

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Computer Sciences Corporation with respect to the procurement of Medicaid Administrative Services and Fiscal Agent Services conducted by the New York State Department of Health

**Determination
of Bid Protest**

SF-20140300

Contract Number – C029586

April 17, 2015

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Department of Health (DOH) for Medicaid Administrative Services and Fiscal Agent Services (collectively MAS). We have determined the grounds advanced by Computer Sciences Corporation (CSC) are insufficient to merit the overturning of the contract award made by DOH and, therefore, we deny the Protest. As a result, we are today approving the DOH contract with Xerox State Healthcare, LLC (Xerox) for MAS.

BACKGROUND

Facts

On June 25, 2013, DOH issued a Request for Proposal (RFP) for the procurement of a MAS contractor to provide fiscal agent services and other administrative services for the New York State Medicaid Program. The resultant contractor is expected to replace the current New York State Medicaid Management Information System (MMIS) with a new claims processing and information retrieval system that satisfies all federal and state requirements for purposes of receiving enhanced federal matching funds (RFP, at § I - A). To save on cost and speed up implementation, DOH asked vendors to focus on configuring existing commercial off-the-shelf (COTS) infrastructure and platforms for claims processing, customer service, care management, and other services, rather than following a traditional approach of building a new system from the ground up. DOH indicated that to support the leveraging of COTS technology, it increased its flexibility on technical details to focus on achieving the outcomes provided in the RFP (RFP, at § I – A).

Since this was a procurement for services, consistent with the requirements of State Finance Law (SFL) § 163, the method of award was based on best value. The RFP provided that all proposals submitted would undergo an initial Compliance Assessment to assure that the mandatory requirements were satisfied. Proposals that passed the Compliance Assessment were then evaluated based on the following criteria and weighting: Technical Evaluation (based on the detailed requirements set forth in the RFP as well as official guidance from the Centers for Medicare and Medicaid Services [CMS]) (70%); and Cost Evaluation (the lowest cost proposal

meeting the mandatory requirements) (30%). The technical and price scores were then combined to determine the highest scoring proposer (RFP, at §§ IV - G.2, G.3, G.4).

The deadline for submission of proposals was November 25, 2013. On November 20, 2013, CSC submitted a no-bid letter to DOH indicating it was declining the opportunity to respond under the requirements presented in the RFP (Protest, Exh. B). Two other contractors submitted proposals by the submission deadline: 1) Xerox and 2) HP Enterprise Services, LLC (HP). The technical proposals were independently evaluated against predetermined criteria by an evaluation team consisting of 28 evaluators (MAS Contract Procurement Executive Summary at pgs. 3-4). The proposal with the highest raw technical score received 70 points, while the other proposal was then normalized using the 70-point scale (*Id.* at pg. 7). Similarly, a full 30 points were awarded to the lowest cost proposal, while the other proposal's cost score was normalized in the same manner. The final technical and cost scores were then combined to determine the final score for each bidder. Xerox proposed a lower cost than HP and received the highest technical score.

After determining Xerox to be the highest scoring proposer, DOH conducted a vendor responsibility assessment to ensure the proposed contract award was made to a responsible vendor as required by SFL § 163 (RFP, at § IV – D.8; DOH Answer at pg. 12). According to DOH, this process included a detailed Vendor Responsibility Profile analysis as well as discussions with representatives in states where Xerox implemented other MMIS projects (DOH Answer, at pg. 13). After determining Xerox to be a responsible vendor, DOH proposed an award of the contract to Xerox as the highest scoring proposer (*Id.* at pg. 12).

On May 23, 2014, DOH advised HP that Xerox was awarded the MAS contract. CSC became aware of the contract award and, by letter dated June 11, 2014, filed a protest with this Office challenging the appropriateness of the award to Xerox. CSC then followed up with a supplemental protest filing on November 4, 2014 (collectively the Protest). DOH thereafter submitted the contract for review to this Office on December 9, 2014. On February 13, 2015, this Office nonapproved the contract without prejudice to allow DOH sufficient time to address this Office's outstanding audit questions. On February 23, 2015, DOH provided its responses to the audit questions and this Office resumed its review of the contract.

Comptroller's Authority and Procedures

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

In carrying out the contract approval responsibility prescribed by SFL § 112, this Office has issued a Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency.¹ This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Since this is an initial protest of an agency's contract award, the Protest is governed by section 3 of the OSC Protest Procedure.

¹ OSC Guide to Financial Operations, Chapter XI.17, at <http://www.osc.state.ny.us/agencies/guide/MyWebHelp/>.

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DOH with the DOH/Xerox contract;
2. the correspondence between this Office and DOH arising out of our review of the DOH/Xerox contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. CSC's Protest dated June 11, 2014;
 - b. MAS Contract Procurement Executive Summary submitted by DOH on August 25, 2014;
 - c. CSC's Supplemental Protest dated November 4, 2014;
 - d. Xerox's Answer to the Protest dated November 25, 2014;
 - e. DOH's Answer to the Protest dated December 5, 2014;
 - f. CSC's Reply to DOH's Answer dated December 11, 2014; and
 - g. CSC's Supplemental Protest dated March 5, 2015.

