

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by J.P.Morgan Chase Bank, N.A. with respect to the Protest Determination issued by the New York State Office of Temporary and Disability Assistance regarding the procurement of Electronic Benefits Transfer Services

Determination
of Appeal

SF20130334

Contract Number C021576

October 31, 2013

The Office of the State Comptroller has completed its review of the above-referenced procurement conducted by the New York State Office of Temporary and Disability Assistance (OTDA), on behalf of the Northeast Coalition of States (NCS),¹ and the Appeal filed by J.P. Morgan Chase Bank, N.A. (JPMorgan Chase) of the protest decision issued by OTDA with respect thereto. We have determined that the grounds advanced by JPMorgan Chase are insufficient to merit the overturning of the contract award made by OTDA, and, therefore, deny the Appeal. As a result, we are today approving the OTDA contract with Xerox Corporation (Xerox) for Electronic Benefits Transfer Services.

BACKGROUND

Facts

On November 2, 2012, on behalf of the NCS, OTDA issued a Request for Proposal for Electronic Benefits Transfer services (RFP).²

The RFP provided that a contract would be awarded on the basis of best value after an evaluation of both the services being proposed and the cost of the services (RFP, pgs. 290-91). The RFP stated that the technical review would account for 60% of the overall score and the cost review would account for 40% of the overall score (RFP, pg. 295). The RFP further provided that the technical proposals would be evaluated on four criterion and stated the relative weight of such criterion: (i) Understanding the Scope of the Work to be Performed – 30%; (ii) Project Staff – 10%; (iii) Qualifications and Related Experience – 25%; and (iv) Quality of Technical Approach – 35% (RFP, pgs. 292-93). The offerer receiving the highest point total after

¹ The States of New York, Connecticut, New Hampshire, Rhode Island, Vermont and Massachusetts joined to form the NCS for the purpose of procuring a cost effective regional Electronic Benefits Transfer system.

² The current Electronic Benefits Transfer program provides State and Federal government benefits and services to public assistance recipients. Public assistance recipients are using the EBT magnetic stripe card technology and the debit card infrastructure to receive their cash benefits (e.g., TANF-Welfare Transition and Refugee Assistance) at automated teller machines (ATMs), point-of-sale (POS) and point of banking (POB) machines or their Supplemental Nutrition Assistance Program (SNAP, formerly Food Stamps) benefits at POS in federally authorized retailers. (RFP, pg. 20).

combining the technical and financial scores would be selected for contract award (RFP, pg. 295).

The RFP initially set the proposal due date as January 18, 2013. However, after several amendments, February 6, 2013 was established as the proposal due date.³ Two bids were received prior to the February 6, 2013 proposal due date, one from JPMorgan Chase and the other from Xerox.

After the proposals were scored by an Evaluation Committee comprised of representatives of the NCS, on May 16, 2013, an award was made to Xerox, and JPMorgan Chase was advised that its proposal had not been selected. By correspondence dated May 28, 2013, JPMorgan Chase filed a formal protest with OTDA. By correspondence dated July 12, 2013, OTDA issued its determination denying the JP Morgan Chase protest. By correspondence dated July 24, 2013, JPMorgan Chase filed an Appeal of OTDA's protest determination with this Office.

Procedures and Comptroller's Authority

Under State Finance Law §112, generally, before any contract for or by the State which exceeds \$50,000 becomes effective it must be approved by the Comptroller.⁴

To carry out its contract review and approval responsibilities under State Finance Law §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.⁵ These procedures govern initial protests to this Office of agency contract awards and contract awards made by this Office, and appeals of agency protest determinations. Since this is an Appeal of OTDA's protest determination, the process is governed by Section 4 of the Contract Award Protest Procedures.

In the determination of this Appeal, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by OTDA with the OTDA/Xerox contract;
2. The correspondence between this Office and OTDA arising out of our review of the OTDA/Xerox contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
 - a. JP Morgan Chase's protest to OTDA, dated May 28, 2013;

³ In the RFP, the NCS expressly reserved the right to "[c]hange any of the scheduled dates, including start dates, stated herein upon notice to the Offerors" (RFP, pg. 30).

⁴ State Finance Law §112(2).

⁵ Guide to Financial Operations, Chapter IX.17.

- b. OTDA's Protest Determination, dated July 12, 2013;
- c. JP Morgan Chase's Appeal to OSC, dated July 24, 2013;
- d. OTDA's Response to the Appeal, dated August 21, 2013;
- e. Xerox's Response to the Appeal, dated August 12, 2013; and
- f. Fidelity Information Services' (FIS, a subcontractor of Xerox) Response to the Appeal, dated August 5, 2013.

