STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest
filed by Davis Vision
with respect to the procurement for the
administration of the New York State Vision Plan
conducted by the New York State
Department of Civil Service Employee Benefits Division
Contract Number C000580

Determination
of Bid Protest
SF-20060333

December 1, 2006

This Office has completed its review of the above-referenced procurement conducted by the New York State Department of Civil Service Employee Benefits Division (hereinafter "DCS") and the bid protest filed by Davis Vision, Inc. (hereinafter "Davis Vision") with respect thereto. As outlined in further detail below, we have determined that the grounds advanced by the protestor are without sufficient merit to overturn the contract award by DCS. As a result, we hereby deny the protest and are today approving the DCS contract award to EyeMed Vision Care, LLC (hereinafter "EyeMed").

BACKGROUND

Facts

On March 10, 2006, the DCS issued a Request for Proposals ("RFP") seeking competitive proposals to secure the services of a qualified organization to administer the New York State Vision Plan (hereinafter "Plan"). The Plan is a self-funded vision program that is paid for entirely by New York State, with the exception of certain copayments by covered individuals. The Plan currently has close to 100,000 enrollees, and approximately 269,000 covered individuals. The benefit design of the Plan is the result of collective bargaining between the State and the various unions representing its employees. Benefits are administratively extended to non-represented State employees. In addition, the Plan affords limited benefits to members of the Student Employee Health Plan.[1] Enrollees and dependents may receive services from any licensed optometrist acting within the scope of his/her license. Benefits (eye examination, frames and lenses, or contact lenses) are available to enrollees and covered dependents once in a twenty-four month period. Participating providers perform eye examinations and dispense Plan lenses and a selection of Plan frames at no cost to covered individuals. A covered individual may obtain non-Plan frames, lenses or lens coatings from a participating provider; however, he/she is responsible for any additional charges associated with these non-covered services. Under the Plan's Occupational Vision Program, in light of their

[1] The Student Employee Health Plan was established in 1994 through collective bargaining and became part of the Plan in 2002. The Student Employee Health Plan provides basic vision plan benefits to graduate students of the State University of New York and their eligible dependents.

occupational duties, certain enrollees are entitled to an additional pair of prescription eyeglasses from participating providers.

Prior to the proposal due date of May 3, 2006, DCS received two proposals in response to the RFP, one from Davis Vision and the other from EyeMed. After a review of the proposals, by letter dated July 28, 2006, DCS made a conditional award under the procurement to EyeMed and notified Davis Vision of such award. By letter dated August 4, 2006, Davis Vision filed a formal Protest with DCS. DCS Commissioner Daniel Wall designated Joseph F. Kulkus, DCS Director of Internal Audit, to perform a review of the procurement conducted by DCS in light of the issues raised in the Protest filed by Davis Vision. By letter dated August 18, 2006 to Mr. Kulkus, the DCS Employee Benefits Division responded to the issues raised in the Protest. By letter dated September 12, 2006, Mr. Kulkus issued his report and recommendation (hereinafter "Kulkus Report"), to DCS Commissioner Wall concluding that the Protest was unwarranted and that the award to EyeMed should stand. By letter dated September 19, 2006, DCS Commissioner Wall adopted the findings and recommendation of Mr. Kulkus and dismissed the Protest filed by Davis Vision.

Subsequently, DCS signed a contract with EyeMed for the services required under the RFP and forwarded such contract to this Office for approval. The DCS/EyeMed contract was received by this Office on October 4, 2006. By correspondence dated October 25, 2006, Davis Vision filed an appeal of the DCS Protest determination with this Office (hereinafter "Appeal").

Procedures and Comptroller's Authority

Under Section 112 of the State Finance Law (hereinafter "SFL"), generally, before any expenditure contract made for or by a state agency, which exceeds $50,000 in amount, becomes effective it must be approved by the Comptroller. Because DCS had already entered into a proposed contract with EyeMed resulting from this procurement, the Comptroller has reviewed the issues raised in the Appeal filed by Davis Vision, as well as the issues raised in the Protest, as part of his review of the contract award to EyeMed.

In determination of this Appeal, this Office considered:
(i) the documentation contained in the procurement record forwarded to this Office by DCS with the DCS/EyeMed contract;
(ii) the correspondence and communications between this Office and DCS arising out of our review of the proposed DCS/EyeMed contract; and
(iii) the following correspondence/submissions from the parties (including the attachments thereto)

- Davis Vision Protest, dated August 4, 2006 (correspondence from Paul Ennis, Vice President of Client Administration, Davis Vision to Carol Whiteman, Procurement Manager, DCS)

