and most obvious sense . . . and [ ] it should not be supposed that the Legislature will deliberately place words in a statute without any purpose in view" (*Erie Cty. Water Auth. v. Kramer*, 4 A.D.2d 545, 550 (App. Div. 4th Dep't 1957), *aff'd by* 5 N.Y.2d 954 (N.Y. 1959)). In addition, generally, when interpreting two statutory provisions relating to the same subject matter, both should be construed according to their plain language, and by giving "purpose and meaning" to the words and not rendering them meaningless (*Id.*; *see also Miglino v. Bally Total Fitness of Greater N.Y., Inc.*, 937 N.Y.S.2d 63, 69 (App. Div. 2d Dep't 2011), *aff'd* 20 N.Y.3d 342 (N.Y. 2013) (holding that "[a] court should avoid a statutory interpretation rendering the provision meaningless or defeating its apparent purpose")).

SFL §§ 163(4)(d) and 163(10) require contracts for services to be "awarded" on the basis of best value; whereas, SFL § 163(10)(c) requires "selection among multiple contracts at the time of purchase" to be based on the "most practical and economical alternative . . . in the best interests of the state." Based on the plain language in the above-referenced statutes, and reading such provisions together, "best value" is the standard applied to contract awards and "most practical and economical alternative . . . in the best interests of the state" is the standard applied after multiple contracts have been awarded and an Authorized User needs a mechanism to decide which of the multiple awarded contracts to purchase from. SFL § 163(10)(c) does not provide a standard for awarding contracts, nor does it purport to be used in lieu of the "best value" standard. To interpret SFL § 163(10)(c) otherwise would overstate the requirements found therein as well as undermine the requirements of "best value."

Accordingly, multiple-award centralized contracts for services are to be awarded on the basis of best value in accordance with SFL §§ 163(4)(d) and 163(10), and to the extent that an additional competitive mechanism is needed to decide which contract to purchase from, Authorized Users must select among the contracts at the time of purchase on the basis of which contract presents the most practical and economical alternative in the best interests of the state in accordance with SFL § 163(10)(c).

**Application of Statutory Standard for Multiple Award Procurements to the OGS' PBITS Centralized Contract Procurement**

We determined above that multiple-award centralized contracts for services are to be awarded on the basis of best value in accordance with SFL §§ 163(4)(d) and 163(10), and to the extent that an additional competitive mechanism is needed to decide which contract to purchase from, Authorized Users must select among the contracts at the time of purchase on the basis of which contract presents the most practical and economical alternative in the best interests of the state in accordance with SFL § 163(10)(c). We must now determine whether the PBITS centralized contract awards satisfy the requirement of SFL §§ 163(4)(d) and 163(10), that they be awarded on the basis of best value; and if so, whether SFL § 163(10)(c) is triggered when Authorized Users look to make a purchase off of the PBITS centralized contracts.

1. The PBITS Centralized Contract Awards Satisfy Best Value

SCI contends that OGS did not meet the requirements of the SFL in making the PBITS centralized contract awards, stating, "OGS admits that each First Step award was made without competition . . . [even though] [p]ursuing competition at PBITS's First Step was feasible" (SCI's Appeal, at p. 7). SCI further contends that "[u]nder SFL, Single Source awards are allowable, but only after meeting stringent criteria exempting the award from the competition rule [and] [i]n the case of PBITS, those exempting criteria were never met" (*Id.*).

OGS responds "[w]hile OGS disagrees with [SCI]'s contention that Best Value is required for multiple-award service contracts, even if . . . Best Value is required, OGS did make awards based on Best Value" (OGS' Determination of SCI's Post-Award Protest, at p. 4). OGS contends that "the PBITS Solicitation by OGS utilizes a Best Value evaluation because it optimizes the three factors in a Best Value evaluation: Price, Quality, and Efficiency . . . [i]ndeed, OGS evaluated both Price and Quality in making its awards under [the PBITS] Solicitation, and OGS also established a Two-Step Process to optimize Efficiency" (*Id.* (internal footnote omitted)).

Best value is defined as "the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers" (SFL § 163(1)(j)). 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)). 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." 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."

The RFP for the PBITS centralized contracts establishes a framework for OGS and/or the Authorized Users to satisfy best value through a two-tier competitive process. Purchases cannot be made directly from the PBITS centralized contracts, as the Authorized Users need to determine a particular scope of work first. As is described in more detail below, the first tier of the PBITS RFP, completed by OGS, determines the responsive offerors, creating a pool of contractors for an Authorized User to complete the second tier by conducting a mini-bid to determine the best value contractor to complete the Authorized User's scope of work. Accordingly, OGS has established a framework that encompasses the centralized contract award process and the Authorized User agreement award process in order to satisfy best value.[11]

In order to be eligible for contract award under the PBITS RFP, an offeror needed to meet the minimum qualifications for a particular Lot, as follows:

- Lot 1A for project values from $50,000 - $250,000: Offeror must:

[11] Notably, this method of procurement is not unusual; in fact, the United States General Services Administration establishes contracts for use by eligible entities, such as federal government entities, state and local governments, tribes and tribal organizations, and non-governmental organizations, that include a two-tier competitive process such as that used in PBITS.

        - Be a New York State certified minority- or women- owned business enterprise ("MWBE"), a New York State certified service-disabled veteran-owned business ("SDVOB"), or a New York State small business ("SBE");
        - Have at least 2 years of continuous operation for the 2 years prior to and including the bid opening date;
        - Have at least 2 years of experience delivering consultant services for IT projects to Government Entities; and
        - Document 2 IT projects as a Prime Contractor:
            - Executed after 01/01/2018 with Government Entities;
            - At least $25,000 per project; and
            - Projects must be within scope for this solicitation, as per Section 1.2 – In-Scope Projects.
- Lot 1B for project values from $250,001 - $750,000: Offeror must:
    - Be a MWBE, SDVOB or SBE;
    - Have at least 2 years of continuous operation for the 2 years prior to and including the bid opening date;
    - Have at least 2 years of experience delivering consultant services for IT projects to Government Entities; and
    - Document 2 IT projects as a Prime Contractor:
        - Executed after 01/01/2018 with Government Entities;
        - At least $100,000 per project; and
        - Projects must be within scope for this solicitation, as per Section 1.2 – In-Scope Projects.
- Lot 2 for project values from $750,001 - $10,000,000: Offeror must:
    - Have at least 4 years of continuous operation for the 4 years prior to and including the bid opening date;
    - Have at least 4 years of experience delivering consultant services for IT projects to Government Entities; and
    - Document 5 IT projects as a Prime Contractor:
        - Executed after 01/01/2017 with Government Entities;
        - At least $400,000 per project; and
        - Projects must be within scope for this solicitation, as per Section 1.2 – In-Scope Projects.
- Lot 3 for project values from $10,000,001 - $30,000,000: Offeror must:
    - Have at least 8 years of continuous operation for the 8 years prior to and including the bid opening date;
    - Have at least 8 years of experience delivering consultant services for IT projects to Government Entities; and
    - Document 5 IT projects as a Prime Contractor:
        - Executed after 01/01/2013 with Government Entities;
        - At least $5,000,000 per project; and
        - Projects must be within scope for this solicitation, as per Section 1.2 – In-Scope Projects.

(RFP, Section 3.1, at pp. 18-20). An offeror is also "required to demonstrate that all the proposed prices are reasonable" (RFP, Section 4.3, at p. 23). Additionally, the RFP establishes a clear framework for Authorized Users to follow in establishing minimum requirements for their specific statements of work: RFP, Attachment 16, *How to Use This Contract*, provides, "the Authorized User shall develop a mandatory statement of work (SOW) with enough specificity to allow a Contractor to adequately respond to a mini-bid" and RFP, Attachment 15, *Mini-Bid Template*, establishes a framework for Authorized Users to identify any additional minimum requirements that apply to the specific project (RFP, Attachment 16, Section 2.6, at p. 5; RFP, Attachment 15, Section 2, at p. 7). Accordingly, the PBITS RFP satisfies the legal requirements of SFL § 163(9)(b) in prescribing minimum requirements for an offeror to be considered responsive.

The PBITS RFP also sets forth the framework for Authorized Users to follow in establishing general evaluation criteria, consisting of a review of cost and the technical components of the proposal, along with the respective scoring weight of each component. RFP, Attachment 16, *How to Use This Contract*, provides, "[a] competitive mini-bid is required for every transaction under this Contract" and "[a]ll mini-bid awards are based on Best Value" (RFP, Attachment 16, Section 1.3, at p. 1). RFP, Attachment 16 further specifies, "[t]echnical weighting must be no more than 70% . . . [f]inancial weighting must be no less than 30%" and "Authorized Users are encouraged to develop a weighting ratio within these parameters that will provide Best Value – for example 60% technical / 40% financial;" however, "Best Value may also be based on Contractor meeting the mandatory requirements (pass/fail) and lowest cost (100% financial weighting)" (RFP, Attachment 16, Section 2.7, at p. 6). RFP, Attachment 15, *Mini-Bid Template*, contains a "Best Value Award Methodology" section consistent with the above, where an Authorized User can fill in evaluation weights. Accordingly, the evaluation and selection process set forth in the RFP satisfies the statutory requirements of SFL § 163(9)(b).

Additionally, the PBITS RFP instructs Authorized Users that "[t]he evaluation tools, criteria, and weighting must be finalized prior to the bid opening date [and] [a]s a best practice, the Authorized User should finalize their evaluation tools, criteria, and scoring factors prior to mini-bid release" (RFP, Attachment 16, Section 2.8.5, at p. 9). Therefore, the evaluation process established by the PBITS RFP satisfies the requirements of SFL § 163(7).

Therefore, we conclude that the framework established for Authorized Users to purchase from the PBITS centralized contracts satisfies the statutory requirements for a best value award.[12]

2. <u>The PBITS Centralized Contract Awards Do Not Trigger SFL § 163(10)(c)</u>

As set forth above, the PBITS centralized contracts set up a mini-bid process that satisfies best value, for Authorized Users to follow to select which PBITS centralized contract to utilize; accordingly, Authorized Users do not need to utilize an additional competitive mechanism or invoke the competitive selection standard set forth in SFL § 163(10)(c). This conclusion is not at

[12] We note that pursuant to SFL § 112(2)(a)(i), "before any purchase order or other procurement transaction issued under [a] centralized contract, which exceeds [$200,000] in amount shall be executed or become effective, it shall first be approved by the comptroller."

odds with the apparent purpose of SFL § 163(10)(c), which is to provide a competitive mechanism for purchasing off of multiple-award contracts; SFL § 163(10)(c) cannot be read to prevent the higher standard of best value from being applied when deciding which of multiple awards to purchase from.[13]

**Minimum Qualifications Established by the OGS' PBITS Centralized Contract Procurement**

1. Establishment of Minimum Qualifications

SCI asserts that "[t]he design of OGS's Minimum Qualifications is not rationally related to the procurement scope, does not necessarily assure project performance, unnecessarily limits competition, and is based only on unsubstantiated and unquantified beliefs" (SCI's Appeal, at p. 10).[14] SCI contends that since OGS "arbitrarily selected" offerors eligible to compete in the mini-bid process, "achieving a statutorily defined Best Value [as a result of the mini-bid process] is impossible in substance and form" (*Id.*, at p. 17). SCI further contends that OGS' "method of employing [Most Favored Nation pricing to achieve reasonableness of price] establishes statewide prices as higher than *fair market prices* [which] is not in the best interest of New York State" (*Id.*, at p. 10 (emphasis in original)).

OGS asserts that "OGS established minimum qualifications that were rationally related to the scope of services and contract value" (OGS' Answer). OGS states that "the purpose of these minimum qualifications is for the bidder to demonstrate successful performance on projects of similar size and scope to the projects that the bidder would become eligible for, if awarded a contract, and to give the State a reasonable degree of assurance that the bidder is capable of successful performance under the contract" (OGS' Determination of SCI's Pre-Award Protest, at p. 3). OGS posits that "it is well established, both in the State Finance Law and general best practices for public procurement, that whenever possible, objective and quantifiable criteria should be used, so as to maintain a fair and level playing field for all bidders and avoid subjective decision-making to the greatest extent possible" and "[n]umber and dollar thresholds are a common approach to achieving that 'objective and quantifiable analysis'" (*Id.*).

This Office generally defers to agency determinations where they are properly within the agency's expertise, have a rational basis, and are supported by the procurement record. OGS, as the State agency responsible for establishing centralized contracts for services for use by Authorized Users,[15] possesses the expertise to determine the specific needs and requirements for

[13] Contrast the assessment of PBITS, a project-based contract where the specifics of the project are determined at the Authorized User level, with Hourly-Based Information Technology Consulting Services ("HBITS"), another group of OGS centralized contracts that SCI references in its Appeal (at p. 7). The HBITS contracts provide information technology staff augmentation, establishing authorized job titles at approved hourly rates. In the case of HBITS, job titles and hourly rates were predetermined by OGS, so SFL § 163(10)(c) is triggered when an Authorized User needs to determine which contract of multiple to utilize for staff augmentation.

[14] For example, SCI asserts that "OGS offers no logical basis for [the] belief . . . that because the Contractors in Lot 2 will be authorized to perform projects up to $10 million each, it is important for bidders to be able to demonstrate successful performance on five projects of at least $400,000 each" (SCI's Appeal, at p. 14).

[15] SFL § 163(4)(b)(i).

procuring PBITS for Authorized Users. Moreover, OGS is required to develop an RFP and evaluation instrument that effectively meets those needs. Our review of the procurement record confirms that determinations made by OGS in crafting the RFP had a rational basis, complied with statutory requirements, and were supported by the procurement record. Accordingly, we defer to OGS' expertise and judgment in regard to this matter. We further find no evidence in the procurement record to support the contention that competition was unnecessarily limited by the minimum qualifications crafted by OGS.

2. Evaluation of Minimum Qualifications

SCI alleges that OGS "subjectively evaluat[ed] Minimum Qualifications in the First Step" leading to bidders being "preclude[d] [from] their fair and honest inclusion in the mini-bidder pool" (SCI's Appeal, at p. 8).

OGS contends that it "applied the minimum qualifications [in the RFP] fairly and consistently to all bidders" (OGS' Answer).

Based on our review of the procurement record, OGS evaluators awarded proposals according to the clearly articulated criteria set forth in the RFP. The procurement record shows that the evaluation of an offeror's minimum qualifications was performed consistently across all awarded proposals. Thus, we find no reason to disturb OGS' evaluation of minimum qualifications.

**CONCLUSION**

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the centralized contract awards by OGS. As a result, the Appeal is denied and we are today approving 149 of OGS' centralized contracts for PBITS.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

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| In the Matter of the Bid Protest filed by Technical Safety Services LLC with respect to the procurement of Chemical Fume Hood, Biological Safety Cabinet, and HEPA Exhaust Filter Certification conducted by the New York State Department of Health. | **Determination of Bid Protest**<br><br>**SF–20250037** |
| Contract Number – C040463 | July 3, 2025 |

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The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Health (DOH) for Chemical Fume Hood, Biological Safety Cabinet, and HEPA Exhaust Filter Certification. We have determined the grounds advanced by Technical Safety Services LLC (TSS) 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 Mechanical Testing, Inc. for Chemical Fume Hood, Biological Safety Cabinet, and HEPA Exhaust Filter Certification.

## BACKGROUND

### Facts

DOH issued an invitation for bids (IFB) on July 10, 2024, "seeking competitive bids from (a) qualified organization(s) to perform inspections, decontaminations, repairs and annual certifications of chemical fume hoods, biological safety cabinets, dump stations, microisolators, as well as building exhaust HEPA banks" at four sites of The Wadsworth Center public health laboratory in Albany, New York (IFB, Sections 2.0 and 2.1, at p. 3). According to the IFB, DOH intended to award one contract "to the responsible and responsive Bidder who offers the lowest total bid price" as a result of the procurement (IFB, Sections 2.0 and 8.0, at pp. 3, 17).

The IFB set forth minimum qualifications, including "[a] minimum of five (5) years['] experience providing certification services in accordance with National Sanitation Foundation standard 49 (NSF 49) and American National Standards Institute/American Society of Heating, Refrigerating and Air Conditioning Engineers standard 110 (ANSI/ASHRAE 110-2016)" and "[m]ust be NSF accredited field certifiers" (IFB, Section 3.1, at p. 5; *see also* IFB, Section 6.1.1, at p. 13). Additionally, the IFB required bidders to "submit documentation that provides sufficient evidence of meeting the minimum qualifications" (IFB, Section 6.1.1, at p. 13). The

IFB cautioned that "[f]ailure to meet the[] Minimum Qualifications [in Section 3.1] will result in a bid being found non-responsive and eliminated from consideration" (IFB, Section 3.1, at p. 5).[1]

The procurement record reflects that TSS submitted a bid in response to the IFB before the required deadline of October 10, 2024. On January 22, 2025, DOH notified TSS that it "was found to be non-responsive and eliminated from consideration" because "TSS did not submit documentation that provided sufficient evidence of meeting the minimum qualifications to bid." TSS requested a debriefing, which DOH provided on February 13, 2025. TSS filed a protest with this Office on February 19, 2025 (Protest). DOH responded to the Protest on April 16, 2025 (Answer). DOH submitted the procurement record, including the proposed DOH / Mechanical Testing, Inc. contract to this Office on April 17, 2025.

## 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 regulations setting forth the procedure (OSC Protest Procedure) to be used by an interested party seeking to challenge a contract award by a state agency (*see* 2 NYCRR Part 24). The OSC Protest Procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no protest procedure at the agency level, the Protest is governed by 2 NYCRR § Section 24.4.

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 / Mechanical Testing, Inc. contract;

2. the correspondence between this Office and DOH arising out of our review of the proposed DOH / Mechanical Testing, Inc. contract; and

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

    a. Protest; and,
    b. Answer.

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[1] Moreover, the IFB in several other places offered the following notices to bidders: "To be considered responsive, a Bidder will be required to provide responses that address all of the requirements of this IFB as part of its Bid" (IFB, Section 4.0, at p. 5); "Bidders responding to this IFB must satisfy all requirements stated in this IFB. A Bidder must submit a complete Bid package. A Bid that is incomplete in any material respect must be rejected" (IFB, at Section 6.0, at p. 12); "In order to be considered responsible and responsive, the Bid must include all [IFB] required documents and meet the minimum qualifications as stated in the IFB" (IFB, Section 8.1, at p. 17).

**ANALYSIS OF THE PROTEST**

**TSS's Protest to this Office**

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

1. DOH improperly disqualified TSS for failure to provide proof of meeting minimum qualifications because TSS did, in fact, include the required proof of meeting minimum qualifications in its bid submission.
2. Even if it is determined TSS failed to include the required proof of meeting minimum qualifications in its bid submission, TSS does in fact meet the minimum qualifications for the IFB and TSS is the incumbent provider which should automatically demonstrate to DOH that TSS is qualified.
3. DOH should have awarded the contract to TSS as TSS's bid was likely the lowest bid.

**DOH's Answer to the Protest**

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

1. DOH properly disqualified TSS from consideration for contract award because TSS failed to provide proof of meeting the minimum qualifications and was thus found non-responsive.
2. DOH does not dispute that TSS is a qualified vendor and was the incumbent provider; however, that does not exempt TSS from needing to provide proof of meeting the minimum qualifications with its bid submission as required by the IFB.
3. DOH's decision to disqualify TSS from consideration from contract award was proper as the contract award was based not only on the lowest cost but also on responsiveness to minimum qualifications.

**DISCUSSION**

**Responsiveness**

The requirements applicable to this procurement are set forth in SFL Article 11, which provides that contracts for services shall be awarded on the basis of "best value" to a responsive and responsible offeror (SFL § 163(10)).[2] A "responsive" offeror is an

[2] State Finance Law provides that, generally, contracts for services shall be awarded on the basis of "best value" to a responsive and responsible offeror (SFL § 163(4)(d)). In *Transactive Corporation v. State Department of Social*

"offeror meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency" (SFL § 163(1)(d)). 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."

TSS contends that "[b]oth [its] Regional Operations Manager and Regional Director of Client Solutions checked the submitted documents and verified they had included the qualification information prior to submitting [the bid to DOH]" (Protest).[3] DOH responds that "TSS did not submit documentation that provided evidence of meeting the minimum qualifications to bid"; rather, "two bid packages were received from TSS and did not include any information establishing TSS' minimum qualifications to bid" (Answer, at pp. 1, 3).

As set forth in the Facts section above, it was clear from the IFB that submission of documentation evidencing that a bidder met the minimum requirements specified in IFB Section 3.1 was a minimum qualification that must be met in order for a bidder to be found responsive. Likewise, the consequences for failure to demonstrate that a bidder met the minimum qualifications were clear – the bidder would be found non-responsive and eliminated from further consideration. TSS's bid submission, as contained in the procurement record, contains no documentation to show that TSS met the minimum qualifications. Accordingly, the procurement record supports DOH's findings of non-responsiveness based on TSS's failure to include documentation in its bid demonstrating that TSS met the minimum qualifications set forth in the IFB.

**<u>Demonstration of Minimum Qualifications as Incumbent Provider</u>**

TSS asserts, "[i]f there was a slight mistake and somehow the documents [demonstrating TSS met the minimum qualifications required by the IFB] were removed without our knowledge, then us being the incumbent [ ] should automatically show we are qualified" (Protest). TSS additionally notes, "[TSS is an] NEBB Certified Firm for

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*Services*, the Appellate Division, Third Department, held that, while a State agency is typically required to evaluate cost and technical factors in establishing "best value," an award for services to a responsive and responsible bidder based on an evaluation of cost alone could be permissible when such approach effectively represents a cost-benefit analysis (236 A.D.2d 48, 53 (1997), *aff'd on other grnds*, 92 N.Y.2d 579 (1998)). In addition, the New York State Procurement Council recognizes that "best value can be equated to lowest price" (NYS Procurement Guidelines (Revised February 2025), at Section 4.4). Applying the rational in *Transactive Corporation* and consistent with the NYS Procurement Guidelines, this Office has upheld awards of service contracts to a responsive and responsible bidder based on an evaluation of cost alone where the services were routine in nature and the solicitation sufficiently defined the qualitative requirements, so that there is little room for technical variances which will have any meaningful value to the procuring agency (*see, e.g.,* OSC Bid Protest Determination SF-20160139, at fn. 1). For this procurement, which is primarily for services, DOH concluded that an award based on best value equated to lowest price and used an invitation for bids instead of a request for proposals, the typical method to procure services. Notwithstanding the fact that TSS did not raise this issue, based on our review of the procurement record, our Office is satisfied that DOH's award of this contract based on lowest price was appropriate.

[3] The Protest is an e-mail that is approximately one page; accordingly, citations to the Protest will not include page numbers.

Chemical Fume Hood Testing" and "[TSS has] 5 NSF certified technicians who live in New York" (*Id.*). DOH states it "does not dispute TSS is a qualified vendor, and concurs [TSS was] the incumbent vendor at the time [the IFB] was issued . . . [h]owever, . . . an IFB is a competitive solicitation generally used for [a] procurement when the award is based on lowest cost offered by a responsive and responsible bidder . . . [and] does not exempt TSS from providing the minimum qualifications as required in [the IFB]" (Answer, at p. 3).

We find no merit to TSS's contentions, that because it is the incumbent contractor or because it does in fact meet the minimum qualifications, the failure to comply with a minimum qualification can be disregarded. The IFB clearly, and repeatedly, specified the mandatory requirements, and consequences for failing to meet them. DOH is not required, either by the IFB or applicable law, to waive strict compliance with a mandatory IFB requirement (*see Le Cesse Bros. Contracting v. Town of Williamson*, 62 A.D.2d 28, 31 (App. Div. 4th Dep't 1978), *aff'd* 46 N.Y.2d 960 (N.Y. 1979) (holding that a governmental entity "may decline bids which fail to comply with the literal requirements of the bid specifications")).

Accordingly, we find no reason to disturb DOH's determination that TSS was non-responsive to the requirements of the IFB and disqualified from further consideration for contract award.

**<u>Lowest Cost</u>**

TSS alleges that it "likely [submitted] the most competitive bid [for] this [IFB]" and the "decision [not to award to TSS] could raise major concerns about the prudent use of taxpayer funds and adherence to the principle of awarding contracts based on best value for the state of New York" (Protest). DOH responds that "[a]wards are not based on lowest cost alone. A bidder must also be a responsive and responsible bidder. TSS was not a responsive bidder" (Answer, at p. 2).

As noted above, SFL requires a contract award to a responsive and responsible bidder (SFL §§ 163(10), 163(1)(d)). Consistent with statutory requirements, the IFB provided contract award would be made "to the responsible and responsive Bidder who offers the lowest total bid price" (IFB, Sections 2.0 and 8.0, at pp. 3, 17). Based on DOH's determination that TSS was non-responsive to the requirements of the IFB, TSS was not eligible for the contract award; accordingly, we find no merit to the suggestion that TSS was exempt from the requirement of responsiveness because it offered the lowest price.

**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 / Mechanical Testing, Inc. contract for Chemical Fume Hood, Biological Safety Cabinet, and HEPA Exhaust Filter Certification.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

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| In the Matter of the Appeal filed by ADP Group, Inc. with respect to the procurement for rehabilitation of the Music and Imagination Playground at Franklin D. Roosevelt State Park conducted by the New York State Office of Parks, Recreation and Historic Preservation. | **Determination of Appeal**<br><br>**SF–20250101** |
| Contract Number – D006359 | July 8, 2025 |

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The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Office of Parks, Recreation and Historic Preservation ("Parks") for rehabilitation of the Music and Imagination Playground (Lot # 2) at Franklin D. Roosevelt State Park ("Playground Rehabilitation"). We have determined the grounds advanced by ADP Group, Inc. ("ADP") are insufficient to merit overturning the contract award made by Parks and, therefore, we deny the Appeal. As a result, we are today approving the Parks contract with Paladino Concrete Creations Corporation ("Paladino") for Playground Rehabilitation.

## BACKGROUND

### Facts

On November 21, 2024, Parks issued an invitation for bids entitled, "Project Manual TA-FR-2023-003: Music and Imagination Playground: Lot # 2 Playground Rehabilitation Franklin D. Roosevelt State Park" ("IFB") soliciting bids for the Playground Rehabilitation (IFB, at p. 3). The IFB indicated that Parks intended to award one contract to "the lowest responsible and reliable bidder as will best promote public interest" (IFB, at p. 13). The IFB also included the following provision regarding Public Buildings Law ("PBL") § 8(6),

> Pursuant to [PBL] § 8(6), [for] any contracts over $5,000 for the work of construction, reconstruction, alteration, repair, or improvement of any State building, a responsible and reliable NYS-certified Minority or Women-Owned Business Enterprise that submits a bid within ten percent of the lowest bid will be deemed the apparent low bidder provided that the bid is $1,628,283 or less (maximum amount has been adjusted for inflation effective January 1, 2024).

(IFB, at p. 4).

On December 19, 2024, Parks opened bids for the Playground Rehabilitation. The results of the bid opening[1] were as follows: 7 Seas Infratech Corporation ("7 Seas") ranked first with a total bid of $1,110,000.00; ADP ranked second with a total bid of $1,247,200.00; and Paladino,

[1] As shown in a certified bid tabulation issued by Parks dated February 5, 2025.

the only New York State certified minority- and/or women-owned business enterprise ("MWBE") who submitted a bid, ranked fifth, with a total bid of $1,344,000.00. On January 7, 2025, Parks issued a notice of intent to award the contract to 7 Seas as the lowest bidder; however, Parks ultimately disqualified 7 Seas, by letter dated January 30, 2025, for being non-responsive to requirements for contract award.[2] On February 5, 2024, Parks sent a notice of intent to award the contract to ADP "as the identified low bidder."

Thereafter, on March 11, 2025, Parks submitted a proposed contract between Parks and ADP for Playground Rehabilitation to this Office for review. On March 12, 2025, Parks notified ADP that "Unfortunately, Parks cannot proceed with ADP Group on this contract. An MWBE submitted a bid within 10% of your bid, and by law, we are required to award the contract to the MWBE." Also on March 12, 2025, Parks sent a notice of intent to award the contract to Paladino. This Office non-approved the Parks / ADP contract on March 13, 2025 "due to the award of contract not in accordance with Public Building[s] Law § 8(6). The WBE was not selected for the award of the contract."

Thereafter, on March 24, 2025, ADP submitted a protest of the contract award to Parks ("ADP's Protest to Parks") pursuant to Parks' bid protest procedures, as contained in the IFB (IFB, at pp. 8-9). Parks denied ADP's Protest to Parks in a written determination on April 4, 2025[3] ("Parks Determination"). ADP then appealed such denial to this Office on April 18, 2025 ("ADP's Appeal"). On April 21, 2025, Parks submitted the Parks / Paladino contract for Playground Rehabilitation, which is the subject of ADP's Appeal, to this Office for review.

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

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

In carrying out this contract approval responsibility, OSC has promulgated regulations setting forth the procedure ("OSC Protest Procedure") to be used by an interested party seeking to challenge a contract award by a State agency (*see* 2 NYCRR Part 24). The OSC Protest Procedure governs initial protests to this Office of agency contract awards and appeals of agency

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[2] The IFB specified that after Parks issued a notice of intent to award, the selected low bidder would be required to submit certain documents within ten calendar days (*see* IFB, at p. 27). By letter dated January 30, 2025, Parks advised 7 Seas it was finding the bidder non-responsive, and disqualifying them from further consideration, for failure to submit the following required documents (as required by both the IFB and the notice of intent to award letter sent to 7 Seas), despite repeated attempts to obtain them, beginning on January 7, 2025: "a signed and notarized agreement [and] a signed EEO policy statement." To note, Parks' January 30, 2025, letter to 7 Seas identifies failure of 7 Seas to submit the following additional documents as reasons for disqualification: a summary of subcontractors and a signed EO 16 certification; however, these items were neither listed in the IFB nor the notice of intent to award letter sent to 7 Seas as required prior to award to avoid disqualification. In any event, the inclusion of these additional items in the January 30, 2025, letter does not change the outcome as there is no question that the signed and notarized agreement as well as the signed EEO policy statement were both required to be submitted prior to award to avoid disqualification.

[3] The determination issued by Parks is dated April 4, 2024; however, it is clear from the record that it was issued in 2025 and the 2024 date referenced was a mere typographical error.

protest determinations. Because this is an appeal of an agency protest determination, ADP's Appeal is governed by 2 NYCRR § 24.5.

In the determination of ADP's Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by Parks with the proposed Parks / Paladino contract;

2. the correspondence between this Office and Parks arising out of our review of the proposed Parks / Paladino contract; and,

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

    a. ADP's Protest to Parks;
    b. Parks' Determination; and,
    c. ADP's Appeal.

**ANALYSIS OF ADP's APPEAL**

**<u>ADP's Appeal to this Office</u>**

In ADP's Appeal, it challenges the procurement conducted by Parks on the following grounds:

1. Parks' contract award to the MWBE bidder (Paladino) pursuant to PBL § 8(6), instead of the lowest responsible and reliable bidder (ADP), was improper for the following reasons:
    a. Parks misinterpreted PBL § 8(6) in finding that an award to an MWBE bidder is triggered if the MWBE bid is within 10% of the **lowest responsible and reliable bidder (ADP)**; to the contrary, the legislative intent as reflected in the express language of PBL § 8(6) only triggers award to an MWBE bidder if the MWBE bid is within 10% of the **lowest bidder (7 Seas)**; and,
    b. The provision in PBL § 8(6) regarding the award to an MWBE bidder does not apply to the contract award, as none of the bids are within 10% of the lowest bidder (7 Seas).

**DISCUSSION**

**Interpretation of Public Buildings Law § 8(6)**

Public Buildings Law § 8(6) provides,

> All contracts for amounts in excess of five thousand dollars for the work of construction, reconstruction, alteration, repair or improvement of any state building, whether constructed or to be constructed must be offered for public bidding and may be awarded to the lowest responsible and

> reliable bidder, as will best promote the public interest . . . [p]rovided, however, that where a responsible and reliable bidder certified as a minority-owned business enterprise or women-owned business enterprise pursuant to article fifteen-A of the executive law submits a bid of one million four hundred thousand dollars or less, as adjusted annually for inflation beginning January first, two thousand twenty,[4] the bid of the minority or women-owned business enterprise shall be deemed the lowest bid unless it exceeds the bid of the lowest bidder by more than ten percent.

ADP asserts that Parks' "interpret[ation] [of] the phrase 'lowest bidder' in [PBL] Section 8(6) to mean the bid of the lowest responsible and reliable bidder, i.e. ADP, rather than 7 Seas, who was the lowest bidder but was deemed non-responsive by Parks" is a "misread[ing] [of] [PBL] Section 8(6) and its intent, which is best reflected by the language the Legislature chose for Section 8(6)" (ADP's Appeal, at p. 4). ADP posits that "the Legislature could have easily replaced 'lowest bidder' with lowest 'responsible and reliable bidder', the phrase it used earlier in the same sentence, but chose not to do so when deciding what would trigger an award to an MWBE" (*Id.*, at p. 5). ADP further contends "by using the phrase 'lowest bidder', Section (8)(6) requires the agency to take into account only one factor—the *amount* of the bid—in determining whether the MWBE firm must be awarded the contract" which ensures that "the public obtains the best price for the work, while affording MWBE firms opportunities" (*Id.*, at pp. 5-6).

Parks contends "'lowest bidder' in the phrase, 'unless it exceeds the bid of the lowest bidder' in [PBL] Section 8(6) [means] the bid of the lowest responsible and reliable bidder" and to interpret the language otherwise "ignores the legislative intent that only responsible and reliable bidders be considered lowest bidders and creates an illogical result, in that it would negate the beneficial intent of the provision as it applies to MWBEs" (Parks Determination, at p. 2). Accordingly, Parks asserts that " it is not the lowest bidder but the lowest responsible and reliable bidder that triggers the MWBE provision of [PBL] Section 8(6)" (*Id.*). Parks further asserts "that to be a reliable bidder, the bidder must first be a responsive bidder, [meaning] a bidder whose offer meets the specifications or requirements provided in the bid document or solicitation" (*Id.*).

First and foremost, there is no dispute as to the bid pricing submitted by the respective bidders, or that 7 Seas was disqualified from consideration. The dispute lies in the interpretation of PBL § 8(6) and whether, in determining if an MWBE bidder's bid is within 10% of the lowest bidder's bid and thus susceptible to award, the lowest bidder is required to be to be responsive, reliable, and responsible.

With respect to statutory interpretation, we note that the inclusion of "responsible and reliable" in the phrase "may be awarded to the lowest responsible and reliable bidder" sets the requirement for all awardees under PBL § 8(6) to be responsible and reliable. The inclusion of "responsible and reliable" in the phrase "where a responsible and reliable bidder certified as a minority-owned business enterprise or women-owned business enterprise pursuant to article fifteen-A of the executive law submits a bid of one million four hundred thousand dollars or less,

[4] As of March 1, 2025, the amount is $1,680,923.00.

as adjusted annually for inflation beginning January first, two thousand twenty, the bid of the minority or women-owned business enterprise shall be deemed the lowest bid" sets the requirement that an MWBE awardee benefitting from PBL § 8(6) must also be "responsible and reliable" and is not exempt from that requirement. The fact that "responsible and reliable" is not repeated in the phrase "unless it exceeds the bid of the lowest bidder by more than ten percent" does not operate to remove the "responsible and reliable" requirement from a lowest bidder.

Notwithstanding the foregoing, to address the dispute as to the interpretation of PBL § 8(6), it is well-settled that legislative history provides invaluable insight into how a statute was intended to be interpreted (*see United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543-44 (U.S. 1940) (holding that "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination" (internal quotations omitted)); *see also In re. Auerbach v. Bd. of Educ.*, 86 N.Y.2d 198, 204 (N.Y. 1995) (holding that examining the legislative history to determine the intent of the legislature in enacting a statute is appropriate "where a literal construction [of the statutory language] would lead to absurd or unreasonable consequences that are contrary to the purpose of the enactment"); *State Psychiatric Ass'n, Inc. v. State Dep't of Health*, 19 N.Y.3d 17, 24 (N.Y. 2012) ("To determine the intent of a statute, inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision" (internal quotations omitted)); *State Bankers Ass'n v. Albright*, 38 N.Y.2d 430, 434 (N.Y. 1975) ("While the statutes may appear literally 'unambiguous' on their face, the absence of ambiguity facially is never conclusive. Sound principles of statutory interpretation generally require examination of a statute's legislative history and context to determine its meaning and scope")). Thus, "[a] court should avoid a statutory interpretation rendering the provision meaningless or defeating its apparent purpose" (*Miglino v. Bally Total Fitness of Greater N.Y., Inc.*, 937 N.Y.S.2d 63, 69 (App. Div. 2d Dep't 2011) (internal quotations omitted), *aff'd* 20 N.Y.3d 342 (N.Y. 2013)). "Finally, it is well settled that a statute must be construed as a whole and that its various sections must be considered with reference to one another" (*Matter of Albany Law School v. State Off. of Mental Retardation & Dev. Disabilities*, 19 N.Y.3d 106, 120 (N.Y. 2012)).

PBL § 8(6) was amended to add language regarding bids submitted by MWBEs (the "MWBE Provision")[5] by Chapter 96 of the Laws of 2019, whose purpose was to "extend the effectiveness of provisions of law relating to participation by [MWBEs] in state contracts and [ ] expand upon those provisions based upon the findings of the 2016 Disparity Study" (New York State Assembly Memorandum in Support of Legislation, Bill No. A8414). The Assembly Memorandum in Support additionally noted, "the [2016 Disparity] Study found continued evidence of statistically significant underutilization of available MWBEs and provides support for the continuation of the MWBE program. The Study also provided several recommendations to enhance and improve upon the program." Among the "enhancements" to the MWBE program intended to rectify "statistically significant underutilization" was the amendment to PBL § 8(6).

[5] The language added to PBL § 8(6) is as follows: "[p]rovided, however, that where a responsible and reliable bidder certified as a minority-owned business enterprise or women-owned business enterprise pursuant to article fifteen-A of the executive law submits a bid of one million four hundred thousand dollars or less, as adjusted annually for inflation beginning January first, two thousand twenty, the bid of the minority or women-owned business enterprise shall be deemed the lowest bid unless it exceeds the bid of the lowest bidder by more than ten percent."

Thus, clearly, the legislative intent was to increase participation opportunities in State contracting for MWBEs.[6]

The change to PBL § 8(6) made by Chapter 96 of the Laws of 2019 provided MWBEs with enhanced competitive opportunities – an MWBE bidder could submit a bid up to 10% more than all other bidders, if the total bid was below a set threshold, and be awarded the contract. Significantly, the MWBE bidder is required to be responsive, reliable, and responsible. The requirements of responsiveness, reliability, and responsibility are not waived for the MWBE bidders or for the non-MWBE bidders, and thus logically should not be waived for the lowest bidder. To apply the requirements differently to the lowest non-MWBE bidder would effectively render the MWBE Provision meaningless.

