

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Bid Protests filed by Parsons Environment & Infrastructure Group, Inc. and SGS Testcom Inc. with respect to the procurement of the New York Vehicle Inspection Program (NYVIP2) conducted by the New York State Department of Motor Vehicles

**Determination  
of Bid Protests**

**SF20120274  
SF20120243**

Contract Number – C000744

February 28, 2013

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This Office has completed its review of the above-referenced procurement conducted by the New York State Department of Motor Vehicles (“DMV”) and the bid protests filed by Parsons Environment & Infrastructure Group, Inc. and SGS Testcom Inc. (“Parsons” and “SGST” respectively, and collectively referred to as “Protesters”) with respect thereto. As outlined in further detail below, we have determined that the grounds advanced by the Protestors are without sufficient merit to overturn the contract award by DMV. We, therefore, hereby deny the protests and are today approving the DMV contract with SysTech International, LLC (“SysTech”).

**BACKGROUND**

**Facts**

On March 30, 2012, DMV issued a Request for Proposals (“RFP”) seeking a contractor to replace the existing New York Vehicle Inspection Program (“NYVIP”) system for conducting motor vehicle safety/emission inspections with an upgraded system (“NYVIP2”). The successful bidder would be responsible for providing all elements required for the development, procurement, installation and maintenance of NYVIP2. The new program would be used by 60,000 certified inspectors throughout the State. The costs of the NYVIP2 will not be paid by the State, but rather will be borne by the private inspectors and inspection stations. The RFP provided that proposals would be evaluated on the following criteria: 1) Program Requirements (worth 20% of the total score); 2) Information Services Technical Requirements (worth 25% of the total score); 3) Experience and Expertise (worth 15% of the total score); and 4) Cost (worth 40% of the total score). The RFP provided that an award would be made to the responsive and responsible bidder awarded the most points from the Bid Evaluation Committee. DMV received five proposals prior to the June 8, 2012 due date set forth in the RFP.

On July 7, 2012, DMV made an award to SysTech, the bidder that submitted the proposal receiving the most points from the Bid Evaluation Committee, and subsequently informed the four other bidders of such award. The SysTech proposal received a score of 76.62 out of 100,

SGST was the second highest-scoring bidder with a score of 73.29 and Parsons was the fourth highest scoring bidder with a score of 70.76.

On August 23, 2012, both Parsons and SGST participated in debriefings conducted by DMV. Shortly after being debriefed by DMV, the Protesters filed protests with this Office, challenging DMV's decision to award the contract to SysTech and requesting that this Office refrain from approving the contract. In essence, the Protesters argue that the procurement conducted by DMV violated the New York State Finance Law ("SFL"), was not conducted in a fair and rational manner and that the award to SysTech does not provide the best value to the State.

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

Under SFL §112(3), before any contract wherein the State agrees to give a consideration other than the payment of money, when the value of such consideration exceeds ten thousand dollars (\$10,000) in amount, becomes effective it must be approved by the Comptroller.

In carrying out the responsibilities proscribed by SFL §112, this Office has issued Contract Award Protest Procedures that govern the process to be used when an interested party challenges a contract award by a State agency.<sup>1</sup> These procedures govern (i) initial protests to this Office of agency contract awards and (ii) appeals of agency protest determinations. Because the RFP issued by DMV did not provide for a protest process with DMV, the Protest is governed by this Office's procedures for initial protests filed with OSC (Section 3 of the Contract Award Protest Procedure).

In the determination of this Protest, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by DMV with the DMV/SysTech contract;
2. The correspondence between this Office and DMV arising out of our review of the proposed DMV/SysTech contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
  - a. Parson's Protest, dated September 7, 2012;
  - b. SGST's Protest, dated August 27, 2012;
  - c. SGST's Additional Filing, dated October 16, 2012;
  - d. DMV's Answer to Parson's Protest, dated December 4, 2012;
  - e. DMV's Answer to SGST's Protest and Additional Filing, dated December 4, 2012;
  - f. SGST's Reply, dated December 7, 2012;
  - g. SGST's Supplemental Reply, dated December 11, 2012;

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<sup>1</sup> OSC's Guide to Financial Operations (GFO) Chapter 11.17.