- DCS Response to Protest, dated August 18, 2006 (correspondence from Robert W. DuBois, Director of the DCS Employee Benefits Division, to Joseph Kulkus, Director of Internal Audit)
- Report and Recommendation of Joseph Kulkus, dated September 12, 2006
- Davis Vision's Appeal to OSC, dated October 25, 2006 (correspondence from Norma Meacham of Whiteman, Osterman & Hanna, LLP to John Moriarty, Director, Bureau of Contracts OSC)
- DCS Response to Appeal, dated November 7, 2006 (correspondence from Brian S. Reichenbach, DCS Counsel, to John Moriarty, Director, Bureau of Contracts OSC)
- EyeMed's Response to Appeal, dated November 7, 2006 (correspondence from Melissa J. Copeland, of Nelson Mullins Riley & Scarborough, LLP, Counsel to EyeMed, to John Moriarty, Director, Bureau of Contracts OSC)
- Davis Vision's Reply to responses from DCS and EyeMed, dated November 13, 2006 (correspondence from Norma Meacham of Whiteman, Osterman & Hanna, LLP to John Moriarty, Director, Bureau of Contracts OSC)

Protesting Party

The protestor, Davis Vision, is one of the entities that submitted a proposal in response to the RFP issued by DCS, and is the incumbent vendor administering the Plan.

Applicable Statutes

The requirements applicable to this procurement are set forth in Article 11 of the SFL, and provide that contracts for services shall be awarded on the basis of "best value" from a responsive and responsible offerer.[2] Best value is defined as "the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers."[3] A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."[4]

ANALYSIS OF BID PROTEST/APPEAL

Davis Vision's Protest to DCS

Davis Vision challenged the procurement conducted by DCS on the following grounds:

[2] SFL Section 163(10).

[3] SFL Section 163(1)(j).

[4] SFL Section 163(1)(d).

1. The RFP's evaluation criteria did not result in the award of the contract on the basis of best value as required by SFL §163.

   - The RFP weighted cost too heavily at 80% of the total evaluation score, while technical was weighted at only 20%. The evaluation criteria further minimized the weight of technical by attempting to equalize the scoring system for the technical and cost components.
   - The RFP's evaluation criteria operated to award the procurement to the low cost bidder, regardless of quality.

2. The RFP fails to accurately calculate total cost by ignoring the costs borne by Plan members.

   - Only the direct costs to the State were considered in the cost calculation.
   - The costs borne by covered individuals through upgrade payments or out-of-network costs were not considered in the cost evaluation.

3. The RFP failed to accurately calculate cost since it does not evaluate the cost of occupational lenses.

4. DCS used a scoring system for the technical evaluation that was different from what was set forth in the RFP.

   - The RFP distorted the ratio between quality and cost by placing factors such as the performance guarantee, arguably a cost factor, in the technical services section.
   - The performance guarantee was rated by a single reviewer, rather than multiple evaluators as stated in the RFP.

5. DCS failed to consider its experience with Davis Vision in its evaluation of the Davis Vision proposal, contrary to the language of the RFP.

6. DCS did not adhere to the timeline set forth in the RFP.

   - While the RFP set July 14, 2006 as the selection date, Davis Vision was not notified that it was an unsuccessful bidder until July 28, 2006.
   - Under its current contract, Davis Vision is required to have a transfer plan in place by September 1, 2006. Under the circumstances, there is not sufficient time for an orderly progression of benefit transfer.

DCS's Response to the Protest

DCS responded to the Protest as follows:

- The RFP included a number of mandatory minimum requirements which, in effect, limited the field of potential offerers to those firms with an established

track record both to the purchaser of such services and plan beneficiaries. Given the high bar set for participation in the process, coupled with the fact that eye exams for prescriptions and the fitting of corrective lenses are performed by professionals licensed by the State, a heavy weighting of cost was appropriate.

- The scoring methodology set forth in the RFP was the same scoring methodology that was used in the evaluation process. Further, this same methodology was used by DCS in the previous procurement under which Davis Vision was awarded its present contract for these services.
- Under the terms of the RFP, potential offerers were required to submit any claim regarding errors or omissions in the RFP prior the proposal due date. While many of the grounds advanced by Davis Vision allege apparent errors or omissions in the RFP, Davis Vision failed to file any such claim.
- It is common practice in the benefits field to define "plan costs" as the contractual costs paid by the plan sponsor to an insurer or third party administrator. Any attempt to evaluate out of pocket costs of enrollees based upon their selection of upgrades over fully covered plan benefits would not have been objective or quantifiable.
- DCS did consider the cost of occupational vision lenses in its cost calculation. DCS multiplied the offerer's submitted prices (which included prices for occupational lenses, frames and examinations) by a set of utilization figures based on the Plan's prior experience.
- The technical evaluation of proposals was conducted in accordance with the RFP.
- Performance guarantees were a proper part of the technical evaluation. Since the performance guarantees are in the nature of performance penalties proposed by the offerers, there was no subjective nature to their scoring. Therefore, it was appropriate to have this aspect of the technical proposals evaluated by a single evaluator.
- While the past performance of Davis Vision did not result in any bonus points in the scoring of its technical proposal, the past performance of Davis Vision was factored into the evaluation of its proposal consistent with information that was obtained in a reference check.
- The timeframe set forth in the RFP was an "estimated" timeline and the RFP expressly provided DCS with the authority to change any scheduled dates set forth therein.