Applicable Statutes

The requirements applicable to this procurement are set forth in SFL Article 11, which provides that contracts for services shall be awarded on the basis of "best value" to a responsive and responsible offerer.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 In this context, "responsible" means the financial ability, legal capacity, integrity, and past performance of a business entity.⁴

SFL § 163(7) provides that "[w]here the basis for award is the best value offer, the state agency shall document, in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria, which whenever possible, shall be quantifiable, and the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted."

SFL § 163(9)(a) provides that "a state agency shall select a formal competitive procurement process ... [which] shall include ... a reasonable process for ensuring a competitive field."

SFL § 163(9)(b) provides that the "solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted."

² SFL §163(10).

³ SFL §163(1)(j).

⁴ SFL §163(1)(c).

ANALYSIS OF THE PROTEST

Protest to this Office

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

1. The RFP contains unreasonable requirements that deterred CSC from submitting a bid and, ultimately, reduced competition: a) An 18-month implementation timeline that is impossible to meet; and b) Service Level Agreements that are unachievable and contain extreme and compounding penalties that will likely result in higher costs to the State.
2. Xerox is not a responsible vendor because of its poor past performance, a lack of business integrity, and a failure to comply with public policy issues and statutory requirements; and
3. The procurement is not in the best interest of the State at this time and could be procured at a much lower cost in the future.

DOH's Response to the Protest

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

1. CSC is not an “interested party” for purposes of this procurement and, therefore, does not have standing to protest the contract award;
2. The terms of the RFP were reasonable and did not reduce competition;
3. Xerox is a responsible vendor; and
4. DOH, as the State agency responsible for the administration of the Medicaid program, has determined that the replacement of the current program at this time is in the best interest of the State.

Xerox's Response to the Protest

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

1. CSC was not a participant in the procurement process, and as such, is not an “interested party” for purposes of this procurement and, therefore, does not have standing to protest the contract award;
2. While the implementation timeline required by the RFP is aggressive, it did not foreclose CSC from submitting a proposal or prevent other contractors from submitting proposals; and
3. Xerox is a responsible vendor.

CSC's Reply to the Answers

In its Reply, CSC reiterates the arguments raised in the Protest and, additionally, challenges the procurement conducted by DOH on the following grounds:

1. DOH failed to provide an adequate factual record to support its assertions;
2. Xerox's proposed software is not a COTS product;⁵ and
3. The Request for Information (RFI) issued by DOH does not support its 18-month implementation timeline because an RFI for an Administrative Services Organization is not equivalent to an MMIS.

DISCUSSION

I. CSC's Status As An Interested Party

Both DOH and Xerox contend CSC is not an "interested party" pursuant to the OSC Protest Procedure, which provides that a formal bid protest may only be filed by an "interested party" and defines an "interested party" as "a participant in the procurement process and those whose participation in the procurement process has been foreclosed by the actions of the contracting agency" (OSC Protest Procedure, at § 2[c]). CSC asserts it participated in the early stages of the procurement and, ultimately, its participation in the procurement process was foreclosed by DOH's inclusion of an unachievable mandatory timeframe for implementation of the new MAS and other unreasonable contract terms (Protest, at pgs. 2, 7).

First, with regard to whether CSC was a participant in the procurement process, CSC described its early involvement in the process including attendance at the Vendor's Conference, the submission of 62 questions to DOH during the Question and Answer period, and a significant amount of internal expenditures and personnel resources expended before arriving at the ultimate conclusion that it would not submit a proposal (Protest, at pgs. 2-3). DOH and Xerox contend this does not rise to the necessary level of participation in the procurement and, more specifically, CSC does not meet the standard for standing set forth in *Transactive Corp. v. New York State Dep't of Soc. Servs.*, 92 NY2d 579 (1998). In *Transactive*, the Court of Appeals held that to have standing to sue, a party must show it has suffered an injury in fact, distinct from that of the general public. Moreover, the party must demonstrate the injury claimed falls within the zone of interests to be protected by the statute challenged (*Id.* at 587, citing *Society of Plastics Indus. v. County of Suffolk*, 77 NY2d 761, 771-774 [1991]).

As an initial matter, we note an important distinction in the *Transactive* case in that, unlike CSC's position here, none of the petitioners in *Transactive* were potential prime bidders on the procurement (*Id.* at 587-588). Moreover, DOH and Xerox are mistaken in their belief that this Office, in defining who is an "interested party" under the OSC Protest Procedure, is required to apply the standing analysis used by the court in *Transactive*. We are not. Indeed, prior to the commencement of litigation in the *Transactive* case, this Office fully reviewed the contract award and issued a final determination regarding a protest filed by the party that was ultimately denied

⁵ We find this argument which was not initially raised in CSC's Protest to be unavailing. Based on our review of the procurement record, it is apparent that Xerox has proposed to use an existing software solution that has already been successfully implemented in another state, and plans to configure that product to meet New York's needs, rather than designing a new product from the ground up. Therefore, we are satisfied that DOH's procurement goal of using a configurable COTS solution has been met.

standing by the court.⁶ To determine whether a party qualifies as an “interested party,” we examine a number of factors on a case-by-case basis and assess whether the party has a significant involvement in the procurement and a demonstratable potential harm as a result of the manner in which the procurement was conducted.