The standard for awarding a contract for public work, such as the contract at issue, is whether the apparent low bidder is "responsible and reliable" and whether the award will "best promote the public interest" (PBL § 8(6)). Clearly, however, in order to be a "reliable" bidder, a bidder on a procurement for public work must be responsive to the requirements of the IFB and must be disqualified if non-responsive to a material requirement. In furtherance of this and the public interest in fair competitive procurements, the IFB should be objectively clear in setting forth what is required for a bidder to meet its requirements and be qualified.[7] In fact, as is relevant here, a finding of non-responsiveness may call into question the integrity of a vendor's pricing, and thus their status as a "lowest bidder." If a bidder submits what is technically the lowest bid but has not submitted pricing for all the items as required to complete the work pursuant to the solicitation, that bid is non-responsive. Moreover, this concept is included within PBL § 8(6) itself: "the lowest bid shall be deemed to be that which specifically states the lowest gross sum for which the entire work will be performed, including all the items specified in the proposal thereof." Additionally, other failings that render a bid non-responsive also lead to questions of pricing integrity – for example, if a bidder does not submit required proof of insurance, the contracting agency does not have assurance that all required insurance costs are contemplated in the bid price.

Pursuant to State Finance Law, Article XI, State Purchasing, '"[r]esponsible' or 'responsibility' means the financial ability, legal capacity, integrity, and past performance of a business entity" (SFL § 163(1)(c)).[8] The New York State Procurement Guidelines[9] expand upon this definition, providing,

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[6] Notably, this year, New York State again extended its MWBE program, for another three years, through July 1, 2028. The reauthorization was enacted as Part KK of the Fiscal Year 2025–26 budget bill, and preserves all existing rules governing eligibility, certification, and participation, and ensures continued enhancement opportunities for MWBEs in state contracting.

[7] State Finance Law, Article XI, State Purchasing, is instructive here. 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" offeror is an "offeror meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency" (SFL § 163(1)(d)).

[8] While SFL § 163 does not apply to construction contracts, the term responsible or responsibility is not otherwise defined in PBL, and the SFL definition has been widely adopted as applicable to state purchasing generally, including in the construction context.

> The responsibility determination is based upon many factors, including, but not limited to:
> 1. Financial and organizational capacity
> 2. Legal authority to do business in this State
> 3. The integrity of the owners/officers/principals/members and contract managers [and]
> 4. Past performance of the bidder on prior government contracts.

(NYS Procurement Guidelines (Revised February 2025), Section 6.6, p. 34). As is relevant here, a finding of non-responsibility based on financial ability or past performance may call into question the integrity of a bid; for example, a bidder may submit an unrealistically low bid that the bidder does not have the financial ability to perform. Concerns regarding financial ability that impact a bid price are reflected in Executive Order No. 4.170.1, first issued in 1993 by Governor Mario Cuomo, and continued by subsequent administrations to the present day, which enumerates uniform guidelines for determining vendor responsibility, including: "[l]ack of adequate expertise, prior experience with comparable projects, or financial resources to perform the work of the contract or subcontract in a timely, competent, and acceptable manner"; "[t]he submission of a bid which is mathematically or materially unbalanced"; and "[t]he submission of a bid which is so much lower than the agency's confidential engineers' estimate of the cost of, or anticipated bids for, the contract, that it appears unlikely that the bidder will be able to perform the contract satisfactorily at the price bid."

A bid that is not responsive, reliable, or responsible, and thus not eligible for contract award pursuant to applicable State procurement laws, is simply not a legitimate bid that can properly be used as a point of comparison to other bids. Therefore, to consider a bid that is not responsive, reliable or responsible, to be the lowest bid in determining whether an MWBE's bid is within 10% of such bid, defeats the legislative intent of enhancing opportunities for MWBEs to participate in State contract work. Thus, taking into account the meaning of PBL § 8(6) as a whole, which requires awards only to responsible and reliable bidders, and the legislative intent behind the MWBE Provision, which aims to increase opportunities for MWBEs, it is clear that the benchmark for "lowest bidder" when comparing MWBE pricing must be responsive, reliable, and responsible, in order to effectuate realistic increased opportunities for MWBEs. To interpret the MWBE Provision otherwise, would allow any bid, regardless of how unrealistic the pricing or terms, to dictate whether the legislative intent of enhancing opportunities for MWBEs would be triggered, diminishing the effectiveness of the MWBE Provision.[10]

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[9] While the NYS Procurement Guidelines do not apply to construction contracts, the term responsible or responsibility is not otherwise defined in PBL, and the SFL definition has been widely adopted as applicable to state purchasing generally, including in the construction context.

[10] We likewise find no merit to ADP's assertion that if PBL § 8(6) "were based on the amount of the bid from the 'lowest responsible and reliable bidder' . . . [it would] all but guarantee[ ] that the State will overpay by up to 10% every time Section 8(6) is invoked" (Appeal, at p. 6). The legislature, in enacting PBL § 8(6) affirmatively chose to have the State pay up to 10% more for contracts with MWBEs; the price control that the legislature imposed was to limit the application of the MWBE Provision to bids under a certain dollar threshold. ADP's interpretation attempts to artificially limit MWBE opportunities, in direct contravention of the legislative intent.

Therefore, we find no basis to disturb Parks' application of PBL § 8(6), utilizing the lowest responsive, reliable, and responsible bidder (ADP) as the benchmark to determine whether to award to an MWBE, and subsequently awarding to the MWBE (Paladino) whose bid was within 10% of the lowest responsive, reliable, and responsible bid.

**Application of PBL § 8(6) to the Parks Contract Award for Playground Rehabilitation**

ADP contends "the 'lowest bid' [for purposes of PBL § 8(6)] is from 7 Seas, at $1,110,000.00, not ADP, at $1,247,200.00 . . . 10% of $1,110,000.00 is $111,000.00, meaning the MWBE bid would need to be $1,221,000.00 or less to satisfy [PBL] Section 8(6) [and] [n]one of the bids come in under this number, as the next lowest bid after 7 Seas is ADP, at $1,247,200.00. (ADP's Appeal, at p. 7). Therefore, ADP asserts that "[PBL] Section 8(6)'s provision for awards to MWBEs if they are within 10% of the **lowest bid**, does **not** apply to the Contract award, as there are no bids from MWBE firms that are within 10% of the **lowest bid**, which was submitted by 7 Seas—not ADP" (*Id.*).

As set forth above, we do not adopt ADP's interpretation of PBL § 8(6) and instead affirm Parks' interpretation.

In order to apply the above interpretation of PBL § 8(6), we must first determine the lowest responsive, reliable and responsible bidder, notwithstanding the application of PBL § 8(6) to an available MWBE bidder. According to the procurement record, and undisputed by the parties, ADP was the lowest responsive, reliable and responsible bidder prior to the application of PBL § 8(6). Accordingly, we must look to ADP's bid amount to determine whether Paladino, the only MWBE bidder, was within 10% of ADP's bid.[11] The procurement record reflects, and it is undisputed by the parties, that ADP bid $1,247,200.00 and Paladino bid $1,344,000.00, a difference of only $96,800.00 or 7.76% of ADP's bid; accordingly, Paladino's bid was within 10% of ADP's bid, and pursuant to PBL § 8(6), Paladino's bid is deemed to be the lowest bid. We therefore find no basis to disturb Parks' award of the contract to Paladino as the lowest responsive, reliable and responsible bidder.

**CONCLUSION**

For the reasons outlined above, we have determined the issues raised in ADP's Appeal are not of sufficient merit to overturn the contract award by Parks. As a result, ADP's Appeal is denied, and we are today approving the Parks / Paladino contract for Playground Rehabilitation.

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[11] It is clear from the record, and undisputed by the parties, that Paladino's bid was less than $1,680,923.00, and thus eligible for consideration pursuant to PBL § 8(6). *See supra* fn. 4.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Bid Protest filed by
BronxWorks, Inc. with respect to the grant awards for Health Homes Supportive Housing Program made by the New York State Department of Health.

Procurement Record – DOH01-0000795-3450000

**Determination of Bid Protest**

**SF–20250115**

July 17, 2025

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The Office of the State Comptroller ("OSC" or "Office") has reviewed the above-referenced grant awards made by the New York State Department of Health ("DOH") for Medicaid Redesign Team Health Homes Supportive Housing Program ("HHSHP"). We have determined the grounds advanced by BronxWorks, Inc. ("BronxWorks") are insufficient to merit overturning the grant awards made by DOH and, therefore, we deny the Protest.

**BACKGROUND**

**Facts**

On May 7, 2024, DOH, Division of Program Development and Management, Bureau of Social Care and Community Supports, issued a Request for Applications ("RFA") seeking applications for the HHSHP. DOH expected "funding for up to 17 awards that will provide permanent rental subsidies and housing tenancy services to provide housing for vulnerable homeless Medicaid members" (RFA, at p. 3). The RFA provided that "[t]he rental subsidies and services provided under the [HHSHP] are intended to be a means to provide affordable and stable housing and services, thereby improving access to health services and connection to health systems" (*Id.*).

The RFA set forth minimum eligibility requirements for all applicants and set guidelines for the evaluation of each application (*Id.*, at pp. 5, 22–28). The RFA provided that "[a]t least one (1) award will be made" for fifteen (15) different Service Areas, with the Service Areas identified by counties/region in Table 1 of the RFA (RFA, at pp. 3-4). The RFA specified that applicants would be scored based on a 100-point system, and "[a]wards will be scored by Service Areas (table 1), the highest score will be awarded in each Service [A]rea or to the two highest scoring applications if that Service [A]rea [provides for] more than one award [ ] in Table 1" (*Id.*, at p. 28).[1]

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[1] The only Service Area applied to and contested by BronxWorks is Service Area # 11 – Bronx Only ("Service Area # 11"), which provided funding for up to two (2) awards (*Id.*, at p. 4).

By the J y 2 2 24 app ication dead ine DOH received a tota of 26 app ications across a Service Areas ith 4 app ications specifica y for Service Area # . DOH iss ed tentative a ard etters for Service Area # to Bronx Parents Ho sing Net ork Inc. and BronxWorks on Febr ary 28 2 25. BronxWorks received an amended tentative a ard etter on March 2 25 pdating the a arded f nding amo nt. On Apri 24 2 25 BronxWorks received a rescindment notice from DOH based on an "administrative ro nding error" identified ith respect to the Service Area # a ards. On that same date DOH iss ed a tentative a ard etter to Fort ne Society Inc. for Service Area # . S bseq ent y a debriefing as req ested by BronxWorks hich as he d on Apri 3 2 25.

BronxWorks fi ed a protest ith this Office on May 5 2 25 ("Protest"). DOH responded to the Protest on May 29 2 25 ("Ans er").[2]

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**Comptroller's Authority and Procedures**

Under State Finance La ("SFL") § 2(2) ith certain imited exceptions before any contract made for or by a State agency hich exceeds fifty tho sand do ars becomes effective it m ust be approved by the Comptro er.

In carrying o t this contract approva responsibi ity OSC has prom ugated reg ations setting forth the proced re ("OSC Protest Proced re") to be sed by an interested party seeking to cha enge a contract a ard by a State agency (*see* 2 NYCRR Part 24). The OSC Protest Proced re governs initia protests to this Office of agency contract a ards and appea s of agency protest determinations. Beca se there as no protest proced re at the agency eve the Protest is governed by 2 NYCRR § 24.4.

In the determination of the Protest this Office considered:

. the doc mentation contained in the proc rement record for arded to this Office by DOH ith respect to the proposed DOH HHSHP grant a ards;

2. the correspondence bet een this Office and DOH arising o t of o r revie of the proposed DOH HHSHP grant a ards; and

3. the fo o ing correspondence/s bmissions from the parties (inc ding the attachments thereto):

    a. Protest; and
    b. Ans er.

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[2] We note that DOH's ans er as s bmitted at the req est of this Office (*see* 2 NYCRR §§ 24.4(j)).



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**Applica l a s**

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The grant award in question is subje t to the requirements of Arti le 11-B of the SFL.[3] Therefore, the pro urement ondu ted by DOH is not subje t to the ompetitive bidding requirements of SFL § 163 sin e those statutory ompetitive bidding requirements do not apply to " ontra ts approved in a ordan e with arti le eleven-B of [the SFL]" (SFL § 160(7)). While Arti le 11-B does not require ompetitive bidding, the Comptroller, in fulfilling his statutory duty of assuring that State ontra ts are awarded in the best interest of the State, requires that agen ies undertake a ompetitive pro ess for grant awards or, alternatively, do ument why ompetition is not appropriate or feasible. Thus, notwithstanding the inappli ability of SFL § 163, this Offi e generally requires that grant ontra ts be awarded after a fair and impartial ompetitive pro urement pro ess whi h provides a level playing field for all potential award re ipients, ex ept where the agen y an do ument a sole sour e, single sour e or emergen y justifi ation for a non- ompetitive award ( onsistent with the do umentation for su h awards under SFL § 163). To determine whether the pro urement pro ess is fair and impartial, we look to whether: "1) the s oring system itself was lear; and 2) the evaluators, in assigning s ores, arrived at reasonable on lusions" (OSC Bid Protest Determination SF-20150159, at p. 3). In light of these non-statutory standards, we will pro eed to analyze the issues raised in this Protest.

**ANALY I OF THE PROTE T**

**Pro s o his Offic**

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In its Protest, BronxWorks hallenges the de ision by DOH to deny funding of its appli ation on the following grounds:

1. BronxWorks' award was res inded by DOH due to "an administrative rounding error" and it should be reinstated; and c

2. DOH's last-minute res indment of BronxWorks' grant award is unfair to BronxWorks' lients and the transition to a new provider may disrupt the HHSHP's goal of keeping tenants stably housed.

**DOH R spons o h Pro s**

In its Answer, DOH ontends the Protest should be reje ted on the following grounds:

1. DOH followed its pre-established evaluation methodology as outlined in the RFA, and had to res ind BronxWorks' award to orre t an administrative rounding error; and

2. DOH properly res inded its award to BronxWorks as the award was tentative until approval by OSC, and the award to BronxWorks had to be res inded to make awards for Servi e Area # 11 to the two highest s oring appli ants as required by the RFA.

[3] Arti le 11-B of the SFL applies to grant awards to not-for-profit organizations as part of a program plan developed by a State agen y (*see* SFL § 179-q(1), (2), (6), (10)).



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**DISCUSSIO N**

**<u>u tion Methodo ogy</u>**

BronxWork a ert that it ha “ ignificant concern about the re cindment of [it ] award” and “reque t that thi award be rein tated immediately for the betterment and well-being of the client ” (Prote t, at pp. 1, 2).

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DOH tate it “e tabli hed evaluation coring tool utilized during thi evaluation proce to en ure a fair and impartial evaluation of the received application ” (An wer, at p. 1). DOH a ert “[t]he Department mu t follow the evaluation and award proce a et forth in Section V. C. Review & Award Proce of the RFA [which] allowed for the two (2) highe t- coring applicant in Service Area # 11” (*Id.*, at p. 3). DOH tate , “[t]hrough an admini trative rounding error . . . BronxWork wa incorrectly notified of their award[] a the 2nd highe t- coring applicant [however] [t]he Department ha validated the evaluation core which rank BronxWork third in their applicable region” (*Id.*, at pp. 2-3).

BronxWork appear to broadly call into que tion the outcome of thi grant procurement, a uch, we will review the procurement record to determine whether the evaluation methodology et forth in the RFA wa fair and impartial, and whether it wa fairly and con i tently applied acro all application .

Thi Office look to whether the evaluation methodology wa clear to determine whether the grant award wa fair and impartial. Here, the RFA clearly outlined the evaluation methodology DOH would u e to core applicant (RFA, at pp. 22–28). The procurement record reflect that DOH e tabli hed detailed evaluation tool and in truction in advance of receipt of application that were con i tent with the RFA. Ba ed on our review of the procurement record, we are ati fied DOH evaluated and cored all application con i tent with the articulated criteria and pre-e tabli hed evaluation methodology, reached rea onable conclu ion in a igning core , and awarded Service Area # 11 to the two highe t coring applicant a required by the RFA.

Regarding DOH’ “admini trative error” that re ulted in the re cindment of BronxWork ’ tentative award, the procurement record reflect that the “admini trative error” re ulted from DOH rounding core to the neare t whole number during it initial evaluation of application . DOH’ rounding re ulted in the appearance of a tie core of 88% between BronxWork and another applicant, The Fortune Society, Inc., and triggered the tie core procedure a outlined by RFA, Section C. The RFA pecified, “[i]n the event of a tie core, the applicant with the highe t core in Section 4. Program De ign and Activitie will receive an award” (*Id.*, at p. 28). BronxWork received the higher core for Section 4—37.667 compared to 35.333. Therefore, a the winner of the tie core procedure, DOH initially awarded Service Area # 11 to BronxWork . However, upon final review of coring, DOH evaluated applicant’ core , without rounding,[4] re ulting in core of 88% for BronxWork and 88.3% for The Fortune Society, Inc. Accordingly, DOH re cinded the tentative award to BronxWork (the third highe t corer for Service Area # 11), and i ued a

[4] Notably, neither the RFA nor the evaluation in trument/in truction provided for DOH to round core a part of the evaluation.



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tentative a a t he F tune S ciety, Inc., as the applicant h eceive the sec n highest sc e base n the actual, un un e sc es.

F the eas ns set f th ab ve, e fin n basis t istu b the g ant a a s ma e by DO .

**Rescindment of Tentative Award**

B nxWo ks asse ts the "last-minute escin ment is evastating t the p g am's clients, especially since e ha n time t inf m them, an t u elati nships ith lan l s" (P test, at p. 1). B nxWo ks fu the c nten s that "[a] change in p vi e may esult in lan l s n t electing t ene leases [ ]especially ith the last-minute natu e, the t ansiti n injects unce tainty an isk int client's ability t emain h use " (*Id.*).

DO esp n s "[a]s state in the a a lette s sent t B nxWo ks, Inc., 'final g ant a a s a e c ntingent n the evie an app val f the Office f the State C mpt lle (OSC)' [an ] OSC is n t able t app ve the final g ant a a as iginally submitte ue t the a minist ative un ing e i entifie " (Ans e , at p. 2).
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B nxWo ks appea s t questi n hethe it as app p iate f DO t escin its a a an hethe the timing f the escin ment as app p iate; the ef e, e ill ete mine hethe DO acte ithin the sc pe f its auth ity hen it escin e B nxWo ks' tentative a a .
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Pu suant t the SFL, "[b]ef e any c nt act . . . ma e f by any state agency . . . shall be execute bec me effective, heneve such c nt act excee s fifty th usan lla s in am unt, it shall fi st be app ve by [OSC]" (SFL § 112(2)(a)(i); *see Charlie's at the Fair, LLC v. State*, 135 A.D.3 1042 (App. Div. 3 Dep't 2016) (h l ing that hen a State agency c nt acts f value excee ing the statut y th esh l equi ing C mpt lle app val un e SFL § 112, the c nt act is n t enf ceable until app ve by the C mpt lle )). C nsistent ith applicable la , the RFA p vi es that any g ant a a ma e by DO is tentative in natu e as "[a]ny c nt act esulting f m this RFA ill be effective nly up n app val by the Ne Y k State Office f the C mpt lle " (RFA, at p. 14). M o e ve , the tentative a a lette s sent t B nxWo ks in icate that "[f]inal g ant a a s a e c ntingent n the evie an app val f [OSC]." A iti nally, the RFA p vi es DO ith the ese ve ight t "[ ]eject any all applicati ns eceive in esp nse t this RFA" (*Id.*, at p. 12).
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It as clea f m applicable la , the RFA, an the tentative a a lette s sent t B nxWo ks that the a a ma e t B nxWo ks as tentative an the ef e subject t escin ment, until app ve by this Office. Fu the , as esc ibe in m o e etail ab ve, the p cu ement ec supp ts the eas n behin DO 's escin ment f B nxWo ks' a a . he ef e, n evi ence has been p esente t sh that DO acte utsi e f its auth ity, a bit a ily, in escin ing B nxWo ks' a a .
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Acc ingly, e fin n basis t istu b DO 's ete minati n t escin B nxWo ks' tentative a a .

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**CONCLUS ON**

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he eas ns u lined ab ve, we have de e mined he issues aised in he P es a e n y f sufficien me i ve u n he g an awa ds b DOH. As a esul , he P es is denied.



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STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

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| In the Matter of the Bid Protest filed by Coastal Contracting Corp. with respect to the procurement of Maintenance of Park & Ride, Bikeways, Rest Areas, Noisewalls, Graffiti, and Tree Trimming conducted by the New York State Department of Transportation. | **Determination of Bid Protest**<br><br>**SF–20250116** |
| Contract Number – D265431 | August 13, 2025 |

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The Office of the State Comptroller ("OSC" or "Office") has reviewed the above-referenced procurement conducted by the New York State Department of Transportation ("DOT") for Maintenance of Park & Ride, Bikeways, Rest Areas, Noisewalls, Graffiti, and Tree Trimming – Various Locations in Nassau and Suffolk Counties ("Park & Ride Maintenance"). We have determined the grounds advanced by Coastal Contracting Corp. ("Coastal") are insufficient to merit overturning the contract award made by DOT and, therefore, we deny the Protest. As a result, we are today approving the DOT contract with Quintal Contracting Corp. ("Quintal") for Park & Ride Maintenance.

## BACKGROUND

### Facts

On November 25, 2024, DOT issued a solicitation[1] seeking a contractor to provide Park & Ride Maintenance. The solicitation provided that a "contract award will be made only to the lowest responsible bidder as will best promote the public interest as provided by Section 38 of the Highway Law" and that DOT "reserve[d] the right to reject any proposal deemed non-responsive, or any contractor deemed non-responsible" (DOT Standard Specifications, § 103–01, at p. 60).

DOT received two bids by the bid opening date of December 19, 2024, including a bid from Coastal. On March 3, 2025, Coastal received correspondence from DOT simultaneously notifying Coastal it was the apparent low bidder in response to the solicitation and that DOT had identified multiple concerns regarding Coastal's responsibility. The correspondence sets out the vendor responsibility concerns in detail and advises Coastal that Coastal is "directed to appear before a meeting of [DOT's] Contract Review Unit ("CRU") to discuss and address the [vendor responsibility] concerns, and to demonstrate to [DOT] that Coastal is a responsible bidder eligible

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[1] The solicitation was comprised of Proposal Book 1, Proposal Book 2, Proposal Book 3, DOT Standard Specifications, Construction and Materials, dated September 1, 2024 ("DOT Standard Specifications") (as incorporated by reference into the bid documents – *see* Proposal Book 1, at p. 1, Proposal Book 2, at p. 1, Proposal Book 3, at p. 1), as well as supplemental information, and applicable amendments.

for award of contracts." The correspondence further advises Coastal to "be prepared to answer questions and present any information you deem relevant to a decision by the CRU concerning Coastal's status as a responsible bidder.". On March 10, 2025, Coastal submitted a letter to DOT responding to the responsibility concerns raised by DOT in its March 3, 2025, correspondence. On April 15, 2025, the CRU held a meeting ("CRU Meeting") with Coastal to discuss DOT's responsibility concerns.[2] DOT's CRU issued a determination to Coastal via letter dated May 7, 2025 ("Non-Responsibility Determination"), finding Coastal non-responsible and ineligible for award of the Park & Ride Maintenance contract. As a result, DOT awarded the Park & Ride Maintenance contract to Quintal, the next lowest responsible bidder in response to the solicitation.

Coastal filed a protest with this office on May 16, 2025 ("Protest"). DOT submitted its answer on June 16, 2025 ("Answer"), and the procurement record, including the proposed DOT / Quintal contract, to this Office on June 17, 2025. Coastal submitted a reply to the Answer on June 18, 2025 ("Reply").

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

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

In carrying out this contract approval responsibility, OSC has promulgated regulations setting forth the procedure ("OSC Protest Procedure") to be used by an interested party seeking to challenge a contract award by a State agency (*see* 2 NYCRR Part 24). The OSC Protest Procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no protest procedure at the agency level, the Protest is governed by 2 NYCRR § 24.4.

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DOT with the DOT / Quintal contract, including the record between DOT and Coastal that resulted in DOT's Non-Responsibility Determination for Coastal;

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

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

   a. Protest;
   b. Answer; and
   c. Reply.

[2] Coastal originally appeared for this meeting on April 1, 2025. However, DOT had scheduling conflicts arise, and DOT and Coastal mutually agreed to reschedule this meeting to April 15, 2025.

## ANALYSIS OF THE PROTEST

### Protest to this Office

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

1. Coastal is a responsible contractor eligible for contract award, and DOT's Non-Responsibility Determination for Coastal is unsupported.

2. Coastal was denied the requisite due process prior to DOT's Non-Responsibility Determination.

### DOT Response to the Protest

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

1. DOT's Non-Responsibility Determination for Coastal and resultant finding that Coastal is ineligible for contract award is supported by a clear and significant record.

2. DOT provided Coastal with the requisite due process prior to making its Non-Responsibility Determination.

### Coastal's Reply to the Answer

In its Reply, Coastal further elaborates on the grounds contained in its Protest.

## DISCUSSION

### Vendor Responsibility

Coastal alleges that DOT's Non-Responsibility Determination was "based on incorrect assumptions, misinterpretations of Coastal's actions and words, and a failure to properly consider evidence" (Protest, at p. 1; Reply, at p. 1).[3]

DOT counters that it "determined Coastal was non-responsible after informing Coastal of [DOT's] concerns and providing Coastal [ample] opportunity – in writing and through discussion – to address and attempt to resolve [DOT's] responsibility concerns" (Answer, at p. 1). DOT further asserts that "[a]fter consideration of all information, including Coastal's submissions and the [CRU Meeting], [DOT] . . . found Coastal non-responsible" and that there was "abundant substantive support" for the Non-Responsibility Determination (*Id.*, at pp. 1, 2). DOT states "[a]s noted in the [Non-Responsibility] Determination, Coastal did not resolve the concerns [DOT]

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[3] The Protest and Reply are not paginated. For purposes of this Determination, this Office includes page numbers as they would have appeared, if included.

enumerated in the March 3, 2025 letter, and instead attempted to deny or avoid responsibility" (*Id.*, at p. 2).

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." Executive Order No. 4.170.1[4] sets forth guidelines for determining vendor responsibility.[5] "The standard of review of an agency's decision to award or deny a contract is whether there is a rational basis to support that determination" (*Schiavone Constr. Co. v. Larocca*, 117A.D.2d 440, 444 (3d Dep't 1986) (holding that the DOT provided a rational basis for its finding of non-responsibility of the vendor, pursuant to Highway Law § 38)).

Our review of the procurement record verifies that DOT conducted a vendor responsibility review of Coastal, considering Coastal's financial ability, legal capacity, integrity, and past performance. DOT's Non-Responsibility Determination was based on DOT's finding that there were unresolved issues with Coastal's integrity and past performance. Prior to DOT making this Non-Responsibility Determination, DOT provided detailed notice of its concerns on March 3, 2025, an opportunity for Coastal to submit responses to DOT's concerns and discussed with Coastal the same concerns at the CRU Meeting. As a result, the procurement record reflects that DOT documented a rational basis for its Non-Responsibility Determination for Coastal. Therefore, we find no basis to disturb DOT's Non-Responsibility Determination.

**Due Process**

1. Notice of Concerns

Coastal asserts that DOT "faile[d] to provide due process" when making its Non-Responsibility Determination (Reply, at p. 1). Coastal contends that at the CRU Meeting, the "CRU focused on issues that were not set forth in their letter dated March 3, 2025, and Coastal was not afforded the ability to provide documentation and responses to the new line of questioning" (Protest, at p. 1; *see* Reply, at p. 3).

DOT contends "Coastal was provided sufficient notice of and ample opportunity to address the issues underlying the [Non-Responsibility] Determination" (Answer, at p. 2). DOT counters that "[t]he CRU's March 3, 2025 letter to Coastal [] outlined [DOT's] specific concerns, including apparent inaccuracies regarding debarment on Coastal's current [vendor responsibility questionnaire], as well as issues from prior projects, including staging permit problems, payment issues, equipment certification fraud, improper interactions with [DOT] employees, late payments to subcontracts, and other contract compliance issues" (*Id.*, at p. 1).

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[4] This Executive Order was first issued in 1993 by Governor Mario Cuomo and was most recently continued by Governor Kathy Hochul in 2021 via Executive Order 9.6.

[5] The guidelines for determining vendor responsibility set forth in Executive Order No. 4.170.1 include, among others, "[l]ack of adequate expertise, prior experience with comparable projects, or financial resources to perform the work of the contract or subcontract in a timely, competent, and acceptable manner"; "[c]riminal conduct in connection with government contracts"; "[w]illful noncompliance with the prevailing wage and supplements payment requirements of the Labor Law"; "[a]ny significant violation of the Workers' Compensation Law"; and "[a]ny other cause of so serious or compelling a nature that it raises questions about the present responsibility of a contractor or subcontractor . . . ."

A State agency must provide a vendor with due process prior to its issuance of a non-responsibility determination (*see Schiavone Constr. Co.*, 503 N.Y.S.2d at 197–98 (holding that a vendor non-responsibility finding affects a vendor's ability to carry on its business, therefore implicating a liberty interest and triggering due process protections)). Due process requires the contracting State agency to provide the vendor with notice of its responsibility concerns and an opportunity to be heard, including an opportunity to present relevant information or evidence regarding its responsibility (*Id.*, at 198).

The procurement record reflects that DOT provided Coastal with the requisite notice of its responsibility concerns. Initially, DOT notified Coastal of its responsibility concerns through the March 3, 2025, correspondence. DOT provided this Office with a recording of the CRU Meeting and the concerns discussed had been previously raised in the March 3, 2025, correspondence. Contrary to Coastal's allegations, the record reflects that DOT provided Coastal with notice of all the issues that formed the basis of the Non-Responsibility Determination. Accordingly, the procurement record reflects that DOT provided Coastal with the requisite notice to satisfy due process requirements; therefore we find no basis to disturb DOT's Non-Responsibility Determination.

2. Opportunity to be Heard

Coastal contends "the one hour allotted [for the CRU Meeting] was insufficient to address the issues presented" (Protest, at p. 1). Coastal asserts that at the CRU Meeting, the "CRU asked only for an explanation on three items and Coastal was not able to fully address these concerns, or any of the other items listed in its letter dated March 3rd, 2025, due to the one hour time limit imposed by the CRU" (*Id.*).

DOT states "the [Non-Responsibility] Determination came after Coastal and its counsel were notified in writing of [DOT] concerns, given the opportunity to submit a response and materials prior to the CRU [M]eeting, made aware of the CRU [M]eeting schedule weeks in advance, given the opportunity to respond directly to questions at the CRU [M]eeting, and permitted to make both opening and closing statements at the CRU [M]eeting" (Answer, at p. 2). DOT states "Coastal raised no concerns about the meeting time allotted prior to or during the CRU [M]eeting, and neither requested nor attempted to provide supplemental information after the CRU [M]eeting was held" (*Id.*).

To satisfy due process, "a full, formal adversarial hearing" is not required. *See Schiavone Constr. Co., Inc.*, 503 N.Y.S.2d 196; *R.W. Granger & Sons, Inc. v. State of N.Y. Facilities Dev. Corp.*, 615 N.Y.S.2d 509, 510-11 (3d Dep't 1994) (holding that a "formal trial-type hearing" is not necessary to satisfy procedural due process prior to finding a vendor non-responsible and rejecting its bid); *New York State Asphalt Pavement Assoc. v. White*, 532 N.Y.S.2d 690 (Albany County, 1988). Written submissions have been held to be sufficient to satisfy due process; a formal evidentiary hearing is not required (*see Schiavone Constr. Co.*, 503 N.Y.S.2d at 198; *see also R.W. Granger & Sons, Inc.*, 615 N.Y.S.2d at 510).

The procurement record reflects that DOT issued its Non-Responsibility Determination after Coastal was provided with an opportunity to be heard—both through written responses and a meeting. DOT considered both the written responses Coastal submitted, as well as provided Coastal with an opportunity to meet as evidenced by the CRU Meeting. Notably, Coastal never submitted additional material following the CRU Meeting, nor requested an additional meeting. Despite Coastal's allegations, we are satisfied that DOT fulfilled its due process obligations by providing Coastal with the requisite opportunity to be heard. Therefore, we find no basis to disturb DOT's Non-Responsibility Determination.

**CONCLUSION**

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the contract award by DOT. As a result, the Protest is denied and we are today approving the DOT / Quintal contract for Park & Ride Maintenance.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Bid Protests filed by Amneal Pharmaceuticals, LLC and Emergent Devices, Inc. with respect to the procurement of Naloxone and Fentanyl Test Strips conducted by the New York State Department of Health.

Contract Number – DOH01-C041106-3450000

**Determination of Bid Protests**

**SF–20250128**
**SF-20250222**

February 19, 2026

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The Office of the State Comptroller ("OSC" or "Office") has reviewed the above-referenced procurement conducted by the New York State Department of Health ("DOH") to provide an FDA-approved intranasal naloxone variation of 4 mg in 0.1 mL solution ("Naloxone") and fentanyl test strips ("FTS") to registered Opioid Overdose Prevention Programs. We have determined the grounds advanced by Amneal Pharmaceuticals, LLC ("Amneal") are not of sufficient merit to overturn the contract award made by DOH; however, we have determined that the grounds advanced by Emergent Devices, Inc. ("Emergent") are of sufficient merit to overturn the contract award made by DOH and, therefore, we uphold the Protest.

Specifically, as set forth more fully below, we find that (1) the cost evaluation methodology disclosed in DOH's invitation for bids ("IFB") did not have a reasonable relationship to the actual costs to be incurred under the contract for FTS, and therefore we cannot find that DOH awarded the contract to the lowest-priced bidder as required by applicable law; and, (2) the requirement in the IFB for the awarded vendor to contract with a lab to validate each lot of FTS before distribution was not sufficiently defined, such that DOH did not adequately prescribe the minimum requirements that needed to be met by a bidder in order to be considered responsive. As award was made by DOH based on a total bid price comprised of the combined pricing for both Naloxone and FTS, the flaws in the procurement related to FTS cannot be severed from the procurement. As a result, we are today returning non-approved the DOH contract with Padagis US, LLC ("Padagis") for Naloxone and FTS.

## BACKGROUND

### Facts

On April 29, 2025, DOH issued an IFB to procure Naloxone and FTS "to supply the New York State registered Opioid Overdose Prevention Program" (IFB, at § 4.2).[1]

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[1] "In December of 2024, Legislation S.4393/A.5004 was signed by Governor Hochul to increase community access to [FTS]. The legislation requires that the Department supply [FTS] when state-registered Opioid Overdose Prevention Programs order naloxone" (IFB, at § 2.1; *see* Public Health Law § 3309(3-a)).

The IFB set forth mandatory minimum qualifications that Bidders needed to meet in order to be responsive, as follows:

- The Bidder must have a minimum of two (2) years of experience manufacturing, direct shipping, distributing, and tracking a high volume (est. 45,000 per month) of opioid antagonist of the naloxone classification shipments to the requestor;
- The Bidder must have two years' experience providing a Food and Drug Administration (FDA) approved intranasal naloxone variation 4mg in a 0.1 mL solution or injectable naloxone single use; and
- The Bidder must have one dedicated contract with a shipping company (examples: United Parcel Service (UPS), Federal Express (FedEx), etc.) to deliver product within 3-5 business days to the DOH registered program locations and provide a tracking number for the product shipment. This includes shipping to residential and business locations.

(IFB, at § 3.1). The IFB explicitly provided that "[f]ailure to meet these Minimum Qualifications will result in a Bid being found non-responsive and eliminated from consideration" (IFB, at § 3.1). The IFB specified that DOH would "award one contract as described in [the] IFB to the responsible and responsive Bidder who offers the lowest total bid price" (IFB, at § 8). The IFB articulated that DOH would "examine all Bids [that were] received in a proper and timely manner" and that "[t]he Bid containing the lowest price offered [would] be further evaluated to determine if it meets all bid submission requirements" (IFB, at § 8.2).

The IFB indicated that the lowest total bid price would be determined by combining the pricing bid for Naloxone and FTS (*see* IFB, at Attachment B, *Bid Form*). Bidders were required to submit annual unit pricing for Naloxone which was multiplied by estimated annual quantities, to derive the Naloxone pricing (*see id.*). Bidders were required to submit pricing for a single FTS, with no estimated annual quantities provided (*see id.*).

Amneal filed a protest with this Office on June 16, 2025 ("Amneal's Protest"). DOH received four (4) bids by the bid opening date of June 24, 2025, including bids from protestors Amneal and Emergent. On October 16, 2025, both Amneal and Emergent received a non-award letter. Amneal requested a debriefing, which DOH responded to on October 28, 2025. Emergent also requested a debriefing, which DOH provided on November 6, 2025.

Thereafter, on November 14, 2025, Emergent also filed a protest with this Office ("Emergent's Protest"). DOH responded to the Emergent Protest on November 28, 2025 ("DOH's Answer to Emergent's Protest") and Emergent submitted a reply on December 3, 2025 ("Emergent's Reply"). DOH submitted the procurement record, including the proposed DOH/Padagis contract, which is the subject of the Protests, to this Office for review on December

8, 2025. DOH responded to the Amneal Protest on December 12, 2025 ("DOH's Answer to Amneal's Protest")[2] and Amneal submitted a reply on December 29, 2025 ("Amneal's Reply").[3]

Subsequently, on January 12, 2026, during this Office's review of the procurement record submitted by DOH, this Office sent questions to DOH, which DOH responded to on January 21, 2026 ("DOH's Responses to OSC's Questions"). On January 26, 2026, Emergent submitted a response to DOH's Responses to OSC's Questions (Emergent's Additional Reply"); and, on January 30, 2026, Amneal submitted a response to same ("Amneal's Additional Reply").[4]

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

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

In carrying out this contract approval responsibility, OSC has promulgated regulations setting forth the procedure ("OSC Protest Procedure") to be used by an interested party seeking to challenge a contract award by a State agency (*see* 2 NYCRR Part 24). The OSC Protest Procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no protest procedure at the agency level, the Protests are governed by 2 NYCRR § 24.4.

In the determination of the Protests, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DOH with the proposed DOH/Padagis contract;

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

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

    a. Amneal's Protest;
    b. Emergent's Protest;
    c. DOH's Answer to Amneal's Protest;

[2] Pursuant to OSC's Protest Procedure, DOH could file an answer with the delivery of the contract to this Office for review; although DOH's Answer to Amneal's Protest was untimely, this Office exercised its discretion to consider it in making our determination (2 NYCRR §§ 24.4(d)(1), (i)).

[3] Amneal indicated that this submission was an "appeal from the Department of Health's December 12, 2025 denial of Amneal's protest." However, as this Office advised Amneal via email on December 30, 2025, we considered the submission to be a Reply to DOH's Answer pursuant to OSC's Protest Procedures. This is because Amneal had previously submitted a Protest to this Office and such Protest was still pending at the time Amneal's Reply was submitted.

[4] Pursuant to OSC's Protest Procedure, the last submission permitted as of right was Amneal's Reply and Emergent's Reply; although an additional submission was not permitted as of right, this Office exercised its discretion to consider Emergent's and Amneal's Additional Replies in making our determination (2 NYCRR §§ 24.4(f), (j)).

d. DOH’s Answer to Emergent’s Protest;
e. Amneal’s Reply;
f. Emergent’s Reply;
g. DOH’s Responses to OSC’s Questions;
h. Amneal’s Additional Reply; and,
i. Emergent’s Additional Reply.