Davis Vision's Appeal to this Office

In the Appeal filed with this Office, in addition to the grounds advanced by Davis Vision in its Protest to DCS, Davis Vision raised the following issues.

- DCS provided an unfair advantage to competitors by disclosing proprietary information of Davis Vision. DCS released extensive information on Davis Vision's pricing under its current contract, as well as utilization information.
- EyeMed may have failed to meet the preliminary requirement of provider network coverage due to the language of its provider agreements that allows providers to determine whether to participate on a plan by plan basis.

- DCS may have inappropriately allowed EyeMed to amend its proposal.
- The DCS/EyeMed contract materially deviates from the terms of the RFP in that the proposed contract fails to fulfill: (i) the three separate frame collection requirement, or (ii) the stated goal of the Plan – "to offer quality eyecare services at little or no cost to eligible Employees and their covered Dependents."[5]
- The change from a frame collection to a retail allowance benefit design represents a potential deviation from collectively negotiated benefits.

DCS' Response to the Appeal

DCS responded to the new issues raised in the Appeal as follows:

- Aggregate amounts paid by the State for goods or for services are never proprietary. Utilization information (i.e., the specific number of services historically consumed under the Plan) is key information that must be provided to potential offerors to allow them to develop a proposal in response to the RFP. This information was not designated as trade secret information when Davis Vision provided it to DCS.
- A participating provider's ability to terminate its contract with EyeMed in the future (under the cited opt out language) does not affect EyeMed's fulfillment of the RFP's coverage requirement. EyeMed's corporate-owned facilities, which can not opt out of the Plan, satisfy the mandatory access standards set forth in the RFP.
- EyeMed did not amend its proposal.
- The DCS/EyeMed contract does not materially deviate from the RFP. The retail allowance method proposed by EyeMed satisfies the RFP requirements.
- The EyeMed proposal and the resulting DCS/EyeMed contract are consistent with the State's collectively bargaining agreements.

EyeMed's Response to the Appeal

EyeMed responded to the issues raised in the Appeal as follows:

- EyeMed's proposal met and exceeded the minimum access standards of the RFP.
- The language of EyeMed's participating provider agreement does not prevent EyeMed from considering these providers for purposes of meeting the access standards. Additionally, EyeMed's provider agreements with its corporate owned facilities do not contain the "opt out" language.
- EyeMed was not given an opportunity to, nor did it, amend its proposal.
- The DCS/EyeMed contract is in full compliance with the terms of the RFP, in that it provides three categories of frames differentiated by retail allowance as specifically authorized by the RFP.

[5] RFP page 1-2.

DISCUSSION

The resolution of this Appeal, and our review of the contract award by DCS, requires that we address the following issues:

(1) Did DCS award the procurement on the basis of best value?
(2) Did DCS accurately calculate cost in the evaluation of proposals?
(3) Did DCS evaluate the technical proposals consistent with the RFP?
(4) Did DCS properly consider the past experience of Davis Vision in evaluating its proposal?
(5) Did DCS inappropriately vary from the timeframe set forth in the RFP?
(6) Did DCS provide an unfair advantage to competitors by disclosing proprietary information of Davis Vision?
(7) Did EyeMed meet the preliminary requirement of provider network coverage, in light of the language of its provider agreements?
(8) Did DCS inappropriately permit EyeMed to amend its proposal?
(9) Does the DCS/EyeMed contract materially deviate from the terms of the RFP?
(10) Does the change from a frame collection to a retail allowance benefit design constitute a deviation from collectively negotiated benefits?

1. Best Value

As required by Section 163 of the SFL, the RFP provides that the contract award under this procurement would be made to the "responsive and responsible Offeror whose Proposal offers the **best value** to the DCS and the State . . ." (emphasis supplied).[6] For purposes of the RFP, the best value was the Offerer whose proposal received the highest Total Combined Score. As described in the RFP, to arrive at an Offerer's Total Combined Score, the following formula was utilized: the Offerer's Technical Score was multiplied by 20% and this figure was added to the product of the Offeror's Cost Score multiplied by 80%.[7] As a result, the technical evaluation was weighted at 20% of the scoring and the cost evaluation was weighted at 80% of the scoring. Davis Vision asserts that by placing such a high value on the cost component of the proposals, DCS did not make an award on the basis of best value.

SFL Section 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." The leading case interpreting these requirements is Transactive Corporation v. New York State Department of Social Services, 236 A.D.2d 48, 53 (1997); aff'd on other grnds, 92 N.Y.2d 579 (1998). In that case, the Appellate Division, Third Department reviewed a procurement of a complex electronic benefit transfer system. The procuring agency determined to award the contract using a competitive

[6] RFP page 5-1.

[7] RFP page 5-7.

range methodology whereby the cost proposals of all responsive proposers would first be evaluated and scored and the technical scores would only be considered for those proposers with a cost within 10% of the lowest cost proposer. Since no other responsive proposer had a cost within 10% of that of the lowest cost proposer, the award was ultimately made without considering the technical scores. One of the grounds asserting in the challenge to the award was that this methodology did not constitute a best value award as required by section 163.