In this case, as referenced above, CSC had significant involvement in the early stages of the procurement process and CSC has set forth specific factual allegations supporting its claim that it was deterred from submitting a bid as a result of DOH’s inclusion of an unachievable implemenation timeframe and other unreasonable contract terms. As a result, we find CSC is an interested party and we will address the issues raised in the Protest.

II. Reasonableness of RFP Requirements

The RFP provided that the MAS project would occur in several overlapping phases, including: 1) Planning; 2) Design/Development/Implementation (DDI Phase); 3) Operations; 4) Certification (by CMS); 5) System and Operational Enhancements; and 6) Transition (RFP, at § I – A, pg. 7). While offerors would be able to propose their own approach for deliverables during the Planning phase, the RFP envisioned that the various system components would be implemented in two stages: Release 1 and Release 2. The RFP then illustrated the necessary system components that would go live during each Release. Following the Planning phase, the DDI Phase would encompass the design, development, and implementation of all resources necessary to carry out the project. As part of the design and development, the contractor is expected to configure its existing infrastructure to adopt the Medicaid plan (using a COTS-based approach), rather than developing a new computer system. As indicated by the RFP, implementation of the system is expected to occur within 18 months of the contract start date, with Release 1 of certain components occurring nine months after the start of the contract and Release 2, encompassing the remaining functionality, occurring within 18 months of the contract start date (RFP, at § I – A, pg. 7). In the Protest, CSC argues: 1) compliance with the 18-month DDI Phase implementation timeline is impossible, and as a result, effectively reduced competition by deterring CSC and other contractors from bidding, and 2) missed deadlines will ultimately harm the State fisc by reducing or delaying the amount of Federal matching funds the State may receive, and by increasing the expected cost of implementation (Protest, at pgs. 2, 4, 6-7).

A. 18-Month Implementation Timeline

CSC argues compliance with the 18-month implementation timeframe is inherently unreasonable given the complexity of the tasks to be completed in each Release and notes that replacement of an MMIS in this amount of time has never been achieved in any other state. CSC asserts that, as a result of this requirement, potential bidders were deterred from bidding on the procurement⁷ (Protest, at pgs. 2, 4, 6-8).

⁶ See SF-19960095, at http://www.osc.state.ny.us/contracts/bidprotestdecisions/bpd_SF19960095.pdf.

⁷ CSC also states it is “highly probable” that the proposals submitted contained “some qualification of the implementation, SLA and/or penalty provisions of the RFP” (Protest, at pgs. 6-8). At the time that DOH issued the RFP, the original timeline for implementation of the DDI Phase was scheduled for 12 months. However, during the Question and Answer period, DOH was asked by the bidders if the State would consider lengthening the period. In response, DOH amended the RFP to increase the DDI Phase implementation timeline from 12 to 18 months by

Addressing whether the implementation timeline is reasonable, DOH acknowledges the timeline is aggressive but asserts it is achievable as demonstrated by the submission of two responsive bids (DOH Answer, at pg. 6). According to DOH, the timeline was based upon industry responses to a Request for Information (RFI) published by DOH in 2012 to assess market interest in participating in a COTS approach to MMIS replacement. The RFI asked vendors how long they believed was necessary to implement the MMIS replacement. One vendor indicated nine months, one vendor indicated 18 months, and three vendors indicated 12 months (DOH Answer, at pg. 8). Thus, it appeared to DOH that multiple vendors could meet an accelerated timeline.

Xerox, in its Answer to the Protest, reaffirms it can achieve the 18-month implementation timeline required by the RFP. Specifically, Xerox explains it has already developed the Xerox Health Enterprise (XHE), a COTS solution for the Medicaid claims system that can be implemented in a shorter timeframe because it only requires configuration to meet New York's requirements, rather than building a new system from the ground up (Xerox Answer, at pg. 2). In addition, DOH's Business Transformation contractor reviewed Xerox's proposal and agreed the XHE can meet a majority of DOH's project requirements through system configuration rather than development of new code (DOH Answer, at pg. 7). Xerox also notes it will be partnering with certain New York based subcontractors for delivery of some of its components, as well as Cognizant, a global consultant Xerox has successfully partnered with in other states to meet project deliverable timelines (Xerox Answer, at pg. 2). Finally, HP, who filed a separate protest challenging the contract award to Xerox, also continues to assert that an 18-month timeline is achievable (HP Protest, at pg. 8).