- h. Parson's Reply, dated December 19, 2012; and
- i. DMV's January 8, 2013<sup>2</sup> Response to SGST's Replies dated December 7 and 11, 2012.

## **ANALYSIS OF BID PROTEST**

### **Parson's Protest to this Office**

In its protest (including its reply), Parsons challenges the procurement conducted by DMV on the following grounds:

1. The evaluation methodology used by DMV was arbitrary and not rationally related to the aims of the RFP and when an appropriate evaluation methodology is used Parsons offers the best value to the State; and
2. DMV applied an incorrect standard to award the contract. Primarily, the value assigned to cost was misrepresented by the RFP and materially over-emphasized.

### **DMV's Answer to the Parson Protest**

In its answer, DMV contends the Parson protest should be rejected and the award upheld on the following grounds:

1. The evaluation methodology used by DMV was rational and has been successfully used by DMV for at least the past six years;
2. DMV determined the relative scoring weight of each category prior to the submission of bids based on the importance of each factor; and
3. The cost criterion is a quantitative, objective one in which the lowest bidder will receive a maximum score, whereas, the technical criterion is subjective and qualitative wherein the relatively "best" proposal may not receive a maximum score.

### **SGST's Protest to this Office**

In its protest (including its additional filing and reply), SGST challenges the procurement conducted by DMV on the following grounds:

1. DMV failed to follow clear and rational standards in evaluating the bids;
2. The disproportionally low cost bid from SysTech relative to the other bids should raise some level of scrutiny as to how SysTech could provide a comparable quality service to the State and whether it is, in fact, the best value to the State; and
3. SysTech's bid proposal exceeded the 150-page limit set forth in the RFP by some thirty pages.

### **DMV's Answer to the SGST Protest**

In its answer (including its additional response), DMV contends the SGST protest should be rejected and the award upheld on the following grounds:

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<sup>2</sup> DMV's Response was inadvertently dated January 8, 2012.

1. DMV's evaluation methodology was rational and was applied fairly and consistently to all bidders' proposals. The evaluation criteria was clearly indicated in the RFP. If a bidder met the basic requirements of the RFP, it would be awarded half of the total points allotted for that particular area. To the extent a bidder provided a proposal in a particular area that exceeded the basic requirements, it would be awarded additional points, up to the maximum established for each area;
2. DMV did, in fact, follow clear and rational standards in evaluating proposals;
3. SysTech's cost proposal was within 15% of the next lowest bid and therefore, would not be considered significantly lower than the other bids calling into concern its capabilities to perform the contract at the proposed price. Additionally, DMV did not rely solely on SysTech's references to evaluate their responsibility but rather undertook a FLIP analysis in making such determination; and
4. SysTech's proposal did comply with the 150-page limit; the proposal was 146 pages in length.

## DISCUSSION

Preliminarily, we note that, since the State will not be making any payments under this contract, it is not clear whether, technically, the award of the contract was subject to the requirements of SFL §163. In *Allen Group v. Adduci*, 123 A.D.2d 91 (3d Dept. 1987), the Appellate Division considered a contract by DMV very similar to the contract at issue in these protests. The Court determined that the award of such contract was not subject to a predecessor statute to SFL §163, because such contract, like the contract presented by these protests, did not involve any direct purchase by the State, and was therefore a revenue or concession contract. We also note, however, that in an earlier decision by the Court of Appeals, in *Signacon Controls v. Mulroy*, 32 N.Y.2d 410 (1973), the Court seemed to suggest that contracts by municipalities that will result in purchases by members of the general public could be considered purchase contracts subject to General Municipal Law §103, the bidding statute applicable to municipalities. Because, however, for the reasons outlined below, we are satisfied that the award of this contract is consistent with the requirements of SFL §163, we need not conclusively determine whether this contract is exempt from such requirements.