The Appellate Division in addressing this issue first stated "[i]n 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 State Finance Law § 163(10) provides that such a contract must...be awarded on the basis of best value..."[8] (emphasis added). The court noted, however, that the agency had issued an RFP with extensive technical requirements, and had established criteria for the evaluation of both the technical and cost proposals. Therefore, the court upheld the award methodology and the award. In reaching this conclusion, the court stated,

> Given the fact that DSS subjected the proposals to technical and financial evaluations, we find that it engaged in the requisite cost-benefit analysis. Further, DSS' reliance on a competitive range was permissible because such procedure embodies a cost-benefit analysis as it reflects a determination that where a price proposed by a responsive and responsible bidder is lower than a price offered by another bidder by a stated percentage, any increase in value embodied in the higher price will be offset by the cost savings of the lower priced proposal.[9]

Therefore, what is required by section 163 is that an agency undertake a cost benefit analysis in determining best value. OSC, in applying the rationale in Transactive and consistent with the Procurement Guidelines issued by the New York State Procurement Council, [10] has determined two prior bid protests where cost alone was used as the basis for an award. In the first protest, we concluded that it was not appropriate to award the contract solely on the basis of cost because, in that case, quality and efficiency

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[8] Transactive 236 A.D.2d 48, 53.

[9] Transactive 236 A.D.2d 48, 53-54.

[10] The Procurement Guidelines, state there are "occasions when it makes sense to boil down a best value award for services to a lowest price determination" (Section IV-9). The Procurement Guidelines explain that the IFB methodology, which is the method used where cost is the only consideration:

> "is appropriate for those situations where the needed . . . services and/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, among responsive and responsible offerers ... **In the case of services**, an IFB may be used to acquire services and technology when the agency determines that price is the principal award criteria" (Section VI-1, emphasis in original).

requirements had not been fully defined in the specifications - only duties had been defined. Because quality and efficiency were of dire financial, health, and safety consequences to the People of the State of New York, it was clear that the award of the contract on the basis of cost alone did not reflect the cost-benefit analysis required by section 163.[11] Subsequently, however, in another protest, we upheld an award based solely upon cost because quality and efficiency requirements had been sufficiently defined in the specifications, and quality and efficiency variations between responsive and responsible offerers were not reasonably expected to have significant financial, health or safety consequences to the People of the State of New York.[12]

Here, the issue presented is whether the evaluation methodology adopted by DSC which ascribes a relatively low value to technical constitutes an appropriate cost/benefit analysis and therefore a best value award. Preliminarily, we note that it is clear that agencies are not required to ascribe equal weights, or any other fixed weights, to cost and technical. Rather, section 163(9) provides for such determination to be made in each procurement. Consistent with the decision in Transactive, and our prior protest determinations, it is our view that an agency may utilize an award methodology in a service procurement which awards most of the weight to cost where, based upon the established bidder qualifications and other technical requirements, there is either little likelihood that there will be significant variances in the quality of the technical proposals or any variances will have only a somewhat limited impact upon the value of such services to the State.

Here, DCS determined the 20% weighting of the technical proposal as an appropriate method to effect a cost benefit analysis in light of the preliminary mandatory requirements and other technical requirements.[13] The preliminary mandatory requirements contained in the RFP required the Offerer to demonstrate to the satisfaction of DCS that: (i) it provides vision plan administration for a minimum of five hundred thousand (500,000) covered lives as of the proposal due date; and (ii) that on the proposal due date it had an existing participating provider network that will provide services under the contract in accordance with certain minimum access standards.[14] DCS further notes that the eye exams for prescriptions and the fitting of corrective lenses will be performed by professionals licensed by the State.[15] We are satisfied based upon our review of the procurement record that any increase in value resulting from greater technical merit will

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[11] SF-20010084

[12] SF-20020035

[13] RFP page 3-1.

[14] As discussed in further detail below at Point 7 of this Determination, the RFP sets forth the following minimum access standards: (i) 70% of the enrollees in urban areas will have at least one participating provider within five miles of an enrollee's home; (ii) 70% of the enrollees in suburban areas will have at least one participating provider within fifteen miles of an enrollee's home; and (iii) 70% of the enrollees in rural areas will have at least one participating provider within thirty miles of an enrollee's home. RFP page 3-2.

[15] While the RFP contains numerous other requirements, including submissions of various plans and other documents, these requirements were not prescriptive in nature.

have only a limited value to the State, and therefore that the 20% weight given to technical is justified and consistent with section 163.

Davis Vision also asserts that the "equalization" of the technical and cost components of the scoring before applying the 80/20 weighting, further devalued technical merit making it even more unlikely that an offer other than the offerer proposing the low cost would win the award. We disagree. In fact, the scoring system, including the equalization methodology, employed by DCS, while complex, operates to insure that the technical components are actually given their assigned weight of 20 percent. The equalization methodology operates to eliminate the bias inherent in most scoring systems which would otherwise operate to increase the actual weight of the cost score.[16]

2. **Calculation of Cost**

Davis Vision asserts that DCS failed to accurately calculate cost by ignoring costs borne by Plan members.