Notwithstanding the Comptroller's broad contract review authority under SFL § 112, this Office generally gives significant deference to agency factual determinations that are within the agency's technical expertise, so long as such determinations are supported by the record. DOH, as the State agency responsible for the administration and management of the Medicaid program, possesses the expertise to determine the specific needs and requirements for carrying out the program.⁸ With respect to the requirement of an 18-month timeline for the MMIS replacement, DOH conducted appropriate diligence before issuing the RFP through the release of an RFI which, as discussed above, yielded results indicating an 18-month timeline was achievable. Further, DOH explained it "retained an aggressive timeline deliberately to telegraph to vendors it would not be willing to accept significant on-site code development work, and was serious about its intention to configure an existing fully-functional product that satisfied the latest MITA principles" (DOH Answer, at pg. 9).⁹ In other words, DOH asserts the 18-month implementation is reasonable

keeping the Release 1 deadline at nine months, but extending the Release 2 deadline from three months to nine months (DOH Questions and Answers #17-18). Since this amendment occurred before any bids were received and prior to CSC's submission of its no-bid letter, DOH asserts, and we agree, that this increase in the timeline was not an "improper modification and/or qualification of the RFP contract specifications" (DOH Answer, at pg. 9). Given that we have reviewed the procurement record and found no evidence of a modification to the implementation requirement, or the SLA and penalty provisions of the RFP, we dismiss this assertion by CSC as speculative and unsupported.

⁸ See Social Services Law § 367-b.

⁹ "MITA" refers to the Medicaid Information Technology Architecture standards published by CMS.

because the RFP sought configuration of an existing COTS solution. Since the procurement record supports DOH's technical determination that an 18-month implementation timeline is achievable and is necessary to meet the agency's goals, we see no reason to disturb it.

Turning to whether the 18-month timeline unfairly deterred competition, we note initially DOH received two proposals responsive to this requirement. Further, even if we were to assume this requirement did reduce competition, "New York's competitive bidding statutes do not compel unfettered competition . . ." (*see Associated Gen. Contrs. v New York State Thruway Auth.*, 88 NY2d 56, 67 [1996]). As discussed above, DOH made a technical determination that requiring an aggressive timeline would achieve the goal of replacing the MMIS with a COTS-based solution at a lower price, in a faster timeframe. Thus, it appears the intent of the specification was to obtain the best work at the lowest price. In light of the above, we find the requirement did not unfairly deter competition to the detriment of the State.

B. Impact of 18-Month Timeline on State Fisc

i) Federal Matching Funds

In its Answer, DOH advises, and this Office has confirmed, that with limited exception, 75% of the Federal matching funds do not become available until the new MAS is operational and certified by CMS (DOH Answer, at pg. 6).¹⁰ Once the system is certified, the Federal matching funds are applied retroactively beginning on the first date the system became operational. As a result, the State would not experience reductions or delays in Federal matching funds unless significant and unusual project delays occur with respect to the system becoming operational, or the system is not certified by CMS (DOH Answer, at pg. 6). With respect to project delays, DOH has provided evidence that the XHE continues to show a decreasing trend in delay periods as used in other states. With respect to certification, DOH notes that the XHE was designed specifically to meet the CMS certification requirements.

Additionally, to further reduce implementation delays and any possibility of producing a system that cannot be certified, DOH has adopted a gate review process that will allow CMS to review defined stages of progress and provide feedback on the State's compliance with certification requirements prior to the go-live date. Moreover, to save the State added costs, the procurement was structured in a manner that required bidders to propose the use of a COTS solution capable of meeting DOH's requirements without the need for significant development of new code. To further protect taxpayers from increased costs resulting from delays, DOH included Service Level Agreements (SLAs) in the RFP that provide for damages if the required timeline is not met due to the fault of the contractor (RFP, at § III, pg. 17). Based on the foregoing, we are satisfied that implementation delays, if any, will not result in a delay or reduction of Federal matching funds to the detriment of the State. Further, we believe DOH has taken reasonable and necessary precautions to keep overall implementation costs as low as possible in a project of this magnitude.

¹⁰ See also CMS Center for Medicaid and CHIP Services, *Medicaid and CHIP FAQs: Enhanced Funding for Medicaid Eligibility Systems*, at <http://www.medicaid.gov/State-Resource-Center/FAQ-Medicaid-and-CHIP-Affordable-Care-Act-Implementation/Downloads/FAQs-by-Topic-75-25-Eligibility-Systems.pdf>.

ii) Penalties under Service Level Agreements

The RFP contained numerous SLAs defining DOH's service requirements and the penalties imposed on the contractor if the service requirements are not met.¹¹ Bidders were required to review and agree to each SLA and propose their approach to compliance (RFP, at § III, pg. 12). The awarded contractor will be required to report monthly to DOH on its performance against the SLAs and how such performance has been evaluated (RFP, at § III, pg. 12).