## ANALYSIS OF THE PROTESTS

### Amneal’s Protest to this Office

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

1. DOH’s IFB set forth mandatory minimum qualifications, specifically the two-year experience requirement and the requirement for experience providing naloxone / opioid antagonists, that were unjustifiably narrow and not rationally related to the objectives of the State, unreasonably limiting competition; and,
2. The IFB’s mandatory minimum qualifications unnecessarily narrowed the field of potential responsive bidders, creating a situation where only the incumbent Emergent could be responsive, which created an unjustified sole source procurement.

### DOH’s Answer to Amneal’s Protest

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

1. DOH established mandatory minimum qualifications for the IFB in accordance with SFL § 163, with the aim of fostering competition as well as including requirements necessary to meet the needs of the State’s Opioid Overdose Prevention Program; and,
2. DOH determined that the minimum qualifications offered a competitive environment, and at least five vendors could potentially meet them.

### Amneal’s Reply to DOH’s Answer

In its Reply, Amneal argues that:

1. DOH may have improperly waived adherence to the IFB’s mandatory minimum qualifications in order to award the contract to Padagis.[5]

[5] Amneal posits that “[t]he specifications would have excluded other generic vendors as well [as Amneal] and probably should have excluded Padagis though [DOH] appears to have made some form of compromise to obtain Padagis’ bid price” (Amneal’s Reply, at p. 12). Amneal’s contention is based on conjecture and there is no evidence in the procurement record to support that DOH waived a mandatory requirement with respect to Padagis’ bid, as such, we decline to address it further.

**Emergent's Protest to this Office**

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

1. DOH conducted an unreasonable cost evaluation which failed to account for the total cost of FTS to be provided under the contract, and thus failed to determine which bid offered the lowest price;
2. The requirement to validate the accuracy of FTS was ambiguous and not clearly defined in the IFB; and,
3. The IFB imposed uncapped liability for any negligence associated with the intended off-label use of the procured FTS, which created an unreasonable restriction on competition.

**DOH's Answer to Emergent's Protest**

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

1. DOH has no baseline for potential volume of FTS to be provided, and instead reasonably utilized the cost of one FTS in its cost evaluation;
2. The IFB clearly set forth the validation requirement for FTS; and,
3. The standard liability terms contained in the IFB did not deny Emergent a fair opportunity to compete.

**Emergent's Reply to DOH's Answer**

In its Reply, Emergent further elaborates on the grounds contained in its Protest.

**DISCUSSION OF AMNEAL'S PROTEST**

**Mandatory Minimum Qualifications**

Amneal contends that the "two-year experience requirements [in the IFB] . . . are unnecessary to ensure an adequate supply of naloxone to the [State] or the proper functioning of the State's naloxone program, and instead impose artificial barriers that limit participation from otherwise qualified manufacturers" (Amneal's Protest, at p. 1).[6] Amneal asserts that it "has been marketing [naloxone] for less than two years after receiving FDA approval . . . [yet is] abundantly qualified to meet the State's needs" (*Id.*, at p. 2).

Amneal challenges the following mandatory qualifications, identified in the IFB:

- "The Bidder must have a minimum of two (2) years of experience manufacturing, direct shipping, distributing, and tracking a high volume (est. 45,000 per month) of opioid antagonist of the naloxone classification shipments to the requestor" (hereafter "First Specification").

[6] Amneal's Protest is not paginated. For purposes of this Determination, this Office includes page numbers as they would have appeared, if included.

- The Bidder must have two years' experience providing a Food and Drug Administration (FDA) approved intranasal naloxone variation 4mg in a 0.1 mL solution or injectable naloxone single use (hereafter "Second Specification").

IFB, at § 3.1. Specifically, Amneal challenges whether the two-year experience requirements are necessary (as opposed to a shorter timeframe) and whether experience with naloxone/opioid antagonists is necessary (as opposed to other classes of medication).

DOH responds that "[a]s prescribed by SFL § 163, [DOH] established the Mandatory Qualifications to be the minimally acceptable qualifications that a bidder must meet in order to be deemed responsive, and [DOH] did so with an eye to foster competition while stipulating the criteria necessary to support the breadth, service level and caliber of the [DOH]'s Opioid Overdose Prevention [P]rogram" (DOH's Answer to Amneal's Protest, at p. 3).[7] DOH asserts that "Amneal was not denied a fair opportunity to compete" (*Id.*, at p. 2).

As set forth more fully herein, we find no basis to disturb DOH's First and Second Specifications. We will address each dispute in turn.

1. Requirement for Two-Years of Experience

Amneal contends that the two-year experience requirement in the First Specification "is overly narrow as [it] does not recognize a vendor's experience in running a high-volume, on demand naloxone program for less than two years" (Amneal's Protest, at p. 5). Amneal asserts that "it defies reason for the State to take the position that a bidder that services a naloxone program involving 45,000 units per month for 24 months is qualified to run the State's program, but a bidder that services a naloxone program involving 100,000 units per month for fourteen months is not" (*Id.*). Accordingly, Amneal contends that the two-year experience requirement "is unreasonably and unnecessarily lengthy" and "[a] more reasonable and relevant standard would be a minimum of twelve months of demonstrated experience managing a high-volume distribution program" (*Id.*).

With respect to the Second Specification, Amneal asserts that it is not "linked to an ability to demonstrate the ability to produce 'high volume' quantities of the drug [as] [t]here is no minimum level of production, sales, or distribution expressed in connection with [the] requirement" and "it does not necessarily take a drug manufacturer two years after receiving FDA approval of its drug to become competent in high-volume naloxone manufacture and on-demand delivery" (*Id.*, at p. 7). Amneal contends that "a bidder seemingly can satisfy this requirement through a very low level of production that does not support the conclusion that it is able to meet the needs of New York's naloxone program" (*Id.*).

DOH responds that it determined that "two years was ultimately [ ] the truest minimum level sufficient to demonstrate the bidder's ability, experience and established distribution relationship while allowing for a larger bidder pool" (DOH's Answer to Amneal's Protest, at p. 3). DOH asserts that "[w]ith the size and scope of the [ ] Opioid Overdose Prevention Program

[7] DOH's Answer to Amneal's Protest is not paginated. For purposes of this Determination, this Office includes page numbers as they would have appeared, if included.

(which is now the largest program in the United States), it is critical to have a vendor who can manufacture, direct ship, and distribute, in order to provide this life-saving drug to a geographically diverse program within very specific timeframes" (*Id.*). DOH further asserts that it "needed to ensure that the vendor has experience with manufacturing the medication, at a supply level that would satisfy [DOH's] needs, and that they have a track record of producing a product that can meet the specific needs and safety of the community" (DOH's Responses to OSC's Questions).

Contracts for commodities are awarded on the basis of lowest price to a responsive and responsible bidder (*see* SFL §§ 163(1)(i), (3)(a)(ii)). A "responsive" bidder is a bidder "meeting the minimum specifications or requirements described in a solicitation for commodities [ ] by a state agency" (SFL § 163(1)(d)). Accordingly, SFL § 163(9)(b) provides that the "solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted."

This Office generally defers to agency determinations where they are properly within the agency's expertise, have a rational basis, and are supported by the procurement record. DOH, as the State agency responsible for establishing standards for the State's Opioid Overdose Prevention Program, possesses the expertise to determine the specific needs and requirements for providing Naloxone and FTS to the Program (*see* Public Health Law § 3309). Moreover, DOH is required to develop an IFB and evaluation instrument that effectively meets those needs. DOH indicated that the two-year experience requirements reflected the minimum amount of experience required to provide satisfaction to DOH that a vendor could satisfactorily provide Naloxone to the Opioid Overdose Prevention Program. This was based on DOH's expertise in considering the size of the State's Opioid Overdose Prevention Program, critical nature of the Naloxone to be supplied, and complexity of the shipping requirements and timeframes. Our review of the procurement record confirms that determinations made by DOH in crafting the two-year experience requirements in the First and Second Specifications in the IFB had a rational basis, complied with statutory requirements, and were supported by the procurement record. Accordingly, we defer to DOH's expertise and judgment in regard to this matter. We further find no evidence in the procurement record to support the contention that competition was unnecessarily limited by the two-year experience requirements in the First and Second Specifications crafted by DOH.

2. <u>Requirement for Experience with Naloxone/Opioid Antagonists</u>

Amneal further contends that "[t]here is also no rational basis for limiting eligibility solely to vendors with a two-year track record specific to naloxone" as a "vendor's proven ability to deliver other critical medications at scale and on demand is directly relevant to the objectives of this procurement and should be given equal consideration" (Amneal's Protest, at p. 5). Amneal asserts that "the same skills and services can be demonstrated through a bidder's experience supplying any drug . . . [whether] naloxone or something else" (*Id.*, at p. 6).

DOH counters that "having experience with other medication classes does not equate to the ability to manufacture and ship an opioid antagonist" (DOH's Responses to OSC's Questions). DOH further asserts that "[o]pioid antagonists are a specific drug classification and there are only a small number of vendors who manufacture and produce this medication" with "[m]ost [being] fairly new to the market, and producing this type of medication consistently was crucial [in the development of the IFB]" (*Id.*).

As set forth above, this Office will defer to the expertise of DOH in developing specific requirements for the IFB, if such requirements have a rational basis and are supported by the procurement record. DOH indicated that the experience with naloxone/opioid antagonists requirements were necessary to provide satisfaction to DOH that a vendor could satisfactorily provide the Naloxone to the Opioid Overdose Prevention Program, based on DOH's expertise in considering the particularity of the medication class, the essential need to ensure Naloxone is supplied, and the lack of widespread and longstanding expertise in providing such medication. Our review of the procurement record confirms that determinations made by DOH in crafting the experience with naloxone/opioid antagonists requirements in the First and Second Specifications in the IFB had a rational basis, complied with statutory requirements, and were supported by the procurement record. Accordingly, we defer to DOH's expertise and judgment in regard to this matter. We further find no evidence in the procurement record to support the contention that competition was unnecessarily limited by the experience with naloxone/opioid antagonists requirements in the First and Second Specifications crafted by DOH.

**Competitive Field**

Amneal contends that "[t]he impact of the Specifications will essentially result in the limitation of the field of qualified bidders to the incumbent supplier, Emergent" resulting in the creation of an "unjustified sole source procurement" (Amneal's Protest, at p. 8).

DOH responds that "[b]ased on market familiarity, [DOH] estimated that there were at least five vendors who might respond to the IFB, across the country, and who could potentially meet the minimum qualifications" (DOH's Answer to Amneal's Protest, at p. 4). DOH asserts that it "determined that the Minimum Qualifications as written were fair and offered a competitive environment, while maintaining [DOH] standards" (*Id.*).

SFL § 163(7) provides, "[e]xcept where otherwise provided by law, procurements shall be competitive, and state agencies shall conduct formal competitive procurements to the maximum extent practicable." As opposed to a competitively bid procurement, a "sole source" procurement refers to a procurement "in which only one offerer is capable of supplying the required commodities or services" (SFL § 163(1)(g)).

Here, DOH issued an IFB to competitively procure commodities. As set forth above, the First and Second Specifications crafted by DOH had a rational basis and did not unnecessarily limit competition. In fact, DOH received several bids in response to the IFB that contained information to demonstrate how they would be responsive to both the First and Second Specifications, at the time of bid. Contrary to Amneal's contention that the incumbent Emergent was the only potential awardee under the IFB, there were several potential awardees, and DOH ultimately awarded the contract to a bidder other than Emergent (i.e., Padagis).

Accordingly, the procurement record does not support Amneal's contention that DOH made a sole source award to Emergent; the fact that DOH awarded the contract to a vendor that was not Emergent makes Amneal's allegation particularly specious.

**DISCUSSION OF EMERGENT'S PROTEST**

**Cost Evaluation Methodology**

Emergent asserts "[t]o reasonably predict actual costs under a contract, an agency's evaluation must consider a reasonable estimate of the quantities that will be ordered . . . [y]et here, [DOH] failed to use *any* estimate of the quantity of [FTS] to be ordered, and instead based its cost evaluation on the unit price for a *single* [FTS] . . . [even though DOH] will likely purchase millions of [FTS] over the contract's five-year period of performance" (Emergent's Protest, at pp. 22-23). Emergent further asserts that "[b]y failing to account for the huge volume of [FTS] it will order, [DOH's] evaluation failed to capture the likely total cost of each proposal, and thus failed to determine which bid actually offered the lower cost" (*Id.*, at p. 23). Emergent posits that "[a] bidder could propose a comparatively lower price for the estimated doses of naloxone, but then propose an extraordinarily high unit price for a single test strip, and still appear to be the lowest-price bidder under [DOH's] methodology . . . [b]ut if the unit price for the [FTS] is multiplied by the quantity of [FTS] likely to be purchased, it becomes clear that the bidder does not, in fact, offer the lowest actual cost to [DOH]" (*Id.*, at p. 4). Emergent asserts that DOH "had more than enough information to develop a reasonable estimate of the volume of [FTS] it might purchase" (Emergent's Reply, at p. 9).

DOH responds that it "has no baseline for potential volume of the [FTS], which is why [DOH] only asked for price per [FTS]" (DOH's Answer to Emergent's Protest, at p. 4).[8]

The solicitation issued by a procuring State agency must "prescribe the minimum specifications or requirements that must be met to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted" (SFL § 163(9)(b)). Additionally, SFL § 163 "implicitly requires that the cost evaluation methodology have a reasonable relationship to the anticipated *actual* costs to be incurred by the State under the terms of the contract" (OSC Bid Protest Determination SF-20220031, at p. 5; *see* SF-20100156, at p. 6, SF-20080408, at p. 9). Therefore, when evaluating cost, the State agency awarding the contract "must generally consider all expected costs and must weigh such costs in a manner reasonably designed to predict actual costs under the contract" (*Id.*). As this office has indicated previously, a state agency must evaluate all fees or other elements that will impact cost, unless the impact of such fee or element on cost: "(i) will be substantially identical for all providers; (ii) are difficult or impossible to estimate and therefore are speculative; or (iii) are unlikely to occur" (OSC Bid Protest Determination SF-20100156, at p. 5). As set forth above, it is well-established that bid specifications in public procurements must be enumerated "as definitely as practicable" and "[i]t

[8] DOH also asserts that Emergent "did not provide the required all-inclusive price per [FTS]" and "was then deemed non-responsive" (DOH's Answer to Emergent's Protest, at p. 4). While the procurement record does confirm, and Emergent does not dispute, that Emergent did not provide the required pricing for FTS, this point is irrelevant to the issue at hand. Emergent challenges DOH's cost evaluation methodology itself, not a determination of non-responsiveness with respect to Emergent's cost proposal.

is the duty of [public contracting  entities], in advance of bidding, [to] convey in precise terms to prospective bidders the exact basis on which the contract will be awarded, so that each such bidder will be enable[d] to make an intelligent evaluation and bid, and so that possible favoritism may be avoided" (*Suffolk Roadways, Inc. v. Minuse*, 19 A.D.2d 888, 889 (App. Div. 2d Dep't 1963)).  An agency cannot "change the rules" after bids are submitted or employ a methodology "to determine the lowest bidder which had not been disclosed in the advertised proposal or bid specifications" (*Progressive Dairy Consultants v. Wyoming County*, 90 A.D.2d 214, 217 (App. Div. 4th Dep't 1982)).

The IFB required bidders to complete a Bid Form to submit pricing for Naloxone and FTS (*see* IFB, at Attachment B, *Bid Form*). The Bid Form instructed that for Naloxone, "[t]he Bid Price will be per unit (1 unit = 1 carton containing 2 doses of 4 mg intranasal naloxone spray) and will include shipping, tracking and service support" (*Id.*).  The Bid Form required each Bidder to complete a price/unit for each of the five contract years with each contract year indicating an estimated quantity, which varied depending on the shelf-life of the Naloxone being offered (*see id.*).[9] The cost proposal instructions provided to DOH evaluators indicated that the unit price per year would be multiplied by the estimated quantity of units per year, and pricing for all contract years would be added to derive the total bid price. Notably, while DOH tied pricing for Naloxone to annual estimated quantities to be provided under the contract, DOH failed to do so for FTS. Instead, for FTS, the Bid Form instructed that "Bidders must provide a price per [FTS]" (*Id.*). As the quantity of FTS required to be provided under the contract could impact proposed pricing, DOH received numerous questions related to clarifying what the annual estimated volume of FTS would be during the IFB's Question & Answer period but declined to provide a meaningful response (*See* IFB Q&A, at Nos. 14, 22, 23, 62).[10] Rather, the cost proposal instructions provided that "[t]he total bid = total [N]aloxone bid price for 5 years + all-inclusive price per [FTS]."

DOH did not explicitly provide an estimated quantity of FTS in the IFB nor did DOH include sufficient information in the IFB in order for bidders to deduce an estimated quantity of FTS. With respect to FTS quantity, the IFB indicates that "[t]he number of [FTS] . . . can range anywhere from 0-1,000 [FTS] per order of naloxone" (IFB, at § 4.2). The IFB includes estimates for the units of Naloxone to be ordered each contract year at 400,000 to 600,000, depending on the Naloxone variation bid, with the contract term quantity ranging from 2 million to 2.6 million units (*see* IFB, at Attachment B). This information is insufficient for bidders to determine what the estimated quantity of FTS would be over the contract term, as DOH discloses an estimate for units of Naloxone to be ordered and a divergent estimate of FTS to be ordered based on orders (not units) of Naloxone.  DOH fails to provide in the IFB an estimate concerning the number of orders of Naloxone that could be used to derive an estimated range for FTS.

Here, the Emergent Protest concerns the cost evaluation methodology employed by DOH for the FTS and the fact that DOH did not provide an estimated quantity of FTS in the IFB by

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[9] The estimated quantity per year ranged from 400,000 to 600,000 units and the contract-term quantity ranged from 2 million to 2.6 million units.

[10] Question No. 14 asked DOH, "Can you provide estimates on monthly quantities for [FTS]?" DOH responded, "Per Section 4.2, the number of [FTS] is determined by the program and can range anywhere from 0-1,000 strips per order of naloxone. At this time there is no projection available. This is a new service and legislative directive. The Department is unclear on the volume."

which to evaluate the proposed price per FTS, instead utilizing a quantity of one FTS. DOH alleges that it was "difficult or impossible to estimate" the quantity of FTS to be purchased under the contract. As indicated above, a state agency must evaluate all fees or other elements that will impact cost, unless the impact of such fee or element on cost is "difficult or impossible to estimate." We therefore turn to whether it was reasonable for DOH to decline to provide an estimate for FTS in the IFB. In this regard, while DOH declined to provide an estimated volume or range of potential FTS quantities contemplated in the contract to bidders to inform their formulation of pricing, contrary to it being difficult or impossible for DOH to estimate the quantity of FTS required, the procurement record confirms that **DOH did in fact calculate and include an estimated quantity for FTS in the procurement record to support an estimated contract value when submitting the contract to OSC for approval.** Specifically, in response to a question from this Office asking how DOH derived a quantity of 11 million FTS it applied in calculating an estimated contract value, DOH explained that it came to this figure by first "tak[ing] several factors into consideration, including the historical record of 400,000 to 600,000 naloxone kits distributed annually" and "an estimated 4 to 5 [FTS] per naloxone kit to be distributed" (DOH's Responses to OSC's Questions). In other words, DOH utilized an estimate of 4 to 5 FTS per Naloxone unit to calculate total cost. Accordingly, the cost evaluation methodology utilized by DOH with respect to the use of a single FTS to estimate costs under the contract was not reasonable or appropriate because it does not appreciate the costs that can be reasonably anticipated to be incurred under the contract. Indeed, DOH itself recognized that the costs reasonably expected to be incurred under the contract for FTS are based on a figure in the millions, not a figure of one. By failing to base its evaluation methodology on costs reasonably expected to be incurred under the contract, it is unclear whether DOH awarded the contract to the lowest priced bidder.

We cannot find that the flaw in DOH's cost evaluation methodology with respect to the FTS was a harmless error or sever the FTS component from the Naloxone component of the IFB; in fact, depending on the estimated amount of FTS utilized in the contract, the total bid price can vary greatly and alter the lowest-priced bidder / contract awardee. Using the figures supplied by DOH when it computed total contract value (400,000 to 600,000 Naloxone units and 4 to 5 FTS per Naloxone unit) results in estimated quantities of FTS ranging from 8 to 15 million over the five-year contract term. Assuming an FTS price of $0.50 each, the cost of FTS over the term of the contract drastically changes when using the IFB quantity of one versus 11 million (what DOH selected to derive the estimated contract value): specifically, $0.50 as opposed to $5.5 million for FTS. When applying a quantity of 15 million (supported by the information presented by DOH in response to questions from this Office – 600,000 Naloxone kits per year with 5 FTS per kit, totaling 3 million FTS per year and 15 million FTS over the contract term), the difference is even more drastic: $7.5 million for FTS. **In fact, based on our review of the procurement record, the winning/lowest-priced bidder changes when a quantity of FTS is used for evaluation that is higher than 11 million but still well within the 15 million maximum derived from DOH's own justification.**

We also note that even assuming DOH's flawed evaluation methodology happened to result in an award to the lowest priced bidder, it is impossible to quantify what impact the inclusion of a reasonable estimate of FTS would have had on bid prices. SFL § 163(9)(b) requires an IFB to "describe and disclose the general manner in which the evaluation and selection shall be conducted," accordingly, access to valid cost evaluation information was essential in order for bidders to formulate their bids. Indeed, Emergent stated that it was unable to even submit a per unit FTS proposal absent this information. The fact that DOH requested the Validation Requirement for FTS further underscores the need for an estimated quantity of FTS to be included in the IFB – bidders were expected to bid an "all-inclusive price per [FTS]" which would necessarily include the cost to cover any validation. While problematic for the reasons set forth in the below section, this is further problematic from a quantitative standpoint – without access to estimated quantity information, FTS inclusive of all corresponding requirements could not be viably priced. Therefore, the cost evaluation methodology disclosed in the IFB did not have a reasonable relationship to the actual costs to be incurred under the contract, and therefore we cannot find that DOH awarded the contract to the lowest-priced bidder as required by applicable law.

**The FTS Validation Requirement**

Emergent asserts that "[t]he IFB [ ] requirement to 'employ quality control measures' to 'validate' the accuracy of [FTS] being supplied for off-label use" was "ambiguous and undefined, in violation of state law" and "prevented bidders from competing intelligently and on a common basis" (Emergent's Protest, at pp. 15-16). Specifically, Emergent contends that "the IFB did not provide any parameters for [the] requirement: [i]t did not identify any required quality control measures; it did not establish any standard for validation; and [ ] it did not establish any required degree of accuracy for the [FTS] to be supplied" and DOH "declined to [clarify its requirement]" when asked to do so by bidders (*Id.*). Emergent further asserts that DOH "does not know either the quality of the [FTS] it will receive or whether it obtained the lowest available price for [FTS] that will meet its requirement" as "[o]ne bidder could propose extensive quality controls and thus more reliable (albeit more costly) [FTS], while another could offer only minimal quality controls resulting in far less reliable (and less costly) [FTS]" (*Id.*, at p. 18; Emergent's Reply, at p. 3).

DOH responds that it "responded to this point during the question-and-answer period . . . [stating that] '*The Department is requiring that the contractor contract with a lab to conduct validation testing on each lot prior to shipping. Please reference section 4.2 of the IFB'* [and citing] a peer reviewed article . . . as a potential option for how to validate the effectiveness of [FTS]" (DOH's Answer to Emergent's Protest, at p. 2). DOH asserts that the IFB "clearly stated that this process was left up to the bidder to decide how they would validate the [FTS]" (*Id.*). DOH further asserts that it "was under no obligation to employ any qualitative analysis – only quantitative (lowest cost)" and the "[q]uality and control measures were not included in the minimum qualifications" (*Id.*).

A principle of state procurement is that it must be "based on clearly articulated procedures which require a clear statement of product specifications, requirements or work to be performed . . ." (SFL § 163(2)(b)). Accordingly, an IFB must "prescribe the minimum specifications or requirements that must be met in order to [for a bidder to] be considered responsive . . ." (SFL § 163(9)(b)). In addition to "the necessary qualifications" of the bidder, specifications or requirements may include "any description of the work to be performed, . . . or any other requirement necessary to perform the work" which "may include a description of any obligatory testing, inspection or preparation for delivery and use . . ." (SFL § 163(1)(e)). Accordingly, public entities are "required to furnish specifications which state the nature of the work as definitely as practicable and which contain all the information necessary to enable bidders to prepare their bids" and if a public entity fails to do so, bidders are prevented from "mak[ing] an intelligent evaluation and bid" (*Progressive Dairy Consultants v. Wyoming County*, 90 A.D.2d 214, 217 (App. Div. 4th Dep't 1982); *see Suffolk Roadways, Inc. v. Minuse*, 19 A.D.2d 888, 889 (App. Div. 2d Dep't 1963); *see also Browning-Ferris Indus. v. City of Lackawanna*, 204 A.D.2d 1047, 1048 (App. Div. 4th Dep't 1994)). "Bid specifications [that] create an element of uncertainty . . . [invite] the danger that bidding would be discouraged or that bids would be unnecessarily inflated" (*Sagamore Auto Body, Inc. v. Cnty. of Nassau*, 104 A.D.2d 818, 821 (App. Div. 2d Dep't 1984)). Language in bid specifications is unclear where it "is reasonably susceptible of more than one interpretation . . ." (*DiPizio Constr. Co. v. Erie Canal Harbor Dev. Corp.*, 120 A.D.3d 905, 906 (App. Div. 4th Dep't 2014); *see Chimart Assoc. v. Paul*, 66 N.Y.2d 570, 573 (N.Y. 1986)).

IFB Section 4, Detailed Specifications, sets forth "products or services" that "[t]he selected Bidder must be able to provide . . . throughout the contract term" and that "a Bidder will be required to [address] as part of its Bid" in order "[t]o be considered responsive." Contained within this IFB Section are specific requirements, including that "[t]he Contractor must employ quality control measures to validate each lot [of FTS] before distribution to the community" and "[t]he Contractor must contract with a lab for validation" ("Validation Requirement") (IFB, at § 4.2). The only further information provided by DOH was reference to a singular scientific report which discusses and questions the efficacy of any extant testing: "[FTS] have not been subject to any State or Federal regulatory regime or process which has led to variations in accuracy among brands and testing strips when testing drug samples" (*Id.*).

Here, the IFB's language was not precise enough for bidders to ascertain what the Validation Requirement actually required and associated cost to incorporate into its bid; instead, the broad language of the IFB left bidders to interpret what was required among a variety of available procedures of varying levels of accuracy and cost. The procurement record overwhelmingly demonstrates that bidders were unclear about the Validation Requirement. In fact, DOH received numerous inquiries about what specific documentation would be required to demonstrate compliance with the Validation Requirement – evincing a significant level of confusion and ambiguity surrounding the requirement (IFB Q&A, Nos. 33, 35, 66).[11] Yet, despite numerous inquiries, DOH continued to reiterate its message that bidders should rely on the information contained in the IFB § 4.2 (*see id.*). DOH admitted the lack of clarity in the Validation Requirement by asserting in response to Emergent's Protest that the "bid document clearly stated that this process was left up to the bidder to decide how they would validate the [FTS]" (DOH's Answer to Emergent's Protest, at p. 2). This lack of objectivity and clarity surrounding the

[11] Question No. 33 asked DOH, "Please specify the 'quality control measures' required by DOH." DOH responded, "The quality control [DOH] is requiring is for the contractor to test each lot of FTS via a lab to ensure the validity of the strips. Once the validity is confirmed shipping of the lot can occur."
Question No. 66 asked DOH, "The Contractor must employ quality control measures to validate that each lot before distribution to the community and contract with a lab for validation. – could you explain with more detail? Will a certificate of validation from the manufacturer suffice or will the winning vendor need an independent lab to validate the test strip work? What other, if any, specific documentation or evidence is required from bidders and their subcontractors to demonstrate compliance with these requirements for both products?" DOH responded, "FTS validation is being required as outlined in the IFB Section 4.2. Each individual lot of FTS are developed individually and thus need verifications from a lab on their validity. Each time there is a lot change new validation testing must occur. A certificate of validation from the manufacturer will not meet the standards outlined in the IFB, you must use an outside lab for validation."

Validation Requirement was further demonstrated when this Office sought further explanation from DOH,[12] and was informed that, "[a]s stated in the IFB, the contractor is responsible for contracting with a lab for validation of each lot of [FTS]" (DOH's Responses to OSC's Questions). Curiously, despite stating that the scientific report referenced in the IFB was provided "to assist in planning how the contractor might execute [the Validation Requirement]," DOH did not adopt or require the procedure recommended in the report and instead left it up to bidders to determine what procedure to utilize including purportedly less efficacious and presumably less costly testing.

Here, the lack of clarity surrounding the Validation Requirement prevented bidders from making an intelligent and informed bid. Bidders were not provided with sufficient information in the IFB to have a clear understanding of what was required by the specifications; therefore, different bidders could interpret the Validation Requirement differently, leading to varying costs for compliance, and altering bid pricing. Accordingly, we find that the Validation Requirement in the IFB was not sufficiently defined, such that DOH did not adequately prescribe the minimum requirements that needed to be met by a bidder in order to be considered responsive.

## Liability Terms

Emergent contends that "[n]o reasonable bidder could agree to [the] terms [of the IFB]" specifically DOH's "standard indemnification requirements" which "asked the bidders to accept uncapped and unfettered liability for any 'intentional act' or 'negligence' associated with the [FTS]" because "[i]n light of the unreliability of [FTS] when used off-label to test drugs directly, and because [DOH] did not define what quality control and validation measures are required in the context of its off-label use, any inaccurate test strip could lead to a 'negligence' claim" (Emergent's Protest, at p. 3; *see id.*, at pp. 11-12, 13). Emergent asserts that by submitting a bid, "a bidder is potentially accepting all (or nearly all) product liability risk associated with [DOH's] intended off-label use of [FTS]"; accordingly, Emergent "could not submit a price for the [FTS] and could not compete fully and effectively for the contract" (*Id.*, at p. 21).

DOH responds that "Emergent was not denied a fair opportunity to compete" and "[o]ther Bidders accepted the proposed Contract terms and provided Bids that were both responsive and at lower cost" (DOH's Answer to Emergent's Protest, at pp. 1, 3).

Based on the above finding that the Validation Requirement was not sufficiently defined, and since the inadequacies in such requirement form the basis of Emergent's contention here, we find this contention to be moot and we will not address further.

## CONCLUSION

For the reasons outlined above, we have determined the issues raised in Amneal's Protest are not of sufficient merit to overturn the contract award by DOH; however, the issues raised in Emergent's Protest are of sufficient merit to overturn the contract award by DOH. As a result, Emergent's Protest is upheld and we will not be approving the DOH/Padagis contract for Naloxone and FTS.

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[12] OSC asked DOH, "In connection with the lab validation requirement imposed by IFB § 4.2, please explain in detail what DOH will consider in determining whether the contractor has complied with this requirement."

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

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| In the Matter of the Bid Protest filed by Save the Michaels of the World, Inc. with respect to the grant awards for the Street Outreach Program made by the New York State Office of Addiction Services and Supports. | **<u>Determination of Bid Protest</u>** |
| | **SF–20250129** |
| Procurement Record – OAS01-0000071-3670000 | October 14, 2025 |

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The Office of the State Comptroller ("OSC" or "Office") has reviewed the above-referenced grant awards made by the New York State Office of Addiction Services and Supports ("OASAS") for Street Outreach OASAS Project No. STEW – 24031 ("Street Outreach Program"). We have determined the grounds advanced by Save the Michaels of the World, Inc. ("STM") are insufficient to merit overturning the grant awards made by OASAS and, therefore, we deny the Protest.

## BACKGROUND

### <u>Facts</u>

On February 3, 2025, OASAS issued a request for applications ("RFA") seeking applications for funding from organizations "to provide services through mobile outreach to expand harm reduction education, support, resources, and linkages [to] target individuals who actively use drugs and are not engaged in harm reduction or treatment services, face chronic barriers to care, or live far from traditional brick-and-mortar harm reduction services" with "[t]he ultimate objective of the initiative [being] to reduce drug-related fatalities, transmission of infectious diseases [ ] and expand access to care (RFA, Section 1.1, at p. 4).

The RFA specified that "funding is available to support twenty-two (22) awards for Street Outreach Services for a maximum of two (2) awards per Empire State Development (ESD) Region with a large city (Albany/Buffalo/Rochester/Syracuse/Yonkers),[1] two (2) awards each for Manhattan, Brooklyn, and the Bronx, one (1) award each for Queens and Staten Island, and [one] (1) award for each of the remaining four ESD regions"[2] (RFA, Section 1.3, at p. 5).

The RFA provided that awards would be made to responsive applicants on the basis of best value, meaning that "the proposal that best optimizes quality, cost and efficiency among responsive and responsible bidders, shall be selected for award(s)" (RFA, Section 4.2, at p. 22). The RFA specified that applicants would be scored on "three components: Technical, Fiscal and

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[1] This references the following ESD Regions: Capital, Central New York, Finger Lakes, Western New York, and Mid-Hudson.
[2] This references the following ESD Regions: Long Island, North Country, Mohawk Valley, and Southern Tier.

Diversity Practice" (*Id.*). The RFA detailed that the application could receive up to 78 points on its technical component, 20 points on its fiscal component, and 2 points on its diversity practice component (*Id.*, at p. 23). The applicant with the "highest composite score" would be awarded per geographic region (*Id.*, at p. 22).

OASAS received 55 applications by the bid opening date of April 1, 2025, including an application from STM for the Western New York region. On May 28, 2025, STM received a notice of non-award.[3] STM requested a debriefing, which OASAS provided on June 10, 2025.

Thereafter, STM filed a protest with this Office on June 13, 2025 ("Protest"). OASAS responded to the Protest on July 2, 2025 ("Answer"). On July 29, 2025, OASAS submitted the procurement record, including the proposed grant awards made by OASAS for the Street Outreach Program, which is the subject of the Protest, to this Office for review.

**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 regulations setting forth the procedure ("OSC Protest Procedure") to be used by an interested party seeking to challenge a contract award by a State agency (*see* 2 NYCRR Part 24). The OSC Protest Procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no protest procedure at the agency level, the Protest is governed by 2 NYCRR § 24.4.

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by OASAS with the proposed Street Outreach Program grant awards;

2. the correspondence between this Office and OASAS arising out of our review of the proposed Street Outreach Program grant awards; and,

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

    a. Protest; and
    b. Answer.

[3] OASAS made one grant award in the Western New York region to Evergreen Health Services, Inc.

## ANALYSIS OF THE PROTEST

**Protest to this Office**

In its Protest, STM challenges the decision by OASAS to deny funding its application on the following grounds:

1. OASAS' decision to reduce the number of grant awards in certain regions, including the Western New York region, placed the applicants for grant awards in those regions, including STM, at an unfair disadvantage.

2. OASAS' failure to notify applicants in advance of the application due date by an amendment to the RFA that the number of grant awards in certain regions, including the Western New York region, would be reduced, placed applicants for those regions, including STM, at an unfair disadvantage, because had such applicants known they could have adjusted their applications.

**OASAS Answer to the Protest**

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

1. OASAS properly acted within its reserved rights under the RFA when it determined to reduce the number of available grant awards for certain regions.

## DISCUSSION

**Number of Grant Awards Made by OASAS by Region**

STM contends that "[w]hile OASAS has the reserved right to reduce the number of awards[,] [t]heir failure to do so in every region, places Western New York and other regions where less than two awards were made at a disadvantage" (Protest, at p. 2). STM asserts that "OASAS could have modified the procurement to notify potential bidders of the reduction in awards which would have allowed bidders to make adjustments" and if OASAS had done so, "STM may have partnered with other possible bidders which would likely have produced an even stronger and more comprehensive bid" (*Id.*).[4]

OASAS counters that it "is within its' reserved right to award in whole or in part to this procurement" (Answer, at p. 3). OASAS asserts "[i]n the wake of Federal potential funding reductions, on April 14, 2025, the Executive team, having no knowledge of applicants or potential awardees, determined i[t] was in the best interest of the whole target population, to reduce the number of contracts awarded in upstate and central NY and focus spend on maintaining existing programs" and accordingly "OASAS utilized reserved rights declared in the RFA [to] 'make an award under the RFA in whole or in part'" (*Id.*, at p. 2).

[4] As set forth more fully herein, STM had the opportunity to submit a bid for the available awards and agreed to the terms of the RFA which did not guarantee that two awards would be made in the Western NY region.

The RFA provided for "a maximum of two (2) awards" in the Western New York, Capital, Central New York, Finger Lakes, and Mid-Hudson regions (RFA, Section 1.3, at p. 5). The RFA did not require that the maximum number of awards be given in a region. In fact, the RFA specified that "OASAS reserved the right to: . . . [m]ake an award under the RFA in whole or in part" (RFA, Section 5.1, at p. 25).

The procurement record reflects that OASAS acted in accordance with the terms of the RFA in awarding less than the maximum number of awards in the Western NY region, as well as the Capital, Central New York, Finger Lakes, and Mid-Hudson regions. Any applicant who submitted an application in response to the RFA agreed to the terms, conditions, and reservations set forth in the RFA. The procurement record further shows that OASAS provided a rational basis to support the determination to award less than the maximum number of awards in certain regions – citing concerns over potential federal funding reductions and a focus on spending to maintain existing programs. As such, we will not disturb OASAS' determination to award less than the maximum number of awards available under this grant opportunity for the Western NY, Capital, Central New York, Finger Lakes, and Mid-Hudson regions.

**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 OASAS. As a result, the Protest is denied.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

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| In the Matter of the Appeals filed by Rosemar Contracting Inc. with respect to the procurements of Asphalt Pavement Resurfacing – NY Routes 24 & 102, Village & Town of Hempstead and Drainage Improvements – Various Locations in the Town of Islip by the New York State Department of Transportation. | **Determination of Appeals** <br><br> **SF–20250131** <br> **SF–20250130** |
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| Contract Numbers – D265444 & D265401 | September 12, 2025 |

The Office of the State Comptroller ("OSC" or "Office") has reviewed the above-referenced procurements conducted by the New York State Department of Transportation ("DOT") for Asphalt Pavement Resurfacing – NY Routes 24 & 102, Village & Town of Hempstead ("Asphalt Resurfacing") and Drainage Improvements – Various Locations in the Town of Islip ("Drainage Improvements").[1] We have determined the grounds advanced by Rosemar Contracting Inc. ("Rosemar") are insufficient to merit overturning the contract awards made by DOT and, therefore, we deny the Appeals. As a result, we are today approving the DOT contract with Posillico Civil, Inc. ("Posillico Civil") for Asphalt Resurfacing and the DOT contract with Bove Industries, Inc. ("Bove Industries") for Drainage Improvements.