The RFP provides that to evaluate Plan cost, DCS will calculate the Total Plan Cost for each Offerer as the sum of the Total Projected Claims Cost, the Total Projected Administrative Cost and the Total Projected Communications Cost (as these terms are further defined in the RFP).[17] The proposal with the lowest Total Plan Cost was to be awarded a cost score equal to the highest technical score awarded. All other Cost proposals were to be awarded a Cost score using a pre-established formula such that the Cost scores awarded would be proportional to the points awarded to the low cost proposal.

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[16] This bias arises from the fact that in the methods most commonly used to evaluate proposals, the low cost proposal is guaranteed the maximum points for costs (with each other proposal receiving an appropriate percentage of the maximum points based upon its ratio to the low price proposal), whereas, because of the subjective nature of technical evaluations, the highest ranked technical proposal will almost never receive the maximum number of points; resulting in a system which effectively grants even more weight to cost. For example, in a procurement where cost and technical are given equal weight and the low cost proposal from Bidder A is 5% cheaper than the proposal of Bidder B, Bidder A will typically receive the full 50 points for cost and bidder B will receive 47.5 points. If in the same procurement Bidder B is the highest ranked technical proposal with a score 5% greater than that of Bidder A, it will (because perfection is rare) almost always receive a score of less than 50 points, for example 45 points, with Bidder A receiving 42.75 points. As a result, Bidder A will, without a normalization methodology receive a higher total score (92.75 points) than Bidder B (92.5 points) despite the fact that the differences between each on cost and technical are identical, and the effective ratio of cost to technical would actually be 52.6% cost to 47.4% technical. The type of normalization utilized by DCS operates to ensure that in this hypothetical, each bidder would receive identical scores of 97.5 points, more accurately reflecting the assigned weights of cost and technical.

[17] RFP page 5-6.

While DCS did not consider the out of pocket expenses of covered individuals in evaluating the Cost proposals, DCS was not required to do so.[18] DCS established a fair and reasonable method of evaluating cost,[19] which DCS detailed in the RFP. Our review of the procurement record confirms that, as required by law,[20] DCS evaluated the Cost proposals consistent with the methodology stated in the RFP.

As for the allegation by Davis Vision that DCS did not consider the cost of occupational lenses in its evaluation of cost, our review of the procurement record reveals that DCS did consider the cost of occupational lenses as part of the cost evaluation. As stated by DCS, and confirmed by our review of the procurement record, the prices submitted by Offerers (including prices for occupational lenses) were applied to predetermined utilization figures, based on the Plan's prior experience, in the calculation of Cost.

3. Evaluation of Technical Proposals

Davis Vision asserts that performance guarantees were improperly evaluated as a component of an Offerer's technical proposal and should have been reviewed as a cost consideration.

Section 160(5)of the SFL provides that "cost"

> shall be quantifiable and may include, without limitation, the price of the given good or service being purchased; the administrative, training, storage, maintenance or other overhead associated with a given good or service; the value of warranties, delivery schedules, financing costs and foregone opportunity costs associated with a given good or service; and the life span and associated life cycle costs of the given good or service being purchased. Life cycle costs may include, but shall not be limited to, costs or savings associated with construction, energy use, maintenance, operation, and salvage or disposal.

Price is further defined as "the amount of money set as consideration for the sale of a commodity or service and may include, but is not limited to, when applicable and when specified in the solicitation, delivery charges, installation charges and other costs." [21]

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[18] We would agree that DCS could have considered such costs (which might be passed on to the State through collective bargaining) as indirect costs, but they were not required to do so.

[19] In addressing the evaluation of cost, DCS asserts that: (i) it is common practice in the benefits field to define "plan costs" as the contractual costs paid by the plan sponsor to an insurer or third party administrator; and (ii) since there is no reasonable way to predict if an employee will select a pair of glasses within the plan structure or, if he/she does not, the exact amount of the out-of-pocket expense associated with such upgrades, any attempt to evaluate cost would not qualify as objective or quantifiable.

[20] See SFL §163(10)(a).

[21] SFL §160(6).

Performance guarantees do not appear to fall within the definition of "cost" as defined in the SFL. Further, as we understand it, a performance guarantee is in the nature of a financial penalty associated with a service provider's failure to maintain a guaranteed service level. As such, a performance guarantee does not result in any independent costs to the Plan, but rather represents potential payments from the service provider to the State as a result of the service provider's failure to maintain the required service levels. Therefore, in our view, DCS properly considered the performance guarantees as part of its technical review of the proposals. This conclusion is further supported by the position asserted by DCS that the primary purpose of the performance guarantees is not to generate any revenue, but rather to insure a high quality of service.