CSC asserts the terms of the SLAs are unreasonable and expose contractors to excessive and almost certain penalties that will harm the relationship between DOH and the resulting contractor (Protest, at pg. 7). CSC also argues the unreasonableness of the SLAs deterred it and other companies from bidding on the contract (Protest, at pg. 2). DOH acknowledges that certain conditions, like the aggressive 18-month timeline, increase the chances that penalties may be imposed for a failure to comply with a SLA. DOH asserts, however, the requirements are reasonable and fair since proposers had the opportunity to assess this risk and bid accordingly. DOH further elaborates on the nature of the SLAs stating:

“[SLAs] are, by their nature, a binding agreement of minimum service levels between the vendor and DOH ... Communication of SLAs serves both parties by clearly defining responsibilities and expectations so that, in the event of issues with the services, neither party can plead ignorance. Further, SLAs safeguard all parties through common understanding of requirements and ensuing assessment of damages if they are not met. ... **The SLAs documented with the RFP were based upon industry practices where COTS solutions were employed.** Neither vendor that submitted proposals took exception to the [SLAs] as presented with the [MAS] RFP, indicating commercial acceptance of the terms and conditions and associated damages as presented. ... DOH does not agree that competition was reduced as a result of the SLAs ... As a result of the Questions & Answers process, only a limited number of overall vendor questions, less than [7%] pertained to SLAs/terms. ... DOH made only a small number of SLA and terms changes as a result of the questions, and these changes were published well before bids were due ... **[T]wo leading MMIS vendors ultimately responded and explicitly accepted the SLAs and terms. Therefore, DOH does not believe competition was affected nor that serious vendors found the SLAs to be unreasonable ...**” (DOH Answer, at pg. 10 [emphasis added]).

Again, in this instance, we defer to DOH's technical expertise with respect to the reasonableness and necessity of the service requirements and penalties included in the SLAs.

III. Xerox's Vendor Responsibility

¹¹ The RFP explained the purpose of the SLAs is to “manag[e] the relationship between the contractor and [DOH]” and “ensur[e] that information systems and administrative services function smoothly while fulfilling the business needs of stakeholders” (RFP, at § III – E.3.4).

CSC argues Xerox is not a responsible offerer pursuant to the requirements of SFL § 163. Specifically, SFL § 163(4)(d) requires that “[s]ervice contracts shall be awarded on the basis of best value to a responsive and **responsible** offerer ...” (emphasis added). Further, SFL § 163(9)(f) provides that “[p]rior to making an award of contract, each state agency shall make a determination of responsibility of the proposed contractor ...” SFL § 163(1)(c) defines “responsible” as “the financial ability, legal capacity, integrity, and past performance of a business entity ...” As a part of our review of the DOH/Xerox contract, this Office carefully examined and assessed the information provided in the procurement record, the Protest, and additional information provided by DOH in response to our questions regarding the responsibility of Xerox. Below, we address CSC’s assertion that Xerox is not a responsible bidder due to: 1) unsatisfactory past performance; 2) a lack of business integrity and a failure to comply with public policy issues and statutory requirements.

A. Xerox’s Past Performance

CSC contends Xerox’s past performance record is unsatisfactory and in light of such performance Xerox cannot meet the criteria of “satisfactory performance.”

i) Past Performance Issues on Similar Contracts between Xerox and other States

1. Texas Medicaid System Administration Contract

The first example of Xerox’s alleged poor performance provided by CSC is the cancellation by the State of Texas of a Medicaid system administration contract with Xerox (Protest, at pg. 9). The Attorney General of Texas filed a lawsuit alleging that Xerox knowingly failed to conduct prior authorization reviews of certain orthodontic claims resulting in the improper payment of such claims (*see Texas v. Xerox Corp. et al*, No. D-1-GV-14-000581 [D. Tex., complaint filed May 9, 2014]).¹²

Upon becoming aware of the lawsuit, DOH reached out to the Associate Commissioner for Medicaid in Texas to ascertain the status of the litigation and was advised that the lawsuit was still pending and, therefore, there has been no final determination with regard to the allegations raised therein.¹³ Additionally, DOH states the allegations raised in the litigation are “not illustrative of Xerox’s performance as the fiscal agent for 10 other state Medicaid programs and the District of Columbia” (DOH Answer, pg. 15). However, in light of the matters raised in the litigation and DOH’s assessment of the information it has received during its due diligence of contractor performance issues, DOH has taken steps to manage such risks and incorporate safeguards into the contract (DOH Answer, pgs. 15-16). These steps include:

¹² In its Supplemental Protest filing, CSC also cites a second action brought by the State of Texas against Xerox that arose from the original lawsuit, alleging that Xerox has improperly retained documents and information related to the litigation (CSC Supplemental Protest, at pgs. 5-6). We do not believe this bears any further discussion than that relating to the underlying initial action, discussed above. Further, we note that Xerox has averred that the issue has already largely been resolved by an agreement between the parties (Xerox Answer, at pg. 12).

¹³ We note that as of the date of this Protest Determination, the matter remains pending.