The Protesters' arguments can be summarized into four categories: 1) the evaluation methodology developed by DMV was flawed and did not measure best value; 2) the actual scoring and evaluation of the proposals by DMV was flawed; 3) DMV did not properly review SysTech's vendor responsibility; and 4) the technical proposal submitted by SysTech did not comply with the RFP's 150-page limit. We will address each of these categories in turn below.

### 1. DMV's Evaluation Methodology was Flawed

Both Protesters assert that DMV's evaluation methodology was flawed and was not reasonably designed to determine best value to the State because: a) DMV failed to comply with the requirements of SFL §163 in developing the procedures to be utilized in evaluating proposals; b) DMV assigned too much weight to cost; c) the evaluation methodology employed by DMV and the scoring of the technical proposals resulted in cost being afforded more than

40% of the weight set forth in the RFP; and d) the cost evaluation methodology employed by DMV failed to account for indirect costs to the State.

a. Statutory Standards for Evaluation Process

The SFL provides that service “contracts shall be awarded on the basis of *best value* to a responsive and responsible offerer”<sup>3</sup> (emphasis added). “Best value” is defined as “the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers.”<sup>4</sup> As the definition makes clear, “best value” is a flexible concept based on a balancing of the cost and technical benefits of each proposal based upon the specific circumstances present in each procurement.

The SFL requires that the solicitation issued by the procuring 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 will be conducted (SFL §163(9)(b)). Furthermore, the SFL requires that, where appropriate, the solicitation identify the relative importance and/or weight of cost and the overall technical criterion to be considered in the determination of best value. *Id.*

In this instance, the RFP issued by DMV set forth minimum requirements (RFP pg. 7) and disclosed that an award would be made to the proposal receiving the highest score after an evaluation of the following criteria: Program Requirements (worth 20% of the total score); Information Services Technical Requirements (worth 25% of the total score); Experience and Expertise (worth 15% of the total score); and Cost (worth 40% of the total score) (RFP pg. 61). The language of the RFP setting forth the minimum requirements to be responsive; the general manner in which the evaluation and selection would be made; and the relative importance/weight of cost satisfied the requirements of SFL §163(9)(b).

Additionally, we note that where the basis for award is best value, the procuring agency must document in the procurement record, prior to the initial receipt of bids, the evaluation criteria 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)). The procurement record establishes that DMV did in fact develop its detailed evaluation and selection process prior to the initial receipt of bids on June 8, 2012.

Finally, we note that the evaluation methodology developed by DMV normalized the cost scores by assigning the full 40 points to the lowest cost proposal, but did not normalize the technical scores by assigning the full 60 points (or the full points to any category) to the highest ranked proposal. Parsons asserts that the failure to include this information in the RFP violated the requirements of SFL §163(9)(b). We do not agree. As noted previously, the RFP reflected the values assigned to cost and technical. While it is certainly unlikely that a technical proposal would receive the full 60 points, such an outcome is not impossible. Furthermore, we are

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<sup>3</sup> SFL §163(4)(d).

<sup>4</sup> SFL § 163(1)(j).

satisfied that, in any event, the disclosure of the assigned values in the RFP satisfied the statutory requirement.<sup>5</sup>

b. Importance/Weight of Cost

The leading case interpreting the requirements for best value procurements is *Transactive Corporation v. New York State Department of Social Services*, 236 A.D.2d 48 (3d Dept. 1997, *aff'd on other grnds*, 92 N.Y.2d 579 [1998]). In *Transactive*, the Appellate Division reviewed a procurement of a complex electronic benefit transfer system. The procuring agency awarded the contract using a competitive range methodology, whereby the cost proposals were first evaluated and scored and technical scores were only considered for those proposers offering a cost that fell within 10% of the lowest cost proposal. Since no other responsive proposer submitted a cost proposal that fell within 10% of the lowest cost proposal, the award was ultimately made without considering any technical scores. One of the grounds asserted in the challenge of the award was that this methodology did not result in a best value award as required by SFL §163. The Appellate Division rejected this argument, among others, and upheld the contract award.<sup>6</sup> With respect to the method of award of a service contract, the Court stated:

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 State Finance Law § 163(10) provides that such a contract must be awarded on the basis of best value...<sup>7</sup>

The Court noted, however, that the agency issued an RFP with extensive technical requirements and established criteria for the evaluation of both the technical and cost proposals. The Court found that the use of a competitive range was permissible since the agency had engaged in the requisite cost-benefit analysis, stating that:

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.<sup>8</sup>

Thus, the Court in *Transactive*, found that, even a methodology affording much more than 40% weight to cost took into consideration a cost-benefit analysis sufficient enough to encompass the objectives of a best value award. Here, the evaluation methodology utilized by DMV afforded only 40% of the total weight to cost and 60% to technical (25% being allotted to information services requirements, 20% to program requirements and 15% to experience). Generally, this Office gives substantial deference to agency determinations concerning criteria to

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<sup>5</sup> Further, we note, as discussed below, that even if the technical scores had been normalized, there would have been no change in the results of the procurement.

<sup>6</sup> Prior to the commencement of litigation, the procurement under review in *Transactive* had been the subject of a bid protest to this Office, and we also rejected the protest and approved the contract (see SF19960095). The Court's decision thus ratified the determination of this Office.

<sup>7</sup> *Transactive*, 236 A.D.2d at 53.

<sup>8</sup> *Transactive*, 236 A.D.2d at 53-54.

be evaluated and the appropriate weights allotted to different areas of the evaluation, particularly where such determinations are within the expertise of the agency.

Here, we are satisfied that DMV, consistent with the principles outlined above, undertook an appropriate cost-benefit analysis and we have no reason to upset DMV's determination to afford cost 40% of the weight in the best value determination.

c. The Evaluation Methodology as Employed by DMV and the Scoring of the Technical Evaluations Resulted in Cost Being Afforded More than 40% of the Weight

The Protesters assert that the value assigned to cost was misrepresented by the RFP and was materially over-emphasized. Specifically, it is argued that the bidder offering the lowest cost proposal automatically received the full 40 points allotted for cost, whereas the proposal receiving the highest technical score did not receive the full 60 points for technical merit. Essentially, the protesters argue that the normalization of the cost scores without normalization of the technical scores diluted the value of the technical proposal scores below the 60% stated in the RFP. We believe that SFL § 163(9)(b) does not require that an agency state in the RFP that it is not normalizing technical scores. Furthermore, ultimately, this is a moot issue in this case. We have reviewed the scoring of the proposals and have determined that even if DMV had normalized the technical scores and awarded 60 points to the highest ranked technical proposal (and proportionately less points to the remaining proposals,) SysTech would remain the highest scoring bidder.<sup>9</sup>

The Protesters also appear to be asserting that the evaluation was flawed because ultimately the determination of best value came down to the scoring of the cost proposals. This argument is based upon the fact that the technical scores for all of the bidders were in a very narrow range, and, therefore, ultimately the proposal with the lowest cost (and therefore the highest cost score) became the best value proposal.

The Protesters are correct that DMV, in this case, could not choose to equate lowest price to best value, and therefore DMV could not have utilized an evaluation methodology that awarded the contract to the lowest price bidder.<sup>10</sup> However, DMV did not do that in this case. DMV developed an evaluation system that allotted 60 of the 100 available points to technical. While it happened that all of the bidders received technical scores in a very narrow range, DMV had no way of knowing that would happen in this case, and indeed such a narrow range in the scoring of technical proposals is possible in any procurement. Therefore, the Protesters' argument in this respect, which is based upon the results of the evaluation rather than the evaluation process, is, in our view, without merit.

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<sup>9</sup> We also normalized the scores for each of the subcategories of technical, and this likewise, did not result in any change in the final ranking of the proposals.