Davis Vision further asserts that, in contravention of the requirements of the RFP, the performance guarantees were rated by a single individual rather than a team of reviewers. The RFP provides that "Qualifying Proposals will be evaluated by multiple evaluators based on the Evaluation Criteria".[22] The purpose of multiple evaluators and DCS's decision to use a single evaluator to score the performance guarantees is specifically addressed in the Kulkus Report which stated:

> [s]ince the evaluation of many elements of the technical proposal is by its very nature, somewhat subjective, multiple evaluators are used to guard against bias or misinterpretation of an offeror's proposal. However, within the evaluation process, there may be some instances where the score is simply the result of applying a number presented in the offeror's proposal against a specific numerical standard in the evaluation criteria. Such is the case in the evaluation of performance penalties proposed by offerors. The RFP instructed offerors to propose a penalty for failure to perform certain tasks at a specified performance level. Suggested penalties were provided. Points were awarded based on whether the offeror proposed penalties below, at or above the suggested level.

The Kulkus Report concluded that since there was "no subjective evaluation of the [performance guarantees], it would have been a waste of time to have multiple evaluators perform the same calculation."[23] We concur with the findings of the Kulkus Report on this matter.

4. Past Experience

Apparently, based on certain statements attributed to DCS representatives at an August 2nd debriefing provided to Davis Vision, Davis Vision asserts that DCS failed to consider its experience with Davis Vision in the evaluation process.

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[22] RFP page 5-6.

[23] Kulkus Report page 3.

The RFP provides that the evaluation of an Offeror's Technical Proposal "will be based on that Offeror's written Technical Proposal; responses to clarifying questions, if any; information obtained through reference checks, including the DCS's and GOER's experience with the Offeror or its proposed subcontractors, if any; and, as deemed necessary by DCS, oral presentation(s) conducted to amplify and/or clarify that Offeror's proposed Technical Proposal" (emphasis added).[24] Nothing in the RFP or the scoring instrument provided that the results of the reference checks or the prior experience with Davis or any other proposer was a separate "evaluation area" which would be independently scored.

As we read the RFP, it simply provides that members of the evaluation committee in their evaluation of the proposals will consider a number of factors, including information obtained through a reference checks and the prior experience of DCS and GOER with Davis Vision or any other Offerer. Furthermore, in response to the assertion by Davis Vision, DCS stated that in accordance with the RFP "DCS' past experience with Davis Vision was factored into the evaluation of its technical proposal as information obtained in a reference check would have been for any other offeror"[25] and our review of the procurement record confirms that DCS' past experience with Davis Vision was considered.

Therefore, we are satisfied that the scoring of the Davis Vision's technical proposal on this matter was consistent with the language of the RFP.

5. Time Line

Davis Vision asserts that DCS did not follow the time line set forth in the RFP and, as a result, Davis Vision was placed at a disadvantage. Furthermore, Davis Vision asserts that while its current contract with DCS mandates that a transfer plan be put in place no later than September 1, 2006, in light of the pending protest and DCS's failure to adhere to the time line set forth in the RFP, "Davis Vision should be maintained as the vendor for a minimum of one year to ensure an orderly progression of benefit transfer."[26]

Initially, we note that DCS provided notice to Davis Vision on July 28, 2006 of its selection of EyeMed under the procurement. While Davis Vision claims to not have received a "hard copy" of the notification, Davis Vision does acknowledge that it received this information by fax and telephone on this date.

While the RFP set forth an "estimated" timeline listing July 14, 2006 as the Selection Date,[27] the express language of the RFP describes the listed dates as estimations. In our

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[24] RFP page 5-2.

[25] DCS Response to Protest, dated August 18, 2006, page 3.

[26] Davis Vision Protest, dated August 4, 2006, page 5.

[27] RFP page 2-1.

view, it is clear that the language of the RFP did not require that DCS make a selection on the estimated July 14, 2006 date. Furthermore, since DCS did provide notice of selection by July 28, 2006, within two weeks of the date listed in the RFP, Davis Vision does not appear to have been disadvantaged by the timing of DCS' notification.

As for the transition to the new provider, Davis Vision is under a contractual obligation to submit, for DCS approval, a turnover plan by September 1, 2006 or such other date as agreed to by DCS. Additionally, Davis Vision is under a contractual obligation to provide the services necessary for an efficient transition to a new Contractor while providing the necessary Plan services during the term of its pending agreement. As we understand it, Davis Vision has provided DCS with its turnover plan which has met with DCS approval and DCS anticipates a timely and efficient transition from Davis Vision to EyeMed.

6. Disclosure of Pricing and Utilization Information

Davis Vision asserts that DCS provided an unfair advantage to competitors by disclosing its proprietary information in the procurement process.

In Exhibit III. A and B of the RFP, DCS provided information relative to the total amount paid per service, per employee group, as well as corresponding utilization counts for services provided under its current agreement with Davis Vision. In addition, in response to questions received from potential offerers prior to the proposal submission date, DCS provided information relative to: (i) claims costs for the Basic, Standard and Enhanced frame selections; (ii) the most utilized participating providers in the Davis Vision network; (iii) the most popular frames in Davis Vision's basic, standard and enhanced frame collections; (iv) the contact lenses Davis Vision currently offers under the Plan; and (v) upgrade costs per service under the current Plan.[28] Davis Vision argues that the release of this "proprietary" information violated the terms of the RFP[29] and created an unlevel playing field.