- i. An SLA that will hold the contractor “liable for the actual amount of all contractor caused incorrect payments, duplicate payments, or payments that should have been denied that are not recovered” (RFP, at § III – E.3.4).
- ii. Language added to the contract during contract negotiations with Xerox providing that “[t]he Contractor shall not employ management staff ... on the MAS project that have been previously assigned to Contractor projects or accounts that were subject to successful litigation, or are under ongoing litigation for failure to meet the terms of the contract, or for which the contract was terminated for cause, without [DOH’s] prior written authorization” (DOH Answer, at pg. 16).
- iii. The employment of an independent Quality Assurance contractor, Cognosante, who is helping DOH to develop a Requirements Validation plan for Xerox (DOH Response to OSC’s Audit Question No. 12).
- iv. SLAs “that require a minimum review of 10% of each reviewer’s prior approvals, prior authorizations, and treatment plans and damages assessments when the consistency and appropriateness threshold is not met to confirm consistent decisions” (DOH Answer, at pg. 18).

2. Nevada Health Insurance Exchange Contract

The second example provided by CSC of Xerox’s alleged poor past performance is the cancellation by the Silver State Insurance Exchange Board in Nevada of a contract with Xerox to build its health insurance exchange website (Protest, at pg. 9). In their Answers to the Protest, DOH and Xerox point out that Xerox’s work on the Nevada contract is substantively different from the work it will be performing on the New York MAS contract (DOH Answer, at pg. 15; Xerox Answer, at pg. 12). As described by DOH, health insurance exchanges and MMIS solutions support different functionalities and purposes and, therefore, present different software implementation issues. Additionally, at the time Xerox was working on the contract in Nevada, health insurance exchange solutions and requirements were entirely new to the marketplace, and therefore, would be more difficult to implement than MMIS solutions, the requirements of which have already been well established (DOH Answer, at pg. 16). Finally, DOH notes that several states (including Massachusetts, Oregon and Maryland) and the Federal government experienced difficulties starting up their exchanges (DOH Answer, at pg. 15).

3. California MMIS

The third example provided by CSC pertains to a report issued by the Auditor of California which details significant delays by Xerox in implementing the State of California’s new MMIS. The Auditor of California reported significant staff turnover by Xerox resulting in the loss of key employees. The California audit also listed delays in other states where Xerox has implemented the MMIS system, in particular, New Hampshire, Alabama, North Dakota, and Montana.

To conduct a thorough vendor responsibility assessment of Xerox, DOH contacted several of the aforementioned states where Xerox worked on MMIS contracts (DOH Answer, at pg. 12). In August 2014, DOH began participating in a state user group for Xerox Health Enterprise consisting of representatives from California (who ran the group), New Hampshire,

Alaska, and Montana. (Xerox did not participate in these conferences.) DOH attended conference calls with the state representatives to learn more about the implementation of the projects in those states (DOH Response to OSC's Audit Question No. 1). According to DOH, "[b]oth California and New Hampshire state representatives described Xerox as a responsive and **responsible** contractor, with good access up the chain of command as necessary, and willingness to replace staff or alter the project approach when the states raised issues" (DOH Answer, at pg.13 [emphasis added]). In addition, New Hampshire has stated its new system has been "remarkably stable" and able to meet its needs since becoming operational (DOH Answer, at pg. 13). DOH has also advised that some of the delays on the California contract were attributable to a failure on the part of both Xerox and California to configure the already-established XHE product, as originally planned. Instead, the project managers shifted to the more traditional MMIS approach of developing an entirely new "from the ground up" system (DOH Answer, at pg. 13).¹⁴

DOH has also advised that Xerox, in an effort to address the delays that were occurring in California, New Hampshire, and Montana, brought in Cognizant to help with staffing needs and improve the new system's development methodology (DOH Answer, at pgs.13-14). For the New York State MAS, Xerox proposed Cognizant as a subcontractor from the start of the project to provide its expertise and mitigate any disruption caused by the transitioning of employees (DOH Answer, at pgs. 13-14).

4. Alaska MMIS

Finally, CSC points to problems with the MMIS contract between Xerox and Alaska (Protest, at pg. 10). CSC, in its supplemental protest, elaborates on the performance issues in Alaska and notes an administrative claim filed by the Alaskan Department of Health and Human Services alleging that "[t]he DDI portion of the contract was to be completed in approximately two years and 8 months. Seven years from contract inception, Xerox has yet to provide a fully implemented, functional, and certifiable system in accordance with the contract requirements. The MMIS that was implemented has fundamental defects" (CSC Supplemental Protest, at Exh. L, para. 9).