DISCUSSION

In its Appeal, JPMorgan Chase asserts that:

- (i) The award of the contract to Xerox was not made on the basis of a "best value" determination;
- (ii) JPMorgan Chase's proposal was incorrectly scored down due to errors of the evaluators;
- (iii) The technical scoring mechanics used to evaluate the proposals were not disclosed in advance of the receipt of offers;
- (iv) The scoring of the cost and technical proposals was flawed resulting in unreliable and incorrect scoring;
- (v) JPMorgan Chase's lower reference scores lacked validity; and
- (vi) OTDA did not properly address the RFP's MBE/WBE requirements with Xerox.⁶

The specific issues raised in the Appeal are addressed below in the order in which they were presented.

I. Contract Award – Best Value Standard

JPMorgan Chase asserts that the contract was not awarded on the basis of "best value" as required by the New York State Finance Law (SFL). Specifically, JPMorgan Chase asserts that, after conducting an evaluation that resulted in the selection of a higher cost proposal, OTDA was required to conduct a cost-benefit analysis to determine whether the higher cost proposal submitted by Xerox is worth more to the State than the lower cost proposal submitted by JPMorgan Chase. According to JPMorgan Chase, the Xerox proposal results in the unnecessary expenditure of many millions of dollars without clearly establishing additional material, or superior, functionality and capability that could not be provided by the JPMorgan Chase proposal. In support of its position, JP Morgan Chase cites the decision of the Appellate Division Third Department in *Matter of Transactive Corporation v. State*, 236 AD2d 48, 665 NYS2d 701 [1997] *affd on other grounds* 92 NY2d 579, 648 NYS2d 156 [1998].

⁶ In its initial protest to OTDA, JPMorgan Chase also asserted that "the scoring may have been permeated with bias in favor of Xerox" (JPMorgan Chase's Protest to OTDA, pgs. 9-10). In support of this assertion, JP Morgan Chase alluded to NCS' use of a consultant that was previously employed by Massachusetts, a Xerox incumbent state. In its Protest Determination, OTDA responded to this assertion by noting that a number of the Technical Evaluation Committee evaluators were from JPMorgan Chase incumbent states. Since this issue was not raised in the Appeal, it appears that JPMorgan Chase was satisfied with OTDA's response to this point. Additionally, we note that this Office's review of the procurement record does not reveal any bias in the favor of Xerox in the evaluation and scoring of the proposals.

SFL §163(4)(d) provides that service contracts are to be awarded on the basis of “best value”. “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)). SFL §163(9)(b) requires that the solicitation “prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted. Where appropriate, the solicitation shall identify the relative importance and/or weight of cost and the overall technical criterion to be considered by a state agency in its determination of best value.” In addition, SFL§ 163(9)(a) provides that “[w]here the basis for award is best value, documentation in the procurement record shall, where practicable, include a quantification of the application of the criteria to the rating of proposals and the evaluation results, or, where not practicable, such other justification which demonstrates that best value will be achieved.” SFL §163(10)(a) provides that “[s]election and award shall be a written determination in the procurement record made by ... a state agency in a manner consistent with the provisions of the solicitation.”

In *Transactive*, the Appellate Division reviewed the bidding process used by the NCS in 1995 to obtain these same electronic benefits transfer services. Under the 1995 RFP, bidders were required to submit proposals in two parts: technical and pricing. The 1995 evaluation methodology provided that after proposals passed a prescreening process, the proposals were evaluated by two committees, a technical evaluation committee and a financial evaluation committee, with the ultimate selection of the contractor made by a selection committee. At the conclusion of the technical evaluation process, the proposal submitted by Fleet ranked first and the proposal submitted by Citicorp ranked fourth. In cost rankings, however, the Citicorp was the lowest price proposal with the Fleet proposal being 18% higher. Although technically superior, the Fleet proposal was not considered for award since it was outside the 10% competitive range established by the NCS. The issue before the Court was whether the evaluation and selection process used by NCS, which provided for the exclusion of proposals outside an established competitive range, constituted a best value award under the SFL.

The Court stated that a State agency generally cannot rely on price alone to make a best value award, but must engage in a cost-benefit analysis. In addressing whether the State agency had engaged in a cost-benefit analysis, the Court concluded that “[g]iven the fact that [the State agency] subjected the proposals to technical and financial evaluations, we find that it engaged in the requisite cost-benefit analysis” (236 AD2d at 10, 665 NYS2d at 53).