## BACKGROUND

### Facts

On February 12, 2025, DOT issued two separate solicitations: one for Asphalt Resurfacing[2] and the other for Drainage Improvements.[3] Each solicitation provided that the "contract award will be made only 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. 61). Each solicitation further indicated as contracts receiving federal aid, participation was required in the federal Disadvantaged Business Enterprises ("DBE") program and set a goal of 10% DBE participation for all bidders (Asphalt Resurfacing Proposal Book 2, at

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[1] We have determined to resolve the issues raised in the Asphalt Resurfacing Appeal (Contract Number D265444/ SF-20250131) and the Drainage Improvements Appeal (Contract Number D265401/ SF-20250130) in this single Determination as the issues raised in both appeals are substantially similar.
[2] The Asphalt Resurfacing solicitation was comprised of Proposal Book 1, Proposal Book 2, DOT Standard Specifications, Construction and Materials, dated January 1, 2025 ("DOT Standard Specifications") (as incorporated by reference into the bid documents – *see* Asphalt Resurfacing Proposal Book 1, at p. 1; Asphalt Resurfacing Proposal Book 2, at p.1), as well as supplemental information including record plans, and applicable amendments.
[3] The Drainage Improvements solicitation was comprised of Proposal Book 1, Proposal Book 2, DOT Standard Specifications (as incorporated by reference into the bid documents – *see* Drainage Improvements Proposal Book 1, at p. 1; Drainage Improvements Proposal Book 2, at p.1), as well as various plans, supplemental information including record plans, and applicable amendments.

p. 32; Drainage Improvements Proposal Book 2, at p. 36; DOT Standard Specifications § 102-12*; see* 49 CFR Part 26 ("Federal DBE Regulations")).

1. Asphalt Resurfacing Solicitation

DOT received seven (7) bids by the bid opening date of March 13, 2025, which included a bid from Rosemar. On March 14, 2025, Rosemar received notification from DOT that they were the tentative lowest bidder. On March 28, 2025, DOT notified Rosemar its bid was being rejected as non-responsive due to insufficient good faith efforts ("GFE") in meeting DBE participation goals. Rosemar provided DOT additional information regarding its GFE and made a request for administrative reconsideration[4] of DOT's non-responsive determination on April 10, 2025 ("Asphalt Resurfacing Protest").[5] On April 30, 2025, a meeting was held between Rosemar and DOT's Administrative Reconsideration Panel. On May 1 and 7, 2025, Rosemar sent additional GFE documentation for DOT's consideration. Subsequently, the DOT Administrative Reconsideration Panel issued its findings and decision on May 14, 2025 ("Asphalt Resurfacing Protest Determination").[6] On April 9, 2025, DOT made a tentative award to the next lowest bidder, Posillico Civil.

Rosemar appealed the Asphalt Resurfacing Protest Determination on May 27, 2025, and submitted an amended appeal on May 28, 2025 ("Asphalt Resurfacing Appeal").[7] DOT responded to the Asphalt Resurfacing Appeal on June 23, 2025 ("Answer"). DOT submitted the Asphalt Resurfacing procurement record, including the proposed DOT / Posillico Civil contract to this Office on June 24, 2025.

2. Drainage Improvements Solicitation

DOT received eight (8) bids by the bid opening date of March 27, 2025, which included a bid from Rosemar. On March 28, 2025, Rosemar received notification from DOT that they were the tentative lowest bidder. On April 1, 2025, DOT notified Rosemar that its bid was being rejected as non-responsive due to insufficient GFE in meeting DBE participation goals. Rosemar provided DOT additional information regarding its GFE and made a request for administrative reconsideration of DOT's non-responsive determination on April 10, 2025 ("Drainage Improvements Protest").[8] On April 30, 2025, a meeting was held between Rosemar and DOT's Administrative Reconsideration Panel. On May 1 and 7, 2025, Rosemar sent additional GFE documentation for DOT's consideration. Subsequently, the DOT Administrative Reconsideration

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[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 is also included in the solicitation (*see* DOT Standard Specifications § 102-12(J), at p. 48, as amended by the Asphalt Resurfacing Amendment No. 2, § 102-12(J) at p. 15, and as amended by the Drainage Improvements Amendment No. 1, § 102-12(J) at p. 15).

[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] All references to the Asphalt Resurfacing Appeal refer to the amended appeal, which was the latest submission by Rosemar.

[8] For purposes of OSC's Protest Procedure, we considered the request for administrative reconsideration to be a protest to the agency.

Panel issued its findings and decision on May 14, 2025 ("Drainage Improvements Protest Determination").[9] On April 9, 2025, DOT made a tentative award to the next lowest bidder, Bove Industries.

Rosemar appealed the DOT Drainage Improvement Protest Determination on May 27, 2025, and submitted an amended appeal on May 28, 2025 ("Drainage Improvement Appeal").[10] DOT responded with its Answer to the Drainage Improvement Appeal on June 23, 2025.[11] DOT submitted the procurement record, including the proposed DOT / Bove Industries contract to this Office on June 24, 2025.

**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 regulations setting forth the procedure ("OSC Protest Procedure") to be used by an interested party seeking to challenge a contract award by a State agency (*see* 2 NYCRR Part 24). The OSC Protest Procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because these are appeals of two agency protest determinations, the Appeals[12] are governed by 2 NYCRR § 24.5.

In the determination of the Appeals, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DOT with the proposed DOT / Posillico Civil contract for Asphalt Resurfacing;

2. the correspondence between this Office and DOT arising out of our review of the proposed DOT / Posillico Civil contract for Asphalt Resurfacing;

3. the documentation contained in the procurement record forwarded to this Office by DOT with the proposed DOT / Bove Industries contract for Drainage Improvements;

4. the correspondence between this Office and DOT arising out of our review of the proposed DOT / Bove Industries contract for Drainage Improvements; and,

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[9] For purposes of OSC's Protest Procedure, we considered DOT's Administrative Reconsideration Panel Decision to be the protest determination made by the agency.

[10] All references to the Drainage Improvements Appeal refer to the amended appeal, which was the latest submission by Rosemar.

[11] DOT submitted its Answer to the Asphalt Resurfacing Appeal and the Drainage Improvements Appeal as one answer since "the issues raised in both [of] Rosemar's [Appeals] are similar, [DOT] is responding to both [Appeals] in this response" (Answer, at p. 1).

[12] Collectively, the Asphalt Resurfacing Appeal and the Drainage Improvements Appeal are referred to herein as the "Appeals."

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

    a. Asphalt Resurfacing Protest;
    b. Asphalt Resurfacing Protest Determination;
    c. Asphalt Resurfacing Appeal;
    d. Drainage Improvements Protest;
    e. Drainage Improvements Protest Determination;
    f. Drainage Improvements Appeal; and
    g. Answer.

**ANALYSIS OF THE APPEALS**

**Appeals to this Office**

In its Appeals, Rosemar challenges the procurements conducted by DOT on the following grounds:

1. DOT's non-responsive determination for Rosemar was in error as DOT failed to consider all of the documentation submitted by Rosemar, whether with its bid or after the bid opening, as all of Rosemar's GFEs were completed prior to the bid opening.

2. DOT should waive Rosemar's inadvertent omission of a portion of its GFE documentation with its bid, and allow for submission after bid opening, since it was an immaterial omission that had no impact on competition.

3. Rosemar's pre-bid GFE were sufficient to comply with the Federal DBE Regulations and DOT, in finding otherwise, inappropriately applied a more heightened standard than required under the Federal DBE Regulations and violated federal law by treating DBE goals as required quotas.

4. DOT violated Rosemar's due process rights by failing to provide timely and proper notice before finding Rosemar non-responsive to the solicitations.

**DOT's Answer to the Appeals**

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

1. DOT properly determined that Rosemar was non-responsive for its failure to comply with the requirement that sufficient GFE be submitted by the time of bid, as outlined in the solicitations and Federal DBE Regulations.

2. DOT could not waive the requirement that sufficient GFE be submitted at the time of bid, as required by the solicitations and the Federal DBE Regulations, and allow Rosemar to submit GFE documentation post-bid, as it is an unwaivable substantive requirement.

3. DOT considered Rosemar's timely-submitted GFE documentation according to applicable federal standards and guidance and deemed Rosemar's GFE insufficient.

4. DOT provided Rosemar with the requisite due process by providing proper notice to the company's owner and an opportunity to be heard before the administrative reconsideration panel.

**DISCUSSION**

**Responsiveness of Rosemar to DBE Program Requirements**

Rosemar appears to challenge the basis of DOT's non-responsive determination on several grounds related to the DBE Program requirements, including (1) whether Rosemar needed to submit proof of GFE with its bid or whether Rosemar was allowed to submit additional GFE documentation post-bid submission; (2) if Rosemar was required to submit GFE documentation with its bid and could not supplement post-bid, whether DOT could / should have waived Rosemar's failure to submit sufficient GFE documentation with its bid and allow Rosemar to supplement post-bid; and (3) if DOT could not have waived the requirement and thereby allowed post-bid submission of GFE documentation, whether the GFE documentation Rosemar submitted with its bid, should have been found to be sufficient. We will address each ground in turn.

1. Timing of GFE Submission

Rosemar asserts it "fully performed the required [GFE] by the bid deadline; its sole misstep was the inadvertent omission of [submitting] a portion of the supporting documentation [with its bid]" (Appeals, at p. 11). Rosemar alleges that "[DOT]'s [non-responsive] determination ignores the voluminous evidence that Rosemar has submitted to the [DOT] documenting its pre-bid GFE" (*Id.*, at p. 1). Rosemar contends that pursuant to the Federal DBE Regulations, "bidders are expressly permitted to submit written documentation or argument during the administrative reconsideration process to demonstrate that they made adequate [GFE] to meet the DBE goal" (*Id.*, at p. 8).

DOT counters that "Rosemar concedes it did not meet the DBE goals for the subject contracts at the time of bid submission [and that] Rosemar needed to submit documentation of its GFE at the time of bid" (Answer, at p. 3). DOT further asserts that "Rosemar also concedes it did not submit all of its GFE documentation at the time of bid, instead arguing that [DOT] should have considered additional previously unsubmitted documentation during the administrative reconsideration process" (*Id.*).

Highway Law § 38(3) provides that the "[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.[13]

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** "all bidders or offerors" to **provide documentation of meeting the goal or making adequate GFE to meet the goal either "[u]nder sealed bid procedures, as a matter of responsiveness**, or with initial proposals, under contract negotiation procedures" or "[n]o later than [5] days after bid opening as a matter of responsibility" (49 CFR §§ 26.53(b)(2), 26.53(b)(3)(i)(A), (B) (emphasis added)). DOT, may choose, "[a]t [their] discretion[,]" the timeframe by which bidders must submit required DBE documentation (49 CFR § 26.53(b)(3)(i)(A), (B)). Here, DOT has indicated it follows the former, as outlined in DOT Standard Specifications § 102, as amended by, the Asphalt Resurfacing Amendment No. 2, and the Drainage Improvements Amendment No. 1.[14]

The procurement record reflects that the requirement was clearly set forth that all bidders were required to submit a complete DBE Participation Package with their bid or they may be deemed non-responsive by the Department. Specifically, the amendments to the solicitations clearly articulated that "[a]ll Bidders shall submit a complete DBE Participation Package with their bid proposal . . . [and f]ailure to submit the required Bidders List information may result in rejection of the bid" (Asphalt Resurfacing Amendment No. 2, amending § 102-12(F), at pp. 7–8; Drainage Improvements Amendment No. 1, amending § 102-12(F), at pp. 7–8).

As described above, consistent with the Federal DBE Regulations, DOT established a DBE Program package compliance deadline that all bidders must submit a complete DBE package, or if necessary, documentation it made adequate GFE to attain the DBE goal, at the time bids were due. In the solicitation documents, DOT further specified:

> **For Federal-Aid contracts, all Bidders shall submit a complete DBE Participation Package to the Department with their proposal.** The DBE Participation Package shall include confirmed DBE commitments; DBE confirmation, on Department provided forms [], for each DBE firm for the kind

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

[14] Accordingly, DOT has determined to treat timely submission of proof of compliance with Federal DBE Requirements as a matter of responsiveness, not responsibility. The Appeals suggest that Rosemar believes "responsibility" is implicated, which is inaccurate. Rosemar asserts that DOT's "decision to reject Rosemar's bid as non-responsive . . . is a grossly disproportionate penalty for a good faith mistake [and t]he implication of non-responsibility can place Rosemar's 'commercial good name, reputation, honor, and integrity at stake'" (Appeals, at p. 14). Rosemar further asserts that "the rejection of a bid as non-responsive has a detrimental impact on the bidder's ability to compete for future public contracts" (*Id.*, at p. 15). While a non-responsibility determination implicates a vendor's financial ability, legal authority to do business in the state, integrity, and/or past performance, and accordingly may affect a vendor's future business prospects, a non-responsive determination indicates that a vendor did not comply with a mandatory term or condition of the solicitation and does not impact a vendor's ability to compete for other procurement opportunities.

> and amount of work shown in the Bidder's commitments; **and good faith effort documentation (if required). No additions, substitutions, or deductions to the DBE commitments identified at time of letting will be considered as part of the DBE Participation Package**. . . . **If the contract goal(s) is not met in full, then the Bidder shall provide documentation of its good faith efforts with their proposa**l, in accordance with §102-12H[,] Good Faith Efforts that demonstrate that the Bidder attempted but could not meet the goal(s). **If the Low Bidder fails to submit a complete DBE Participation Package (i.e., DBE commitments, DBE confirmation, and/or GFE) at time of letting they may be deemed non-responsive by the Department.**"

(DOT Standard Specifications, § 102-12(G)(1), as amended by the Asphalt Resurfacing Amendment No. 2, amending § 102-12(G)(1), at pp. 8-9, and the Drainage Improvements Amendment No. 1, amending § 102-12(G)(1), at pp. 8-9) (emphasis added). Additionally, as was further made clear by the amendments to the solicitations, "if [a bidder] do[es] not meet the DBE goal, [the bidder] shall submit sufficient [GFE] documentation with [its] bid submission. **No supplemental information will be considered after Letting**." (DOT Standard Specifications, § 102-12, as amended by the Asphalt Resurfacing Amendment No. 2, *Form AAP14*, at p. 2, and the Drainage Improvements Amendment No. 1, *Form AAP14*, at p. 2).

It is clearly established that there are strict compliance requirements with the Federal DBE Program requirements. Additionally, bidders were clearly notified, in numerous ways, that **all** GFE documentation was required with the bid submission and that no additional information would be considered past the deadline. Rosemar's assertions that it completed its GFE prior to the bid deadline are irrelevant to the determination of whether GFE documentation was submitted timely. The DBE program timing requirements are based on when the bidder submits its GFE documentation to DOT, not on when the bidder alleges it engaged in its GFE. Rosemar failed to submit timely evidence of those efforts with its bid submissions.[15] As such, we find no reason to disturb DOT's finding that Rosemar was non-responsive to the solicitations' requirement to submit evidence of compliance with DBE requirements with the bid.

2. Waiver of DBE Program Requirements

Rosemar repeatedly asserts that "[DOT's] refusal to review [its post deadline GFE submission]—even though the[ GFE] predated the bid deadline—violated both federal regulations and basic fairness" (Appeals, at pp. 11-12; *see id.*, at pp. 13, 14). Rosemar asserts DOT should waive any "error in its submission [of untimely GFE documentation as] not material to the bid" (*Id.*, at p. 11). Rosemar asserts "[e]ven if the Comptroller were to accept that a

[15] It is noted that Rosemar submitted new material as part of the administrative reconsideration process outlined by the Federal DBE Regulations (49 CFR § 26.53(d)). However, the Federal DBE Regulations state that "[a]s part of this reconsideration, the bidder/offeror must have the opportunity to provide written documentation or argument concerning the *issue of whether it met the goal or made adequate good faith efforts to do so*" (49 CFR § 26.53(d)(1)) (emphasis added). The regulations contemplate that the written documentation submitted would analyze whether the GFE documentation *timely* submitted constituted adequate GFE, and not an opportunity for the bidder to submit *new* GFE documentation that the bidder failed to timely submit. In other words, the additional opportunity to submit documentation during the administrative reconsideration process is not an opportunity for the bidder to circumvent timely GFE submission requirements.

technical documentation error occurred, [DOT's] decision to reject Rosemar's bid as non-responsive, rather than seek clarification or supplemental information, is a grossly disproportionate penalty for a good faith mistake" (*Id.*, at p. 14).

DOT counters that "it could not consider the additional GFE documentation [Rosemar] submitted post-letting" since "Rosemar needed to submit documentation of its GFE at the time of bid" (Answer, at pp. 3, 4). DOT further asserts that it "could not waive the requirement that GFE documentation be submitted at the time of bid" because the DBE/GFE requirements are "unwaivable substantive requirements set forth in regulations and contract bid documents" (*Id.*, at p. 4). DOT contends that it "must follow federal regulations and its own Standard Specifications . . . [and h]ad [DOT] waived Rosemar's DBE/GFE failures, it would have been in violation of these authorities" (*Id.*).

The Federal DBE Regulations and solicitations established that failure to comply with the DBE program requirements could result in a non-responsive determination (Asphalt Resurfacing Amendment No. 2, amending § 102-12(B)(1), at p. 4, and the Drainage Improvements Amendment No. 1, amendment § 102-12(B)(1), at p. 4). DOT Standard Specifications also state that "[DOT] reserves the right to reject any proposal deemed non-responsive, or any contractor deemed non-responsible, and then, pursuant to Section 38 of the Highway Law, award to other than the low bidder, or waive minor informalities if, in its opinion, the best interest of the State will thereby be promoted" (DOT Standard Specifications, § 103-01, at p. 61).

We find no merit to Rosemar's contentions that DOT should waive compliance with the Federal DBE Regulations or solicitations. Both solicitations reiterate that a bidder must submit evidence of compliance with the Federal DBE program requirements at the time of bid opening. DOT is not required, either by the solicitations or applicable law, to waive strict compliance with a solicitation requirement (*see Le Cesse Bros. Contracting v. Town of Williamson*, 62 A.D.2d. 28, 31 (4th Dept. 1948), *aff'd* 46 N.Y.2d 960 (N.Y. 1979) (holding that a governmental entity "may decline bids which fail to comply with the literal requirements of the bid specifications")). Moreover, DOT is unable to waive strict compliance with a federal law, which, in this case, formed the basis for the solicitation requirement.

Accordingly, we find no basis to disturb DOT's determination that Rosemar was non-responsive to the solicitation requirements, and therefore, Rosemar was not eligible for award of either contract.

3. <u>Adequacy of GFE Documentation</u>

Rosemar seems to assert in its Appeals both that (1) the documentation of GFE that it submitted with its bid was sufficient to show GFE (*see* Appeals, at pp. 2, 11, 13); and (2) notwithstanding the foregoing, the documentation of GFE that it submitted with its bid and post-bid, documenting all pre-bid GFE, was sufficient to show GFE (*see id.*, at pp. 1, 7-10, 12-13). Based on the above analysis, we will only address whether DOT's determination that the GFE documentation timely submitted with the bid was sufficient to demonstrate GFE.

Rosemar contends that "[r]ather than evaluating the quality and sincerity of Rosemar's [GFEs]—as required under 49 CFR § 26.53—[DOT] applied an unauthorized, heightened 'every effort' standard and penalized Rosemar for not meeting the numeric DBE goal" (Appeals, at p. 6; *see id.*, at p. 7). Rosemar asserts "[t]he regulations do not require to contact *every* DBE firm in a broad radius or to accept any DBE bid regardless of cost[, instead] [t]hey require that bidders take reasonable, targeted steps to include DBEs where feasible[, which] Rosemar did exactly that" (*Id.*, at p. 6) (emphasis in original). Rosemar further asserts that "[it] is being penalized for not meeting the 10% DBE goal on the Contract even though federal law expressly prohibits treating DBE goals as quotas" (*Id.*, at p. 9).

DOT counters that it "considered and found Rosemar's documentation submitted at bid to be inadequate" (Answer, at p. 3). Specifically, DOT contends that "Rosemar's GFE efforts fell short in numerous areas, including soliciting less than 10% of the 200 DBE firms within a 100 mile radius, failing to place any ads soliciting DBEs, soliciting bids from non-DBEs when DBEs were available but unsolicited, ignoring areas of work where DBE utilization was available, [] failing to negotiate in good faith on bid prices with DBE firms[, and] failing to submit [required] GFE documentation" (*Id.*, at p. 4). DOT further contends that "[t]he assertion that [DOT] treated the DBE goals as a quota is unsupported" (*Id.*).

The Federal DBE Regulations establish 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). The Federal DBE Regulations also provide a non-exclusive list of factors that may demonstrate whether a bidder's GFE was adequate to obtain DBE participation—which includes (among many others) sending "written notices or emails to **all** DBEs listed in the State's directory of transportation firms that specialize in the areas of work desired (as noted in the DBE directory) and which are located in the area or surrounding areas of the project" (49 CFR Part 26, Appendix A, at IV).

The DOT Standard Specifications reiterated that "efforts to obtain [DBE] participation that are merely pro forma are not [GFEs], nor are efforts that, even if they are sincerely motivated, given all relevant circumstances, they could not reasonably be expected to produce a level of [DBE] participation sufficient to meet the goal(s)" (DOT Standard Specifications § 102-12(H), as amended by the Asphalt Resurfacing Amendment No. 2, § 102-12(H), at p. 12 and the Drainage Improvements Amendment No. 1, § 102-12(H), at p. 12). The DOT Standard Specifications § 102-12(H), as amended, also includes a non-exhaustive list of factors that DOT considers when determining whether a bidder's GFE are adequate.

Our review of the procurement records verifies that DOT conducted a review of Rosemar's GFEs and determined that they were such that their scope, intensity, and appropriateness to the objective of obtaining the DBE goal, would not have yielded sufficient DBE participation. The procurement record shows, for each solicitation, Rosemar was the only bidder that failed to submit documentation that it could meet the DBE goal. In such instances, the Federal DBE Regulations contemplate that:

> In determining whether a bidder has made good faith efforts, it is essential to scrutinize its documented efforts. At a minimum, [the agency] must review the performance of other bidders in meeting the contract goal. For example, **when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional efforts the apparent successful bidder could have met the goal.**

(49 CFR Part 26, App. A § V) (emphasis added). For both solicitations, the procurement record reflects that all other bidders were able to meet the DBE program goals.[16] DOT has documented a rational basis that Rosemar could have reasonably done more to solicit and achieve the DBE program goals. Therefore, our review of the procurement records reflects that there is a rational basis for DOT's determinations that the GFE submitted to DOT were merely pro forma.

In addition, contrary to Rosemar's claims, the procurement records reflect that DOT did not deem Rosemar non-responsive simply for its failure to meet the DBE goal, but that DOT found Rosemar non-responsive for its failure to comply with DBE program requirements as set by Federal DBE Regulations and the solicitations, which require a showing of GFE. Therefore, we find no merit to the contention that DOT treated the DBE goals as quotas.

As a result, we find no basis to disturb DOT determinations that Rosemar's GFEs were inadequate based on Rosemar's timely submitted documentation, and thus did not satisfy the requirements of the Federal DBE Regulations or the solicitations.

**Due Process**

Rosemar contends it did not receive due process as "[t]he rejection of Rosemar's bid was procedurally flawed in a way that deprived Rosemar of its right to meaningfully respond" (Appeals, at p. 15). Rosemar asserts they were delayed notice of their non-responsive determinations because DOT transmitted the non-responsive notice to their president, rather than the contact designated in its bid submissions (*Id.*, at pp. 15–16).

DOT counters that Rosemar received due process as "notice to a company's owner is sufficient notice to a company, and Rosemar and its attorneys had repeatedly included that owner on emails with [DOT]" (Answer, at p. 4). Additionally, DOT asserts "Rosemar received due process, as it was able to make its arguments to the administrative reconsideration panel" (*Id.*).

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[16] The solicitations set a DBE goal of 10% participation (Asphalt Resurfacing Proposal Book 2, at p. 32; Drainage Improvements Proposal Book 2, at p. 36; DOT Standard Specifications § 102-12). The procurement records reflect that Rosemar achieved 8.87% in the Drainage Improvements contract and 6.79% in the Asphalt Resurfacing contract.

Due process[17] requires that a bidder receive notice and an opportunity to be heard. There appears to be no dispute that Rosemar received an opportunity to be heard through the administrative reconsideration process as outlined by the Federal DBE Regulations. Therefore, we will only discuss whether Rosemar received adequate notice.

Contrary to Rosemar's assertion, DOT provided Rosemar with *actual* notice of the non-responsive determinations. It is indisputable that notice to an entity's president constitutes actual notice to that entity. Furthermore, we find Rosemar's claims that had it "received timely and properly addressed notice, it could have immediately clarified the issue, submitted the already-prepared documentation, and avoided the erroneous finding of non-responsiveness" meritless (Asphalt Resurfaching Appeal, at p. 16; Drainage Improvements Appeal, at p. 15). Contrary to Rosemar's repeated contentions, it did not have the ability to "clarify" or "submit already prepared documentation" as all GFE documentation was a required submission at the time of bid letting (as discussed in detail above). The procurement record reflects that DOT provided notice to Rosemar of its non-responsive determinations, which were made in accordance with Federal DBE Regulations and the solicitations.

Therefore, we find no merit to Rosemar's contentions it failed to receive the requisite due process. As such, we will not disturb DOT's determinations.

**CONCLUSION**

For the reasons outlined above, we have determined the issues raised in the Appeals are not of sufficient merit to overturn the contract awards by DOT. As a result, the Appeals are denied and we are today approving the DOT contract with Posillico Civil for Asphalt Resurfacing and the DOT contract with Bove Industries for Drainage Improvements.

[17] We note this discussion of due process is limited to the context of the inadequate GFE determination, as the Federal DBE Regulations provide due process protections. It is well established that bidders do not have a liberty interest such that they are required due process protections when an agency finds a bidder non-responsive to solicitation requirements.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

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| In the Matter of the Appeals filed by Rosemar Contracting Inc. with respect to the procurements of Asphalt Pavement Resurfacing – NY Routes 24 & 102, Village & Town of Hempstead and Drainage Improvements – Various Locations in the Town of Islip by the New York State Department of Transportation. | **Determination of Appeals**<br><br>**SF–20250131**<br>**SF–20250130** |
| Contract Numbers – D265444 & D265401 | September 12, 2025 |

The Office of the State Comptroller ("OSC" or "Office") has reviewed the above-referenced procurements conducted by the New York State Department of Transportation ("DOT") for Asphalt Pavement Resurfacing – NY Routes 24 & 102, Village & Town of Hempstead ("Asphalt Resurfacing") and Drainage Improvements – Various Locations in the Town of Islip ("Drainage Improvements").[1] We have determined the grounds advanced by Rosemar Contracting Inc. ("Rosemar") are insufficient to merit overturning the contract awards made by DOT and, therefore, we deny the Appeals. As a result, we are today approving the DOT contract with Posillico Civil, Inc. ("Posillico Civil") for Asphalt Resurfacing and the DOT contract with Bove Industries, Inc. ("Bove Industries") for Drainage Improvements.

## BACKGROUND

### Facts

On February 12, 2025, DOT issued two separate solicitations: one for Asphalt Resurfacing[2] and the other for Drainage Improvements.[3] Each solicitation provided that the "contract award will be made only 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. 61). Each solicitation further indicated as contracts receiving federal aid, participation was required in the federal Disadvantaged Business Enterprises ("DBE") program and set a goal of 10% DBE participation for all bidders (Asphalt Resurfacing Proposal Book 2, at

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[1] We have determined to resolve the issues raised in the Asphalt Resurfacing Appeal (Contract Number D265444/ SF-20250131) and the Drainage Improvements Appeal (Contract Number D265401/ SF-20250130) in this single Determination as the issues raised in both appeals are substantially similar.
[2] The Asphalt Resurfacing solicitation was comprised of Proposal Book 1, Proposal Book 2, DOT Standard Specifications, Construction and Materials, dated January 1, 2025 ("DOT Standard Specifications") (as incorporated by reference into the bid documents – *see* Asphalt Resurfacing Proposal Book 1, at p. 1; Asphalt Resurfacing Proposal Book 2, at p.1), as well as supplemental information including record plans, and applicable amendments.
[3] The Drainage Improvements solicitation was comprised of Proposal Book 1, Proposal Book 2, DOT Standard Specifications (as incorporated by reference into the bid documents – *see* Drainage Improvements Proposal Book 1, at p. 1; Drainage Improvements Proposal Book 2, at p.1), as well as various plans, supplemental information including record plans, and applicable amendments.

p. 32; Drainage Improvements Proposal Book 2, at p. 36; DOT Standard Specifications § 102-12*; see* 49 CFR Part 26 ("Federal DBE Regulations")).

1. <u>Asphalt Resurfacing Solicitation</u>

DOT received seven (7) bids by the bid opening date of March 13, 2025, which included a bid from Rosemar. On March 14, 2025, Rosemar received notification from DOT that they were the tentative lowest bidder. On March 28, 2025, DOT notified Rosemar its bid was being rejected as non-responsive due to insufficient good faith efforts ("GFE") in meeting DBE participation goals. Rosemar provided DOT additional information regarding its GFE and made a request for administrative reconsideration[4] of DOT's non-responsive determination on April 10, 2025 ("Asphalt Resurfacing Protest").[5] On April 30, 2025, a meeting was held between Rosemar and DOT's Administrative Reconsideration Panel. On May 1 and 7, 2025, Rosemar sent additional GFE documentation for DOT's consideration. Subsequently, the DOT Administrative Reconsideration Panel issued its findings and decision on May 14, 2025 ("Asphalt Resurfacing Protest Determination").[6] On April 9, 2025, DOT made a tentative award to the next lowest bidder, Posillico Civil.

Rosemar appealed the Asphalt Resurfacing Protest Determination on May 27, 2025, and submitted an amended appeal on May 28, 2025 ("Asphalt Resurfacing Appeal").[7] DOT responded to the Asphalt Resurfacing Appeal on June 23, 2025 ("Answer"). DOT submitted the Asphalt Resurfacing procurement record, including the proposed DOT / Posillico Civil contract to this Office on June 24, 2025.

2. <u>Drainage Improvements Solicitation</u>

DOT received eight (8) bids by the bid opening date of March 27, 2025, which included a bid from Rosemar. On March 28, 2025, Rosemar received notification from DOT that they were the tentative lowest bidder. On April 1, 2025, DOT notified Rosemar that its bid was being rejected as non-responsive due to insufficient GFE in meeting DBE participation goals. Rosemar provided DOT additional information regarding its GFE and made a request for administrative reconsideration of DOT's non-responsive determination on April 10, 2025 ("Drainage Improvements Protest").[8] On April 30, 2025, a meeting was held between Rosemar and DOT's Administrative Reconsideration Panel. On May 1 and 7, 2025, Rosemar sent additional GFE documentation for DOT's consideration. Subsequently, the DOT Administrative Reconsideration

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[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 is also included in the solicitation (*see* DOT Standard Specifications § 102-12(J), at p. 48, as amended by the Asphalt Resurfacing Amendment No. 2, § 102-12(J) at p. 15, and as amended by the Drainage Improvements Amendment No. 1, § 102-12(J) at p. 15).

[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] All references to the Asphalt Resurfacing Appeal refer to the amended appeal, which was the latest submission by Rosemar.

[8] For purposes of OSC's Protest Procedure, we considered the request for administrative reconsideration to be a protest to the agency.

Panel issued its findings and decision on May 14, 2025 ("Drainage Improvements Protest Determination").[9] On April 9, 2025, DOT made a tentative award to the next lowest bidder, Bove Industries.

Rosemar appealed the DOT Drainage Improvement Protest Determination on May 27, 2025, and submitted an amended appeal on May 28, 2025 ("Drainage Improvement Appeal").[10] DOT responded with its Answer to the Drainage Improvement Appeal on June 23, 2025.[11] DOT submitted the procurement record, including the proposed DOT / Bove Industries contract to this Office on June 24, 2025.

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

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

In carrying out this contract approval responsibility, OSC has promulgated regulations setting forth the procedure ("OSC Protest Procedure") to be used by an interested party seeking to challenge a contract award by a State agency (*see* 2 NYCRR Part 24). The OSC Protest Procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because these are appeals of two agency protest determinations, the Appeals[12] are governed by 2 NYCRR § 24.5.

In the determination of the Appeals, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DOT with the proposed DOT / Posillico Civil contract for Asphalt Resurfacing;

2. the correspondence between this Office and DOT arising out of our review of the proposed DOT / Posillico Civil contract for Asphalt Resurfacing;

3. the documentation contained in the procurement record forwarded to this Office by DOT with the proposed DOT / Bove Industries contract for Drainage Improvements;

4. the correspondence between this Office and DOT arising out of our review of the proposed DOT / Bove Industries contract for Drainage Improvements; and,

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[9] For purposes of OSC's Protest Procedure, we considered DOT's Administrative Reconsideration Panel Decision to be the protest determination made by the agency.

[10] All references to the Drainage Improvements Appeal refer to the amended appeal, which was the latest submission by Rosemar.

[11] DOT submitted its Answer to the Asphalt Resurfacing Appeal and the Drainage Improvements Appeal as one answer since "the issues raised in both [of] Rosemar's [Appeals] are similar, [DOT] is responding to both [Appeals] in this response" (Answer, at p. 1).

[12] Collectively, the Asphalt Resurfacing Appeal and the Drainage Improvements Appeal are referred to herein as the "Appeals."

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

    a. Asphalt Resurfacing Protest;
    b. Asphalt Resurfacing Protest Determination;
    c. Asphalt Resurfacing Appeal;
    d. Drainage Improvements Protest;
    e. Drainage Improvements Protest Determination;
    f. Drainage Improvements Appeal; and
    g. Answer.

**ANALYSIS OF THE APPEALS**

**Appeals to this Office**

In its Appeals, Rosemar challenges the procurements conducted by DOT on the following grounds:

1. DOT's non-responsive determination for Rosemar was in error as DOT failed to consider all of the documentation submitted by Rosemar, whether with its bid or after the bid opening, as all of Rosemar's GFEs were completed prior to the bid opening.

2. DOT should waive Rosemar's inadvertent omission of a portion of its GFE documentation with its bid, and allow for submission after bid opening, since it was an immaterial omission that had no impact on competition.

3. Rosemar's pre-bid GFE were sufficient to comply with the Federal DBE Regulations and DOT, in finding otherwise, inappropriately applied a more heightened standard than required under the Federal DBE Regulations and violated federal law by treating DBE goals as required quotas.

4. DOT violated Rosemar's due process rights by failing to provide timely and proper notice before finding Rosemar non-responsive to the solicitations.

**DOT's Answer to the Appeals**

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

1. DOT properly determined that Rosemar was non-responsive for its failure to comply with the requirement that sufficient GFE be submitted by the time of bid, as outlined in the solicitations and Federal DBE Regulations.

2. DOT could not waive the requirement that sufficient GFE be submitted at the time of bid, as required by the solicitations and the Federal DBE Regulations, and allow Rosemar to submit GFE documentation post-bid, as it is an unwaivable substantive requirement.

3. DOT considered Rosemar's timely-submitted GFE documentation according to applicable federal standards and guidance and deemed Rosemar's GFE insufficient.

4. DOT provided Rosemar with the requisite due process by providing proper notice to the company's owner and an opportunity to be heard before the administrative reconsideration panel.

**DISCUSSION**

**Responsiveness of Rosemar to DBE Program Requirements**

Rosemar appears to challenge the basis of DOT's non-responsive determination on several grounds related to the DBE Program requirements, including (1) whether Rosemar needed to submit proof of GFE with its bid or whether Rosemar was allowed to submit additional GFE documentation post-bid submission; (2) if Rosemar was required to submit GFE documentation with its bid and could not supplement post-bid, whether DOT could / should have waived Rosemar's failure to submit sufficient GFE documentation with its bid and allow Rosemar to supplement post-bid; and (3) if DOT could not have waived the requirement and thereby allowed post-bid submission of GFE documentation, whether the GFE documentation Rosemar submitted with its bid, should have been found to be sufficient. We will address each ground in turn.

1. Timing of GFE Submission

Rosemar asserts it "fully performed the required [GFE] by the bid deadline; its sole misstep was the inadvertent omission of [submitting] a portion of the supporting documentation [with its bid]" (Appeals, at p. 11). Rosemar alleges that "[DOT]'s [non-responsive] determination ignores the voluminous evidence that Rosemar has submitted to the [DOT] documenting its pre-bid GFE" (*Id.*, at p. 1). Rosemar contends that pursuant to the Federal DBE Regulations, "bidders are expressly permitted to submit written documentation or argument during the administrative reconsideration process to demonstrate that they made adequate [GFE] to meet the DBE goal" (*Id.*, at p. 8).

DOT counters that "Rosemar concedes it did not meet the DBE goals for the subject contracts at the time of bid submission [and that] Rosemar needed to submit documentation of its GFE at the time of bid" (Answer, at p. 3). DOT further asserts that "Rosemar also concedes it did not submit all of its GFE documentation at the time of bid, instead arguing that [DOT] should have considered additional previously unsubmitted documentation during the administrative reconsideration process" (*Id.*).

Highway Law § 38(3) provides that the "[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.[13]

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** "all bidders or offerors" to **provide documentation of meeting the goal or making adequate GFE to meet the goal either "[u]nder sealed bid procedures, as a matter of responsiveness**, or with initial proposals, under contract negotiation procedures" or "[n]o later than [5] days after bid opening as a matter of responsibility" (49 CFR §§ 26.53(b)(2), 26.53(b)(3)(i)(A), (B) (emphasis added)). DOT, may choose, "[a]t [their] discretion[,]" the timeframe by which bidders must submit required DBE documentation (49 CFR § 26.53(b)(3)(i)(A), (B)). Here, DOT has indicated it follows the former, as outlined in DOT Standard Specifications § 102, as amended by, the Asphalt Resurfacing Amendment No. 2, and the Drainage Improvements Amendment No. 1.[14]

The procurement record reflects that the requirement was clearly set forth that all bidders were required to submit a complete DBE Participation Package with their bid or they may be deemed non-responsive by the Department. Specifically, the amendments to the solicitations clearly articulated that "[a]ll Bidders shall submit a complete DBE Participation Package with their bid proposal . . . [and f]ailure to submit the required Bidders List information may result in rejection of the bid" (Asphalt Resurfacing Amendment No. 2, amending § 102-12(F), at pp. 7–8; Drainage Improvements Amendment No. 1, amending § 102-12(F), at pp. 7–8).

As described above, consistent with the Federal DBE Regulations, DOT established a DBE Program package compliance deadline that all bidders must submit a complete DBE package, or if necessary, documentation it made adequate GFE to attain the DBE goal, at the time bids were due. In the solicitation documents, DOT further specified:

> **For Federal-Aid contracts, all Bidders shall submit a complete DBE Participation Package to the Department with their proposal.** The DBE Participation Package shall include confirmed DBE commitments; DBE confirmation, on Department provided forms [], for each DBE firm for the kind

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

[14] Accordingly, DOT has determined to treat timely submission of proof of compliance with Federal DBE Requirements as a matter of responsiveness, not responsibility. The Appeals suggest that Rosemar believes "responsibility" is implicated, which is inaccurate. Rosemar asserts that DOT's "decision to reject Rosemar's bid as non-responsive . . . is a grossly disproportionate penalty for a good faith mistake [and t]he implication of non-responsibility can place Rosemar's 'commercial good name, reputation, honor, and integrity at stake'" (Appeals, at p. 14). Rosemar further asserts that "the rejection of a bid as non-responsive has a detrimental impact on the bidder's ability to compete for future public contracts" (*Id.*, at p. 15). While a non-responsibility determination implicates a vendor's financial ability, legal authority to do business in the state, integrity, and/or past performance, and accordingly may affect a vendor's future business prospects, a non-responsive determination indicates that a vendor did not comply with a mandatory term or condition of the solicitation and does not impact a vendor's ability to compete for other procurement opportunities.