In response to this assertion by Davis Vision, DCS takes the position that the aggregate amounts paid by the State for goods or services are never proprietary and the utilization information is needed by potential offerers to develop a response to the RFP.

As to the release of amounts paid by the State under the current contract with Davis Vision for the administration of the Plan, we agree with DCS that these aggregate amounts represent the expenditure of public funds and, therefore, are a matter of public information. As for the utilization figures, initially we note that Davis Vision is required to provide certain utilization information to DCS under its current contract to administer the Plan. The current DCS/Davis Vision contract requires that Davis Vision provide

[28] Questions Nos. 8(b), 2(b), Attachment 3, 12(a), 12(f) NYS Vision Plan RFP Questions and Answers.

[29] The RFP provided that "DCS will not provide information about processes or information proprietary to the contract incumbent" (RFP page2-7).

DCS management, utilization and financial reports as required by DCS for its use in the review, management, and analysis of the Program.

In addition, the information in question was provided to DCS by Davis Vision in the context of an ongoing procurement process where, under the circumstances, Davis Vision knew or reasonably should have known that this information would be provided to potential Offerers. Davis Vision was in attendance at a mandatory Pre-Proposal Conference on March 22, 2006 where a potential Offerer requested the disclosure of utilization information regarding the Plan. Shortly thereafter, DCS requested this utilization information from Davis Vision [30] and requested that Davis Vision provide this information to DCS by April 7th three days before the April 10th date set forth in the RFP for the release of the "Official Responses to Questions".

Furthermore, when Davis Vision provided the utilization information to DCS, Davis Vision did not label or otherwise identify the information as proprietary. Since Davis Vision was in the best position to determine whether this information was in fact proprietary, Davis Vision can not now be heard to complain that the release of such information provided an unfair advantage to its competitors when Davis Vision did not identify the information as proprietary at the time the information was provided to DCS. In addition to Davis Vision not identifying this information as proprietary when providing it to DCS, it is also important to note that Davis Vision did not object to the release of this information when the Official Responses to Questions were issued on April 11, 2006, or when Davis Vision filed its initial Protest with DCS on August 4, 2006. The first time Davis Vision voiced any concern as to the release of this information was in the October 25, 2006 Appeal filed with this Office.

Finally, it is important to note that DCS clearly did not view this information as proprietary and did not believe that providing this information to potential offerers would disadvantage Davis Vision or provide other offerers an unfair advantage.[31] Rather, DCS felt that the information was "necessary" for potential offerers to formulate a proposal based on "a consistent set of assumptions". We defer to DCS' determination in this regard.

7. **Provider Network Coverage**

The RFP lists certain preliminary mandatory requirements that must be satisfied or the Offerer's proposal is removed from consideration. One of listed preliminary mandatory requirements was that the Offerer provide documentation demonstrating that:

> On the Proposal Due Date it has an existing Participating Provider Network that will provide services under the terms of the contract

[30] DCS requested this information by one e-mail dated March 24th and two e-mails dated April 4th.

[31] DCS Response to Appeal, dated November 7, 2006, page 1.

resulting from this RFP that meets the following minimum access standards within NYS:

- Seventy percent (70%) of Enrollees in urban areas will have at least one (1) Participating Provider within five (5) miles of an Enrollee's home;
- Seventy percent (70%) of Enrollees in suburban areas will have at least one (1) Participating Provider within fifteen (15) miles of an Enrollee's home;
- Seventy percent (70%) of Enrollees in rural areas will have at least one (1) Participating Provider within thirty (30) miles of an Enrollee's home.

For the purpose of meeting the minimum access standards, the term provider means a licensed, optometrist or ophthalmologist who has an existing contract with the Offerer that meets the requirements of this RFP, on the Proposal Due Date (emphasis in original).[32]

Davis Vision asserts that in light of the language of EyeMed's provider agreements, that allows participating providers to opt out of participating in "new standard plans" or "non-standard plans", EyeMed did not satisfy the minimum access standards required under the RFP.

As we read the RFP, to satisfy the minimum access standard, an Offeror could consider any provider with which it had an "existing" contract. The fact that a provider could, under the terms of such agreement, elect not to continue its relationship with the respective Offeror is of no import with respect to satisfying this requirement of the RFP. In any event, EyeMed's contracted network of providers consists of providers in both corporate owned and independent facilities and it is only the independent facilities that utilize provider agreements containing the opt out language referenced in the Appeal; the provider agreements with the corporate owned facilities do not have this language.[33] Assuming arguendo (that in light of the opt out language of the EyeMed provider agreements with its independent facilities) that the independent facilities should not be considered for purposes of satisfying the minimum access standards, EyeMed nevertheless satisfies this RFP requirement with its corporate owned facilities.