In its Appeal, JPMorgan Chase asserts that even though the evaluation process used by the NCS consisted of separate technical and financial reviews of the proposals, prior to making an award to the higher cost Xerox proposal, OTDA was required to undertake an additional cost-benefit analysis. Such an assertion, however, is not consistent with the statutory requirements set forth in the SFL, or the decision in *Transactive*. The evaluation and selection process used by the NCS subjected the proposals to separate technical and financial evaluations. These separate evaluations produced separate technical and financial scores for each proposal, which were then combined to produce the final total score for each proposal. The proposal with the highest score was deemed the best value proposal. Clearly, this process constituted the requisite cost-benefit

required under the SFL and resulted in a “best value” award within the meaning of SFL §163(4)(d) and consistent with the decision in *Transactive*.

II. Scoring of the JPMorgan Chase Proposal

JPMorgan Chase asserts that the technical evaluators were under the mistaken assumption that the JPMorgan Chase solution would not be available by the July 31, 2014 deadline established in the RFP (RFP, pg. 227) and this inaccurate assumption negatively and significantly affected the scoring of the JPMorgan Chase proposal.

This issue appears to have arisen as the result of a clarification letter sent to JPMorgan Chase by the Selection Committee on April 4, 2013. The clarification letter sought confirmation from JPMorgan Chase that its proposal would provide a fully operational EBT system that met the specifications set forth in the RFP no later than the July 31, 2014 deadline. The Selection Committee’s request for clarification was triggered by certain statements made by JPMorgan Chase in its oral presentation to the Technical Evaluation Committee on March 21, 2013. In response to the request for clarification, JPMorgan Chase confirmed that it was committed to deliver the solution in the intended timeframe (JPMorgan Chase’s correspondence to Selection Committee, dated April 8, 2013).

Initially we note that if the Technical Evaluation Committee had found that the JPMorgan Chase proposal did not provide for implementation by the July 31, 2014 deadline, which was a core mandatory element of the RFP, the proposal would have been deemed non-responsive and eliminated from consideration. Since the JPMorgan Chase proposal was evaluated and scored, it would appear that the Technical Evaluation Committee concluded that the proposal met this mandatory requirement. This conclusion is supported by the language of the clarification letter sent by the Selection Committee which expressly states that the JPMorgan Chase proposal “gave an unqualified representation of JP Morgan’s commitment to undertake transition of each and every NCS member State, should such State so elect, to an EBT System containing all the functionality required under the EBT RFP no later than July 31, 2014”.⁷

Furthermore, as noted by OTDA, timeliness was not a scored criteria (presumably because of the July 31, 2014 mandatory requirement). Additionally, OTDA, in its Protest Determination and in its Response to the Appeal, stated that the Technical Evaluation Committee did not revise or lower JP Morgan Chase’s technical evaluation scores following the oral presentation (Protest Determination, pg. 4 and Response to Appeal, pg. 5). Finally, we note that the instructions for evaluators stated that evaluators should include comments for any factors that significantly reduced or increased a score. Clearly, if any evaluator had reduced the score based on perceived significant timeliness problems, the score sheets should have contained comments to that effect. However, our review of the scoring sheets did not reflect any such comments.

⁷ The April 4, 2013 letter from the Selection Committee sought clarification from JPMorgan Chase in light of the apparent discrepancy between the contents of the JPMorgan Chase proposal and statements from its March 21, 2013 oral presentation.

In light of the foregoing, we find no basis to conclude that an incorrect assumption by members of the technical evaluation team negatively and significantly affected the scoring of the JPMorgan Chase proposal.

III. Disclosure of Detailed Technical Scoring Mechanics

JPMorgan Chase asserts that “the actual mechanics for scoring the technical proposals [were] not arrived at and disclosed in advance of the receipt of offers as required by the State Finance Law” (Appeal, pg. 14).

SFL §163(9)(b) 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 shall describe and disclose the general manner in which the evaluation and selection shall be conducted. Where appropriate, the solicitation shall identify the relative importance and/or weight of cost and the overall technical criterion to be considered by a state agency in its determination of best value.” (emphasis added)

The RFP stated that technical scores would account for 60% of the overall score and the cost scores would account for 40% of the overall score (RFP, pg. 295). The RFP further provided that the technical proposals would be evaluated on four criterion and disclosed the relative weights of such criterion: (i) Understanding the Scope of the Work to be Performed – 30%; (ii) Project Staff – 10%; (iii) Qualifications and Related Experience – 25%; and (iv) Quality of Technical Approach – 35% (RFP, pgs. 292-93). Finally, the RFP stated that the offerer receiving the highest point total after combining the technical and financial scores would be selected for contract award (RFP, pg. 295).