> and amount of work shown in the Bidder's commitments; **and good faith effort documentation (if required). No additions, substitutions, or deductions to the DBE commitments identified at time of letting will be considered as part of the DBE Participation Package**. . . . **If the contract goal(s) is not met in full, then the Bidder shall provide documentation of its good faith efforts with their proposa**l, in accordance with §102-12H[,] Good Faith Efforts that demonstrate that the Bidder attempted but could not meet the goal(s). **If the Low Bidder fails to submit a complete DBE Participation Package (i.e., DBE commitments, DBE confirmation, and/or GFE) at time of letting they may be deemed non-responsive by the Department.**"

(DOT Standard Specifications, § 102-12(G)(1), as amended by the Asphalt Resurfacing Amendment No. 2, amending § 102-12(G)(1), at pp. 8-9, and the Drainage Improvements Amendment No. 1, amending § 102-12(G)(1), at pp. 8-9) (emphasis added). Additionally, as was further made clear by the amendments to the solicitations, "if [a bidder] do[es] not meet the DBE goal, [the bidder] shall submit sufficient [GFE] documentation with [its] bid submission. **No supplemental information will be considered after Letting**." (DOT Standard Specifications, § 102-12, as amended by the Asphalt Resurfacing Amendment No. 2, *Form AAP14*, at p. 2, and the Drainage Improvements Amendment No. 1, *Form AAP14*, at p. 2).

It is clearly established that there are strict compliance requirements with the Federal DBE Program requirements. Additionally, bidders were clearly notified, in numerous ways, that **all** GFE documentation was required with the bid submission and that no additional information would be considered past the deadline. Rosemar's assertions that it completed its GFE prior to the bid deadline are irrelevant to the determination of whether GFE documentation was submitted timely. The DBE program timing requirements are based on when the bidder submits its GFE documentation to DOT, not on when the bidder alleges it engaged in its GFE. Rosemar failed to submit timely evidence of those efforts with its bid submissions.[15] As such, we find no reason to disturb DOT's finding that Rosemar was non-responsive to the solicitations' requirement to submit evidence of compliance with DBE requirements with the bid.

2. <u>Waiver of DBE Program Requirements</u>

Rosemar repeatedly asserts that "[DOT's] refusal to review [its post deadline GFE submission]—even though the[ GFE] predated the bid deadline—violated both federal regulations and basic fairness" (Appeals, at pp. 11-12; *see id.*, at pp. 13, 14). Rosemar asserts DOT should waive any "error in its submission [of untimely GFE documentation as] not material to the bid" (*Id.*, at p. 11). Rosemar asserts "[e]ven if the Comptroller were to accept that a

[15] It is noted that Rosemar submitted new material as part of the administrative reconsideration process outlined by the Federal DBE Regulations (49 CFR § 26.53(d)). However, the Federal DBE Regulations state that "[a]s part of this reconsideration, the bidder/offeror must have the opportunity to provide written documentation or argument concerning the *issue of whether it met the goal or made adequate good faith efforts to do so*" (49 CFR § 26.53(d)(1)) (emphasis added). The regulations contemplate that the written documentation submitted would analyze whether the GFE documentation *timely* submitted constituted adequate GFE, and not an opportunity for the bidder to submit *new* GFE documentation that the bidder failed to timely submit. In other words, the additional opportunity to submit documentation during the administrative reconsideration process is not an opportunity for the bidder to circumvent timely GFE submission requirements.

technical documentation error occurred, [DOT's] decision to reject Rosemar's bid as non-responsive, rather than seek clarification or supplemental information, is a grossly disproportionate penalty for a good faith mistake" (*Id.*, at p. 14).

DOT counters that "it could not consider the additional GFE documentation [Rosemar] submitted post-letting" since "Rosemar needed to submit documentation of its GFE at the time of bid" (Answer, at pp. 3, 4). DOT further asserts that it "could not waive the requirement that GFE documentation be submitted at the time of bid" because the DBE/GFE requirements are "unwaivable substantive requirements set forth in regulations and contract bid documents" (*Id.*, at p. 4). DOT contends that it "must follow federal regulations and its own Standard Specifications . . . [and h]ad [DOT] waived Rosemar's DBE/GFE failures, it would have been in violation of these authorities" (*Id.*).

The Federal DBE Regulations and solicitations established that failure to comply with the DBE program requirements could result in a non-responsive determination (Asphalt Resurfacing Amendment No. 2, amending § 102-12(B)(1), at p. 4, and the Drainage Improvements Amendment No. 1, amendment § 102-12(B)(1), at p. 4). DOT Standard Specifications also state that "[DOT] reserves the right to reject any proposal deemed non-responsive, or any contractor deemed non-responsible, and then, pursuant to Section 38 of the Highway Law, award to other than the low bidder, or waive minor informalities if, in its opinion, the best interest of the State will thereby be promoted" (DOT Standard Specifications, § 103-01, at p. 61).

We find no merit to Rosemar's contentions that DOT should waive compliance with the Federal DBE Regulations or solicitations. Both solicitations reiterate that a bidder must submit evidence of compliance with the Federal DBE program requirements at the time of bid opening. DOT is not required, either by the solicitations or applicable law, to waive strict compliance with a solicitation requirement (*see Le Cesse Bros. Contracting v. Town of Williamson*, 62 A.D.2d. 28, 31 (4th Dept. 1948), *aff'd* 46 N.Y.2d 960 (N.Y. 1979) (holding that a governmental entity "may decline bids which fail to comply with the literal requirements of the bid specifications")). Moreover, DOT is unable to waive strict compliance with a federal law, which, in this case, formed the basis for the solicitation requirement.

Accordingly, we find no basis to disturb DOT's determination that Rosemar was non-responsive to the solicitation requirements, and therefore, Rosemar was not eligible for award of either contract.

3. <u>Adequacy of GFE Documentation</u>

Rosemar seems to assert in its Appeals both that (1) the documentation of GFE that it submitted with its bid was sufficient to show GFE (*see* Appeals, at pp. 2, 11, 13); and (2) notwithstanding the foregoing, the documentation of GFE that it submitted with its bid and post-bid, documenting all pre-bid GFE, was sufficient to show GFE (*see id.*, at pp. 1, 7-10, 12-13). Based on the above analysis, we will only address whether DOT's determination that the GFE documentation timely submitted with the bid was sufficient to demonstrate GFE.

Rosemar contends that "[r]ather than evaluating the quality and sincerity of Rosemar's [GFEs]—as required under 49 CFR § 26.53—[DOT] applied an unauthorized, heightened 'every effort' standard and penalized Rosemar for not meeting the numeric DBE goal" (Appeals, at p. 6; *see id.*, at p. 7). Rosemar asserts "[t]he regulations do not require to contact *every* DBE firm in a broad radius or to accept any DBE bid regardless of cost[, instead] [t]hey require that bidders take reasonable, targeted steps to include DBEs where feasible[, which] Rosemar did exactly that" (*Id.*, at p. 6) (emphasis in original). Rosemar further asserts that "[it] is being penalized for not meeting the 10% DBE goal on the Contract even though federal law expressly prohibits treating DBE goals as quotas" (*Id.*, at p. 9).

DOT counters that it "considered and found Rosemar's documentation submitted at bid to be inadequate" (Answer, at p. 3). Specifically, DOT contends that "Rosemar's GFE efforts fell short in numerous areas, including soliciting less than 10% of the 200 DBE firms within a 100 mile radius, failing to place any ads soliciting DBEs, soliciting bids from non-DBEs when DBEs were available but unsolicited, ignoring areas of work where DBE utilization was available, [] failing to negotiate in good faith on bid prices with DBE firms[, and] failing to submit [required] GFE documentation" (*Id.*, at p. 4). DOT further contends that "[t]he assertion that [DOT] treated the DBE goals as a quota is unsupported" (*Id.*).

The Federal DBE Regulations establish 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). The Federal DBE Regulations also provide a non-exclusive list of factors that may demonstrate whether a bidder's GFE was adequate to obtain DBE participation—which includes (among many others) sending "written notices or emails to **all** DBEs listed in the State's directory of transportation firms that specialize in the areas of work desired (as noted in the DBE directory) and which are located in the area or surrounding areas of the project" (49 CFR Part 26, Appendix A, at IV).

The DOT Standard Specifications reiterated that "efforts to obtain [DBE] participation that are merely pro forma are not [GFEs], nor are efforts that, even if they are sincerely motivated, given all relevant circumstances, they could not reasonably be expected to produce a level of [DBE] participation sufficient to meet the goal(s)" (DOT Standard Specifications § 102-12(H), as amended by the Asphalt Resurfacing Amendment No. 2, § 102-12(H), at p. 12 and the Drainage Improvements Amendment No. 1, § 102-12(H), at p. 12). The DOT Standard Specifications § 102-12(H), as amended, also includes a non-exhaustive list of factors that DOT considers when determining whether a bidder's GFE are adequate.

Our review of the procurement records verifies that DOT conducted a review of Rosemar's GFEs and determined that they were such that their scope, intensity, and appropriateness to the objective of obtaining the DBE goal, would not have yielded sufficient DBE participation. The procurement record shows, for each solicitation, Rosemar was the only bidder that failed to submit documentation that it could meet the DBE goal. In such instances, the Federal DBE Regulations contemplate that:

> In determining whether a bidder has made good faith efforts, it is essential to scrutinize its documented efforts. At a minimum, [the agency] must review the performance of other bidders in meeting the contract goal. For example, **when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional efforts the apparent successful bidder could have met the goal.**

(49 CFR Part 26, App. A § V) (emphasis added). For both solicitations, the procurement record reflects that all other bidders were able to meet the DBE program goals.[16] DOT has documented a rational basis that Rosemar could have reasonably done more to solicit and achieve the DBE program goals. Therefore, our review of the procurement records reflects that there is a rational basis for DOT's determinations that the GFE submitted to DOT were merely pro forma.

In addition, contrary to Rosemar's claims, the procurement records reflect that DOT did not deem Rosemar non-responsive simply for its failure to meet the DBE goal, but that DOT found Rosemar non-responsive for its failure to comply with DBE program requirements as set by Federal DBE Regulations and the solicitations, which require a showing of GFE. Therefore, we find no merit to the contention that DOT treated the DBE goals as quotas.

As a result, we find no basis to disturb DOT determinations that Rosemar's GFEs were inadequate based on Rosemar's timely submitted documentation, and thus did not satisfy the requirements of the Federal DBE Regulations or the solicitations.

**<u>Due Process</u>**

Rosemar contends it did not receive due process as "[t]he rejection of Rosemar's bid was procedurally flawed in a way that deprived Rosemar of its right to meaningfully respond" (Appeals, at p. 15). Rosemar asserts they were delayed notice of their non-responsive determinations because DOT transmitted the non-responsive notice to their president, rather than the contact designated in its bid submissions (*Id.*, at pp. 15–16).

DOT counters that Rosemar received due process as "notice to a company's owner is sufficient notice to a company, and Rosemar and its attorneys had repeatedly included that owner on emails with [DOT]" (Answer, at p. 4). Additionally, DOT asserts "Rosemar received due process, as it was able to make its arguments to the administrative reconsideration panel" (*Id.*).

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[16] The solicitations set a DBE goal of 10% participation (Asphalt Resurfacing Proposal Book 2, at p. 32; Drainage Improvements Proposal Book 2, at p. 36; DOT Standard Specifications § 102-12). The procurement records reflect that Rosemar achieved 8.87% in the Drainage Improvements contract and 6.79% in the Asphalt Resurfacing contract.

Due process[17] requires that a bidder receive notice and an opportunity to be heard. There appears to be no dispute that Rosemar received an opportunity to be heard through the administrative reconsideration process as outlined by the Federal DBE Regulations. Therefore, we will only discuss whether Rosemar received adequate notice.

Contrary to Rosemar's assertion, DOT provided Rosemar with *actual* notice of the non-responsive determinations. It is indisputable that notice to an entity's president constitutes actual notice to that entity. Furthermore, we find Rosemar's claims that had it "received timely and properly addressed notice, it could have immediately clarified the issue, submitted the already-prepared documentation, and avoided the erroneous finding of non-responsiveness" meritless (Asphalt Resurfaching Appeal, at p. 16; Drainage Improvements Appeal, at p. 15). Contrary to Rosemar's repeated contentions, it did not have the ability to "clarify" or "submit already prepared documentation" as all GFE documentation was a required submission at the time of bid letting (as discussed in detail above). The procurement record reflects that DOT provided notice to Rosemar of its non-responsive determinations, which were made in accordance with Federal DBE Regulations and the solicitations.

Therefore, we find no merit to Rosemar's contentions it failed to receive the requisite due process. As such, we will not disturb DOT's determinations.

**CONCLUSION**

For the reasons outlined above, we have determined the issues raised in the Appeals are not of sufficient merit to overturn the contract awards by DOT. As a result, the Appeals are denied and we are today approving the DOT contract with Posillico Civil for Asphalt Resurfacing and the DOT contract with Bove Industries for Drainage Improvements.

[17] We note this discussion of due process is limited to the context of the inadequate GFE determination, as the Federal DBE Regulations provide due process protections. It is well established that bidders do not have a liberty interest such that they are required due process protections when an agency finds a bidder non-responsive to solicitation requirements.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Appeal filed by New York City Health & Hospitals / Jacobi Medical Center with respect to the grant awards for the 2025 Victims of Crime Act Victim Assistance Grant Program made by the New York State Office of Victim Services.

Procurement Record – OVS01-0000012-1080200

**Determination of Appeal**

**SF–20250169**

October 24, 2025

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The Office of the State Comptroller ("OSC" or "Office") has reviewed the above-referenced grant awards made by the New York State Office of Victim Services ("OVS") for the Victims of Crime Act ("VOCA") Victim Assistance Grant Program. We have determined the grounds advanced by New York City Health & Hospitals / Jacobi Medical Center ("Jacobi") are of sufficient merit to overturn the grant awards made by OVS and, therefore, we uphold the Appeal. As a result, we are today returning non-approved the OVS grant awards for the Victim Assistance Grant Program.

**BACKGROUND**

**Facts**

On January 6, 2025, OVS issued a Request for Applications ("RFA") seeking applications for the VOCA Victim Assistance Grant Program. The RFA specified that "[t]he primary purpose of the [VOCA] Victim Assistance Grant Program is to provide direct services and assistance to victims of crime" (RFA, Section 1, at p. 4).

The RFA specified that multiple awards would be made on the basis of "best value to the State" following OVS' evaluation of the following application components: Administrative (Pass/Fail); Programmatic; Budget and Budget Narrative; and Required Forms (RFA, Sections 1 and 5, at pp. 7, 20–21). Evaluation of the Administrative (Pass/Fail) component "assess[ed] whether applications satisf[ied] the minimum 'pass/fail' criteria for funding consideration" and failure to meet the criteria would result in disqualification (RFA, Section 5, at p. 20). The Programmatic component was scored by OVS evaluators[1] and received "a maximum of 70 points" (RFA, Section 5, at p. 20). The Budget and Budget Narrative component was scored by OVS evaluators[2] and received "a maximum of 30 points" (RFA, Section 5, at p. 21). The

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[1] The RFA provided that the Programmatic score would be based on the following information set forth in the applicant's Narrative Submission Form: Problem Statement; Organizational Capacity; and Proposed Services, Implementation, and Evaluation (RFA, Sections 3 and 5, at pp. 15, 20).

[2] The RFA provided that the Budget and Budget Narrative score would be based on information entered in the Budget Properties section of the application as well as "additional supporting narrative for the budget justification [ ] included in the Narrative Submission Form" (RFA, Section 3, at p. 17).

Required Forms component identified eight forms[3] "required to be uploaded as part of an applicant's submission" (RFA, Section 5, at p. 21). Of the Required Forms, the RFA indicated that only the Narrative Submission Form would be scored (RFA, Section 3, at p. 17). The RFA indicated "[a]wards will be made to those applications receiving the highest final overall scores" (RFA, Section 5, at p. 21).

OVS received 261 applications by the application due date of March 19, 2025, including an application from Jacobi. On June 27, 2025, Jacobi received a notice of non-award from OVS.[4] Jacobi requested a debriefing, which OVS provided on July 8, 2025.

Thereafter, on July 15, 2025, Jacobi submitted a protest of the grant awards to OVS ("Protest") pursuant to OVS' bid protest procedures, as contained in the RFA (RFA, Section 5, at p. 22).[5] OVS denied the Protest in a written determination dated July 30, 2025 ("Protest Determination"). Jacobi then appealed such denial to this Office on August 5, 2025 ("Appeal"). On August 11, 2025, OVS submitted the procurement record for the Victim Assistance Grant Program grant awards, which is the subject of the Appeal, to this Office for review. On August 12, 2025, OVS responded to the Appeal ("Answer").

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

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

In carrying out this contract approval responsibility, OSC has promulgated regulations setting forth the procedure ("OSC Protest Procedure") to be used by an interested party seeking to challenge a contract award by a State agency (*see* 2 NYCRR Part 24). The OSC Protest 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 determination, the Appeal is governed by 2 NYCRR § 24.5.

In the determination of the Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by OVS with the proposed Victim Assistance Grant Program awards;

2. the correspondence between this Office and OVS arising out of our review of the proposed Victim Assistance Grant Program awards; and,

[3] These included the Narrative Submission Form; Annual Anticipated Services Form; Annual Funding Form; Position Description Form; Program Information Form; Priority Categories Form; Budget Worksheets (Fringe & Prorating); and Counties Served Form (RFA, Section 5, at p. 21).

[4] Out of the 261 applicants, there were 250 tentative grant awardees.

[5] Jacobi submitted its Protest to this Office; however, as agency-level bid protest procedures were established by OVS in the RFA, this Office forwarded the Protest to OVS for initial consideration (*see* 2 NYCRR § 24.3).

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

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

**Applicable Statutes**

The grant award in question is subject to the requirements of Article 11-B of the SFL.[6] Therefore, the procurement conducted by OVS is not subject to the competitive bidding requirements of SFL § 163 since those statutory competitive bidding requirements do not apply to "contracts approved in accordance with article eleven-B of [the SFL]" (SFL § 160(7)). While Article 11-B does not require competitive bidding, the Comptroller, in fulfilling his statutory duty of assuring that State contracts are awarded in the best interest of the State, requires that agencies undertake a competitive process for grant awards or, alternatively, document why competition is not appropriate or feasible. Thus, notwithstanding the inapplicability of SFL § 163, this Office generally requires that grant contracts be awarded after a fair and impartial competitive procurement process which provides a level playing field for all potential award recipients, except where the agency can document a sole source, single source or emergency justification for a non-competitive award (consistent with the documentation for such awards under SFL § 163). To determine whether the procurement process is fair and impartial, we look to whether: "1) the scoring system itself was clear; and 2) the evaluators, in assigning scores, arrived at reasonable conclusions" (OSC Bid Protest Determination SF-20150159, at p. 3). In light of these non-statutory standards, we will proceed to analyze the issues raised in this Protest.

**ANALYSIS OF THE APPEAL**

**Appeal to this Office**

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

1. Consistent with the opportunity provided to Jacobi to correct its Budget Form after the application deadline, OVS should have also allowed Jacobi the opportunity to correct its incomplete Narrative Submission Form.

**OVS' Answer to the Appeal**

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

1. OVS consistently allowed applicants to make corrections after the application deadline where forms were either missing or incorrectly formatted but did not permit applicants to

[6] Article 11-B of the SFL applies to grant awards to not-for-profit organizations as part of a program plan developed by a State agency (*see* SFL § 179-q(1), (2), (6), (10)).

address unanswered questions in the Narrative Submission Form, which was the primary form used for evaluation scoring.

**DISCUSSION**

**Clarifications**

Jacobi asserts that it should have been "given the opportunity to provide supporting documentation" after "an earlier draft of [its Narrative Submission Form] was inadvertently uploaded instead of the final version . . . [where] only one of the questions had been answered" (Protest, at p. 1). Jacobi contends that this "would have been consistent and reasonable [of] OVS" since "OVS has demonstrated flexibility in other areas" including "allowing corrections for certain components" of an application such as Jacobi's Budget Worksheets (Fringe & Prorating) (*Id.*).

OVS counters that its approach to requesting additional information from applicants "was applied consistently across all applications" and Jacobi's application "was evaluated . . . consistent with all other applicants" (Answer, at p. 1). Specifically, OVS asserts it "conduct[ed] outreach to applicants in instances where supporting forms were either completely missing or on an incorrect template, as was the case with [Jacobi's] [B]udget [W]orksheet ([F]ringe & [P]rorating)" (*Id.*). OVS further asserts that it "did not allow any applicants to address unanswered questions in the Narrative Submission Form, as this was the primary document used for evaluation purposes and additional time to revise may have provided an unfair competitive advantage" (*Id.*).

State agencies are authorized to seek additional information from applicants following the application deadline under certain limited circumstances. Requirements found in the State Finance Law are instructive here - SFL § 163(9)(c) provides, "[w]here provided in the solicitation, state agencies may require clarification from offerers for purposes of assuring a full understanding of responsiveness to the solicitation requirements." Clarifications are not intended to supplement or correct material information in an application to make it responsive to the RFA requirements, but rather to confirm immaterial information or correct a mere irregularity in an application. If allowing supplementation or correction of an application would impair the interests of the procuring agency, place the successful bidder in a position of unfair economic advantage, or place other bidders at a competitive disadvantage, it is not permissible. *See LeCesse Bros. Contracting*, 62 A.D.2d 28 (App. Div. 4th Dep't 1978), *aff'd* 46 N.Y.2d 960 (N.Y. 1979). SFL § 163(9)(c) further provides "Offerers shall be accorded fair and equal treatment with respect to their opportunity for discussion and revision of offers." A State agency's decision as to whether to seek a clarification is discretionary; however, when an agency elects to seek clarifications, the clarifications sought must be consistent such that all vendors are treated equally and fairly. *See LeCesse Bros. Contracting*, 62 A.D.2d 28.

Here, OVS reserved the right to seek clarifications in the RFA. The RFA provided that "[a]pplicants may be requested to provide clarification based on the State's evaluation procedure [and that a]ny clarification will be considered a formal part of the Applicant's original application" (RFA, Section 4, at p. 19). The RFA also set out the following reserved rights for

OVS: "to request any additional information deemed necessary to ensure that the Applicant is able to fulfill the requirements of the contract" and "[r]equest additional information or clarification as deemed necessary to evaluate an application more fully" (RFA, Sections 4 and 7, at pp. 19, 26). Specifically, the RFA specified that "[a]dditional information or changes to these [required] forms may be requested at a later time and will not have an impact on the evaluation of your proposal" (RFA, Section 3, at p. 17). The procurement record does not include written instructions to evaluators regarding how to conduct the preliminary review of applications for responsiveness to the RFA requirements and how to determine what applicants to contact seeking clarification. According to the procurement record, following the preliminary review, if any required form was not included in an application, if a form was blank, or if it was submitted in the incorrect template, OVS would reach out to the applicant to obtain the information. However, OVS emphasized that it did not allow applicants to "address unanswered questions in the Narrative Submission Form" (Answer, at p. 1).

The parties do not dispute that Jacobi submitted an incomplete Narrative Submission Form with its application; instead, the dispute is whether Jacobi should have been provided with the opportunity to provide additional information in order to correct its Narrative Submission Form. The procurement record shows that Jacobi, and at least one other applicant, submitted Narrative Submission Forms that were incomplete, i.e., with one or more unanswered question(s), and were not provided with the opportunity to correct their Narrative Submission Forms. The procurement record further shows that at least one applicant submitted a completely blank Narrative Submission Form, i.e., with all questions unanswered, and was provided with the opportunity to correct the submission and submit a late Narrative Submission Form. OVS indicated that they would not allow corrections to incomplete Narrative Submission Forms because of the importance of the Narrative Submission Form as it "was the primary document used for evaluation purposes and additional time to revise may have provided an unfair competitive advantage" (Answer, at p. 1). This demonstrates the materiality of the Narrative Submission Form, as determined by OVS. It is illogical to maintain that the Narrative Submission Form is material and would offer an unfair advantage if one or more (but not all) blank questions were allowed to be completed late while at the same time contending that it is permissible to allow all blank questions to be completed late. To allow certain vendors who submitted a fully incomplete Narrative Submission Form to correct the submission was impermissible and provided an unfair advantage to those vendors. Likewise, to allow the correction of a form by certain vendors who submitted the form completely blank and to not allow the correction of the same form by other vendors who submitted the form partially blank, evidences an inconsistent application of OVS seeking clarification from applicants.

For the foregoing reasons, we have determined that the aforementioned corrections[7] sought by OVS went beyond mere clarifications and were impermissible supplements to applications with material information. Moreover, the aforementioned corrections were inconsistent and as implemented resulted in an unfair competitive advantage to applicants who received them. As such, we cannot find that the OVS grant awards resulted from a fair and impartial competitive procurement process.

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[7] OVS sought corrections to other required forms; however, we will not address herein whether these other corrections were permissible clarifications or impermissible corrections to or supplements of material information.

## CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are of sufficient merit to overturn the grant awards by OVS. As a result, the Appeal is upheld, and we will not be approving the OVS grant awards for the Victim Assistance Grant Program.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Appeal filed by Door Automation Corp. with respect to the procurement of ADA Compliant Automatic Door Operation Install, Maintenance, Repair, and Retrofit conducted by the State University of New York at Stony Brook.

**Determination of Appeal**

**SF–20250188**

Contract Number – C004541

November 13, 2025

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The Office of the State Comptroller ("OSC" or "Office") has reviewed the above-referenced procurement conducted by the State University of New York at Stony Brook ("SBU") for ADA Compliant Automatic Door Operation Install, Maintenance, Repair, and Retrofit services ("Door Repair Services"). This Office has determined the grounds advanced by Door Automation Corp. ("DAC") in its Appeal are of sufficient merit to overturn the contract award made by SBU and, therefore, the Appeal is upheld. As a result, this Office is today returning non-approved the SBU contract with Island Master Locksmith, LLC ("IML") for Door Repair Services.

## BACKGROUND

### Facts

On March 12, 2025, SBU issued Invitation for Bid No. 24/25-142MC ("IFB") soliciting bids for Door Repair Services.[1] The IFB sought to procure "all necessary labor, materials, equipment, and services to install, maintain/repair, retrofit, and inspect/test ADA-compliant automatic door operators. . . at various locations on main campus [and at] other off-site properties belonging to, operated or managed by [SBU]" (IFB, at p. 1).[2]

The IFB indicated each bid would be "screened for completeness and conformance with [the] requirements [ ] as set forth in this IFB" (IFB, at p. 3). The IFB further indicated that "SUNY will conduct a comprehensive review of each responsive bid submitted in accordance with the terms of this IFB" and "the award will be by grand total to the lowest responsible, qualified bidder who meets all qualifications and specifications" (*Id.*). The IFB provided that "[t]he lowest cost proposal needs to meet the bidder's references and will be evaluated," "a committee [would] review the response to the Bidder's References" and "[SBU] reserves the right to contact client references to validate required experience" (*Id.*).

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[1] *See* Discussion section below for consideration of SBU's decision to use an IFB to procure services.
[2] The main body of the IFB is not paginated. For purposes of this Determination, this Office includes page numbers as they would have appeared, if included.

SBU received five proposals by the bid opening date of April 15, 2025, including a proposal from DAC. On April 29, 2025, DAC received a notice of non-award. On May 9, 2025, DAC submitted a protest of the contract award to SBU ("DAC's Protest to SBU") pursuant to SBU's bid protest procedures, as contained in the IFB (IFB, at p. 4). IML responded to the Protest on June 10, 2025 ("IML's Answer to DAC's Protest to SBU"). SBU denied the Protest on June 26, 2025 ("SBU's Protest Determination").

DAC appealed SBU's Protest Determination to SBU on July 14, 2025 ("DAC's Appeal to SBU") pursuant to SBU's bid protest procedures. IML answered DAC's Appeal to SBU on August 5, 2025 ("IML's Answer to DAC's Appeal to SBU"). SBU denied DAC's appeal on August 12, 2025 ("SBU's Appeal Determination").

Subsequently, on August 26, 2025, DAC submitted an appeal of SBU's Appeal Determination to this Office for review ("Appeal"). On September 2, 2025, SBU submitted the SBU / IML contract for Door Repair Services, which is the subject of the Appeal, to this Office for review. On September 3, 2025, IML answered the Appeal ("IML's Answer"). SBU answered the Appeal on September 5, 2025 ("SBU's Answer"). DAC provided an additional letter in support of its Appeal, to this Office on October 3, 2025 ("DAC's Supplement"). On October 10, 2025, IML provided an additional letter in support of its Answer, to this Office ("IML's Supplement").[3]

**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 regulations setting forth the procedure ("OSC Protest Procedure") to be used by an interested party seeking to challenge a contract award by a State agency (*see* 2 NYCRR Part 24). The OSC Protest 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 determination, the Appeal is governed by 2 NYCRR § 24.5.

In the determination of the Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by SBU with the proposed SBU / IML contract;

2. the correspondence between this Office and SBU arising out of this Office's review of the proposed SBU / IML contract; and,

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

[3] Pursuant to 2 NYCRR § 24.5(d), the final submissions permitted as of right under OSC's Protest Procedure were SBU's and IML's Answers. Nonetheless, this Office considered DAC's and IML's Supplements.

a. DAC's Protest to SBU;
b. IML's Answer to DAC's Protest to SBU;
c. SBU's Protest Determination;
d. DAC's Appeal to SBU;
e. IML's Answer to DAC's Appeal to SBU;
f. SBU's Appeal Determination;
g. Appeal;
h. IML's Answer;
i. SBU's Answer;
j. DAC's Supplement; and
k. IML's Supplement.

**ANALYSIS OF THE APPEAL**

**Appeal to this Office**

In its Appeal, DAC challenges the procurement conducted by SBU on the following grounds:

1. The IFB is entirely improper because it is vague and ambiguous with respect to the requirements necessary for bidders to be responsive and ignores industry-standard certifications.

2. IML lacked the qualifications required by the IFB at the time of bid submission.

3. SBU improperly allowed IML to supplement its deficient bid to become responsive to the requirements of the IFB.

4. By failing to adequately consider DAC's impeccable record of past performance and awarding the contract to IML, SBU violated the statutory requirement to award contracts to the lowest responsible bidder.

5. IML was not a responsible bidder at the time of bid.

**SBU's Answer to the Appeal**

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

1. DAC cannot raise new grounds of protest related to the IFB that it did not properly raise with SBU in its agency level protest process[4], and, in any event DAC provides no support for its argument that the IFB is vague.

[4] This Office's review of the procurement record, including any bid protests, is governed by SFL § 112, and such review may not be limited by an agency's procedures. Therefore, this Office will review the grounds for appeal raised by DAC as identified herein.

2. IML met the qualifications required by the IFB at the time of bid submission.

3. SBU did not permit IML to cure deficiencies in its bid as none existed.

4. SBU properly awarded the contract to IML as the lowest responsive and responsible bidder.

5. SBU found IML to be a responsible bidder and DAC has not provided any evidence to the contrary.

**<u>IML's Answer to the Appeal</u>**

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

1. DAC cannot now assert that the IFB is ambiguous as DAC failed to raise this ground throughout the agency level protest process with SBU.[5]

2. IML met the qualifications required by the IFB at the time of bid submission.

3. IML did not submit a deficient bid that needed curing and properly discussed the method of contract performance with SBU.

4. IML satisfied the IFB requirements at a lower price than DAC, accordingly, SBU properly awarded the contract to IML as the lowest responsive and responsible bidder.

5. DAC's allegations that IML is non-responsible are unsupported.

**DISCUSSION**

**<u>Disclosure of Responsiveness Requirements</u>**

DAC asserts that "the IFB is and must be deemed entirely improper" because "the IFB wholly lacks any real measure of clarity and even minimum specificity with regard to the requirements necessary for bidders . . . such that an award based on such vague and ambiguous requirements can only be deemed arbitrary and capricious" (Appeal, at pp. 4, 5). Specifically, DAC asserts that "[t]he IFB required the successful bidder to perform all tasks normally associated with [ ] repair/maintenance and/or retrofits of certain types of ADA-compliant door equipment . . . with all licenses, permits, and any other certification required . . . [and] to utilize [ ] [Original Equipment Manufacturer ("OEM")] parts and [be] authorized to uphold all manufacturers warranties . . . [w]ithout reference to recognized industry-standard certifications, objective staffing requirements, or demonstrated ability to source the required OEM parts . . . ." (*Id.*, at p. 4 (internal quotations omitted)).

SBU counters that "DAC provides no support for its novel argument that the IFB was vague" (SBU's Answer, at p. 2).

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[5] *See* fn.4, *supra*.

State Finance Law provides that, generally, contracts for services shall be awarded on the basis of "best value" to a responsive and responsible offeror, considering both technical and cost factors (SFL § 163(4)(d); *see Transactive Corp. v. State Dept. of Social Services*, 236 A.D.2d 48, 53 (App. Div. 3d Dep't 1997), *aff'd on other grnds*, 92 N.Y.2d 579 (N.Y. 1998) ("In awarding a contract for services, a State agency generally cannot rely solely on price as the determinative factor but must engage in a cost-benefit analysis since . . . such a contract must be awarded on the basis of best value, a method that optimizes quality, cost and efficiency among responsive and responsible bidders")). On the other hand, State Finance Law provides that award made on the basis of lowest price to a responsive and responsible offeror is required to procure commodities (SFL § 163(3)(a)(ii)). However, New York State Procurement Guidelines acknowledge that it may be appropriate to award certain services contracts to the lowest-priced responsive and responsible bidder, where the services are routine in nature and the solicitation sufficiently defines the qualitative requirements, so that there is little room for technical variances which will have any meaningful value to the procuring agency – essentially making the services akin to a commodity where the cost-benefit analysis weighs in favor of award to the lowest cost bid (*see* NYS Procurement Guidelines (Revised August 2025), Section 4.5.2 (providing that "[f]or certain service [ ] procurements where qualifications can be determined on a pass-fail basis, best value can be equated to low price").

Moreover, State Finance Law requires that the solicitation issued by the procuring State agency must "prescribe the minimum specifications or requirements that must be met to be considered responsive . . ." (SFL § 163(9)(b)). A solicitation with award based on lowest-price "must identify all the minimum qualifications and/or requirements the vendor must meet," "it must disclose in the solicitation both the qualification criteria and that bidders not meeting these criteria will be eliminated without further evaluation" and "[the] [m]inimum qualification criteria [must be] scored on a pass/fail basis" (NYS Procurement Guidelines (Revised August 2025), Sections 4.3, 4.5). SUNY has also established a policy, applicable to SBU, that permits procurement of services on the basis of lowest price where such services "can be translated into exact specifications" (*see* SUNY Purchasing and Contracting – Procurement Procedure, dated September 5, 2025 ("SUNY Policy") (defining IFB as "[a] form of solicitation used for procurements where the needed commodities, services or technology can be translated into exact specifications and the award can be made on the basis of lowest price or best value when the best value determination can be made on price alone")).

Here, SBU chose to award a contract for Door Repair Services to the lowest responsive and responsible bidder using an IFB. The IFB set forth certain questions that bidders were required to respond to with a "yes" or "no" to show responsiveness (IFB, Questions Attachment). One question required bidders to confirm understanding and agreement to the "Detailed Specifications and Scope" attachment; a response of "no" would "be considered non-responsive" (*Id.*, Question 1.2.1). At issue here is whether the IFB adequately prescribed the minimum specifications or requirements that must be met to be considered responsive, "translat[ing them] into exact specifications" such that responsiveness could be determined on "a pass-fail basis." As set forth more fully below, based on our review of several IFB requirements against this standard, we determined the IFB did not adequately prescribe the minimum requirements that must be met to be considered responsive, as such the IFB requirements were not "translated into exact specifications." Accordingly, SBU did not demonstrate that making an award based on lowest price using an IFB was the appropriate method of procurement for the Door Repair Services.

1. <u>"Licenses, Permits, and Any Other Certification" Requirement</u>

The IFB set forth the following requirement: "Bidder must possess and provide all licenses, permits and any other certification required to engage and perform the required services [and] must ensure that licenses will not expire during the contract period" (IFB, Detailed Specifications and Scope Attachment, at p. 1). The IFB also required bidders to "upload all applicable licenses" (IFB, Questions Attachment, Question 4.2.1). In response to a question asked by OSC[6] during review of the procurement record, SBU indicated that it "determined compliance [with this requirement] would be demonstrated through evidence of one or more of the following: 1. AAADM Certification [ ], OR 2. Locksmith Licenses, OR 3. OSHA cards for field personnel" (SBU's Response to OSC's Questions, dated October 17, 2025).

The language in the IFB was not precise enough for a bidder to ascertain what particular licenses, permits or certifications were needed. The broad language of the IFB left bidders to interpret what was required. Although SBU articulated specifically what it would have accepted, it did so after-the-fact upon questioning by this Office, instead of when it was required to do so - in the IFB. Accordingly, we find that the IFB did not adequately prescribe the minimum requirements that needed to be met by a bidder in order to be considered responsive.

DAC also specifically contends "[t]here is an industry-trusted certification issued by the American Association of Automatic Door Manufacturers (AAADM) for mechanics and technicians who perform service on ADA-compliant door operators [which] the IFB ignores [ ] in print" but that SBU did subsequently determine "should have been, but [was] not, made [a] requirement[] under the IFB" (Appeal, at pp. 6, 9). SBU counters that "DAC continues to argue, erroneously, that a specific number of [A]AADM-certified technicians were required to perform the anticipated workload, but no such requirement is reflected in the IFB" (SBU's Answer, at p. 2). IML responds that "the IFB does not require bidders or the awardee to employ any specified number of AAADM-certified technicians" (IML's Answer, at p. 4). IML asserts that "[t]he [IFB] places only two requirements on bidders to be considered [responsive] and eligible for award [and] [n]othing in this language requires IML or any other bidder to submit any [ ] AAADM certifications" (*Id.*).

This Office's review of the procurement record reflects that SBU did establish objective requirements to determine whether a bidder had the requisite licenses and certificates: the bidder needed to submit proof of either AAADM certification, locksmith licenses, or OSHA cards for field personnel. It is incumbent upon the agency to assess its needs in relation to a particular program and develop solicitation documents that effectively meet those needs, including any mandatory requirements. Generally, this Office gives significant deference to a State agency in matters within that agency's expertise and that are supported by a rational basis in the procurement

[6] OSC asked SBU, "Please specify what [SBU] considered as sufficient regarding licenses, permits, and certifications to satisfy the requirement in the IFB. Please provide any lists, instructions, and documentation used by evaluators to ensure offerors met this specification."

record. Accordingly, this Office will not disturb the requirements developed by SBU; however, as set forth above, such requirements were required to be clearly set forth in the IFB and SBU erred in not including them. We also note that there is no evidence in the procurement record to show whether such requirements were established prior to the receipt of bids as statutorily required (*see* SFL § 163(2)(b)).