8. Amendments to EyeMed Proposal

In its Appeal, Davis Vision states that, based on certain language in the Kulkus Report,[34] DCS may have "allowed EyeMed to amend its proposal in contravention of law and the

[32] RFP page 3-2.

[33] EyeMed Response to Appeal, page 3.

[34] In the "Review Criteria, Resources and Procedure" section of his report, Mr. Kulkus states that in the context of his inquiry into the allegations of the Protest he requested certain resources from the DCS Employee Benefits Division including vendor-specific documents including but "not limited to, proposal amendments, clarifying correspondence and responses and technical proposal documents and amendments (Kulkus Report, page 2).

procedures set forth in the RFP". In response to this assertion, DCS and EyeMed unequivocally state that EyeMed was not provided an opportunity to amend its proposal.[35] Consistent with the statements of DCS and EyeMed, our review of the procurement record confirms that EyeMed did not amend its proposal.[36]

9. DCS/EyeMed Contract Variation from RFP Requirements

Davis Vision asserts that the DCS/EyeMed contract before this Office materially deviates from the RFP in that the "retail allowance" benefit design provided under the EyeMed proposal does not satisfy the three collection benefit design required under the RFP. The RFP provides that:

> Plan frames must be available in three separate benefit levels: the basic frames for Enrollees and Dependents represented by GSEU; a broader selection of standard Plan frames for all other Plan Enrollees and Dependents, and an enhanced selection of Plan frames for M/C and unrepresented groups. The number of frame models must remain at the same level or at a greater level as the number the Offeror submits in its Proposal. Plan participants eligible for the Upgrade Program should have access to any frame in the third benefit level selection, subject to the Upgrade Program surcharge.[37]

In a response to a question posed at the pre-proposal conference as to whether benefit designs other than the design offered by the incumbent, Davis Vision, were permissible, DCS responded as follows:

> While proposals must comply with the benefit features presented in the RFP, the DCS believes these benefit features do not limit the submission of proposals to vendors other than the incumbent vendor. Regarding frame selection, we have asked Offerors to propose three levels of benefit. The three levels of frames may also be a varying selection within three separate price ranges or retail allowances. Regarding contact lenses, a retail allowance for contact lenses would be acceptable; however the copayment charged as stipulated by the RFP and the quantity of contact lenses received by the member should not vary from provider to provider for the exact same contact lenses.
> If a retail allowance method is selected, DCS expects that the Offeror would set an allowance for each of the three frame benefit levels as well as the two contact lens benefits. Regardless of the retail price of the specific frame or contact lenses selected by a member within a benefit level, the

[35] DCS Reply to Appeal, page 4 and EyeMed Reply to Appeal, page 4.

[36] EyeMed, like Davis did submit clarifications as permitted by the State Finance Law and the RFP.

[37] RFP page 3-34.

> selected Offeror would charge the DCS one contractual amount for frames or lenses falling into each benefit level. The selected Offeror may reimburse the participating provider a different amount based on their participating provider agreement.[38] (emphasis added)

In our view, it is clear that in responding to this question concerning the form of benefit design, DCS specifically authorized a retail allowance approach. Accordingly, the benefit design proposed by EyeMed, providing three categories of frames that are differentiated by retail allowance, is consistent with the requirements of the RFP.

In addition, based on the information provided, it appears that the DCS/EyeMed contract fulfills the stated goal of the Plan by offering quality eyecare services at little or no cost to covered individuals. Under the contract, EyeMed will provide three separate frame allowances at $80, $100 and $130.[39] Any frame selected by a covered individual with a retail price at or below the respective allowance will be provided at no cost. In response to questions raised in follow-up to management interview of EyeMed on June 5, 2006, EyeMed submitted documentation to DCS clarifying that EyeMed would guarantee that each participating provider (corporate and independent) would carry a minimum selection of 15 frame styles within the $80 allowance, 22 frame styles within the $100 allowance and 25 frame styles within the $130 allowance. In addition, we note that on a site visit conducted by the evaluation team, the evaluators confirmed a large selection of frames within the three frame allowances.

In light of the foregoing, we are satisfied that the DCS/EyeMed contract does not materially deviate from the requirements of the RFP.

10. Collectively Negotiated Benefits

Davis Vision has asserted that the retail allowance benefit design offered by EyeMed may be a deviation from the collectively negotiated benefits provided under the Plan. In response to this assertion, this Office requested that DCS confirm with the Governor's Office of Employee Relations that the proposal submitted by EyeMed and the terms of the DCS/EyeMed contract are consistent with the State's collective bargaining agreements. DCS has provided this Office with such confirmation.

CONCLUSION

We find that the issues raised in the protest are not of sufficient merit to overturn the award by DCS to EyeMed and, therefore the protest is denied. We are, therefore, today approving the DCS/EyeMed contract.

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[38] Question #1, NYS Vision Plan RFP Questions and Answers.

[39] EyeMed Proposal page 3-76.