Initially, it is our understanding that the claim in Alaska is still pending and has not been finally resolved. In response to the performance issues under the Alaska contract, DOH acknowledges the project in Alaska was not managed as well as it could, but notes "[t]here are specific and concrete respects in which the early-adopting small states experienced the most delays (New Hampshire, Alaska, Montana) were at a disadvantage compared to New York" (DOH Answer, at pgs. 22-23). In its response to the issues raised on the Alaska project, Xerox states "many of the delays in designing, developing and implementing Alaska's MMIS, resulted from circumstances beyond Xerox's control" (Xerox Answer, at pg. 14). In addition, Xerox notes it has developed a corrective action plan that will address any remaining issues and remains committed to mutually working with Alaska to address any remaining concerns (Xerox Answer, at pg. 15).

ii) DOH's Measures to Mitigate Potential Performance Issues or Delays

¹⁴ As previously discussed, for the New York MAS, Xerox proposed the use of an already-established COTS-based solution that DOH's Business Transformation contractor found can meet a majority of DOH's project requirements through system configuration rather than development of new code (DOH Answer, at pg. 7).

A review of a bidder's "responsibility" requires the procuring state agency to undertake an assessment of the "past performance of [the] business entity" (SFL §163[1][c]). This Office encourages state agencies to take an "eyes wide open" approach when conducting its responsibility review. While recognizing that the award of a contract to a non-responsible vendor can have serious and detrimental consequences for the State, the purpose of vendor responsibility is not to find vendors nonresponsible. Rather, it is to give state agencies an opportunity to proactively identify, solve, and mitigate problems or, if necessary, avoid contracting with nonresponsible vendors and promote fairness in competition for State contracts. In this instance, we are satisfied DOH has thoroughly reviewed Xerox's past performance and taken steps to mitigate any potential performance issues and/or delays in project implementation.

As discussed in greater detail above, DOH has established safeguards and taken measures to mitigate issues with late and/or defective project implementation including: i) structuring the procurement in a manner that would create time and cost efficiencies; ii) requiring the use of a COTS solution that is capable of meeting DOH's requirements without the need for new software development; iii) the inclusion of an SLA governing the implementation timeline and providing for damages if such timeline is not met due to the fault of the contractor; iv) the adoption of a gate review process that will allow CMS to review defined stages of progress and provide feedback on the State's compliance with certification requirements prior to the go-live date; and v) the employment of an independent Quality Assurance contractor, Cognosante. In addition, Xerox proposed to use Cognizant as a subcontractor from the outset of the project to help meet timely deliverables.¹⁵

Additionally, in assessing Xerox's past performance, as part of DOH's vendor responsibility assessment, DOH determined staffing deficiencies were the largest problem for Xerox in its performance on past contracts. DOH also acknowledged Xerox has not consistently managed its staffing issues properly and, therefore, to mitigate this risk, DOH plans to "actively review Xerox's hiring activities, monitor staff training and develop corrective action plans quickly if staffing is inadequate ..." (DOH Answer, at pg. 14). DOH also states it "will insist that Xerox commit to using the key staff identified in [its] proposal rather than replacing with less experienced personnel," which will be possible since DOH has approval rights under the contract for staff replacements. DOH also developed a SLA that will impose stricter requirements for maintaining quality staffing and the assessment of damages for Xerox's failure to do so (DOH Answer, at pgs. 14-15).

Finally, DOH conducted extensive due diligence, including communications with many other states that have contracted with Xerox, and reasonably concluded many of the delays experienced were due to risks inherent in large, complex IT system projects of this nature and were not necessarily an indication that Xerox is a nonresponsible vendor.

In our view, DOH has taken the necessary precautionary measures, including the proper governance and oversight structure and necessary safeguards to help prevent and, if necessary, manage the types of issues that gave rise to the performance issues with Xerox's contracts in other

¹⁵ Contrary to CSC's argument in its Reply (CSC Reply, at pgs. 11-12), we do not view these safeguards as being needed specifically for Xerox but, rather, such safeguards would appear to be prudent in any MMIS redesign project of this magnitude, regardless of the vendor.

states. Accordingly, we do not find a sufficient basis to overturn DOH's vendor responsibility determination based on Xerox's past performance delays.

B. Xerox's Business Integrity and Compliance with Public Policy Issues and Statutory Requirements

CSC asserts Xerox does not meet the SFL § 163(1)(c) element of "integrity" for defining a responsible offerer based on the allegations in the lawsuit filed by Texas that Xerox knowingly and willfully failed to adhere to state Medicaid policies and requirements (Protest at pgs. 10-11). CSC also relies on the administrative action against Xerox by the Alaska Department of Health and Human Services (CSC Supplemental Protest, at pgs. 4-5; CSC Reply, at pg. 12). Based on these allegations and the court's decisions in *Konski Engineers, P.C. v. Levitt*, 69 AD2d 940 (3d Dep't 1979) and *Interstate Industrial Corp. v. Murphy*, 1 AD3d 751 (3d Dep't 2003), CSC argues OSC should withhold its approval of the DOH/Xerox contract.