2. <u>"Sufficient Staffing" Requirement</u>

The IFB set forth the following requirement: "The successful bidder shall be responsible for providing sufficient staffing in order to complete 100% of the work as specified. Vendor will show evidence of qualified mechanics being able to provide service/repairs and installations utilizing UL approved materials and OEM parts and who are authorized to uphold all manufacturers warranties of swinging and sliding door operators. The successful bidder will be required to include with their bid submission evidence (by name and years of experience) of those qualified mechanics who will be assigned to service this contract when called upon. The successful bidder shall provide the resumes of key management and qualified mechanics who will be actively involved in performing the work" (IFB, Detailed Specifications and Scope Attachment, at p. 3; Questions Attachment, Question 3.1.5). In response to a question asked by OSC[7] during review of the procurement record, SBU indicated that "IML submitted a detailed staff roster [ ] identifying personnel by name, years of service, and qualifications [and] SBU sought clarifications from IML . . . regarding the exact number of technicians who handle Automatic Door Operators. IML [ ] indicat[ed] they have 6 master door technicians that can fully diagnose, service and repair automatic doors and operators, prepare proposals and order parts [and] another 22 technicians that can diagnose and provide service under the supervision of one of the other 6 master techs. [SBU] reviewed [ ] and confirmed that IML has sufficient staffing capacity to fulfill the contract requirements" (SBU's Response to OSC's Questions, dated September 26, 2025).

The language in the IFB was not precise enough for a bidder to ascertain exactly what was needed for "sufficient staffing" and "qualified mechanics." Again, the broad language of the IFB left bidders to interpret what was required. Significantly, instead of the requirements being specific enough to be evaluated by SBU on a "pass-fail basis," SBU needed to seek additional information from IML in order to determine whether IML was responsive to the vague standard set in the IFB. If evaluation of technical aspects for the provision of Door Repair Services, such as whether the staffing proposed was sufficient, is needed, award made on the basis of best value, taking into account both technical and cost factors, would be the required method of award (*see* SFL § 163(4)(d), (9)(b)). Accordingly, SBU should reconsider the appropriate method of award for Door Repair Services.

Accordingly, we find that the IFB did not adequately prescribe the minimum requirements that needed to be met by a bidder in order to be considered responsive.

[7] OSC asked SBU, "Section 15 under Detailed Specifications in the IFB states, 'The successful bidder shall be responsible for providing sufficient staffing in order to complete 100% of the work as specified.' How did SUNY determine whether IML had sufficient staff to perform the work?"

3. Ability to Service OEM Parts

The IFB set forth the following requirement: "Vendor will show evidence of qualified mechanics being able to provide service/repairs and installations utilizing . . . OEM parts and who are authorized to uphold all manufacturers warranties of swinging and sliding door operators" (IFB, Detailed Specifications and Scope Attachment, at p. 3). The IFB provided a "Representative Sample of Manufacturers for Existing Automatic Door Operators" that included the following OEMs: Stanley, Record, Power Access, Norton, Nabco, and Dormakaba; and, the IFB indicated that "[t]he successful bidder shall be provided upon request, a complete list of ADA Compliant Door Units and their corresponding locations" (*Id.*, at p. 7). The IFB also required bidders to respond to the "representative sample" of OEMs with a statement confirming the requirement (IFB, Questions Attachment, Question 5.1.1). In response to a question asked by OSC during review of the procurement record, SBU confirmed that it was a "mandatory requirement" of the IFB for the successful bidder "to be able to provide service/repairs and installations utilizing . . . OEM parts" and to be "able to service the Representative Sample of Manufacturers for Existing Automatic Door Operators" (SBU's Response to OSC's Questions, dated September 26, 2025).

The language in the IFB was not precise enough for a bidder to ascertain all of the OEM parts the bidder would be required to provide, service, repair, and uphold manufacturers' warranties for. The IFB required bidders to attest to being able to provide, service, repair, and uphold manufacturers' warranties for all OEM parts, but only provided a representative sample of the OEMs. SBU articulated that only the successful bidder would be provided with full information on the ADA Compliant Door Units, and only then upon request. Accordingly, we find that the IFB did not adequately prescribe the minimum requirements that needed to be met by a bidder in order to be considered responsive.

Based on the above, we find that the IFB issued by SBU for the procurement of Door Repair Services did not translate the applicable requirements into "exact specifications" and did not comply with applicable requirements of State Finance Law requiring that a solicitation prescribe the minimum specifications or requirements that must be met to be considered responsive. The very existence of a variety of acceptable alternative licenses not delineated in the IFB and the relative nature of the "sufficient" staff qualifier absent any parameters in the IFB for objectively determining what that would entail in the context of Door Repair Services, undermine any contention that the published specifications were "exact" as required under the SFL, NYS Procurement Guidelines and SUNY Policy. As such, responsiveness could not be determined on a "pass-fail" basis, as required by the NYS Procurement Guidelines and the SUNY Policy in order for award based on lowest price to be appropriate for services, rather than award based on best value, with consideration of both technical and cost factors, as statutorily required. In essence, SBU effectively conducted a best value procurement packaged as a lowest cost procurement. As these two methods are alternative mechanisms for purchasing goods and services, their respective qualification, scoring and evaluation criteria are not interchangeable and could lead to different results in terms of the universe of potential bidders and the ultimate awardee.

Therefore, we are upholding the Appeal.

**Responsiveness of IML's Bid**

DAC asserts that "[t]he winning bidder (IML) did not meet the stated qualifications at the time bids were opened" (Appeal, at p. 5). Specifically, DAC contends that "[IML] lacked a sufficient number of certified technicians to perform the anticipated workload and could not demonstrate the ability to source the OEM parts necessary to cover nearly half of [SBU's] ADA-compliant inventory without violating the manufacturers' warranty" (*Id.*).

SBU responds "the winning bidder (IML) did, in fact, meet the stated qualifications in the IFB" (SBU's Answer, at p. 2). Additionally, SBU contends that "DAC has not provided any factual support that IML did not meet the IFB requirements at the time of submission" (*Id.*, at p. 3).

IML contends that it "submitted a fully compliant bid and [ ] DAC's allegations to the contrary are baseless" (IML's Answer, at p. 8). Additionally, IML responds that "DAC's argument . . . ignores the fact that the IFB does not require bidders or the awardee to employ any specified number of AAADM-certified technicians" and "the IFB does not require bidders to document, or produce evidence demonstrating, any sort of existing relationship with OEMs" (*Id.*, at pp. 4, 6).

The issue raised by DAC is whether SBU appropriately determined IML to be responsive, specifically as to the requirement to provide sufficient qualified staffing and ability to service OEM parts. A "responsive" bidder is a "bidder [ ] meeting the minimum specifications or requirements as prescribed in a solicitation for commodities or services by a state agency" (SFL § 163(1)(d)). As set forth above, the "sufficient staffing" and ability to service OEM parts requirements of the IFB, were not adequately descriptive for a bidder to know what was necessary to be deemed responsive. Accordingly, we do not find sufficient basis in the procurement record to support SBU's determination that IML's bid was responsive to the requirements of the IFB.

**Clarifications of IML's Bid**

DAC asserts that "[i]nstead of evaluating bids as submitted, [SBU] invited the winning bidder [(IML)]to supplement its deficient bid to justify its award . . . [whereas] other bidders, including DAC, were not given any similar opportunity to revise or enhance their submissions" (Appeal, at p. 8 (emphasis omitted)). DAC asserts "[SBU's] response was not to reject the IML bid, but to allow IML to 'cure' these deficiencies post-bid by submitting timetables for additional [AAADM] certifications and supplementing deficient information (*Id.*, at p. 6).

SBU asserts that "[SBU] never engaged in conversations with IML to allow them to cure any deficiencies (as no deficiencies existed)" (SBU's Answer, at pp. 2–3). SBU further contends "the only post-bid communications between [SBU] and IML related to DAC's bid protest and/or involved further confirmation of information that IML had already properly submitted during the bidding process" (*Id.*, at p. 2).

IML responds that "[t]he record directly contradicts the underlying premise of DAC's argument – that IML submitted a deficient bid that it needed 'cure' – and there is nothing improper with [SBU] discussing the method of contract performance with its identified awardee, IML" (IML's Answer, at p. 8).

Pursuant to State Finance Law, "[w]here provided in the solicitation, state agencies may require clarification from offerers for purposes of assuring a full understanding of responsiveness to the solicitation requirements" (SFL § 163(9)(c)). Clarifications are not intended to supplement or correct material information in a bid to make it responsive to the solicitation requirements, but rather to confirm immaterial information or correct a mere irregularity. If allowing supplementation or correction of a bid would impair the interests of the procuring agency, place the successful bidder in a position of unfair economic advantage, or place other bidders at a competitive disadvantage, it is not permissible. *See LeCesse Bros. Contracting*, 62 A.D.2d 28 (App. Div. 4th Dep't 1978), *aff'd* 46 N.Y.2d 960 (N.Y. 1979).

The IFB provided that SBU could "[r]equire clarifications from Bidders for purposes of assuring a full understanding of responsiveness, and permit revisions from all Bidders determined to be susceptible to contract award prior to approval" (IFB, at p. 6).

As set forth above, the procurement record reflects that instead of the requirements for a bidder to provide sufficient and qualified staff being specific enough to be evaluated by SBU on a "pass-fail basis," SBU needed to seek additional information from IML in order to determine whether IML was responsive. By doing so, SBU was providing IML with an opportunity to supplement a material aspect of its bid to determine whether it was responsive, an opportunity not provided to other bidders and more than a mere clarification. Accordingly, we find that the opportunity provided by SBU to IML was not an appropriate clarification, but an impermissible supplement to the bid to address a vague IFB requirement.

**<u>Evaluation of DAC's Bid</u>**

DAC asserts that despite the fact that it is "the incumbent provider (and second lowest bidder), with an impeccable history of performance under prior contracts with [SBU]" and it has "consistently delivered services on time, by qualified technicians, on budget, and without material deficiency," SBU "ignored" its "impeccable record" (Appeal, at pp. 7-8). DAC further asserts that SBU "discard[ed] the incumbent in favor of an unqualified bidder, who did not even meet minimum requirements at bid submission [which] defies [ ] the statutory mandate to award contracts to 'the lowest responsible bidder'" (*Id.*, at p. 8).

SBU asserts that "DAC was not the lowest responsive and responsible bidder to the IFB" (SBU's Appeal Determination, at p. 23). SBU further asserts that "DAC's argument implies that its 'impeccable record' should be the deciding factor in awarding the bid under the IFB [and i]t is not" (SBU's Answer, at p. 3).

IML responds that "[its] bid fully satisfied the IFB requirements at a lower price than offered by DAC, and [SBU's] selection of IML's bid as the lowest-priced, responsible bidder fully comported with the IFB" (IML's Answer, at p. 8). IML further contends that "DAC's argument constitutes nothing more than mere disagreement with [SBU's] evaluation [and t]here is nothing to indicate that DAC's incumbent performance was 'ignored,' but there also was no requirement that it be dispositive" (*Id.*, at p. 10).

The IFB specified that "[e]ach proposal received by the due date and time will be screened for completeness and conformance with the requirements for the proposal submission as set forth in this IFB" (IFB, at p. 3). Subsequently, "[t]he lowest cost proposal after Administrative Review will advance to a committee to review the response to the Bidder's References . . ." (*Id.*).

The procurement record reflects that SBU screened each proposal received for completeness, and then SBU continued to review the references of the lowest cost proposal, IML. Accordingly, SBU followed its prescribed process for evaluating bids, notwithstanding the deficiencies in the solicitation identified above, and there is no evidence in the procurement record to support the contention that SBU improperly disregarded DAC's bid.

**<u>Responsibility of IML</u>**

DAC asserts that "at the time of bid, [IML] was not and could not have been fairly determined to be a 'responsible bidder' as the law defines the term" (Appeal, at p. 13). SBU counters that "DAC has been wholly unable to point to any evidence that IML is in any way not responsible under New York [State] Finance Law" (SBU's Answer, at p. 2). IML counters that "DAC's arguments [are] entirely premised on an incorrect characterization of . . . IML as 'unqualified' [that] is based on pure speculation" (IML's Answer, at p. 9).

"Prior to making an award of contract, each state agency shall make a determination of responsibility of the proposed contractor" (SFL § 163(9)(f)). For purposes of SFL § 163, "'[r]esponsible' or 'responsibility' means the financial ability, legal capacity, integrity, and past performance of a business entity" (SFL § 163(1)(c)).

This Office's review of the procurement record confirms that SBU conducted a vendor responsibility review of IML and reviewed IML's financial ability, legal capacity, integrity, and past performance, as statutorily required. The procurement record reflects that SBU determined IML to be a responsible offeror that can successfully perform the services under the contract. Additionally, as part of the review of the SBU / IML contract, this Office examined and assessed the information provided in the procurement record and conducted an independent vendor responsibility review of IML. Accordingly, we find no basis to disturb SBU's responsibility determination for IML.

**CONCLUSION**

For the reasons outlined above, we have determined the issues raised in the Appeal are of sufficient merit to overturn the contract award by SBU. As a result, the Appeal is upheld and we will not be approving the SBU / IML contract for Door Repair Services.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

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| In the Matter of the Appeal filed by Martin's Custom Tidesides with respect to the procurement of construction services for the Yanty Marsh Restoration Project at Hamlin Beach State Park conducted by the New York State Office of Parks, Recreation and Historic Preservation. | **Determination of Appeal**<br><br>**SF–20250205** |
| Contract Number – D006017 | January 28, 2026 |

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The Office of the State Comptroller ("OSC" or "Office") has reviewed the above-referenced procurement conducted by the New York State Office of Parks, Recreation and Historic Preservation ("OPRHP") for construction services for earthwork, exterior improvements, waterway and marine construction in support of the Yanty Marsh Restoration Project at Hamlin Beach State Park ("Marsh Services"). We have determined the grounds advanced by Martin's B & A Enterprises LLC d/b/a Martin's Custom Tidesides ("MCT") are insufficient to merit overturning the contract award made by OPRHP and, therefore, we deny the Appeal. As a result, we are today approving the OPRHP contract with LDC Construction Company Inc. ("LDC") for the Marsh Services.

## BACKGROUND

### Facts

On September 2, 2025, OPRHP issued an invitation for bids ("IFB")[1] to procure the Marsh Services for "[h]abitat enhancement within Yanty Marsh including excavating channels and potholes with stands of cattail, invasive species control, placement of logs, native plantings, and removal, transport, and placement of soils within Hamlin Beach State Park" (IFB, Technical Specifications, at Section 1.4.A.1).

The IFB specified that OPRHP intended to award the contract to "the lowest responsible and reliable bidder as will best promote public interest" (IFB, Notice to Bidders, at p. 11).

OPRHP received two (2) proposals by the bid opening date of September 24, 2025, including a proposal from MCT. On September 25, 2025, MCT received a notice of non-award from OPRHP, indicating that MCT's "bid submission [was] disqualified due to being incomplete [because it] was missing [the Department of Labor ("DOL")] registration certificate" and "[a]s

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[1] The IFB entitled "Project Manual: D006017, Yanty Marsh Restoration, Hamlin Beach State Park" included a Notice to Bidders, Instructions to Bidders, General Conditions, and Technical Specifications, as well as various other information and applicable amendments.

stated on the Bid Form under Labor Law Article 8, Bidders must prove they are registered at the time of bid opening by submitting a digital copy of the company's registration certificate with their bid."

Thereafter, on September 29, 2025, MCT submitted a protest of the contract award to OPRHP ("Protest") pursuant to OPRHP's bid protest procedures, as contained in the IFB (IFB, Notice to Bidders, at pp. 6-7). OPRHP denied the Protest in OPRHP's written determination on October 8, 2025 ("Protest Determination"). MCT then appealed such denial to this Office on October 15, 2025 ("Appeal"). On November 18, 2025, OPRHP responded to the Appeal by referring to their position as set forth in the Protest Determination. On November 14, 2025, OPRHP submitted the OPRHP/LDC[2] contract for Marsh Services, which is the subject of the Appeal, to this Office for review.

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

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

In carrying out this contract approval responsibility, OSC has promulgated regulations setting forth the procedure ("OSC Protest Procedure") to be used by an interested party seeking to challenge a contract award by a State agency (*see* 2 NYCRR Part 24). The OSC Protest 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 determination, the Appeal is governed by 2 NYCRR § 24.5.

In the determination of the Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by OPRHP with the proposed OPRHP/LDC contract;

2. the correspondence between this Office and OPRHP arising out of our review of the proposed OPRHP/LDC contract; and,

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

    a. Protest;
    b. Protest Determination; and
    c. Appeal.

[2] OPRHP notified LDC of contract award via letter, dated October 3, 2025.

## ANALYSIS OF THE APPEAL

### Appeal to this Office

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

1. The IFB required bidders to provide a registration certificate with their bid submission, not a Certificate of Contract Registration, which, if required, needed to be explicitly identified in the IFB by name.

2. OPRHP's disqualification of MCT's bid submission for failing to comply with the Labor Law public work contractor registration requirement in the IFB was in error, as MCT provided a registration certificate with their bid submission.

### OPRHP's Answer to the Appeal

In its Answer,[3] OPRHP contends the Appeal should be rejected and the award upheld on the following grounds:

1. The IFB required bidders to "complete registration prior to bidding on public work projects covered under Article 8 of the Labor Law" which is only complete when DOL issues a certificate of registration and is not satisfied by submitting an application for registration.

2. OPRHP properly disqualified MCT for failing to timely submit proof of having completed registration with DOL.

## DISCUSSION

### The Labor Law Contractor Registration Requirement

MCT claims that "[a]s stated on the Bid Form under Labor Law Article 8, Bidders must prove they are registered at the time of bid opening by submitting a digital copy of their company's registration certificate with their bid" and "[MCT] submitted [the] certificate of registration issued to [them] for completion of registration" (Appeal, at pp. 1, 3).[4] MCT contends that "[OPRHP] is claim[ing] [MCT] needed to have with [its] bid submission [ ] the 'Certificate of Contractor Registration'"; however, "[n]ot one place in the Notice to Bidders, Project Manual or even the Protest Determination does it call out the 'Certificate of Contractor Registration' being a requirement that needed to be submitted" (*Id.*, at pp. 2, 5). MCT further contends, OPRHP should "[be] clear [on] what needs to be provided" and "[t]he Project manual/notice to bidders should call out the official name of the documents being required" (*Id.*, at pp. 4, 5).

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[3] OPRHP declined to provide a formal Answer to MCT's Appeal. Instead, OPRHP decided to rest on their initial Protest Determination. Therefore, for purposes of this determination, OPRHP's "Protest Determination" and "Answer" are used interchangeably.

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

OPRHP contends that "OPRHP's Notice to Bidders notes, 'Contractors must complete registration prior to bidding on public work projects covered under Article 8 of Labor Law'" (Answer, at p. 1).[5] OPRHP further asserts that "[t]he act of submitting the application for registration does not satisfy this requirement [as] [DOL] may find applicants unfit and deny the application" as such, "[t]he process of registration is only complete when DOL issues a Certificate of Registration" (*Id.*).

Pursuant to Public Buildings Law § 8(6), "[a]ll contracts for amounts in excess of five thousand dollars for the work of construction, reconstruction, alteration, repair or improvement of any state building, whether constructed or to be constructed must be offered for public bidding and may be awarded to the lowest responsible and reliable 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, an IFB should be objectively clear in setting forth what is required for a bidder to meet its requirements and be qualified.[6]

The Yanty Marsh Restoration Project at Hamlin Beach State Park is a public works project subject to the requirements of Article 8 of the Labor Law. Labor Law § 220-i(6) provides that "[n]o contractor shall bid on a contract for public work unless such contractor is registered" with the New York State Department of Labor Public Work Contractor and Subcontractor Registry (hereafter "Registry") and contractors "must submit their certificate of registration at the time the bid is made" (hereafter "Registration Requirement"). Furthermore, "**[a]pplications for registration shall not be accepted as a substitute for a certificate of registration**" (Labor Law § 220-i(6) (emphasis added)). Mere submission of an application does not guarantee a contractor will be registered, as DOL must review the form and documentation submitted by the contractor to determine where the contractor is fit to be registered (*see* Labor Law § 220-i(4)).

Consistent with the requirements of the Labor Law, the IFB clearly indicated the project is subject to the Registration Requirement and, accordingly, "[b]idders must prove they are registered at the time of bid opening by submitting a digital copy of their company's registration certificate with their bid" (IFB, Notice to Bidders, at p. 2).[7] The IFB further cautioned that "**[f]ailure to provide the registration certificate at bid opening will result in automatic disqualification**" (*Id*. (emphasis in original)).The IFB directed bidders to DOL's public website for additional information and to register (*see id.*, at p. 3).

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

[6] State Finance Law, Article XI, State Purchasing, is instructive here. 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" offeror is an "offeror meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency" (SFL § 163(1)(d)).

[7] This requirement was also reiterated on the General Construction Combination Bid Form that was signed and submitted by MCT to OPRHP on September 24, 2025.

DOL's public website makes clear on the Registry landing page that "it may take approximately 3-4 weeks to review a registration application and issue a Certificate of Registration. Registration is not valid until a Certificate of Registration has been issued" ("*How to Register for the Contractor and Subcontractor Registry*," https://dol.ny.gov/how-register-contractor-and-subcontractor-registry (January 2026)). Responses to Frequently Asked Questions posted on DOL's public website expounded on the Registration Requirement, by indicating, in response to the question "Will the contractor or subcontractor receive proof that they are registered with NYSDOL?" that "Yes, unless the Commissioner finds the applicant unfit, a Certificate of Registration with a unique registration number will be issued to the applicant electronically through the Contractor Registry portal" ("*Frequently Asked Questions for NYSDOL Contractor Registry,"* https://dol.ny.gov/frequently-asked-questions-nysdol-contractor-registry (January 2026)).

Thus, it is clear under the applicable law and the IFB that a contractor must be registered with DOL's Registry and provide proof of same at the time of their bid. It is also clear from applicable law and guidance referenced in the IFB that a certificate of registration containing a unique registration number is appropriate confirmation of registration, and an application does not suffice. In light of the applicable statutory standards, as set forth in the IFB, we will determine whether MCT complied with the Registration Requirement.

**MCT's Compliance with the Labor Law Contractor Registration Requirement**

MCT contends that "[OPRHP] [is] attempting to proclaim [MCT's] registration certification [ ] provided [is instead] proof of application and payment"; however, "[t]hat's what a registration certificate is" (Appeal, at p. 4). MCT asserts that its "bid submission included the digital copy of [MCT's] registration certificate that [MCT] obtained by registering" (*Id.*, at p. 2). To support their stance, MCT provided a screen capture of the DOL Contractor Registry webpage reflecting confirmation of [its] payment for "1 Public Work Contractor Certificate (PW55)" with an "issuance date [of] 9/23/2025 [which was] [p]rior to the date of bid [opening]" (*See* Protest, at pp. 1, 2).[8] MCT avers that this confirmation demonstrates compliance with the Registration Requirement, and that the screen capture of "the Registration certificate [MCT] submitted shows [MCT] acted or went through the process of being registered" (*see id.*, at p. 2).

OPRHP contends that "[t]he document [MCT] provided in their bid was the proof of application and payment" which could not "be accepted by OPRHP as it [did] not meet the requirements of the Law" (Answer, at pp. 1, 2). OPRHP asserts "[c]ontractors must complete registration prior to bidding on public work projects covered under Article 8 of Labor Law. The act of submitting the application for registration does not satisfy the requirement" (*Id.*, at p. 1).

The procurement record shows that the documentation contained within MCT's bid did not comply with the Registration Requirement set forth in the Labor Law and the IFB. As set forth more fully above, pursuant to the Labor Law and the IFB, bidders were required to complete registration and submit proof of same with their bid. The IFB made clear that bids for this project

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

were due by September 24, 2025, at 10:30 a.m., and any contractor who failed to obtain a registration certificate by that date would be automatically disqualified (IFB, Notice to Bidders, at pp. 1, 2). Here, MCT posits that they received the requisite registration certificate on September 23, 2025, and submitted same with their bid as required; however, the record shows only that MCT applied for and paid the non-refundable fee to the Registry on September 23, 2025, not that MCT was actually registered at that time. The documentation submitted by MCT to show "registration" shows only application for registration – the image supplied does not contain MCT's unique registration number and also notes that, "applications will be processed by the Department of Labor staff within 3 weeks" (*see* Protest, at p. 2). However, in order for a vendor to be registered, DOL must have issued proof of registration with a unique registration number (i.e., a certificate) to the applicant. In fact, the record shows that MCT did not receive its certificate of registration until September 25, 2025, after bids were due. Accordingly, it was factually impossible for MCT to submit their proof of registration at the time bids were due in compliance with the Registration Requirement.

Therefore, as MCT did not submit proof of registration with its bid as required by Labor Law § 220-i as well as the IFB, we find no basis to disturb the disqualification of MCT's bid by OPRHP.[9]

**CONCLUSION**

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the contract award by OPRHP. As a result, the Appeal is denied, and we are today approving the OPRHP/LDC contract for Marsh Services.

[9] Neither OPRHP nor OSC has the authority to waive compliance with this statutory mandate.

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Bid Protests filed by Amneal Pharmaceuticals, LLC and Emergent Devices, Inc. with respect to the procurement of Naloxone and Fentanyl Test Strips conducted by the New York State Department of Health.

Contract Number – DOH01-C041106-3450000

**Determination of Bid Protests**

**SF–20250128**
**SF-20250222**

February 19, 2026

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The Office of the State Comptroller ("OSC" or "Office") has reviewed the above-referenced procurement conducted by the New York State Department of Health ("DOH") to provide an FDA-approved intranasal naloxone variation of 4 mg in 0.1 mL solution ("Naloxone") and fentanyl test strips ("FTS") to registered Opioid Overdose Prevention Programs. We have determined the grounds advanced by Amneal Pharmaceuticals, LLC ("Amneal") are not of sufficient merit to overturn the contract award made by DOH; however, we have determined that the grounds advanced by Emergent Devices, Inc. ("Emergent") are of sufficient merit to overturn the contract award made by DOH and, therefore, we uphold the Protest.

Specifically, as set forth more fully below, we find that (1) the cost evaluation methodology disclosed in DOH's invitation for bids ("IFB") did not have a reasonable relationship to the actual costs to be incurred under the contract for FTS, and therefore we cannot find that DOH awarded the contract to the lowest-priced bidder as required by applicable law; and, (2) the requirement in the IFB for the awarded vendor to contract with a lab to validate each lot of FTS before distribution was not sufficiently defined, such that DOH did not adequately prescribe the minimum requirements that needed to be met by a bidder in order to be considered responsive. As award was made by DOH based on a total bid price comprised of the combined pricing for both Naloxone and FTS, the flaws in the procurement related to FTS cannot be severed from the procurement. As a result, we are today returning non-approved the DOH contract with Padagis US, LLC ("Padagis") for Naloxone and FTS.

## BACKGROUND

### Facts

On April 29, 2025, DOH issued an IFB to procure Naloxone and FTS "to supply the New York State registered Opioid Overdose Prevention Program" (IFB, at § 4.2).[1]

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[1] "In December of 2024, Legislation S.4393/A.5004 was signed by Governor Hochul to increase community access to [FTS]. The legislation requires that the Department supply [FTS] when state-registered Opioid Overdose Prevention Programs order naloxone" (IFB, at § 2.1; *see* Public Health Law § 3309(3-a)).

The IFB set forth mandatory minimum qualifications that Bidders needed to meet in order to be responsive, as follows:

- The Bidder must have a minimum of two (2) years of experience manufacturing, direct shipping, distributing, and tracking a high volume (est. 45,000 per month) of opioid antagonist of the naloxone classification shipments to the requestor;
- The Bidder must have two years' experience providing a Food and Drug Administration (FDA) approved intranasal naloxone variation 4mg in a 0.1 mL solution or injectable naloxone single use; and
- The Bidder must have one dedicated contract with a shipping company (examples: United Parcel Service (UPS), Federal Express (FedEx), etc.) to deliver product within 3-5 business days to the DOH registered program locations and provide a tracking number for the product shipment. This includes shipping to residential and business locations.

(IFB, at § 3.1). The IFB explicitly provided that "[f]ailure to meet these Minimum Qualifications will result in a Bid being found non-responsive and eliminated from consideration" (IFB, at § 3.1). The IFB specified that DOH would "award one contract as described in [the] IFB to the responsible and responsive Bidder who offers the lowest total bid price" (IFB, at § 8). The IFB articulated that DOH would "examine all Bids [that were] received in a proper and timely manner" and that "[t]he Bid containing the lowest price offered [would] be further evaluated to determine if it meets all bid submission requirements" (IFB, at § 8.2).

The IFB indicated that the lowest total bid price would be determined by combining the pricing bid for Naloxone and FTS (*see* IFB, at Attachment B, *Bid Form*). Bidders were required to submit annual unit pricing for Naloxone which was multiplied by estimated annual quantities, to derive the Naloxone pricing (*see id.*). Bidders were required to submit pricing for a single FTS, with no estimated annual quantities provided (*see id.*).

Amneal filed a protest with this Office on June 16, 2025 ("Amneal's Protest"). DOH received four (4) bids by the bid opening date of June 24, 2025, including bids from protestors Amneal and Emergent. On October 16, 2025, both Amneal and Emergent received a non-award letter. Amneal requested a debriefing, which DOH responded to on October 28, 2025. Emergent also requested a debriefing, which DOH provided on November 6, 2025.

Thereafter, on November 14, 2025, Emergent also filed a protest with this Office ("Emergent's Protest"). DOH responded to the Emergent Protest on November 28, 2025 ("DOH's Answer to Emergent's Protest") and Emergent submitted a reply on December 3, 2025 ("Emergent's Reply"). DOH submitted the procurement record, including the proposed DOH/Padagis contract, which is the subject of the Protests, to this Office for review on December

8, 2025. DOH responded to the Amneal Protest on December 12, 2025 ("DOH's Answer to Amneal's Protest")[2] and Amneal submitted a reply on December 29, 2025 ("Amneal's Reply").[3]

Subsequently, on January 12, 2026, during this Office's review of the procurement record submitted by DOH, this Office sent questions to DOH, which DOH responded to on January 21, 2026 ("DOH's Responses to OSC's Questions"). On January 26, 2026, Emergent submitted a response to DOH's Responses to OSC's Questions (Emergent's Additional Reply"); and, on January 30, 2026, Amneal submitted a response to same ("Amneal's Additional Reply").[4]

**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 regulations setting forth the procedure ("OSC Protest Procedure") to be used by an interested party seeking to challenge a contract award by a State agency (*see* 2 NYCRR Part 24). The OSC Protest Procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no protest procedure at the agency level, the Protests are governed by 2 NYCRR § 24.4.

In the determination of the Protests, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DOH with the proposed DOH/Padagis contract;

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

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

    a. Amneal's Protest;
    b. Emergent's Protest;
    c. DOH's Answer to Amneal's Protest;

[2] Pursuant to OSC's Protest Procedure, DOH could file an answer with the delivery of the contract to this Office for review; although DOH's Answer to Amneal's Protest was untimely, this Office exercised its discretion to consider it in making our determination (2 NYCRR §§ 24.4(d)(1), (i)).
[3] Amneal indicated that this submission was an "appeal from the Department of Health's December 12, 2025 denial of Amneal's protest." However, as this Office advised Amneal via email on December 30, 2025, we considered the submission to be a Reply to DOH's Answer pursuant to OSC's Protest Procedures. This is because Amneal had previously submitted a Protest to this Office and such Protest was still pending at the time Amneal's Reply was submitted.
[4] Pursuant to OSC's Protest Procedure, the last submission permitted as of right was Amneal's Reply and Emergent's Reply; although an additional submission was not permitted as of right, this Office exercised its discretion to consider Emergent's and Amneal's Additional Replies in making our determination (2 NYCRR §§ 24.4(f), (j)).

d. DOH's Answer to Emergent's Protest;
e. Amneal's Reply;
f. Emergent's Reply;
g. DOH's Responses to OSC's Questions;
h. Amneal's Additional Reply; and,
i. Emergent's Additional Reply.

**ANALYSIS OF THE PROTESTS**

**Amneal's Protest to this Office**

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

1. DOH's IFB set forth mandatory minimum qualifications, specifically the two-year experience requirement and the requirement for experience providing naloxone / opioid antagonists, that were unjustifiably narrow and not rationally related to the objectives of the State, unreasonably limiting competition; and,
2. The IFB's mandatory minimum qualifications unnecessarily narrowed the field of potential responsive bidders, creating a situation where only the incumbent Emergent could be responsive, which created an unjustified sole source procurement.

**DOH's Answer to Amneal's Protest**

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

1. DOH established mandatory minimum qualifications for the IFB in accordance with SFL § 163, with the aim of fostering competition as well as including requirements necessary to meet the needs of the State's Opioid Overdose Prevention Program; and,
2. DOH determined that the minimum qualifications offered a competitive environment, and at least five vendors could potentially meet them.

**Amneal's Reply to DOH's Answer**

In its Reply, Amneal argues that:

1. DOH may have improperly waived adherence to the IFB's mandatory minimum qualifications in order to award the contract to Padagis.[5]

[5] Amneal posits that "[t]he specifications would have excluded other generic vendors as well [as Amneal] and probably should have excluded Padagis though [DOH] appears to have made some form of compromise to obtain Padagis' bid price" (Amneal's Reply, at p. 12). Amneal's contention is based on conjecture and there is no evidence in the procurement record to support that DOH waived a mandatory requirement with respect to Padagis' bid, as such, we decline to address it further.

**Emergent's Protest to this Office**

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

1. DOH conducted an unreasonable cost evaluation which failed to account for the total cost of FTS to be provided under the contract, and thus failed to determine which bid offered the lowest price;
2. The requirement to validate the accuracy of FTS was ambiguous and not clearly defined in the IFB; and,
3. The IFB imposed uncapped liability for any negligence associated with the intended off-label use of the procured FTS, which created an unreasonable restriction on competition.

**DOH's Answer to Emergent's Protest**

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

1. DOH has no baseline for potential volume of FTS to be provided, and instead reasonably utilized the cost of one FTS in its cost evaluation;
2. The IFB clearly set forth the validation requirement for FTS; and,
3. The standard liability terms contained in the IFB did not deny Emergent a fair opportunity to compete.

**Emergent's Reply to DOH's Answer**

In its Reply, Emergent further elaborates on the grounds contained in its Protest.

**DISCUSSION OF AMNEAL'S PROTEST**

**Mandatory Minimum Qualifications**

Amneal contends that the "two-year experience requirements [in the IFB] . . . are unnecessary to ensure an adequate supply of naloxone to the [State] or the proper functioning of the State's naloxone program, and instead impose artificial barriers that limit participation from otherwise qualified manufacturers" (Amneal's Protest, at p. 1).[6] Amneal asserts that it "has been marketing [naloxone] for less than two years after receiving FDA approval . . . [yet is] abundantly qualified to meet the State's needs" (*Id.*, at p. 2).

Amneal challenges the following mandatory qualifications, identified in the IFB:

- "The Bidder must have a minimum of two (2) years of experience manufacturing, direct shipping, distributing, and tracking a high volume (est. 45,000 per month) of opioid antagonist of the naloxone classification shipments to the requestor" (hereafter "First Specification").

[6] Amneal's Protest is not paginated. For purposes of this Determination, this Office includes page numbers as they would have appeared, if included.

- The Bidder must have two years' experience providing a Food and Drug Administration (FDA) approved intranasal naloxone variation 4mg in a 0.1 mL solution or injectable naloxone single use (hereafter "Second Specification").

IFB, at § 3.1. Specifically, Amneal challenges whether the two-year experience requirements are necessary (as opposed to a shorter timeframe) and whether experience with naloxone/opioid antagonists is necessary (as opposed to other classes of medication).

DOH responds that "[a]s prescribed by SFL § 163, [DOH] established the Mandatory Qualifications to be the minimally acceptable qualifications that a bidder must meet in order to be deemed responsive, and [DOH] did so with an eye to foster competition while stipulating the criteria necessary to support the breadth, service level and caliber of the [DOH]'s Opioid Overdose Prevention [P]rogram" (DOH's Answer to Amneal's Protest, at p. 3).[7] DOH asserts that "Amneal was not denied a fair opportunity to compete" (*Id.*, at p. 2).

As set forth more fully herein, we find no basis to disturb DOH's First and Second Specifications. We will address each dispute in turn.

1. <u>Requirement for Two-Years of Experience</u>

Amneal contends that the two-year experience requirement in the First Specification "is overly narrow as [it] does not recognize a vendor's experience in running a high-volume, on demand naloxone program for less than two years" (Amneal's Protest, at p. 5). Amneal asserts that "it defies reason for the State to take the position that a bidder that services a naloxone program involving 45,000 units per month for 24 months is qualified to run the State's program, but a bidder that services a naloxone program involving 100,000 units per month for fourteen months is not" (*Id.*). Accordingly, Amneal contends that the two-year experience requirement "is unreasonably and unnecessarily lengthy" and "[a] more reasonable and relevant standard would be a minimum of twelve months of demonstrated experience managing a high-volume distribution program" (*Id.*).

With respect to the Second Specification, Amneal asserts that it is not "linked to an ability to demonstrate the ability to produce 'high volume' quantities of the drug [as] [t]here is no minimum level of production, sales, or distribution expressed in connection with [the] requirement" and "it does not necessarily take a drug manufacturer two years after receiving FDA approval of its drug to become competent in high-volume naloxone manufacture and on-demand delivery" (*Id.*, at p. 7). Amneal contends that "a bidder seemingly can satisfy this requirement through a very low level of production that does not support the conclusion that it is able to meet the needs of New York's naloxone program" (*Id.*).

DOH responds that it determined that "two years was ultimately [ ] the truest minimum level sufficient to demonstrate the bidder's ability, experience and established distribution relationship while allowing for a larger bidder pool" (DOH's Answer to Amneal's Protest, at p. 3). DOH asserts that "[w]ith the size and scope of the [ ] Opioid Overdose Prevention Program

[7] DOH's Answer to Amneal's Protest is not paginated. For purposes of this Determination, this Office includes page numbers as they would have appeared, if included.

(which is now the largest program in the United States), it is critical to have a vendor who can manufacture, direct ship, and distribute, in order to provide this life-saving drug to a geographically diverse program within very specific timeframes" (*Id.*). DOH further asserts that it "needed to ensure that the vendor has experience with manufacturing the medication, at a supply level that would satisfy [DOH's] needs, and that they have a track record of producing a product that can meet the specific needs and safety of the community" (DOH's Responses to OSC's Questions).

Contracts for commodities are awarded on the basis of lowest price to a responsive and responsible bidder (*see* SFL §§ 163(1)(i), (3)(a)(ii)). A "responsive" bidder is a bidder "meeting the minimum specifications or requirements described in a solicitation for commodities [ ] by a state agency" (SFL § 163(1)(d)). Accordingly, SFL § 163(9)(b) provides that the "solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted."