<sup>10</sup> While section 163 requires that service contracts must be awarded on the basis of best value, consistent with the decision of the Appellate Division in *Transactive*, there are cases where it may be appropriate to equate low price to best value. Indeed, this Office has, in a number of protest determinations, approved the award of a service contract where lowest price was equated to best value (*see, e.g.* SF20020035 and SF20100434). Essentially, it is our view that best value can be equated to lowest price where, because of the routine nature of the services or the detailed technical requirements in the specifications, there is little if any room for variations in the technical merits of proposals that will have meaningful value to the State. However, that is clearly not the case in this procurement.

d. The Cost Evaluation did not Account for Indirect Costs to the State

SGST alleges that the cost evaluation methodology employed by DMV was flawed because it failed to account for indirect costs to the State. SGST correctly points out that, as stated earlier, there are no direct costs to the State and that DMV in evaluating costs only considered the costs to the service stations (and not any indirect costs to the State.) While it is clear that it is reasonable and appropriate to consider these costs as part of the cost evaluation, SGST asserts that DMV erred in failing to consider indirect costs to the State that may be incurred particularly if there is a change in vendors. In support of this argument, SGST cites the prior decision of this Office in SF20100156.

This Office has, in SF20100156 and several other prior bid protests,<sup>11</sup> stated that a state agency, in making an award on the basis of best value pursuant to SFL §163, must, in the evaluation and scoring of cost, generally evaluate all fees or other elements that will impact on cost. We have also recognized, however, that there may be circumstances where this may not be possible or appropriate. Specifically, in SF20010156 we stated that such costs or fees were not required to be included in the evaluation of cost where 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.<sup>12</sup>

We note initially, that this is a procurement for an entirely new system to replace the existing system. Therefore, it is not clear why SGST assumes that there would be cost savings to the State or reductions in start up costs because of any familiarity that State personnel may have with the existing SGST system. Indeed, DMV in its response states that the award of this contract will not result in any significant additional outlay of State funds. Furthermore, even if we were to assume that there might possibly be some cost savings, such savings would be difficult or impossible to estimate. Therefore, we are satisfied that potential start-up costs associated with a new vendor taking over the program, were not required to be included in the cost evaluation for this procurement.<sup>13</sup>

## **2. The Scoring and Evaluation Methodology Used by DMV was Flawed**

In addition to challenging the evaluation methodology developed by DMV, the Protestors also make several assertions challenging the actual evaluation by the DMV technical evaluation team. We will address each of these allegations, in turn, below.

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<sup>11</sup> SF20100156, SF20080408 and 20080185.

<sup>12</sup> While not raised in either protest, as part of our review, we noted that certain optional costs to the users (which the bidders were required to include in their cost proposals) were not included in the evaluation of costs; but after reviewing the issue, we were satisfied that, in this case, DMV's cost scoring methodology was acceptable.

<sup>13</sup> In SF20080156 we did state that where the costs would be difficult or impossible to estimate, that an agency "should" evaluate such savings as part of its technical evaluation where it is possible to do so in a meaningful manner. Here, as noted, it is not at all clear that any such savings will exist. Furthermore, we have no basis to assume that the evaluators could have done so in a meaningful manner. Finally, we question whether, generally, it would be appropriate to grant a higher score based, effectively, upon incumbency, and we certainly do not believe that the failure to ascribe points based effectively upon incumbency is improper.

a) *DMV did not evaluate information concerning the location of staff within the State.* While bidders were required to disclose the location of staff within the State, SGST asserts that this information was not evaluated. DMV indicated that the RFP made it clear which job functions required staff within the State and evaluated the proposals for compliance with that component, however, for most positions, being physically located within the State was neither a requirement nor a preference and did not need to be evaluated.

b) *Size and complexity of the systems implemented by bidders was not evaluated.* The RFP required bidders to show “experience in large system design and implementation. This involves implementations with more than 100 inspection stations on different local and/or wide area networks . . . .” SGST asserts that the RFP, however, requires the successful bidder to manage thousands of units and argues that the weighting should have been attributed to the size and complexity of a referenced program or rather the thousands of units the bidder would be required to manage. DMV indicated that once the basic requirement was met, (i.e. serving at least 100 stations) additional points were awarded to bidders who serviced a larger network.