In *Konski, supra*, the New York State Department of Environmental Conservation (DEC) awarded a contract to Konski Engineers, P.C. (Konski) for rehabilitation work on the Warner Dam in Jamestown, New York. The work was to be performed under three consecutive contracts. The successful bidder on the first contract would have the opportunity to negotiate the second and third contracts. OSC reviewed and approved the first DEC/Konski contract. However, shortly before receiving the second DEC/Konski contract for review and approval, the Comptroller was served with a subpoena that required production of all its records and documents relating to Konski before the Grand Jury of New York County. The Comptroller was also asked to provide information about Konski to the Special State Prosecutor for Onondaga County (who was investigating allegations of political corruption in the award of public contracts). The following day, DEC submitted its second contract with Konski to OSC for review and approval. Based on its knowledge of the criminal investigation of Konski, this Office refused to approve the contract, a decision that was upheld by the Court of Appeals (*see* 49 NY2d 850, *cert denied* 449 US 840).

In our view, the facts in *Konski* are distinguishable from our vendor responsibility review of Xerox in this matter. The allegations against Konski were criminal in nature and specifically related to corruption in public contracting. More importantly, the court in *Konski* noted that the Comptroller's decision on whether to approve a contract must be upheld unless it is arbitrary and capricious (*see* 69 AD2d at 942). While CSC is correct in that the *Konski* decision acknowledges this Office's ability to independently review an agency's vendor responsibility determination, in this instance, we have determined to use that discretion to uphold DOH's responsibility determination with respect to Xerox.

In *Interstate, supra*, the Dormitory Authority of the State of New York (DASNY) deemed Interstate Industrial Corporation (Interstate), the low bidder on a construction procurement, nonresponsible and refused to award it the contract. DASNY's finding of nonresponsibility was based on its knowledge of unresolved issues Interstate had with several New York City governmental entities, as well as the New Jersey Casino Control Commission relating to Interstate's involvement with individuals connected to organized crime. In reviewing the information related to Interstate's responsibility, DASNY found: "[W]hen taken together, [these facts] demonstrate a lack of sensitivity in dealing with Organized Crime members and associates.

Lack of sensitivity relates to the issue of integrity. [Interstate] and its principals repeatedly place themselves in situations that give at the very least an appearance that they are unconcerned with whom they employ or conduct business. Finally, [Interstate] has engaged in transactions with no apparent purposes with individuals connected with Organized Crime” (1 AD3d at 752). The Supreme Court and the Appellate Division affirmed DASNY’s finding. In doing so, the Appellate Division again reaffirmed that the vendor responsibility determination must be upheld unless the party challenging the determination can prove the determination has no rational basis (*see id.*).

While this Office has the authority to make its own independent assessment of a bidder’s responsibility, we conclude that, here, there is not a sufficient basis in the record to reverse DOH’s responsibility determination regarding Xerox. Both *Konski* and *Interstate* presented notably different circumstances than those presented by Xerox. Those cases involved serious criminal allegations that clearly brought into question the contractor’s integrity. While the pending lawsuit in Texas and the administrative claim in Alaska present some troubling allegations, unlike the facts presented in *Konski* and *Interstate*, they mainly relate to contract performance and not overall corporate integrity. Based on the information before this Office at this time, and DOH’s proactive measures to prevent and manage the types of issues raised in the lawsuits, we do not find a sufficient basis to overturn DOH’s vendor responsibility determination.

IV. Procurement Not in the Best Interest of the State

CSC’s final argument is that the procurement conducted by DOH is not in the best interest of the State at this time and could be procured at a much lower cost in the future. CSC asserts future Medicaid reform will result in the transfer of beneficiaries into managed care plans, which will ultimately lead to a major decrease in the number of payments issued by the current eMedNY system. CSC thus contends that, at that future date, the replacement system will necessitate less functionalities and could be procured at far less cost (Protest, at pgs. 12-13). CSC further asserts the current eMedNY system is solidly reliable and changes to the way payments are processed could lead to problems and, thus, could result in “significant degradation” to health services provided to New York State residents (Protest, at pg. 13).

First, it should be noted that CSC is the contractor for eMedNY, the State’s current Medicaid claims processing system and, as such, possesses a great interest in the continuance of this system. Second, as noted in its Answer to the Protest, DOH is “the single State agency responsible for the administration of the Medicaid program and ... the best source of knowledge about the needs of the program ...” To identify several reasons why eMedNY needs to be replaced now, DOH asserts: i) eMedNY, which was specifically designed for the prior fee for service Medicaid program, is not the “optimal solution” when beneficiaries will in the coming years primarily transition to managed care plans, and this would result in unnecessary waste and cost in the system; ii) the eMedNY system lacks the flexibility to support the rapid functional and technological changes necessary to implement the current regulatory requirements for the Medicaid program; iii) eMedNY limits DOH’s ability to implement MITA standards; iv) eMedNY is not sufficient to meet the State’s current goals and; and v) eMedNY lacks the system requirements necessary to fully process all Medicaid financial transactions with the Statewide Financial System (DOH Answer, at pg. 21). DOH also points out that by the time the new MAS system is fully operational in 2016, the Medicaid reform transition to managed care will be

complete and the new system will be needed (DOH Answer, at pg. 21). Since the procurement record supports DOH's technical determination that the replacement of the current MMIS is necessary at this time and in the best interest of the State, we will not disturb it.

CONCLUSION

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