This Office generally defers to agency determinations where they are properly within the agency's expertise, have a rational basis, and are supported by the procurement record. DOH, as the State agency responsible for establishing standards for the State's Opioid Overdose Prevention Program, possesses the expertise to determine the specific needs and requirements for providing Naloxone and FTS to the Program (*see* Public Health Law § 3309). Moreover, DOH is required to develop an IFB and evaluation instrument that effectively meets those needs. DOH indicated that the two-year experience requirements reflected the minimum amount of experience required to provide satisfaction to DOH that a vendor could satisfactorily provide Naloxone to the Opioid Overdose Prevention Program. This was based on DOH's expertise in considering the size of the State's Opioid Overdose Prevention Program, critical nature of the Naloxone to be supplied, and complexity of the shipping requirements and timeframes. Our review of the procurement record confirms that determinations made by DOH in crafting the two-year experience requirements in the First and Second Specifications in the IFB had a rational basis, complied with statutory requirements, and were supported by the procurement record. Accordingly, we defer to DOH's expertise and judgment in regard to this matter. We further find no evidence in the procurement record to support the contention that competition was unnecessarily limited by the two-year experience requirements in the First and Second Specifications crafted by DOH.

2. <u>Requirement for Experience with Naloxone/Opioid Antagonists</u>

Amneal further contends that "[t]here is also no rational basis for limiting eligibility solely to vendors with a two-year track record specific to naloxone" as a "vendor's proven ability to deliver other critical medications at scale and on demand is directly relevant to the objectives of this procurement and should be given equal consideration" (Amneal's Protest, at p. 5). Amneal asserts that "the same skills and services can be demonstrated through a bidder's experience supplying any drug . . . [whether] naloxone or something else" (*Id.*, at p. 6).

DOH counters that "having experience with other medication classes does not equate to the ability to manufacture and ship an opioid antagonist" (DOH's Responses to OSC's Questions). DOH further asserts that "[o]pioid antagonists are a specific drug classification and there are only a small number of vendors who manufacture and produce this medication" with "[m]ost [being] fairly new to the market, and producing this type of medication consistently was crucial [in the development of the IFB]" (*Id.*).

As set forth above, this Office will defer to the expertise of DOH in developing specific requirements for the IFB, if such requirements have a rational basis and are supported by the procurement record. DOH indicated that the experience with naloxone/opioid antagonists requirements were necessary to provide satisfaction to DOH that a vendor could satisfactorily provide the Naloxone to the Opioid Overdose Prevention Program, based on DOH's expertise in considering the particularity of the medication class, the essential need to ensure Naloxone is supplied, and the lack of widespread and longstanding expertise in providing such medication. Our review of the procurement record confirms that determinations made by DOH in crafting the experience with naloxone/opioid antagonists requirements in the First and Second Specifications in the IFB had a rational basis, complied with statutory requirements, and were supported by the procurement record. Accordingly, we defer to DOH's expertise and judgment in regard to this matter. We further find no evidence in the procurement record to support the contention that competition was unnecessarily limited by the experience with naloxone/opioid antagonists requirements in the First and Second Specifications crafted by DOH.

**Competitive Field**

Amneal contends that "[t]he impact of the Specifications will essentially result in the limitation of the field of qualified bidders to the incumbent supplier, Emergent" resulting in the creation of an "unjustified sole source procurement" (Amneal's Protest, at p. 8).

DOH responds that "[b]ased on market familiarity, [DOH] estimated that there were at least five vendors who might respond to the IFB, across the country, and who could potentially meet the minimum qualifications" (DOH's Answer to Amneal's Protest, at p. 4). DOH asserts that it "determined that the Minimum Qualifications as written were fair and offered a competitive environment, while maintaining [DOH] standards" (*Id.*).

SFL § 163(7) provides, "[e]xcept where otherwise provided by law, procurements shall be competitive, and state agencies shall conduct formal competitive procurements to the maximum extent practicable." As opposed to a competitively bid procurement, a "sole source" procurement refers to a procurement "in which only one offerer is capable of supplying the required commodities or services" (SFL § 163(1)(g)).

Here, DOH issued an IFB to competitively procure commodities. As set forth above, the First and Second Specifications crafted by DOH had a rational basis and did not unnecessarily limit competition. In fact, DOH received several bids in response to the IFB that contained information to demonstrate how they would be responsive to both the First and Second Specifications, at the time of bid. Contrary to Amneal's contention that the incumbent Emergent was the only potential awardee under the IFB, there were several potential awardees, and DOH ultimately awarded the contract to a bidder other than Emergent (i.e., Padagis).

Accordingly, the procurement record does not support Amneal's contention that DOH made a sole source award to Emergent; the fact that DOH awarded the contract to a vendor that was not Emergent makes Amneal's allegation particularly specious.

**DISCUSSION OF EMERGENT'S PROTEST**

**Cost Evaluation Methodology**

Emergent asserts "[t]o reasonably predict actual costs under a contract, an agency's evaluation must consider a reasonable estimate of the quantities that will be ordered . . . [y]et here, [DOH] failed to use *any* estimate of the quantity of [FTS] to be ordered, and instead based its cost evaluation on the unit price for a *single* [FTS] . . . [even though DOH] will likely purchase millions of [FTS] over the contract's five-year period of performance" (Emergent's Protest, at pp. 22-23). Emergent further asserts that "[b]y failing to account for the huge volume of [FTS] it will order, [DOH's] evaluation failed to capture the likely total cost of each proposal, and thus failed to determine which bid actually offered the lower cost" (*Id.*, at p. 23). Emergent posits that "[a] bidder could propose a comparatively lower price for the estimated doses of naloxone, but then propose an extraordinarily high unit price for a single test strip, and still appear to be the lowest-price bidder under [DOH's] methodology . . . [b]ut if the unit price for the [FTS] is multiplied by the quantity of [FTS] likely to be purchased, it becomes clear that the bidder does not, in fact, offer the lowest actual cost to [DOH]" (*Id.*, at p. 4). Emergent asserts that DOH "had more than enough information to develop a reasonable estimate of the volume of [FTS] it might purchase" (Emergent's Reply, at p. 9).

DOH responds that it "has no baseline for potential volume of the [FTS], which is why [DOH] only asked for price per [FTS]" (DOH's Answer to Emergent's Protest, at p. 4).[8]

The solicitation issued by a procuring State agency must "prescribe the minimum specifications or requirements that must be met to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted" (SFL § 163(9)(b)). Additionally, SFL § 163 "implicitly requires that the cost evaluation methodology have a reasonable relationship to the anticipated *actual* costs to be incurred by the State under the terms of the contract" (OSC Bid Protest Determination SF-20220031, at p. 5; *see* SF-20100156, at p. 6, SF-20080408, at p. 9). Therefore, when evaluating cost, the State agency awarding the contract "must generally consider all expected costs and must weigh such costs in a manner reasonably designed to predict actual costs under the contract" (*Id.*). As this office has indicated previously, a state agency must evaluate all fees or other elements that will impact cost, unless the impact of such fee or element on cost: "(i) will be substantially identical for all providers; (ii) are difficult or impossible to estimate and therefore are speculative; or (iii) are unlikely to occur" (OSC Bid Protest Determination SF-20100156, at p. 5). As set forth above, it is well-established that bid specifications in public procurements must be enumerated "as definitely as practicable" and "[i]t

[8] DOH also asserts that Emergent "did not provide the required all-inclusive price per [FTS]" and "was then deemed non-responsive" (DOH's Answer to Emergent's Protest, at p. 4). While the procurement record does confirm, and Emergent does not dispute, that Emergent did not provide the required pricing for FTS, this point is irrelevant to the issue at hand. Emergent challenges DOH's cost evaluation methodology itself, not a determination of non-responsiveness with respect to Emergent's cost proposal.

is the duty of [public contracting entities], in advance of bidding, [to] convey in precise terms to prospective bidders the exact basis on which the contract will be awarded, so that each such bidder will be enable[d] to make an intelligent evaluation and bid, and so that possible favoritism may be avoided" (*Suffolk Roadways, Inc. v. Minuse*, 19 A.D.2d 888, 889 (App. Div. 2d Dep't 1963)). An agency cannot "change the rules" after bids are submitted or employ a methodology "to determine the lowest bidder which had not been disclosed in the advertised proposal or bid specifications" (*Progressive Dairy Consultants v. Wyoming County*, 90 A.D.2d 214, 217 (App. Div. 4th Dep't 1982)).

The IFB required bidders to complete a Bid Form to submit pricing for Naloxone and FTS (*see* IFB, at Attachment B, *Bid Form*). The Bid Form instructed that for Naloxone, "[t]he Bid Price will be per unit (1 unit = 1 carton containing 2 doses of 4 mg intranasal naloxone spray) and will include shipping, tracking and service support" (*Id.*). The Bid Form required each Bidder to complete a price/unit for each of the five contract years with each contract year indicating an estimated quantity, which varied depending on the shelf-life of the Naloxone being offered (*see id.*).[9] The cost proposal instructions provided to DOH evaluators indicated that the unit price per year would be multiplied by the estimated quantity of units per year, and pricing for all contract years would be added to derive the total bid price. Notably, while DOH tied pricing for Naloxone to annual estimated quantities to be provided under the contract, DOH failed to do so for FTS. Instead, for FTS, the Bid Form instructed that "Bidders must provide a price per [FTS]" (*Id.*). As the quantity of FTS required to be provided under the contract could impact proposed pricing, DOH received numerous questions related to clarifying what the annual estimated volume of FTS would be during the IFB's Question & Answer period but declined to provide a meaningful response (*See* IFB Q&A, at Nos. 14, 22, 23, 62).[10] Rather, the cost proposal instructions provided that "[t]he total bid = total [N]aloxone bid price for 5 years + all-inclusive price per [FTS]."

DOH did not explicitly provide an estimated quantity of FTS in the IFB nor did DOH include sufficient information in the IFB in order for bidders to deduce an estimated quantity of FTS. With respect to FTS quantity, the IFB indicates that "[t]he number of [FTS] . . . can range anywhere from 0-1,000 [FTS] per order of naloxone" (IFB, at § 4.2). The IFB includes estimates for the units of Naloxone to be ordered each contract year at 400,000 to 600,000, depending on the Naloxone variation bid, with the contract term quantity ranging from 2 million to 2.6 million units (*see* IFB, at Attachment B). This information is insufficient for bidders to determine what the estimated quantity of FTS would be over the contract term, as DOH discloses an estimate for units of Naloxone to be ordered and a divergent estimate of FTS to be ordered based on orders (not units) of Naloxone. DOH fails to provide in the IFB an estimate concerning the number of orders of Naloxone that could be used to derive an estimated range for FTS.

Here, the Emergent Protest concerns the cost evaluation methodology employed by DOH for the FTS and the fact that DOH did not provide an estimated quantity of FTS in the IFB by

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[9] The estimated quantity per year ranged from 400,000 to 600,000 units and the contract-term quantity ranged from 2 million to 2.6 million units.

[10] Question No. 14 asked DOH, "Can you provide estimates on monthly quantities for [FTS]?" DOH responded, "Per Section 4.2, the number of [FTS] is determined by the program and can range anywhere from 0-1,000 strips per order of naloxone. At this time there is no projection available. This is a new service and legislative directive. The Department is unclear on the volume."

which to evaluate the proposed price per FTS, instead utilizing a quantity of one FTS. DOH alleges that it was "difficult or impossible to estimate" the quantity of FTS to be purchased under the contract. As indicated above, a state agency must evaluate all fees or other elements that will impact cost, unless the impact of such fee or element on cost is "difficult or impossible to estimate." We therefore turn to whether it was reasonable for DOH to decline to provide an estimate for FTS in the IFB. In this regard, while DOH declined to provide an estimated volume or range of potential FTS quantities contemplated in the contract to bidders to inform their formulation of pricing, contrary to it being difficult or impossible for DOH to estimate the quantity of FTS required, the procurement record confirms that **DOH did in fact calculate and include an estimated quantity for FTS in the procurement record to support an estimated contract value when submitting the contract to OSC for approval.** Specifically, in response to a question from this Office asking how DOH derived a quantity of 11 million FTS it applied in calculating an estimated contract value, DOH explained that it came to this figure by first "tak[ing] several factors into consideration, including the historical record of 400,000 to 600,000 naloxone kits distributed annually" and "an estimated 4 to 5 [FTS] per naloxone kit to be distributed" (DOH's Responses to OSC's Questions). In other words, DOH utilized an estimate of 4 to 5 FTS per Naloxone unit to calculate total cost. Accordingly, the cost evaluation methodology utilized by DOH with respect to the use of a single FTS to estimate costs under the contract was not reasonable or appropriate because it does not appreciate the costs that can be reasonably anticipated to be incurred under the contract. Indeed, DOH itself recognized that the costs reasonably expected to be incurred under the contract for FTS are based on a figure in the millions, not a figure of one. By failing to base its evaluation methodology on costs reasonably expected to be incurred under the contract, it is unclear whether DOH awarded the contract to the lowest priced bidder.

We cannot find that the flaw in DOH's cost evaluation methodology with respect to the FTS was a harmless error or sever the FTS component from the Naloxone component of the IFB; in fact, depending on the estimated amount of FTS utilized in the contract, the total bid price can vary greatly and alter the lowest-priced bidder / contract awardee. Using the figures supplied by DOH when it computed total contract value (400,000 to 600,000 Naloxone units and 4 to 5 FTS per Naloxone unit) results in estimated quantities of FTS ranging from 8 to 15 million over the five-year contract term. Assuming an FTS price of $0.50 each, the cost of FTS over the term of the contract drastically changes when using the IFB quantity of one versus 11 million (what DOH selected to derive the estimated contract value): specifically, $0.50 as opposed to $5.5 million for FTS. When applying a quantity of 15 million (supported by the information presented by DOH in response to questions from this Office – 600,000 Naloxone kits per year with 5 FTS per kit, totaling 3 million FTS per year and 15 million FTS over the contract term), the difference is even more drastic: $7.5 million for FTS. **In fact, based on our review of the procurement record, the winning/lowest-priced bidder changes when a quantity of FTS is used for evaluation that is higher than 11 million but still well within the 15 million maximum derived from DOH's own justification.**

We also note that even assuming DOH's flawed evaluation methodology happened to result in an award to the lowest priced bidder, it is impossible to quantify what impact the inclusion of a reasonable estimate of FTS would have had on bid prices. SFL § 163(9)(b) requires an IFB to "describe and disclose the general manner in which the evaluation and selection shall be conducted," accordingly, access to valid cost evaluation information was essential in order for bidders to formulate their bids. Indeed, Emergent stated that it was unable to even submit a per unit FTS proposal absent this information. The fact that DOH requested the Validation Requirement for FTS further underscores the need for an estimated quantity of FTS to be included in the IFB – bidders were expected to bid an "all-inclusive price per [FTS]" which would necessarily include the cost to cover any validation. While problematic for the reasons set forth in the below section, this is further problematic from a quantitative standpoint – without access to estimated quantity information, FTS inclusive of all corresponding requirements could not be viably priced. Therefore, the cost evaluation methodology disclosed in the IFB did not have a reasonable relationship to the actual costs to be incurred under the contract, and therefore we cannot find that DOH awarded the contract to the lowest-priced bidder as required by applicable law.

**The FTS Validation Requirement**

Emergent asserts that "[t]he IFB [ ] requirement to 'employ quality control measures' to 'validate' the accuracy of [FTS] being supplied for off-label use" was "ambiguous and undefined, in violation of state law" and "prevented bidders from competing intelligently and on a common basis" (Emergent's Protest, at pp. 15-16). Specifically, Emergent contends that "the IFB did not provide any parameters for [the] requirement: [i]t did not identify any required quality control measures; it did not establish any standard for validation; and [ ] it did not establish any required degree of accuracy for the [FTS] to be supplied" and DOH "declined to [clarify its requirement]" when asked to do so by bidders (*Id.*). Emergent further asserts that DOH "does not know either the quality of the [FTS] it will receive or whether it obtained the lowest available price for [FTS] that will meet its requirement" as "[o]ne bidder could propose extensive quality controls and thus more reliable (albeit more costly) [FTS], while another could offer only minimal quality controls resulting in far less reliable (and less costly) [FTS]" (*Id.*, at p. 18; Emergent's Reply, at p. 3).

DOH responds that it "responded to this point during the question-and-answer period . . . [stating that] '*The Department is requiring that the contractor contract with a lab to conduct validation testing on each lot prior to shipping. Please reference section 4.2 of the IFB'* [and citing] a peer reviewed article . . . as a potential option for how to validate the effectiveness of [FTS]" (DOH's Answer to Emergent's Protest, at p. 2). DOH asserts that the IFB "clearly stated that this process was left up to the bidder to decide how they would validate the [FTS]" (*Id.*). DOH further asserts that it "was under no obligation to employ any qualitative analysis – only quantitative (lowest cost)" and the "[q]uality and control measures were not included in the minimum qualifications" (*Id.*).

A principle of state procurement is that it must be "based on clearly articulated procedures which require a clear statement of product specifications, requirements or work to be performed . . ." (SFL § 163(2)(b)). Accordingly, an IFB must "prescribe the minimum specifications or requirements that must be met in order to [for a bidder to] be considered responsive . . ." (SFL § 163(9)(b)). In addition to "the necessary qualifications" of the bidder, specifications or requirements may include "any description of the work to be performed, . . . or any other requirement necessary to perform the work" which "may include a description of any obligatory testing, inspection or preparation for delivery and use . . ." (SFL § 163(1)(e)). Accordingly, public entities are "required to furnish specifications which state the nature of the work as definitely as practicable and which contain all the information necessary to enable bidders to prepare their bids" and if a public entity fails to do so, bidders are prevented from "mak[ing] an intelligent evaluation and bid" (*Progressive Dairy Consultants v. Wyoming County*, 90 A.D.2d 214, 217 (App. Div. 4th Dep't 1982); *see Suffolk Roadways, Inc. v. Minuse*, 19 A.D.2d 888, 889 (App. Div. 2d Dep't 1963); *see also Browning-Ferris Indus. v. City of Lackawanna*, 204 A.D.2d 1047, 1048 (App. Div. 4th Dep't 1994)). "Bid specifications [that] create an element of uncertainty . . . [invite] the danger that bidding would be discouraged or that bids would be unnecessarily inflated" (*Sagamore Auto Body, Inc. v. Cnty. of Nassau*, 104 A.D.2d 818, 821 (App. Div. 2d Dep't 1984)). Language in bid specifications is unclear where it "is reasonably susceptible of more than one interpretation . . ." (*DiPizio Constr. Co. v. Erie Canal Harbor Dev. Corp.*, 120 A.D.3d 905, 906 (App. Div. 4th Dep't 2014); *see Chimart Assoc. v. Paul*, 66 N.Y.2d 570, 573 (N.Y. 1986)).

IFB Section 4, Detailed Specifications, sets forth "products or services" that "[t]he selected Bidder must be able to provide . . . throughout the contract term" and that "a Bidder will be required to [address] as part of its Bid" in order "[t]o be considered responsive." Contained within this IFB Section are specific requirements, including that "[t]he Contractor must employ quality control measures to validate each lot [of FTS] before distribution to the community" and "[t]he Contractor must contract with a lab for validation" ("Validation Requirement") (IFB, at § 4.2). The only further information provided by DOH was reference to a singular scientific report which discusses and questions the efficacy of any extant testing: "[FTS] have not been subject to any State or Federal regulatory regime or process which has led to variations in accuracy among brands and testing strips when testing drug samples" (*Id.*).

Here, the IFB's language was not precise enough for bidders to ascertain what the Validation Requirement actually required and associated cost to incorporate into its bid; instead, the broad language of the IFB left bidders to interpret what was required among a variety of available procedures of varying levels of accuracy and cost. The procurement record overwhelmingly demonstrates that bidders were unclear about the Validation Requirement. In fact, DOH received numerous inquiries about what specific documentation would be required to demonstrate compliance with the Validation Requirement – evincing a significant level of confusion and ambiguity surrounding the requirement (IFB Q&A, Nos. 33, 35, 66).[11] Yet, despite numerous inquiries, DOH continued to reiterate its message that bidders should rely on the information contained in the IFB § 4.2 (*see id.*). DOH admitted the lack of clarity in the Validation Requirement by asserting in response to Emergent's Protest that the "bid document clearly stated that this process was left up to the bidder to decide how they would validate the [FTS]" (DOH's Answer to Emergent's Protest, at p. 2). This lack of objectivity and clarity surrounding the

[11] Question No. 33 asked DOH, "Please specify the 'quality control measures' required by DOH." DOH responded, "The quality control [DOH] is requiring is for the contractor to test each lot of FTS via a lab to ensure the validity of the strips. Once the validity is confirmed shipping of the lot can occur."
Question No. 66 asked DOH, "The Contractor must employ quality control measures to validate that each lot before distribution to the community and contract with a lab for validation. – could you explain with more detail? Will a certificate of validation from the manufacturer suffice or will the winning vendor need an independent lab to validate the test strip work? What other, if any, specific documentation or evidence is required from bidders and their subcontractors to demonstrate compliance with these requirements for both products?" DOH responded, "FTS validation is being required as outlined in the IFB Section 4.2. Each individual lot of FTS are developed individually and thus need verifications from a lab on their validity. Each time there is a lot change new validation testing must occur. A certificate of validation from the manufacturer will not meet the standards outlined in the IFB, you must use an outside lab for validation."

Validation Requirement was further demonstrated when this Office sought further explanation from DOH,[12] and was informed that, "[a]s stated in the IFB, the contractor is responsible for contracting with a lab for validation of each lot of [FTS]" (DOH's Responses to OSC's Questions). Curiously, despite stating that the scientific report referenced in the IFB was provided "to assist in planning how the contractor might execute [the Validation Requirement]," DOH did not adopt or require the procedure recommended in the report and instead left it up to bidders to determine what procedure to utilize including purportedly less efficacious and presumably less costly testing.

Here, the lack of clarity surrounding the Validation Requirement prevented bidders from making an intelligent and informed bid. Bidders were not provided with sufficient information in the IFB to have a clear understanding of what was required by the specifications; therefore, different bidders could interpret the Validation Requirement differently, leading to varying costs for compliance, and altering bid pricing. Accordingly, we find that the Validation Requirement in the IFB was not sufficiently defined, such that DOH did not adequately prescribe the minimum requirements that needed to be met by a bidder in order to be considered responsive.

**Liability Terms**

Emergent contends that "[n]o reasonable bidder could agree to [the] terms [of the IFB]" specifically DOH's "standard indemnification requirements" which "asked the bidders to accept uncapped and unfettered liability for any 'intentional act' or 'negligence' associated with the [FTS]" because "[i]n light of the unreliability of [FTS] when used off-label to test drugs directly, and because [DOH] did not define what quality control and validation measures are required in the context of its off-label use, any inaccurate test strip could lead to a 'negligence' claim" (Emergent's Protest, at p. 3; *see id.*, at pp. 11-12, 13). Emergent asserts that by submitting a bid, "a bidder is potentially accepting all (or nearly all) product liability risk associated with [DOH's] intended off-label use of [FTS]"; accordingly, Emergent "could not submit a price for the [FTS] and could not compete fully and effectively for the contract" (*Id.*, at p. 21).

DOH responds that "Emergent was not denied a fair opportunity to compete" and "[o]ther Bidders accepted the proposed Contract terms and provided Bids that were both responsive and at lower cost" (DOH's Answer to Emergent's Protest, at pp. 1, 3).

Based on the above finding that the Validation Requirement was not sufficiently defined, and since the inadequacies in such requirement form the basis of Emergent's contention here, we find this contention to be moot and we will not address further.

## CONCLUSION

For the reasons outlined above, we have determined the issues raised in Amneal's Protest are not of sufficient merit to overturn the contract award by DOH; however, the issues raised in Emergent's Protest are of sufficient merit to overturn the contract award by DOH. As a result, Emergent's Protest is upheld and we will not be approving the DOH/Padagis contract for Naloxone and FTS.

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[12] OSC asked DOH, "In connection with the lab validation requirement imposed by IFB § 4.2, please explain in detail what DOH will consider in determining whether the contractor has complied with this requirement."

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

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| In the Matter of the Bid Protest filed by F. F. Thompson Hospital as lead organization on behalf of the Finger Lakes Rural Health Network with respect to the grant awards for the Rural Health Network Development Program made by the New York State Department of Health. | **Determination of Bid Protest**<br><br>**SF–20250225** |
| Procurement Record – DOH01-0000803-3450000 | January 28, 2026 |

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The Office of the State Comptroller ("OSC" or "Office") has reviewed the above-referenced grant awards made by the New York State Department of Health ("DOH") for the Rural Health Network Development Program. We have determined the grounds advanced by F.F. Thompson Hospital as the lead organization on behalf of the Finger Lakes Rural Health Network ("FLRHN")[1] are insufficient to merit overturning the grant awards made by DOH and, therefore, we deny the Protest. As a result, we are today approving the DOH grant awards for the Rural Health Network Development Program.

## BACKGROUND

### Facts

On October 1, 2024, DOH issued a request for applications soliciting applications from rural health networks[2] for the Rural Health Network Development Program ("RFA"). The RFA sought to provide funding for applicants "to address the unique health care challenges of their communities in the context of health care delivery system reform and the focus on patient value and population health" (RFA, at p. 3).

The RFA specified that DOH "anticipates awarding a minimum of 24 contracts, each for a five-year term" (*Id.*). The RFA provided that "[a]n application which meets ALL of the guidelines as set forth [in the RFA] will be reviewed and evaluated competitively by [DOH]" (RFA, at p. 26). The RFA further provided that applicants would be awarded up to 100 points based on evaluation of the applicant's responses to questions in the following program specific

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[1] F. F. Thompson Hospital applied as the lead organization on behalf of the FLRHN which is comprised of several local health organizations.

[2] The RFA specified applications were limited to an "existing or proposed rural health network [that] must be composed of at least three members that are separate, existing health care providers, human service agencies, community-based organizations, and/or educational institutions, each of which has its own Federal Tax Identification Number and at least one member must be located in the area proposed to be served by the rural health network" (RFA, at p. 4; Addendum # 1, issued October 22, 2024). The RFA provides that "[r]ural health networks facilitate cooperative and collaborative efforts among rural health providers, which is vital to improve access to essential services, enhance coordination of services, increase the efficiency of service delivery, and preserve the stability and viability of rural communities" (RFA, at p. 3).

categories: Statement of Need (10 points), Organizational Overview and Experience (15 points), Organizational Capability and Program Readiness (20 points), Strategy to Address Needs (20 points), Budget (20 points), and Work Plan (15 points) (RFA, at pp. 21–25). The RFA specified that "[a] minimum score of 70 out of a possible 100 points is required to be considered for funding" and "[t]he highest scoring applications up to total maximum allowable funding will be awarded" (RFA, at p. 26).

DOH received 35 proposals by the bid opening date of December 3, 2024, including a proposal from FLRHN. Following FLRHN's October 7, 2025, non-award letter, FLRHN requested a debriefing, which DOH provided on November 12, 2025.

Thereafter, FLRHN filed a protest with this Office on November 14, 2025 ("Protest"). DOH responded to the Protest on November 25, 2025 ("Answer"). DOH submitted the procurement record including the proposed grant awards, which is the subject of the Protest, to this Office for review on November 28, 2025.

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

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

In carrying out this contract approval responsibility, OSC has promulgated regulations setting forth the procedure ("OSC Protest Procedure") to be used by an interested party seeking to challenge a contract award by a State agency (*see* 2 NYCRR Part 24). The OSC Protest Procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no protest procedure at the agency level, the Protest is governed by 2 NYCRR § 24.4.

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 proposed Rural Health Network Development Program grant awards;

2. the correspondence between this Office and DOH arising out of our review of the proposed Rural Health Network Development Program grant awards; and,

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

    a. Protest; and
    b. Answer.

## Applicable Statutes

The grant award in question is subject to the requirements of Article 11-B of the SFL.[3] While Article 11-B does not require competitive bidding, the Comptroller, in fulfilling his statutory duty of assuring that State contracts are awarded in the best interest of the State, requires that agencies undertake a competitive process for grant awards or, alternatively, document why competition is not appropriate or feasible. Thus, this Office generally requires that grant contracts be awarded after a fair and impartial competitive procurement process which provides a level playing field for all potential award recipients, except where the agency can document a sole source, single source or emergency justification for a non-competitive award (consistent with the documentation for such awards under SFL § 163). To determine whether the procurement process is fair and impartial, we look to whether: 1) the scoring system itself was clear; and 2) the evaluators, in assigning scores, arrived at reasonable conclusions. In light of these non-statutory standards, we will proceed to analyze the issues raised in this Protest.

## ANALYSIS OF THE PROTEST

### Protest to this Office

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

1. FLRHN's score for the Strategy to Address Needs section of its application should be reconsidered as FLRHN mistakenly improperly completed this section based on FLRHN's misunderstanding of the instructions.

2. DOH incorrectly scored the narrative portion of the Budget section of FLRHN's application by failing to consider the entire submission.

### DOH Answer to the Protest

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

1. DOH properly scored FLRHN's Strategy to Address Needs section a zero as it was not completed in accordance with the instructions of the RFA.

2. DOH scored FLRHN's Budget section in accordance with the pre-established evaluation instrument.

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[3] Article 11-B of the SFL applies to grant awards to not-for-profit organizations as part of a program plan developed by a State agency (*see* SFL § 179-q(1), (2), (6), (10)). To note, the competitive bidding requirements of SFL § 163 do not apply to "contracts approved in accordance with [Article 11-B of the SFL]" (SFL § 160(7)).

## DISCUSSION

### DOH's Evaluation of FLRHN's Application

1. Scoring of Strategy to Address Needs Section

FLRHN requests reconsideration of their "response to the section about our [S]trategy to [A]ddress the [N]eeds [that] scored 0 out of 20" because the individual who completed the application "misunderstood the instructions and attached [FLRHN's] response, rather than pasting it into the box with supplemental information attached to the application" which was "a mistake" (Protest, at p. 1 (emphasis omitted)).[4]

DOH responds that FLRHN "lost the full twenty (20) points for this [Strategy to Address Needs] section" because "[t]he Strategy to Address Needs section of [FLRHN's] application was not completed in the required bid response area [and p]er the RFA instructions [], this attachment was never opened, reviewed or scored" (Answer, at p. 3).[5]

The RFA provided that "Applicants are instructed to use the 'Response' box [in SFS] for narrative responses unless otherwise instructed within this RFA" (RFA, at p. 20). The RFA also made clear to "provide any requested attachments as specified within this RFA" and directed applicants to "**See the Event Comments and Attachments link at the bottom of the Bid Event page in SFS for required attachments to be completed in response to corresponding bid factor questions, as well as informational only attachments"** (*Id.* (emphasis in original)). The RFA contained questions to be addressed in the Strategy to Address Needs section of the application and did not specifically request any attachments be provided for that section (*see* RFA, at p. 23). The RFA further provides that "**there is a 2,000-character limit for each response**" and "[i]t is each Applicant's responsibility to ensure that all materials included in its application have been properly prepared and submitted" (RFA, at p. 20 (emphasis in original)).

The RFA instructions were clear and required applicants to submit a narrative response in the SFS' "Response" box for it to be reviewed and scored. Importantly, FLRHN acknowledges in the Protest that it failed to complete the Strategy to Address Needs section as instructed in the RFA and does not challenge the clarity of the RFA instructions. Our review of the procurement record confirms FLRHN's improper completion of the Strategy to Address Needs section, reflecting that FLRHN responded to the two available "Response" boxes for the Strategy to Address Needs section of the application by indicating "See Attachment 8" in one "Response" box and "None" in the other "Response" box.

This Office generally defers to agency determinations regarding scoring where they are properly within the agency's expertise and supported by the procurement record. Accordingly, this Office will generally not disturb a rationally reached determination of an evaluator unless

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

scoring is clearly and demonstrably unreasonable. The procurement record reflects that DOH established an evaluation tool and instructions, in advance of receipt of applications. With respect to the score of zero assigned by the evaluators for the Strategy to Address Needs section, such score reflects DOH's assessment that the response was "[n]on-responsive or the applicant does not meet any requirements described in the relevant section of the RFA" as outlined in the evaluation instructions.

Accordingly, the evaluators reached reasonable conclusions and scored the Strategy to Address Needs section of FLRHN's application in accordance with the pre-established evaluation instrument, as FLRHN did not provide a narrative response but instead included their narrative in a separate attachment. DOH's scoring reflected that FLRHN was non-responsive / did not meet the requirements described in the RFA, which FLRHN concedes.[6] Therefore, there is no basis to disturb DOH's scoring of the Strategy to Address Needs section of FLRHN's application.

2. <u>Scoring of Budget Section</u>

FLRHN asserts "the [B]udget narrative portion of the application scored 13 out of 20, because the reviewers indicated that we only completed the salary section" however the "entire [B]udget and [B]udget narrative is complete in the submission" (Protest, at pp. 1-2 (emphasis omitted)). FLRHN further asserts that "[t]here was a detailed explanation in the narrative as to how [the budget] was calculated" (*Id.*).

DOH counters that "[t]he [Budget] narrative justification submitted by [FLRHN] lacked a detailed explanation of how the submitted budget would be consistent with the scope of services, reasonable and cost effective for [DOH] including how designated staff time devoted to the project had been determined" (Answer, at pp. 3-4).

Here, the RFA clearly outlined the evaluation methodology DOH would use to score the Budget (RFA, Section V, at pp. 23–25). Furthermore, the RFA clearly delineated specific instructions for applicants regarding the evaluation of the Budget section. The RFA provided:

> All costs must be related to the provision of Rural Health Network Development Program, and be consistent with the scope of services, reasonable, and cost effective. Justification for each cost should be submitted in narrative form. For all existing staff, the Budget Justification must delineate how the percentage of time devoted to this initiative has been determined.

(RFA, Section V, at p. 23). As a guideline for applicants, the RFA further reiterated and provided that "[t]he budget justification must delineate how the percentage of staff time devoted to this project has been determined and provide a detailed description of roles and responsibilities" and "[t]he budget narrative should also include an explanation of how amounts were determined for each line item" (RFA, Section V, at p. 25).

[6] Additionally, the imposition of character limitations further underscores the importance of the applicant using the "Response" box as instructed, rather than an alternative format for submission.

The procurement record reflects that the DOH evaluators determined that the narrative portions of the Budget section of FLRHN's application lacked the specificity that applicants were instructed to provide; specifically, the narrative lacked any detailed explanation as to how the amounts were determined. Our review of the procurement record reflects that while the Budget section of FLRHN's application included a brief statement for funds requested, it failed to include any detailed explanation as to how the amounts were determined, how the percentage of staff time was determined, or a detailed description of staff roles and responsibilities as instructed by the RFA. Accordingly, the evaluators reached reasonable conclusions and scored the Budget section of FLRHN's application in accordance with the pre-established evaluation instrument, awarding less than the allotted points for the Budget section due to the aforementioned deficiencies. Therefore, there is no basis to disturb DOH's scoring of the Budget section of FLRHN's application.

**CONCLUSION**

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

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Appeal filed by Jackson & Coker LocumTenens, LLC with respect to the procurement of Locum Tenens Psychiatrists conducted by the New York State Office of Mental Health

Contract Numbers – C101905, C102833, C102834, C102835, C102836

**<u>Determination of Appeal</u>**

**SF–20250229**

March 24, 2026

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The Office of the State Comptroller ("OSC" or "Office") has reviewed the above-referenced procurement conducted by the New York State Office of Mental Health ("OMH") for locum tenens psychiatrists ("Locum Tenens"). We have determined the grounds advanced by Jackson & Coker LocumTenens, LLC ("J&C") are insufficient to merit overturning the contract awards made by OMH and, therefore, we deny the Appeal. As a result, we are today approving the five OMH contracts awarded for Locum Tenens.[1]

**BACKGROUND**

**<u>Facts</u>**

On May 13, 2025, OMH issued a request for proposals ("RFP") "seeking competitive proposals from qualified firms to provide locum tenens psychiatrists [ ] to OMH for the purpose of providing mental health services to [OMH's] clients" (RFP, at p. 4). The RFP sought proposals for "psychiatry services [including] Adult Psychiatry, Child and Adolescent Psychiatry, and Forensic Psychiatry" at "Psychiatric Centers and satellite locations statewide" on a "temporary basis" and including "inpatient, outpatient, full-time, part-time, and variable hours" positions (RFP, at p. 5).

The RFP specified that "[t]he contracts resulting from this RFP will be awarded based on best value to up to the top five Offerors who are determined to be responsive based on the review and evaluation of their content and completeness that best meets the requirements of this RFP and OMH" (RFP, at p. 25, *see* RFP, at p. 23). The RFP defined best value as "the proposal that meets the mandatory requirements and receives the highest overall combined score based on the Technical Evaluation score and the Financial Evaluation score" (*Id.*). The technical proposals would comprise 70 points of an offeror's final composite score, while the financial proposal would comprise 30 points of an offeror's final composite score (RFP, at pp. 22, 23).

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[1] OMH awarded five contracts for Locum Tenens, to the following entities: (1) AMN Healthcare Locum Tenens, Inc.; (2) Amergis Locum Tenens, LLC; (3) LocumTenens.com, LLC; (4) Lavaca Street Ventures d/b/a Monroe & Weisbrod, LLC; and (5) J&C.

The RFP specified that "[t]he awarded Offerors will be placed on a call-down list and ranked based on their composite scores with the highest composite score being ranked first, the second highest composite score being ranked second, and so forth until the lowest of the top five composite scores is ranked last, in accordance with the ranking methodology defined in [the RFP]" (RFP, at p. 23). Pursuant to the RFP, "[a]s the need arises for Locum Tenens, OMH will make call-downs in sequential order from the ranked list of Contractors [with] [t]he top-ranked vendor [being] the first to receive an opportunity to fulfil the staffing request" (RFP, at p. 25; *see* RFP, at pp. 10-11). The RFP specified that "[i]f the top-ranked Vendor is unable to fulfill the request . . . OMH will move to the next vendor on the list and continue in this manner until a responsive Contractor is secured" (*Id.*).

OMH received 33 proposals by the bid opening date of June 26, 2025, including a proposal from J&C. On October 8, 2025, J&C received an award letter as the fifth-ranked contractor on the call-down list. J&C requested a debriefing, which OMH provided on October 31, 2025.

Thereafter, on or about November 4, 2025, J&C submitted a protest of the contract award to OMH ("Protest") pursuant to OMH's bid protest procedures, as contained in the RFP (RFP, at p. 25). OMH denied the Protest in OMH's written determination on November 13, 2025 ("Protest Determination"). J&C then appealed such denial to this Office on November 25, 2025 ("Appeal"). On January 6, 2026, OMH submitted five contracts for Locum Tenens, which are the subject of the Appeal to this Office, for review.

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

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

In carrying out this contract approval responsibility, OSC has promulgated regulations setting forth the procedure ("OSC Protest Procedure") to be used by an interested party seeking to challenge a contract award by a State agency (*see* 2 NYCRR Part 24). The OSC Protest 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 determination, the Appeal is governed by 2 NYCRR § 24.5.

In the determination of the Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by OMH with the proposed OMH Locum Tenens contracts;

2. the correspondence between this Office and OMH arising out of our review of the proposed OMH Locum Tenens contracts; and,

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

a. Protest;
b. Protest Determination; and
c. Appeal.

## ANALYSIS OF THE APPEAL

### Appeal to this Office

In its Appeal, J&C challenges the procurement conducted by OMH on the following grounds:

1. OMH's Determination of J&C's Protest was arbitrary and unreasonable because it did not respond to the factual allegations raised in the Protest.[2]

2. OMH's evaluation of J&C's technical proposal was arbitrary, unreasonable, and unequal because OMH ignored information in J&C's technical proposal, applied unstated evaluation criteria, and disparately evaluated proposals, leading to J&C attaining a lower score than it should have.