c) *Evaluation of program requirements was flawed.* In evaluating the program requirements, the RFP provided that it would take into account the contractor’s ability to meet user requirements. SGST asserts that it is currently providing NYVIP services to the State and a higher degree of risk would accompany any other bidder since they are not currently providing those services and that such risk should have been taken into account. DMV asserts that it developed the RFP requirements and evaluation criteria to ensure fairness and impartiality. DMV further asserts that the evaluation criteria set forth in the RFP allowed for DMV to assess each bidder’s ability to perform its contractual obligations in a timely and appropriate manner and that the program requirements section of each proposal was evaluated based on content and not past experience with the current system.

d) *Evaluation of technical requirements was flawed.* Pursuant to the RFP, the technical evaluation examined the overall hardware and software capabilities of the bidders to execute the NYVIP2. SGST asserts that, as the incumbent contractor and the largest supplier of vehicle inspection services in the United States, it should have received more than 13.65 points out of 25 in this category. DMV asserts that its scoring methodology was fair and rational and that SGST’s incumbency is not a basis for it to be awarded maximum points in any category.<sup>14</sup>

e) *Evaluation of experience requirements was flawed.* SGST asserts that as the incumbent contractor, it inherently possessed more experience than the other bidders and should have been awarded the highest score in this category. DMV asserts that with respect to earning points for experience, serving larger networks was taken into account, however incumbency experience was not. A total of 15 points were available for experience – 10 points for prior experience and 5 points for Customer Satisfaction Surveys. SGST received the full 10 points for prior experience but did not receive the full 5 points for Customer Satisfaction Surveys due to the information provided by its references.

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<sup>14</sup> While not stated by DMV, we would also note that this category related to the hardware and software capabilities of the bidders, including the actual hardware and software being proposed by the bidder. The depth and breadth of the bidders experience was separately evaluated, and, as outlined below, SGST received the maximum points allotted for prior experience.

f) *The RFP Evaluation Team lacked sufficient knowledge to evaluate proposals.* SGST argues that because no senior or middle level inspection program staff were involved in the evaluation of proposals, the evaluators lacked an understanding of the overall program design requirements. DMV indicated that all of the evaluators are actively working on the current NYVIP and possess an understanding of the overall program design requirements.

With respect to all of these issues we find DMV's responses generally satisfactory. Furthermore, this Office gives substantial deference to agency determinations concerning criteria to be evaluated, the appropriate weights allotted to different areas of the evaluation, and the scoring of proposals particularly where such determinations are within the expertise of the agency. Here, we will defer to DMV's expertise with respect to the values assigned to the different areas in the RFP and the manner in which the bids were evaluated.

### **3. Vendor Responsibility Review of SysTech**

SGST argues that SysTech's cost proposal was disproportionately low, calling into question whether SysTech will be able to meet the necessary quality standards of the procurement and whether it was, indeed, a responsible bidder. SGST asserts that DMV's vendor responsibility review of SysTech was not sufficient because it only contacted the references provided by SysTech and should have conducted its own independent verification. DMV first notes that SysTech's total cost<sup>15</sup> was within 15% of the next lowest bid, and asserts that such difference is not statistically significant or suspect. Further, DMV also indicated that it did not solely rely on the references provided by SysTech to evaluate SysTech's responsibility. DMV asserts that it conducted a "FLIP" analysis, reviewing SysTech's: 1) financial and organizational capacity; 2) legal authority to do business in the State; 3) integrity; and 4) previous performance. DMV asserts that all bidders were required to provide evidence of their financial capacity to perform their contractual obligations under the awarded contract and that SysTech provided three years of audited financial statements and other financial documents required by the RFP. Additionally, SysTech was required to provide a surety for the faithful performance of the contract in the form of an irrevocable documentary letter of credit. DMV's Audit Service completely reviewed SysTech's financial background and determined that it had the financial capacity to sustain the contract for the full term.