Contrary to JPMorgan Chase’s assertion, the SFL does not require that the RFP disclose the detailed technical scoring mechanics to be used in the evaluation process. Rather the SFL requires only that the RFP disclose the “general manner” in which the evaluation and selection will be conducted. This plain reading of section 163(9) was confirmed by the Appellate Division in *Transactive*, where the Court stated that this statute “does not require particularization, but only generalization” (236 AD2d at 53; 665 NYS2d at 704). In this instance, the RFP disclosed: the relative importance or weight of cost to technical (60/40); the four general criterion on which the technical evaluation would be conducted, and the relative weights of the criterion; and that the proposal receiving the highest point total after combining technical and cost scores would be selected for contract award.

Again, the decision in *Transactive* is relevant. The Court determined that it was sufficient that the RFP identified only the 5 criteria categories, not the 109 specific scoring items (236 AD2d at 53; 665 NYS2d at 705). Therefore, we are satisfied that the disclosures in the RFP satisfy the requirements of SFL §163(9)(b).⁸

⁸ We also note that this same issue was the subject of a question and answer submitted during the procurement process. Specifically, in response to a question concerning the scoring of proposals, offerers were advised that:

JPMorgan Chase also questions whether the scoring methodology used in the evaluation process had been “locked down” prior to receipt of proposals as required by SFL §163(7).

As stated earlier, the initial due date for submission of proposals was January 28, 2013. However, the scheduled due date was amended several times: on November 20, 2012, which extended the due date to February 1, 2013, and, on January 30, 2013, which extended the proposal due date to February 6, 2013. When the RFP was amended on January 30th (extending the due date to February 6th), offerers were advised that due to the proximity of the amendment to the previously stated due date, the NCS was offering to act as an escrow agent for any bidder who so requested by holding the bidder’s proposal until the newly established proposal due date. The bidders were also advised that they were permitted to amend the bids being held in escrow up until the new proposal due date. On February 4th (four days after this amendment and two days prior to the February 6th proposal due date), JPMorgan Chase submitted its proposal. Xerox submitted its proposal on February 5, 2013. The proposals were opened on February 7, 2013.

OTDA acknowledges that the final evaluation instruments were not finalized (locked down) until they were approved by the Selection Committee on February 5, 2013. Therefore, the finalization of the evaluation instruments occurred prior to the proposal due date and actual opening of the bids, but after JP Morgan and Xerox submitted their proposals.

SFL §163(7) provides in relevant part that:

Where 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. (emphasis added).

The issue raised is whether the requirement of SFL §163(7) was satisfied when the evaluation instruments were finalized prior to the proposal due date and actual bid opening, but after proposals had been submitted.

Initially, we note that the language of the statute is written in terms of the initial “receipt” of the offers (not the initial submissions by the offerers) and can be reasonably interpreted to not require that the criteria be established prior to the date and time the procuring state entity has required that proposals be delivered to it. The interpretation proposed by JP Morgan Chase would, effectively require that the evaluation criteria be finalized prior to the issuance of the RFP, rather than prior to the initial receipt of offers – since an agency will never know when a proposal might be submitted.

SFL does not require that the RFP provide any detail concerning the weight ascribed to specific areas of the evaluation. Rather, it requires that the agency document in the procurement record before the initial receipt of offers the determination of the evaluation criteria and the process used in the determination of best value and the manner in which the evaluation and selection is to be conducted.

(Question #6, Secondary 2012 EBT RFP Questions and Answers 01/18/2013)

More fundamentally, it is clear that no bidder was disadvantaged by the timing of the finalization of the evaluation instruments by the Selection Committee, and thus such actions did not violate the spirit of the statute. Specifically, (i) the bidders were advised of the new proposal due date prior to the time they submitted their bids, (ii) the bidders were provided the opportunity to amend their proposals any time prior to the new due date, and (iii) the bids were held in a secured area prior to the actual bid opening and were not viewed until after the evaluation methodology was finalized. In our view, the purpose of the timing requirement in SFL §163(7) is to require that the procuring State entity finalize its evaluation and selection process prior to opening and viewing the contents of the competing proposals. This requirement is intended to eliminate the potential for the manipulation of the evaluation and selection process to the benefit of one bidder over another. Clearly, there was no opportunity for any such manipulation in this instance.