3. The RFP requires J&C to involuntarily transfer its Locum Tenens staff to the primary awardee which unfairly disadvantages J&C.

### OMH's Answer to the Appeal

In its Protest Determination,[3] OMH contends the Appeal should be rejected and the award upheld on the following grounds:

1. The RFP described in detail the technical evaluation methodology that OMH would utilize, and OMH's Technical Evaluation Committee evaluated technical proposals consistent with the requirements of the RFP and in accordance with applicable law.

2. The RFP described the contract award process and the call down process to be used for Locum Tenens staff selection.

## DISCUSSION

### Evaluation of J&C's Technical Proposal

J&C asserts that "[t]he evaluation under the Qualifications & Experience[, Recruitment & Retention, and Compliance & Reporting] criteria was arbitrary, unreasonable, and unequal

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[2] We note that this Office conducts a de novo review of the full procurement record and conducts its own analysis of the specific factual or legal allegations forming the basis on which a protesting party challenges a contract award. As such, we will not address this allegation further.
[3] OMH indicated in the procurement record that it would not be submitting an answer to the Appeal to our Office and would instead rely on its Protest Determination.

because OMH ignored information in J&C's proposal, applied unstated evaluation criteria, and disparately evaluated proposals" (Appeal, at pp. 5, 7).[4]

OMH responds that "the RFP describes in detail the evaluation process, criteria and methodology to be used by the Technical Evaluation Committee" and "[e]valuations were conducted consistent with the instructions stated in the RFP and in conformance with all legal requirements and best practices" (Protest Determination, at pp. 1, 2).

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

The RFP provided that the Technical Proposal would account for 70 points of the composite score (RFP, at pp. 22-23). The RFP further provided that the points for the Technical Proposal would be allocated as follows: Executive Summary (5 points), Qualifications and Experience (10 points), Key Staff (10 Points), Recruitment and Retention (10 points), Transition (10 points), Quality of Services / Program Management (5 points), Compliance and Reporting (10 points), References (5 points), and Supplier Diversity (5 points) (RFP, at p. 22). The RFP also provided that OMH would establish a Technical Proposal Evaluation Committee that would conduct the technical evaluation "based upon the requirements set forth in this RFP and the Vendor's technical proposal responses" (*Id.*). The RFP highlighted that Technical Proposals "must completely address all minimum and/or mandatory requirements [and **v]ague, contradictory, or incomplete responses to requirements may result in a reduced technical score** or may result in having the proposal deemed non-responsive and disqualified from further consideration" (RFP, at p. 16 (emphasis added); *see* RFP, at pp. 13, 21, 22, 25).

Our review of the procurement record reflects that, prior to the receipt of proposals, OMH established an evaluation instrument for technical proposals that was consistent with the technical proposal criteria outlined in the RFP. The technical evaluation instrument included a scoring rubric for evaluators to use when scoring all technical criteria against the "scoring benchmark" provided within the evaluation instrument. The evaluation instrument established the following scoring benchmarks:

- 0 – Did not satisfy the requirement. The response is inadequate and does not include information to sufficiently address the response requirement.

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

- 1 – Minimally met the requirement. The response contains a brief description that only minimally addresses the response requirement.
- 3 – Satisfactorily met the requirement. The response adequately addresses the response requirement and/or provided an acceptable approach.
- 5 – Exceeds expectations for the requirement. The response significantly exceeds expectations for the requirement and provided a high level of confidence that the proposed solution is optimal.

To arrive at a technical score for each technical criterion, OMH would apply a formula utilizing the benchmark rating and the available points for that criterion (i.e., the benchmark rating is divided by five times the available points for that criterion). OMH then added all scores for the technical criteria to arrive at a technical score out of 70 possible technical points. Technical scores from all evaluators were averaged to arrive at a final technical score out of 70 points, that was then added to the final financial score to derive the final composite score for each vendor.

Generally, this Office gives significant deference to a State agency in matters within that agency's expertise. It is incumbent upon the agency to assess its needs in relation to a particular program and develop a solicitation document and corresponding evaluation instrument that effectively meets those needs. 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 in accordance with the solicitation and pre-established technical proposal evaluation tool. Accordingly, this Office will generally not disturb a rationally reached determination of a duly constituted evaluation committee unless scoring is clearly and demonstratively unreasonable.

J&C made several contentions with respect to specific scores awarded by OMH in its evaluation of J&C's technical proposal, each of which we address in further detail as follows.

1. <u>Qualifications & Experience: Minimum Vendor Qualifications</u>

J&C asserts they should not have received "minimal points" "due to lack of 'evidence of membership' in [National Association of Locum Tenens Organizations (NALTO)] or [National Association of Physician Recruiters (NAPR)]" (Appeal, at p. 5). J&C contends that "the RFP simply required that offerors demonstrate they have membership in NALTO or NAPR" and "J&C met this requirement by representing that it is a member of NALTO" (*Id.*).[5]

The RFP, Section 3, Vendor and Staff Qualifications, provided, "[v]endor proposals must include **documentation** which satisfies all minimum and/or mandatory requirements . . . [t]he documentation should, **at minimum** demonstrate the Vendor has . . . [m]embership in [NALTO] or [NAPR]" (RFP, at p. 13 (emphases added)). The RFP further instructed offerors to "**describe in detail** their firm's qualifications and experience in providing the services contemplated by [the] RFP [which] should address the following **at a minimum** . . . [p]rovide a narrative

[5] J&C also posits that "J&C is aware that another awardee (Lavaca) is not a member of either NALTO or NAPR . . . [and as such] should not have been eligible for award" (Appeal, at p. 5). Lavaca Street Ventures d/b/a Monroe & Weisbrod, LLC ("Lavaca") received an award from OMH as the fourth-ranked contractor on the call-down list. The procurement record shows that Lavaca was responsive to all RFP requirements.

describing how [the offeror] meets the requirements in Section 3. Vendor and Staff Qualifications" (RFP, at pp. 16–17 (emphases added)).

Our review of the procurement record indicates that where OMH evaluators awarded J&C less than the maximum available points for this portion of the technical proposal, evaluators found that J&C either "satisfactorily met" or "minimally met" the requirement due to not providing evidence of NALTO membership. As J&C admits in its Appeal, J&C did not provide documentary evidence of its NALTO membership (*see* Appeal, at p.5). Our review of the procurement record showed that the evaluators scored this aspect of J&C's technical proposal consistent with the RFP requirements and the technical evaluation tool. Notably, OMH did not conclude that J&C failed to meet the requirement – a conclusion that would have resulted in disqualification. Instead, OMH adhered to the RFP which provided, "[v]ague, contradictory, or incomplete responses may result in a reduced technical score" (RFP, at pp. 13, 16). Accordingly, we find that OMH provided a rational basis for the technical scores awarded for this portion of J&C's technical proposal and we decline to disturb same.

2. Qualifications & Experience: Staff Qualifications

J&C contends that the rationale provided by OMH during the debriefing for reducing J&C's points was "incorrect and problematic" (Appeal, at p. 5). Specifically, J&C took issue with OMH's claim that "it is '[d]ifficult to determine if the firm can meet the needs of OMH without an understanding of how many/percentage of psychiatrists are immediately available for assignment'" (*Id.*). J&C asserts that "OMH has no reasonable basis to conclude that [J&C] would not be able to meet [OMH's] needs, based on either [J&C's] proposal or [J&C's] past and existing successful working relationship with [OMH]" (*Id.*, at p. 6).

The RFP required offerors to "**describe in detail** their firm's qualifications and experience in providing the services contemplated by [the] RFP . . . address[ing] **at a minimum** . . . [s]taff [q]ualifications" including specific directives and questions (RFP, at pp. 16-17 (emphases added)). Among other things, the RFP specifically requested offerors provide the "percentage of your firm's rostered psychiatrists [that] are immediately available for assignment" (RFP, at p. 17).

Our review of the procurement record indicates that where OMH evaluators awarded J&C less than the maximum available points for this portion of the technical proposal, evaluators still found that J&C "satisfactorily met" the requirement based on a lack of information in J&C's proposal regarding the volume of psychiatrists immediately available for assignment. Our review of the procurement record showed that the evaluators scored this aspect of J&C's technical proposal consistent with the RFP requirements and the technical evaluation tool. In order to achieve a higher score, J&C would have had to "exceed expectations" for the requirement, in accordance with the technical evaluation tool scoring benchmarks, which requires not only adequately addressing the requirements but significantly exceeding expectations and providing "a high level of confidence that the proposed solution is optimal." Accordingly, we find that OMH provided a rational basis for the technical scores awarded for this portion of J&C's technical proposal and we decline to disturb same.

3. Qualifications & Experience: Experience / Expertise

J&C contends that the rationale provided by OMH during the debriefing for reducing J&C's points shows that OMH "fundamentally misunderstands what 'fill rate' means and how it is calculated" (Appeal, at p. 6). Specifically, J&C took issue with OMH's claim that "[J&C's] '46% average fill rate is low and does not provide confidence that the firm can meet the needs of OMH'" (*Id.*). J&C posits that "[t]he average fill rate, as available for publicly-traded locums companies, is just above 20% [and J&C's] is 46%" (*Id.*).

The RFP required offerors to "**describe in detail** their firm's qualifications and experience in providing the services contemplated by [the] RFP . . . address[ing] **at a minimum** . . . [e]xperience/[e]xpertise" including specific directives and questions (RFP, at pp. 16-17 (emphases added)). Among other things, the RFP specifically requested offerors provide their "firm's success rate in matching locum tenens psychiatrists with suitable positions" and the "experience [of the] firm [in] filling locum positions at Psychiatric Centers" (RFP, at p. 17).

Our review of the procurement record indicates that where OMH evaluators awarded J&C less than the maximum available points for this portion of the technical proposal, evaluators found that J&C "minimally met" the requirement due to the fill rate and also lack of information "specific to scope of experience with Psychiatric Centers" leading to a lack of confidence that J&C could meet OMH's needs. Our review of the procurement record showed that the evaluators scored this aspect of J&C's technical proposal consistent with the RFP requirements and the technical evaluation tool. Accordingly, we find that OMH provided a rational basis for the technical scores awarded for this portion of J&C's technical proposal and we decline to disturb same.

4. Recruitment & Retention

J&C contends that the rationale provided by OMH during the debriefing for reducing J&C's points was "clearly irrational" (Appeal, at p. 7). Specifically, J&C took issue with OMH's claim that "[J&C's] 'response could have been improved with more information on what an internal escalation of a requisition for broader outreach involves, as well as some information on how frequently this approach is used'" (*Id.*). J&C asserts that "[J&C's] proposal provided precisely the information sought by the RFP," specifically J&C provided "[a description of its] internal escalation process and what [J&C] does if [it is] unable to fulfill a request" (*Id.*).

The RFP required offerors to "**describe in detail** their firm's staffing capacity for providing locum tenens psychiatrist services . . . address[ing] the following **at a minimum** . . . [p]rovide a narrative describing how your firm meets the requirements in *Section 2.2.1 Requisition Management*" which requires "[t]he selected Vendor(s) [to] effectively respond to and manage an[] inventory of over 180 engagements and specialized needs of contingent service requests across all OMH facilities . . . [and the] Vendor(s) must have the experience and ability to manage requisition creation/approval and order management" (RFP, at pp. 5, 18 (emphases added)). The RFP also specifically required offerors to "[d]escribe the processes and next steps when your organization is unable to fulfill a request for temporary labor" and explain the "internal workflow from requisition submission to provider placement" (RFP, at p. 18).

Our review of the procurement record indicates that where OMH evaluators awarded J&C less than the maximum available points for this portion of the technical proposal, evaluators found that J&C "satisfactorily met" the requirement due to lack of detailed information on what internal escalation of a requisition entails. Our review of the procurement record showed that the evaluators scored this aspect of J&C's technical proposal consistent with the RFP requirements and the technical evaluation tool. In order to achieve a higher score, J&C would have had to "exceed expectations" for the requirement, in accordance with the technical evaluation tool scoring benchmarks, and not, as J&C indicates, simply "provide[] precisely the information sought by the RFP." Accordingly, we find that OMH provided a rational basis for the technical scores awarded for this portion of J&C's technical proposal and we decline to disturb same.

5. <u>Compliance & Reporting</u>

J&C contends that the rationale provided by OMH during the debriefing for reducing J&C's points was "clearly irrational" (Appeal, at p. 7). Specifically, J&C took issue with OMH's claim that "[J&C's] response 'does not address availability of ad hoc reporting'" (*Id.*). J&C asserts that "[J&C's] proposal provided the very information sought by the RFP," specifically J&C provided "a list of several examples of different types of ad hoc reports [ ] and two sample reports" (*Id.*).

The RFP required offerors to "**describe in detail** their firm's approach to compliance and reporting . . . address[ing] the following **at a minimum** . . . [p]rovide a narrative describing how your firm meets the requirements in *Section 2.2.6 Compliance and Reporting*" which requires "[t]he selected Vendor(s) [to] provide ad-hoc reporting for stakeholder business units" (RFP, at pp. 6, 19 (emphases added)). The RFP also specifically required offerors to explain "[w]hat ad hoc reports are available" (RFP, at p. 19).

Our review of the procurement record indicates that where OMH evaluators awarded J&C less than the maximum available points for this portion of the technical proposal, evaluators found that J&C either "satisfactorily met" or "minimally met" the requirement due to, in part, not addressing their ability to provide ad hoc reports. The RFP specifically required "detail" including an explanation of the ad hoc reports available. Our review of the procurement record showed that the evaluators scored this aspect of J&C's technical proposal consistent with the RFP requirements and the technical evaluation tool. Again, OMH adhered to the RFP which provided, "[v]ague, contradictory, or incomplete responses to requirements may result in a reduced technical score" (RFP, at p. 16). Accordingly, we find that OMH provided a rational basis for the technical scores awarded for this portion of J&C's technical proposal and we decline to disturb same.

**<u>Locum Tenens Staff Selection</u>**

J&C asserts that the RFP "require[s] [J&C] to stop working with [its] own independent contractors" and undergo "an involuntary transfer of J&C's invested resources to a competitor [namely, the primary awardee] who has not borne the costs or the effort of locating, screening, and maintaining relationships with [J&C's] locum psychiatrists currently serving OMH"

(Appeal, at pp. 7, 8). J&C "protests this [RFP] requirement as fundamentally inconsistent with the principles of fairness and competitive integrity" and "unfairly disadvantage[ous] [to J&C] while granting an unwarranted benefit to the primary awardee" (Appeal, at p. 7).

OMH states that the RFP "defines the contract award process as consisting of 'up to the top five Offerors with the highest composite scores ranked in descending order' . . . [and] describes the call down process to be used" (Protest Determination, at p. 1).

As outlined above, the RFP clearly delineated the award process would result in up to five Locum Tenens contract awardees with a call down structure utilized for fulfilling staffing requests (RFP, at pp. 23, 25). The RFP made it clear that "inclusion in the contract award and call-down list does not guarantee any specific number of fulfillment opportunities or amount of work [as] [r]equests will be issued on an as-needed basis, and vendors will be selected based on their ranking on the call-down list" (RFP, at p. 25). The RFP also underscored that "OMH shall not be a party to individual agreements of representation or employment between providers and their representative staffing firms" (RFP, Addendum No. 2).

J&C appears to be alleging that OMH is requiring it to give its contractual relationships with Locum Tenens staff to the primary awardee;[6] however, this allegation lacks support in either the RFP or the nature of the contractual relationships between Locum Tenens contractors and staff. OMH has established a staff selection process under the RFP but has not dictated to contractors or staff how to engage in their independent contractual relationships. The RFP resulted in a contract award between OMH and the Locum Tenens contractors – not the staff. In fact, as highlighted in the RFP, OMH is not a party to the agreements between Locum Tenens contractors and staff. While it may be true that the primary contract awardee has an advantage in attracting staff to enter into contracts with it over the other awardees, as the primary awardee has preference in the candidate selection process, it is ultimately up to the individual staff whether to enter into a contract with a particular contractor. Accordingly, we find no merit to J&C's contentions.

**CONCLUSION**

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the contract awards for Locum Tenens by OMH. As a result, the Appeal is denied and we are today approving the five OMH contracts for Locum Tenens.

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[6] To the extent J&C is alleging that it should be allowed to automatically maintain its current Locum Tenens staff placements albeit a new competitive procurement was undertaken, with new contract awards in place that contain a staff selection process, this allegation defeats the purpose of statutory competitive bidding requirements. To the extent J&C is requesting such an arrangement, such request would constitute a non-competitive award that lacks justification in this instance.

THOMAS P. DINAPOLI
STATE COMPTROLLER

110 STATE STREET
ALBANY, NEW YORK 12236

STATE OF NEW YORK
**OFFICE OF THE STATE COMPTROLLER**

March 13, 2026

Mark E. Duckstein, Esq.
Sills Cummis & Gross
One Riverfront Plaza
Newark, New Jersey 07102

Re: **SF-20260019 –** Determination of Bid Protest filed by Amneal Pharmaceuticals of NY, LLC with respect to New York State Department of Health Contract No. C043029 – Purchase of Naloxone from Padagis US LLC

Dear Mark E. Duckstein

The Office of the State Comptroller ("OSC" or "Office") has reviewed the above-referenced procurement conducted by the New York State Department of Health ("DOH") for the single source procurement of 4mg naloxone HCl nasal spray for the Opioid Overdose Prevention Program ("Naloxone") from Padagis US, LLC ("Padagis"). We have also reviewed the Protest submitted by you on behalf of your client Amneal Pharmaceuticals of NY, LLC ("Amneal"), dated March 9, 2026 ("Protest"). As a result, we determined the grounds advanced by the Protest are insufficient to merit overturning the contract award made by DOH and, therefore, we deny the Protest. Accordingly, we are today approving the DOH contract with Padagis for Naloxone ("Padagis Contract").

Amneal "protests the contemplated award of a one-year 'single source' contract to Padagis because Padagis is not the sole source of naloxone" and "Padagis is not the only provider of naloxone that could fulfill the State's purchasing needs" (Protest, at pp. 1, 2). On February 20, 2026, OSC granted DOH a **single** source exemption from advertising to purchase Naloxone from Padagis with a term "from 3/1/26-2/28/27 or until a new contract is in place, whichever is earlier." A single source means "a procurement in which although two or more offerers can supply the required commodities or services, the commissioner or state agency, upon written findings setting forth the material and substantial reasons therefor, may award a contract…to one offerer over the other" (*see* State Finance Law § 163(1)(h)). A **single** source award does not require that the awardee is the only provider of a service or commodity, or the only provider that is able to meet a purchasing need. Accordingly, we will not address whether a sole source award was justified and will instead discuss the basis for the single source award.

Amneal contends that "public bidding for the naloxone contract continues to be not only feasible and desirable, but it is the only legal method of procurement" (Protest, at p. 2). Amneal further contends that "the [invitation for bids ("IFB")] process [ ] would result in significant pricing competition and therefore permit the State to source naloxone for the lowest price" (Protest, at p. 2). DOH is required to document in the procurement record submitted to this Office the bases for a determination to purchase from a single source (*see* State Finance Law § 163(10)(b)(i)). The procurement record must include "the material and substantial reasons why a formal competitive process is not feasible" and "the circumstances leading to the selection of the vendor, including the alternatives considered, the rationale for selecting the specific vendor and the basis upon which [the agency] determined the cost was reasonable" (State Finance Law §§ 163(10)(b)(ii), 163(1)(h)). To support its single source request, DOH included the reasons why a formal competitive process is not immediately feasible, indicating that "[t]he current contract with Emergent Devices, Inc. [for Naloxone] ends on 2/28/26 . . . to prevent any gap in service, in the event the new contract [resulting from the April 2025 IFB] is not approved by 2/28/26, or if one or both bid protests are upheld, and the new contract [resulting from the April 2025 IFB] is non-approved[1] . . . [the] single source contract [with Padagis] will ensure that [DOH] can remain compliant with the laws and regulations by having a contract vehicle in place to provide naloxone." DOH indicated in the procurement record that "[t]he period of 12 months is requested in the event [DOH] must reprocure" and provided a "timeline for a competitive procurement" which spans from April 15, 2026, to March 1, 2027. Additionally, DOH included justification in the procurement record submitted to this Office which supports DOH's determination that the cost of purchasing Naloxone from Padagis is reasonable. DOH indicated, as supported by the procurement record, that "[i]n the IFB issued in April 2025, [Padagis] provided the lowest total bid price for naloxone and met the minimum qualifications of the [IFB]." DOH further indicated, as supported by the procurement record, that the pricing offered by Padagis represents significant savings as compared to the current contract with Emergent.

Amneal asserts that "in [ ] circumstances [where the emergency use of a single-source procurement is justified] the term of a single source procurement contract shall be limited to the minimum period of time necessary [and] it is inconceivable that a competitive bid process pursuant to a new IFB could not be concluded in far less time than one year" (Protest, at p. 2). State Finance Law provides the "term of a single source procurement contract shall be limited to the minimum period of time necessary to ameliorate the circumstances which created the material and substantial reasons for the single source award" (State Finance Law § 163(10)(b)(ii)). As stated above, DOH indicated in the procurement record that "[t]he period of 12 months is requested in the event [DOH] must reprocure" and provided a "timeline for a competitive procurement" which spans from April 15, 2026, to March 1, 2027. Moreover, DOH confirmed, that the Padagis Contract includes a provision to terminate early in the event a new competitively awarded contract commences prior to the February 28, 2027, end date for the Padagis Contract.[2]

Accordingly, our review of the procurement record showed that DOH met the applicable requirements of the State Finance Law, by including the required support for a single source contract with Padagis. Therefore, for the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the single source contract award by DOH. As a result, the Protest is denied and we are today approving the DOH / Padagis contract for Naloxone.

Sincerely,

Brian J. Fuller

Brian Fuller
Director of Contracts

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[1] DOH submitted the single source request to this Office on February 12, 2026. Thereafter, on February 19, 2026, this Office non-approved DOH's proposed contract pursuant to its April 2025 IFB for the procurement of Naloxone and Fentanyl Test Strips (*See* OSC Bid Protest Determinations SF-20250128, SF-20250222).

[2] This Office verified that the Padagis Contract includes a provision authorizing DOH to terminate early with thirty days' notice.

cc: Ryan VanDerVoort, Department of Health, ryan.vandervoort@health.ny.gov
Landon Clark, Padagis US LLC, Landon.Clark@padagis.com

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by R.L. Polk & Company with respect to the procurement of Data Acquisition of Access to Registration and Title Information conducted by the New York State Department of Motor Vehicles.

Contract Numbers – X000981 and X000982

**Determination of Bid Protest**

**SF–20240111**

April 7, 2025

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Motor Vehicles (DMV) for the acquisition of access to registration and title information for motor vehicles and motorcycles maintained by DMV (Data). We have determined the grounds advanced by R.L. Polk & Company (Polk) are insufficient to merit overturning the contract awards made by DMV as a result of this procurement and, therefore, we deny the Protest. As a result, we are today approving the DMV contracts for the acquisition of Data.

## BACKGROUND

### Facts

On April 18, 2024, DMV issued Invitation for Bid X000981 Data Acquisition of Access to Registration and Title Information (IFB) seeking bids for the acquisition of the Data (*see* IFB, at p. 5).[1] The IFB provided "[c]ontract(s) let pursuant to this IFB will be awarded to responsive and responsible bidder(s) who have adhered to the submission requirements and are considered qualified by [DMV] to meet the requirements of this IFB" (IFB, Section 1.9, at p. 8). The IFB required bidders to bid a fixed price of $2,960,500 for access to the Data during the one-year term of the contract (*see* IFB, Section 1.16, at p. 11).

DMV received two bids, from Polk and Experian Information Solutions, Inc. (Experian), prior to the due date of May 23, 2024. DMV awarded contracts to Polk and Experian, as DMV determined both bidders were qualified and agreed to meet the fixed price for the acquisition of Data under the IFB.

On June 17, 2024, Polk filed a protest with this Office (Protest) and on January 17, 2025, DMV responded to the Protest (Answer). Polk replied to the Answer on January 23, 2025 (Reply).

[1] Previously, on March 25, 2024, DMV issued an invitation to bid (IFB X000980) for access to the Data pursuant to which DMV would award an exclusive contract to one bidder. The previous solicitation provided for a minimum bid of $2,960,500 for one year's access. DMV withdrew this solicitation and issued the IFB.

## Comptroller's Authority and Procedures

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

In carrying out this contract approval responsibility, OSC has promulgated the Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency (2 NYCRR Part 24). This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no protest process engaged in at the department level, the Protest is governed by section 24.4 of the OSC Protest Procedure.

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DMV with the proposed DMV contracts with Polk and Experian;
2. the correspondence between this Office and DMV arising out of our review of the proposed DMV contracts with Polk and Experian; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
    a. Protest;
    b. Answer; and
    c. Reply.

## Applicable Statutes

This procurement is governed by Vehicle and Traffic Law (VTL) § 202(4)(a) which provides, "[t]he commissioner shall have discretion to contract with the highest responsible bidder or bidders to furnish the registration information specified in this section [202(4)(a)] from the records of all vehicle registrations from any registration period, or number of periods not exceeding five years in the aggregate, with respect to a given territory or information on titles."[2]

[2] This procurement resulted in a revenue contract, i.e., a contract which generates revenue for the State, and as such is not subject to the competitive bidding requirements of SFL § 163 that apply to expenditure contracts involving the purchase of goods or services.

## ANALYSIS OF THE PROTEST

**Protest to this Office**

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

1. DMV violated federal law, which requires states to disclose certain automotive data for "recalls" and "for use in connection with matters of motor vehicle or driver safety," by imposing an "arbitrary" and "unreasonable" fixed price on release of the Data pursuant to the IFB.
2. DMV violated New York State law by failing to justify the fixed price for providing the Data under the IFB, as being reasonably related to the costs incurred by DMV for such disclosure.
3. The fixed price for Data under the IFB was arbitrary and capricious because DMV failed to provide a rational basis for tripling the price for access to the Data.
4. The fixed price for Data under the IFB was arbitrary and capricious because DMV failed to justify its decision to require multiple bidders to each pay a fixed price equal to the minimum price for exclusive access by one bidder in a previously withdrawn IFB.

**DMV Response to the Protest**

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

1. Polk lacks standing to bring a protest in relation to this contract award because they were a successful bidder and agreed to the price stated in the IFB and, as such, Polk is not an interested party as contemplated by the OSC Protest Procedure.
2. The minimum bid price set forth in the IFB did not violate federal law; federal law allows DMV to charge an administrative fee for providing motor vehicle data.
3. The minimum bid price set forth in the IFB did not violate New York State law; New York State law allows DMV to contract with bidders to furnish certain vehicle registration information in bulk.
4. DMV's decision to increase the minimum bid amount was not arbitrary and capricious due to the increased costs to maintain the systems that support the collection, storage and delivery of the data pursuant to the IFB and further achieves the goal of maximizing revenue to the State. Furthermore, the fact that two bidders agreed to pay the minimum bid price demonstrates that it is reasonable.
5. DMV's decision to utilize the same minimum required bid amount for a multiple award IFB as it used for an exclusive award IFB was not arbitrary and capricious because an exclusive award would have resulted in competing bids above the minimum bid, whereas multiple awardees only paid the minimum bid, likely resulting in DMV receiving approximately the same revenue whether the award was exclusive or non-exclusive.

**<u>Polk Reply to the Answer</u>**

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

1. Polk has standing to bring a bid protest since it is a participant in the procurement process. Moreover, the intent of the OSC Protest Procedure is not to preclude successful bidders who must purchase data from a State agency from protesting the lawfulness of that agency's procurement.

**DISCUSSION**

**Status of Polk as an Interested Party**

DMV contends that Polk is not an "interested party" under the OSC Protest Procedure because Polk, "as the successful bidder, was clearly not foreclosed from participating in the procurement process" (Answer, at p. 1). DMV further contends that while Polk was a participant in the procurement process, "DMV does not believe that a protest brought by a successful bidder to dispute the price that it agreed to pay was contemplated in the [OSC Protest Procedure]" (*Id*., at p. 2). Polk retorts that "[a]s [DMV] admits, the plain language of [2 NYCRR § 24.2(e)] 'might not be so specific as to exclude successful bidders'" and therefore, as a participant in the procurement process, Polk has standing to bring a protest (Reply, at p. 5). Polk asserts DMV's interpretation "would preclude bidders from protesting in situations like this one, where a protestor must purchase data or other materials from a state agency but the agency's bid process is unlawful" (*Id*.). Polk states it submitted its bid "under protest" and such bid did "not reflect a willingness to pay an increased price" since "DMV is the only source for New York's title and registration data" and the fixed price precluded it and other bidders from negotiating a better price (*Id.*, at p. 4).

The OSC Protest Procedure defines an "interested party" as "a participant in the procurement process, and those who can establish that their participation in the procurement process was foreclosed by the actions of the public contracting entity and have suffered harm as a result of the manner in which the procurement was conducted" (2 NYCRR § 24.2(e)). When determining whether an entity is an "interested party" under the OSC Protest Procedure, this Office is not bound by the same standard a court uses to determine "standing" for purposes of a judicial challenge (*see* OSC Bid Protest Determination SF-20190191, at p. 4 (citing OSC Bid Protest Determination SF-20140300, at p. 5)). Rather "[t]o determine whether a party qualifies as an 'interested party,' we examine a number of factors on a case-by-case basis and assess whether the party has a significant involvement in the procurement and a demonstrable potential harm as a result of the manner in which the procurement was conducted" (OSC Bid Protest Determination SF-20140300, at p. 6).

Under the novel facts and circumstances presented in this procurement, we will address the arguments raised in Polk's protest. Polk was clearly a "participant" in the procurement process; Polk was not only a bidder but was a successful bidder. It is highly unusual, if not unprecedented, for a successful bidder to protest its own contract award. This is for good reason as a successful bidder normally would be hard pressed to demonstrate potential harm or absence of waiver due to its voluntary participation in the procurement, choice to enter a contract with the State agency, and self-determination of the price it determined to bid or, in regard to a revenue contract, was willing to pay. Nevertheless, the procurement under review is a singular procurement concerning a revenue contract to be awarded to multiple vendors at a fixed price set by the contracting agency (DMV) for the release and resale of data governed by the interplay of federal and State law. As a result, Polk faced the dilemma of either choosing to forgo bidding entirely in a procurement it considered legally infirm and consequently lacking standing to mount a challenge in court and attempting to argue that it was "foreclosed" from doing so in order to file a bid protest to this Office, or bidding and raising the issues on appeal to this Office all at the risk of ending without access to the data to the benefit of its competitor. Because of this unique confluence of factors and that the issues raised by Polk impact the integrity of the procurement itself, implicating the interests of all bidders/potential bidders, regardless of any harm or lack thereof that Polk has suffered, and (protest or not) OSC's statutory obligation under SFL § 112(3) to review and approve the proposed contract and underlying procurement, we will address the issues raised in the Protest.

**The Amount of the IFB Fixed Price Complies with Federal and State Law**

Polk asserts that "[t]he DPPA, a federal statute, requires state DMVs to disclose automotive data for 'recalls' and 'for use in connection with matters of motor vehicle or driver safety'"; however, "[t]he exorbitant, unexplained price for data in [the IFB] frustrates the federal policies embodied in the DPPA" (Protest, at p. 5). Polk alleges that while the DPPA permits DMV to charge an administrative fee for issuance of the Data, "[i]t is arbitrary and capricious for [DMV] to use the mandatory disclosure of data under a federal statutory scheme to offset governmental costs unrelated to the statutory mandate" (Reply, at pp. 1 and 2). Polk further asserts "[t]he DPPA's disclosure requirement prevents states from conditioning release of the data on the payment of an arbitrary, unreasonable fee" (Protest, at p. 6). Polk also claims "NYS DMV's data pricing does not appear to be related to the State's cost for providing the data or any other discernible basis [and while] [u]nder VTL § 202(4), NYS DMV has the exclusive right to collect and sell title and registration data, [ ] it does not have unfettered power when it comes to disclosure of the data . . . the government may not set unreasonable prices" (*Id.*, at p. 5).

DMV responds "the DPPA allows for states to charge an administrative fee for issuance of a motor vehicle record, and the New York State Legislature has deemed specific fees for the search of DMV records to be reasonable in addition to granting [DMV] the discretion to contract with bidders to furnish certain [Data] as an alternative to requiring such searches" (Answer, at p. 3).

The Federal Drivers Privacy Protection Act (DPPA) generally prohibits state departments of motor vehicles, like DMV, from disclosing personal information about individuals obtained by such departments in connection with a motor vehicle record (18 USC § 2721(a)(1)). However, in relevant part, the DPPA provides such information "shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers [ ] to carry out the purposes of [certain Federal Acts]" (18 USC § 2721(b)).

The DPPA further provides that nothing therein prohibits DMV from charging an administrative fee for issuance of a motor vehicle record (18 USC § 2721(e)).[3]

Accordingly, it is indisputable that DMV is authorized to charge fees for searching its records, and State law expressly authorizes DMV to do so (*see* VTL § 202). In fact, beyond the dictates of federal law, State law not only permits DMV to charge administrative fees for searching its records in distinct queries, but it also permits DMV to enter into a contract to sell certain information contained in motor vehicle records in bulk to a vendor as an alternative to the vendor paying statutory fees for searching DMV's records individually (VTL § 202(4)(a)). The VTL makes a clear distinction between the fees set for individual record searches pursuant to VTL §§ 202(2) and (3) versus the contract value for the provision of bulk records pursuant to VTL § 202(4)(a), which provides, "the fees provided by [VTL § 202] shall not apply to copies of records furnished under any such contract [established under VTL § 202(4)(a)]."

Polk asserts that DMV's "pricing decision [is] arbitrary and capricious" because it is not supported by a "rational basis" (Protest, at pp. 4-5). Polk alleges that "DMV has more than tripled the price for [access to] the data [from the prior contract in 2022], for no apparent reason" (Protest, at p. 5). Polk further alleges that although "DMV demanded the same price in [this IFB] for non-exclusive data access as it had proposed to charge for exclusive access in [the prior withdrawn IFB]," DMV has not "explained why the same, increased price it first proposed for *exclusive* access to the data is also the appropriate price for *non-exclusive* access" (*Id.*, at pp. 3, 5 (emphases in original).

DMV counters Polk's assertion, asserting "[t]he minimum bid that [Polk] agreed to pay is not a clearly and demonstratively unreasonable amount [since] two bidders, including [Polk], agreed to pay that amount" (Answer, at p. 3). To bolster its assertion that the bid price is reasonable, DMV contends that had it not exercised its discretion under VTL § 202(4) to award a contract providing for the bulk sale of the Data, "Polk would have been left only with the option of searching DMV records at a cost of seven dollars per search, which the Legislature has deemed to be appropriate [pursuant to VTL § 202(2)(b)]"; and, based on the estimated amount of records needed by Polk, the total cost would have been well "beyond the $2,960,500 that [Polk] agreed to pay in its successful bid" for the bulk Data contract (*Id.*, at p. 2). DMV further contends that "it is more likely that the price for an exclusive award would have been higher than the minimum as it is clear now that there are two interested parties that would have put forth competing bids in an attempt to win the exclusive award of the contract [while] a non-exclusive award resulted in multiple bidders paying only the minimum" accordingly "its entirely possible that the amount that DMV received in either case would be approximately the same" (*Id.*, at pp. 2-3). To further support the bid price, DMV states it will be replacing outdated computer systems and contends "there are costs to DMV associated with maintaining the systems that support the collection, storage, and delivery of the data that is the subject of the instant procurement" (*Id.,* at p. 3). Finally, DMV maintains "the increased minimum bid price tends toward achieving maximum potential revenue to the State" (*Id.*).

[3] Motor vehicle record means "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles" (18 USCS § 2725(1)).

As DMV notes, there was no requirement under federal or State law mandating that it produce the relevant records in bulk to commercial entities to further their business interest, and DMV could have chosen to forgo this option. Rather, State law provides DMV with the discretion to allow bulk distribution pursuant to a revenue contract which, by its very nature, is designed to generate revenue for New York State (as opposed to an expenditure contract involving the purchase of goods and services by the State). The Court of Appeals has acknowledged that apart from regulatory activities where governmental entities impose administrative fees on the public, "governmental entities can and do participate in other economic activities through voluntary contractual arrangements with the private sector," which may include a contractual obligation that requires a contractor to pay a fee. *See In re. Walton v. State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 485 (N.Y. 2009). DMV, the State agency responsible for maintaining vehicle records, established a fixed price to maximize revenue in the best interest of the State accounting for the amount the commercial entity would be required to expend in administrative fees absent this avenue. Polk does not dispute the administrative fee charged per individual searches and has not identified any statute, regulation, or even policy that limits the value of the contract entered into between DMV and the vendor for access to the Data pursuant to VTL § 202(4) or that generally limits the amount of revenue DMV can generate for the State under a revenue contract. Indeed, under the direct language of VTL § 202, DMV was empowered to grant contract awards to the highest bidder or bidders, without restrictions on bid amount that could be set by DMV in the IFB.

In this light, moreover, the evidence de facto demonstrates that the fixed price was not unreasonable as the bidder pool for the Data is willing and able to pay the fixed price set by DMV in the IFB. Two bidders previously contracted with DMV for access to the Data, and the same two bidders (one of which was Polk) agreed to pay the fixed price under the IFB. Polk is in the business of selling data obtained from all 50 states, Washington, D.C., and Puerto Rico to automobile manufacturers for use in connection with vehicle recalls (*see* Protest, at pp. 1-2). Despite the increased price that Polk is challenging, submitting a bid would have been imprudent unless a bidder determined its business would still profit, despite the costs of obtaining the Data. In sum, on its face and by the very nature of revenue contracts, VTL § 202(4) contemplates maximizing revenue for the State for production of bulk data to commercial enterprises in lieu of individual searches and is lawful, therefore, Polk's contention that the IFB's price violates federal and State law lacks merit. Accordingly, Polk has failed to demonstrate that DMV acted outside the bounds of its authority in setting the IFB's price.

Polk's further arguments are unavailing. *In re. Ripp v. Oyster Bay*, 140 A.D.3d 775 (2d Dep't 2016), involved application of a provision of the Freedom of Information Law enumerating permissible and "actual costs" permitted to be charged to a requestor under that statutory scheme designed to encourage public accessibility to governmental records (Pub. Off. Law § 87(1)). The fees at issue are not governed by FOIL or issued pursuant to a statute designed to enhance accessibility. To the contrary, here, the records are only available to Polk under an exception to federal law which allows the imposition of an administrative fee per search. The IFB expressly informed bidders that any resulting contract was pursuant to, and subject to requirements of, VTL § 202(4) (*see* IFB, Section 2.6, at p. 15) which, as mentioned above, provides that DMV "shall have discretion to contract with the highest responsible bidder or bidders" to provide commercially valuable information in bulk. Accordingly, Polk's reliance on *Ripp* and the Freedom of Information law's limitations of costs is misplaced (*see State ex rel. Motor Carrier Serv., Inc. v.*

*Rankin*, 987 N.E.2d 670, 676–77 (Ohio 2013) (holding that DPPA administrative fee is legally distinct from public record access fee)).

**CONCLUSION**

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the contract awards by DMV. As a result, the Protest is denied and we are today approving the DMV contracts with Polk and Experian for the acquisition of the Data.