As a part of our review of the proposed DMV/SysTech contract, this Office conducted an independent vendor responsibility review of SysTech. As a part of our review, OSC's Vendor Responsibility team reviewed several documents and sources with information pertaining to SysTech's responsibility as a vendor including: NYS Vendor Responsibility documents and State databases, financial-based reports, Federal databases with information pertaining to prior vendor misconduct and/or regulatory violations, OSC and NYS Attorney General audits and press releases, NYS Department of Labor Prevailing Wage lists and Worker's Compensation compliance and documentation, Department of State databases and DMV's profile containing its vendor responsibility review and findings. Upon reviewing the foregoing information and materials, this Office determined that SysTech is a responsible vendor capable of performing its duties under the contract.

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<sup>15</sup> This was the cost that was evaluated for the cost evaluation.

#### 4. SysTech's Compliance with the RFP's 150-Page Limit

SGST asserts that SysTech's proposal exceeded the 150-page limit set out in the RFP. Page 55, Section 4-5 of the RFP specifically states that: "[t]he Bidder's response to Section 4-5, Bidder's Technical Proposal, must not exceed 150 pages in length." The RFP provided bidders with the opportunity to submit questions to clarify any portion of the RFP. Several questions asked whether certain materials (resumes, proposed station agreements, sample disaster recovery plans and information required by Appendix F) could be included in an appendix to the bid and not be subject the 150-page limit for the technical proposal. DMV responded that such materials would not be included in the page limitation.

DMV indicates in its answer that SysTech's bid proposal, excluding the above referenced materials submitted with its proposal, is, in fact, 146-pages and thus meets the 150-page requirement.<sup>16</sup> However, as SGST stated in its protest documents, some of these above referenced materials submitted by SGST, were included within its technical proposal and not attached as a separate appendix.

While, in light of the phrasing of the questions submitted to DMV and DMV's answers, SysTech was not technically compliant with the page limit requirement, it is clear that DMV's intention was to waive this informality. This Office, on a number of occasions, has found that a government agency has the discretion to waive a non compliance with a bid specification if the deviation is not material, but instead is a mere irregularity, is in the government agency's best interest to waive the non compliance, and there is no possibility of fraud, corruption or favoritism.<sup>17</sup> For the reasons outlined below, we are satisfied that SysTech's deviation was not material, but rather was a mere irregularity.

Rather than including these materials in a separate appendix at the end of its technical proposal SysTech included such documents in the body of its proposal. Here, since SysTech was the highest scoring bidder, it was most certainly in DMV's best interest to waive this minor informality. Additionally, there is no reason to believe that waiving the informality would result in fraud, corruption or favoritism. Finally, SysTech's deviation was not material because SysTech did not gain any sort of advantage over other bidders. All bidders were allowed to submit such materials along with their proposal and such materials did not count toward the 150-page limitation. Thus, bidders were allowed 150-pages, exclusive of such materials, to present the substance of their proposals. Clearly, SysTech, by including the resumes in the body of its proposal, did not follow the letter of the specification. However, this deviation did not afford SysTech any competitive advantage over other bidders, since SysTech, like the other bidders presented the substance of its proposal within the 150-page limit. Therefore, we are satisfied the DMV properly determined that it could treat SysTech's proposal as materially compliant with the 150-page limitation requirement.

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<sup>16</sup> This Office reviewed SysTech's proposal for compliance with the page limit and confirmed that, excluding the resumes submitted with its proposal, it did fall within the 150-page limit.

<sup>17</sup> *Le Cesse Bros. Contracting, Inc. v. Town Board of the Town of Williamson*, 62 AD2d 28, aff'd. 46 NY2d 960 (1979), *In re C.K., Rehner, Inc.*, 106 AD2d 268 (1<sup>st</sup> Dep't. 1984).

## CONCLUSION

For the reasons outlined above, we find the issues raised in the Protests are not of sufficient merit to overturn the award by DMV to SysTech. As a result, the Protests are denied and we are today approving the DMV/SysTech contract.