In this regard, we note that this Office, in connection with a protest with respect to the procurement for the original EBT contract in 1995, was confronted with a similar argument with respect to compliance with the provisions of SFL §163(7). Specifically, the protestors asserted that the state agency had failed to comply with the requirement of SFL §163(7) because it had not established the competitive range prior to the receipt of the initial proposals – but had instead only established such standard prior to receipt of best and final offer.⁹ This Office determined, based upon the specific circumstances of that procurement, that the State agency could not have developed the evaluation criteria to favor a specific bidder, which we recognized would have violated the spirit of section 163(7). In that case, we concluded that the agency actions did not violate the letter or spirit of SFL §163(7) since there was no evidence of favoritism, fraud or corruption nor any unfair advantage to one bidder at the expense of another. We, therefore, rejected the protester's argument and ultimately denied the protest and approved the contract.¹⁰ The Appellate Division, in its decision indicated that it was "in accord" with these findings by the Comptroller (236 AD2d at 53, 665 NYS2d at 705).

Thus, there is clear precedent both from this Office, and the courts, to the effect that section 163(7) should be read in light of its purpose, i.e. to prevent State agencies from developing evaluation criteria to benefit a favored bidder. Here, this was clearly no such opportunity. Therefore in light of the foregoing, we are satisfied that the finalization (lock down) of the evaluation instrument prior to the deadline for the submission and opening of the bids satisfied the requirement of SFL §163(7).

IV. Evaluation Process and Scoring of Proposals

JPMorgan Chase asserts that the evaluation and scoring process cannot be relied on to be accurate or fair. The specific concerns cited by JPMorgan Chase are addressed below.

⁹ Section 163(7) was subsequently amended to require that the evaluation methodology be finalized prior to the "initial" receipt of offers.

¹⁰ SF-19950095.

A. Scoring of all appropriate/material factors

JPMorgan Chase states that the technical evaluators failed to score surcharge free transactions at contractor owned ATMs, a material cost element. JPMorgan Chase further states that only it is able to deliver a promise of surcharge free ATM transactions at its extensive number of owned ATMs to State cash benefit recipients. We reject this argument for several reasons.

First, in response to this issue, OTDA states that during RFP development, as a policy matter, OTDA decided not to solicit pricing for surcharge free ATMs, or otherwise factor surcharge free ATM transactions into the evaluation process after determining "from the current contract that the cost to the State of a surcharge free ATM network (over \$8 million paid ... to date) was not warranted based upon the percentage of cash assistance recipients that actually use the surcharge free ATMs. As a result, the RFP did not solicit pricing for a surcharge free ATM network" (OTDA's Response to the Appeal, pg. 6). OTDA also cites the availability of free cash access elsewhere (such as point of sale and point of banking locations) to support its decision not to incur the costs associated with a surcharge free ATM network.

In addition to the policy/business justification offered by OTDA for its decision to eliminate the surcharge free ATM option, the RFP established certain minimum ATM and POS access requirements (RFP, pgs 113-14) and the selected offerer was required to provide surcharge free ATM transactions at ATMs that it owned and operated and this requirement extended to subcontractors receiving more than 5% of the State's contract billing value (RFP, pg. 224). In light of these access requirements established by the RFP, benefit recipients will be provided various surcharge free options to obtain cash access. Furthermore, while benefit recipients may incur surcharges at certain ATMs, the decision to use an ATM which imposes a surcharge is within the discretion of the benefit recipient for the apparent convenience of cash access from that respective ATM.

Our review of the procurement record does not provide us with a basis to upset OTDA's policy decision not to solicit pricing for a surcharge free ATM network, or consider such costs in its evaluation.

Second, notwithstanding the lack of a basis for upsetting OTDA's policy decision, we find that the costs at issue in this matter – the cost of providing a surcharge free ATM network – are not the type of costs this Office would require a contracting State agency to consider. In performing our contract review function under SFL §112 and, when applicable, reviewing a contracting State agency's compliance with the requirement of SFL §163 relating to purchasing services and commodities, this Office maintains that the agency must generally consider all costs reasonably expected to be incurred, except where such costs are (1) substantially the same for all providers; (2) difficult or impossible to estimate, and therefore speculative; or (3) unlikely to

occur. In this case, we believe the costs are highly speculative.¹¹ Whether costs will be incurred, and if so, to what extent they will be incurred is dependent on decisions made by the program recipients. Costs will be incurred only if benefit recipients choose to forego other, surcharge free, options, such as POS locations.

For these reasons, we are satisfied that costs could not have been measured in a meaningful manner, and, as a result we will not upset OTDA's policy decision not to solicit pricing for a surcharge free ATM network, or consider such costs in its evaluation.

B. Complexity of scoring methodology

JPMorgan Chase states that the scoring methodology used by the NCS was unnecessarily complicated leading to errors in calculations and potential miscalculations of scores. In support of its position, JPMorgan Chase states that, at the debriefing, OTDA indicated that it had miscalculated an initial score and had to recalculate that score. Based on the need for multiple calculations to arrive at a score, and in light of OTDA's acknowledged incident involving a miscalculation in scoring, JPMorgan Chase questions the accuracy of the scoring that resulted in the award to Xerox.

The RFP encompassed 966 pages and the proposals submitted by JPMorgan Chase and Xerox each exceeded 1,000 pages. Therefore, it is not surprising that the evaluation and scoring methodology to evaluate these proposals was not simplistic. As for the scoring error cited by JPMorgan Chase, we note that prior to making a contract award, the NCS conducted a due diligence review of the scoring of the Financial Committee and the Technical Committee. This review identified several minor technical errors in the evaluation process that resulted in a minor adjustment of 31/100ths of a point to the score of the Xerox proposal. These errors were identified by the NCS and corrected prior to contract award. Finally, this Office's review of the procurement record leads us to conclude that the scoring of the proposals was accurate and consistent with pre-established scoring methodology.

C. Qualification of evaluators

¹¹ While we believe that such costs are highly speculative (and, therefore, not required to be evaluated), we note that even if we were to accept JP Morgan Chase's assumption (apparently based on usage under the current surcharge free arrangement) that the cost to benefit recipients will be approximately \$13 Million over the life of the contract, such costs would need to be offset by the projected savings to the State from the elimination of the charges to the State for that feature. While we do not know what such charges would have been, if we assume (as JP Morgan Chase does with respect to the usage of their ATMs) that the cost to the State would be the same as that under the current contract (over \$8 Million), the net additional cost would be less than \$5 Million. In light of these assumptions, even if we were to add an additional \$5 Million to Xerox's costs, however, the result of the procurement would be the same. Xerox would still have the highest total score (albeit by a more narrow margin), and, therefore would still be the best value proposer. Indeed, while we do not believe these costs can be fairly estimated (and, therefore, we do not believe they should be evaluated), we note that given the availability of other no cost options for cash access, it is likely that the usage of surcharged ATMs will decrease by a substantial amount (thereby substantially reducing the \$13 Million figure suggested by JP Morgan Chase). Conversely, there is no basis to assume that the charges that would have been proposed by bidders for surcharge free ATM availability would have changed materially. Therefore, it is likely that the actual net cost (if any) would be considerably less than the \$5 Million calculated above.

JPMorgan Chase states that the technical evaluation process was further hampered by the fact that evaluators were not appropriately qualified to evaluate the technical proposals. Specifically, JP Morgan Chase asserts that the NCS relied on available volunteers to conduct evaluations, instead of qualified individuals with the specific knowledge needed to evaluate the complicated technical proposals.

Each member state of the NCS made its own assessment of the qualifications necessary for the individuals that it was designating to work on this procurement. We must assume that the respective member states selected qualified individuals to complete this vital work. As stated in the OTDA Response to the Appeal, "for such a significant procurement in terms of monetary and programmatic impact, it was in the NCS' interest to have qualified personnel working on the procurement." (OTDA Response to the Appeal, pg. 7). JPMorgan Chase has not provided any documentary evidence to support this assertion, and our independent review of the procurement record provides no evidence to suggest that the individuals comprising the evaluation teams were not qualified to evaluate the proposals.

D. Distribution of evaluators among NCS states

JPMorgan Chase asserts that the scores assigned by the evaluators were improperly weighted because the scores did not account for a fair or equal distribution of evaluators from the six States participating in the procurement to ensure an appropriate distribution of influence in the scoring. Further, the number of evaluators assigned to any particular section of the evaluation was different and inconsistent.

While the composition of the evaluation teams was not proportional or weighted, this was not required. Additionally, the composition of the technical evaluation committee was addressed by the NCS in a question submitted during the procurement process. The Question presented was:

Question: Would NCS please describe the manner in which the evaluation committee will be constituted? Will there be a representative from each NCS member state on the panel? What weight will be assigned to each state's vote?

Answer: The Technical Evaluation Committee will consist of representatives from each NCS member. There are no weights assigned to any particular state.
(Question 5 of the Secondary Questions and Answers Document, dated January 18, 2013)

Our review of the procurement record provides no basis for this Office to question the composition of the Technical Evaluation Committee.

E. Administrative controls, integrity of scoring process

JPMorgan Chase states that there were no controls in place to ensure that instructions were followed or that evaluators were not unduly influenced in the evaluation process.

The evaluators were provided with general instructions describing the scoring process and a scoring legend to assist them in their scoring of the proposals and our review of the procurement record does not reveal any evidence that would suggest that the evaluators failed to follow the instructions provided, or that would cause this Office to question the veracity of the evaluation process.

F. Evaluators application of the scoring standards

JPMorgan Chase states that the scoring was suspect because there were not consistent criteria used by the evaluators to rate the proposals. Further, JPMorgan Chase asserts that evaluators missed, or misinterpreted, key information and were unable to fairly score its proposal in many areas resulting in a skewed and incorrect score.

JPMorgan Chase has not provided any documentation that would support these assertions and our review of the evaluation and scoring process leads us to conclude the evaluators fairly scored the proposals in a manner that was consistent with the evaluation document.

G. Evaluators justification for scores

JPMorgan Chase states that it was not provided substantial evidence justifying the scoring differences between the JPMorgan Chase and Xerox.

The instructions provided to the evaluators stated that the evaluators should use the "comment section of the score sheet to note any serious deficiencies or areas where the Offeror exceeds RFP standards" (General Instructions for EBT Offeror Technical Proposal Evaluations, #3). Consistent with the instructions, our review of the evaluator's individual score sheets found numerous comments with respect to the assigned scores. Additionally, we note that the Technical Evaluation Committee issued a 19 page Report to the NCS Selection Committee recommending a contract award to Xerox (Report). The Report contained a 7 page Summary outlining the Technical Evaluation Committee's reasons for recommending the Xerox proposal for contract awards (Report, Section I) and a detailed analysis of the evaluators' assessment of each proposal with respect to the four technical evaluation criterion stated in the RFP.

Our review of the procurement record leads us to conclude that the evaluators provided adequate justification for the difference in the scores of the proposals.

H. Evaluators review of a key subcontractor of Xerox

JPMorgan Chase states that the evaluators did not evaluate the capacity of one of Xerox's key subcontractors to deliver the direct services claimed by Xerox. In support of this assertion, JPMorgan Chase questions "whether the evaluators appropriately considered [the

subcontractor's] references and capabilities given the low scores that FIS received in many recent EBT proposals as a bidder" and states that "[i]n Indiana, FIS and/or a subsidiary was barred from bidding due to failure to perform on an existing contract . . . and is currently still on the Indiana Suspended Vendor's list" (Appeal, pg.23).

In response to these assertions, FIS states that it "has for some time provided similar services as a subcontractor to [JPMorgan Chase] in several states, including in the NCS states of Rhode Island, Vermont and New Hampshire under [JPMorgan Chase]'s existing contract since 1996, without problems. In addition, FIS' ability to perform is substantiated by the recent award to FIS of the EBT processing services business, as a prime contractor, to the State of Florida in September 2012. In fact, FIS is now the prime EBT contractor in 10 states, plus the District of Columbia, and provides some EBT services in a total of 48 states" (FIS' Response to Appeal, pg.2). With regard to the issue raised concerning the listing of FIS, or a subsidiary, on the Indiana Suspended Vendor's list, FIS acknowledges Indiana's suspension of an FIS subsidiary, the Metavante Corporation. FIS notes, however, that the Indiana contract did not relate to EBT services, and the suspension was not the result of Metavante's inability to perform, but rather a contract dispute. Additionally, OTDA states that FIS passed a "thorough responsibility assessment, which includes an assessment of a vendor's past performance" (OTDA Response to the Appeal, Pg. 9).

We find that the response provided by FIS adequately addresses the issues raised by JP Morgan Chase. In addition, we note that this Office conducted its own vendor responsibility of FIS and we find no reason to question FIS' responsibility.

V. JPMorgan Chase's Reference Scores

Under the RFP, the offerer was required to list three references for the project manager to be assigned to the project (RFP, pg. 288).¹² The proposal submitted by JPMorgan Chase listed several NCS State representatives as references for its project manager. Certain of the NCS State representatives listed in the JPMorgan Chase proposal declined to provide the requested reference. JPMorgan Chase asserts that it was not notified of the problem with its references until late in the process and, therefore, was not provided sufficient time to obtain comparable references. As a result, JPMorgan Chase asserts that its proposal inappropriately received lower reference scores.

Initially, we note that it is not uncommon, and indeed good practice, to confirm an entity's ability/willingness to provide a reference prior to using such entity as a reference. This is especially true in circumstances, such as are present here, where the listed reference is part of the evaluation process for the engagement for which the reference is being supplied. Furthermore, the RFP expressly provided that:

¹² The RFP also required that the prime contractor provide at least three references from current customers who could verify the prime contractor's capabilities and qualifications (RFP, pg. 39).

The Offeror is responsible for ensuring that all physical addresses, telephone numbers, and email addresses provided . . . are current and that the reference contacts are available and willing to provide prompt responses to NCS inquiries. (emphasis added, RFP, pg. 288)

Therefore, this issue could have been avoided had JP Morgan Chase used due diligence (as stated in the RFP) and contacted the NCS State representatives before listing them as references in its proposal. Further, while JPMorgan Chase was not notified that certain NCS State representatives declined to provide references until January 29, 2013 (8 days prior to the proposals due date), the NCS was not required to provide such notice to JPMorgan Chase or to provide JPMorgan Chase the opportunity to submit alternative references. The NCS could have scored the references JPMorgan Chase originally provided with its proposal, which clearly would have resulted in a lower technical score than the average score of 93.97% that JPMorgan Chase received from the scoring of its alternate references.

In any event, we note that even if JPMorgan Chase had been provided additional time to submit alternative references, and assuming the alternative references received the highest possible scores from the technical evaluation team, any potential increase in JPMorgan Chase's technical score would not have changed the outcome of the evaluation process.¹³

VI. MBE/WBE Requirements

In the RFP, OTDA established an overall goal of 20% for MWBE participation, 10% for Minority-Owned Business Enterprises (MBE) participation and 10% for Women-Owned Business Enterprises (WBE) participation (New York State Appendix 4, pg. 48). Bidders were required to acknowledge these goals, commit to take good faith actions to achieve such goals, and document all participating MBE/WBE subcontractors.

With its proposal, JPMorgan Chase requested a partial waiver from this requirement. Responding to JPMorgan Chase's request for a partial waiver, OTDA stated "A determination as to whether a waiver request is granted will be made after the contract has been tentatively awarded. To date, no waiver requests have been granted by OTDA. If a waiver request is denied, then the Offeror is notified that the proposal is noncompliant with the RFP MWBE goals. If the Offeror is unable to remedy the deficiency within seven business days, then OTDA will select a different Offeror for contract award."

¹³ The review of references for the assigned project manager was part of the "Project Staff" section of the evaluation process. The Project Staff portion was worth 10% of the technical score (or 6 points out of the 60 points allocated to the technical score). The Project Staff portion of the evaluation included an assessment of: (i) the qualifications and experience of Project Manager and proposed staffing resources, (ii) a reference check on the proposed Project Manager, and (iii) an interview of the proposed Project Manager (RFP, pg. 292 and Technical Evaluation Committee Report, pg. 9). The reference check portion was allocated 10% of the 6 points allocated to the Project Staff evaluation, or .6 points. The JPMorgan Chase proposal received an average score of 93.97% for the alternate references, which amounted to a score of .56 points. Therefore, even if JPMorgan Chase had received a perfect score on the reference portion of the evaluation, its technical score would have only increased by .04 points and would have had no effect on the outcome of the selection process.

JPMorgan Chase suggests that "the requirement regarding MWBE participation was ignored by OTDA in favor of Xerox, or Xerox should have been disqualified as a non-responsive bidder because it did not follow the instructions that required it to correct and provide evidence of its ability to meet the goal targets within the seven days required by the RFP." (Appeal, pg 25). In response, OTDA states that MWBE requirements were not scored for award purposes. Rather, each bidder's MWBE participation was evaluated on a pass/fail basis and each bidder passed the administrative evaluation.

At the proposal stage of the procurement process, offerers were required to complete and submit the forms found in Appendix 14 of the RFP with respect to the established MWBE goals. These forms were submitted as part of the administrative portion of an offerer's proposal. Section 13.6.1 of the RFP provides that an "Offeror's Administrative Proposal will be examined to determine compliance with the requirements of the RFP on a pass/fail basis." The NCS reviewed both proposals and determined that the proposals contained the necessary documentation with respect to the MWBE requirements. Additionally, this Office's review of the procurement record confirms that the proposal submitted by Xerox satisfied the MWBE requirements set forth in the RFP and, therefore, its proposal properly passed the administrative evaluation.

Furthermore, we note that Xerox, in its Response to the Appeal, states that "it is fully aware of its MBE/WBE obligations and will meet those obligations throughout the term the contract term" (Xerox Response to the Appeal, pg.16).

CONCLUSION

For the reasons outlined above, we have determined that the issues raised in the Appeal are not of sufficient to merit to overturn the protest determination of OTDA. As a result, the Appeal is denied and we are today approving the OTDA/Xerox contract.