

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Appeal Filed by Bank of America, N.A. with Respect to the Procurement of Benefit Banking Services Conducted by the New York State Department of Labor, the New York State Office of Children and Family Services and the New York State Office of the State Comptroller

**Determination of Appeal**

**SF-20150291**

March 18, 2016

Contract Number C000431

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The Office of the State Comptroller (OSC) has reviewed the above-referenced procurement conducted by the New York State Department of Labor (DOL), the New York State Office of Children and Family Services (OCFS), and OSC for banking services (Benefit Banking Services) used in connection with benefits provided under the New York State Unemployment Insurance and Occupational Training Act programs and the New York State Adoption Subsidy Electronic Payments program. We have determined the grounds advanced by Bank of America, N.A. (BOA) are insufficient to merit the overturning of the contract award made by DOL and, therefore, we deny the Appeal. As a result, we are today approving the contract with KeyBank National Association (KeyBank) for Benefit Banking Services.

**BACKGROUND**

**Facts**

DOL, OCFS, and OSC (Agencies) issued Request for Proposals #V-06 (RFP) for Benefit Banking Services on March 16, 2015.<sup>1</sup> DOL administers the State's unemployment insurance program (UI Program) and Occupational Training Act program (OTA Program) (*see* RFP, Section 1.7.1, at pg. 13). OCFS administers the Adoption Subsidy Electronic Payments program (*see* RFP, Section 1.6, at pg. 12; the Adoption Subsidy Program, the UI Program, and the OTA Program are hereinafter collectively referred to as the Benefit Programs). OSC (along with the New York State Department of Taxation and Finance) maintains custody of the accounts from which the payments under the UI Program and the OTA Program are made (*see* RFP, Section 1.7.1, at pg. 13). The Benefit Banking Services include "deposit, disbursement (via electronic funds transfer [such as direct deposit], debit cards, checks, and other possible mechanisms), reconciliation, reporting, and electronic cash management" for the Benefit Programs (RFP, Section 1.4, at pg. 11). Currently, the majority of Benefit Programs payments are made by (i) direct deposit and (ii) prepaid debit card (*see* RFP, Section 2.5, at pg. 25).<sup>2</sup> The RFP set forth detailed specifications and requirements

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<sup>1</sup> DOL served as lead agency for the procurement): bidders' submissions were sent to DOL, the designated contacts were DOL employees, and DOL provided the offerors notice of award (*see* RFP, Section 1.4, at pg. 12; RFP, Section 1.1, at pg. 10).

<sup>2</sup> DOL issues paper checks to a small number of recipients of benefits under the UI Program and OTA Program (*see* RFP, Section 2.7, at pg. 32).

for the electronic distribution of benefits through these two methods, along with the related banking services necessary to carry out the reconciliation, reporting and other cash management functions for the Benefit Programs (*see* RFP, Section 2, at pgs. 17-45).

The RFP provided that the contract would be awarded on the basis of best value, with the technical and cost proposals weighted 60 percent and 40 percent, respectively (*see* RFP, Section 6, at pg. 63). The cost proposal was comprised of two separate fee schedules, one for fees assessed against the State (State Fees) and another for fees passed along to benefit recipients (Cardholder Fees) (*see* RFP, Amended Attachments A-1 and A-2). Pursuant to the Agencies' predetermined evaluation methodology, 30 of the 40 points available for the cost proposal were assigned to the State Fees, and the remaining 10 points to the Cardholder Fees. The Agencies used separate scoring methodologies for the two fee schedules. The RFP provided that "the Proposal with the lowest all-inclusive not-to-exceed maximum price" would receive the highest State Fee score (RFP, Section 6.4.3, at pg. 65). The other State Fee proposals would receive a proportionate score based on the relation of their proposal to the proposal offering the lowest cost (*Id.*). The RFP further provided that the score for the Cardholder Fees "will be calculated and points awarded to the Bidder that provides financial benefit to fees passed along to Recipient cardholders" (*Id.*). The offeror with the highest total points scored for its technical and cost proposals would be selected for award (*see* RFP, Section 6.3, at pg. 64).

DOL received three proposals in response to the RFP. After evaluation and scoring, the proposal submitted by KeyBank received the highest composite score and was awarded the contract.

BOA requested a debriefing and, on September 2, 2015, DOL provided BOA a written debriefing. By letter dated September 18, 2015, BOA filed a protest with DOL and OCFS challenging the Agencies' award of the contract to KeyBank (Agency Protest).<sup>3</sup> DOL denied the protest in a letter dated September 28, 2015 (Agency Determination). BOA filed an appeal of DOL's protest determination, received by this Office on October 9, 2015 (Appeal). DOL did not file an answer to the Appeal.

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

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

In carrying out 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.<sup>4</sup> This procedure governs initial protests to this Office of agency contract awards and appeals of agency

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<sup>3</sup> The RFP required bid protests to be filed with DOL and OCFS (*see* RFP, Section 7.1.16[V], at pg. 77). OSC was not involved in the determination of the agency-level protest filed by BOA.

<sup>4</sup> OSC Guide to Financial Operations, Chapter XI.17, <http://www.osc.state.ny.us/agencies/guide/MyWebHelp/>.

protest determinations. Because this is an appeal of an agency protest decision, the Appeal is governed by section 4 of the OSC Protest Procedure.

In the determination of the Appeal, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by DOL, as lead agency for the procurement, with the Agencies/KeyBank contract;
2. The correspondence between this Office and DOL arising out of our review of the proposed Agencies/KeyBank contract; and
3. The following correspondence/submissions from the parties (including the attachments thereto):
  - a. BOA's Appeal received by our Office on October 9, 2015.

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.<sup>5</sup> Best value is defined as "the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers."<sup>6</sup> A "responsive" offerer is an "offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency."<sup>7</sup>

## **ANALYSIS OF THE APPEAL**

### **Appeal to this Office**

In its Appeal, BOA challenges the procurement conducted by the Agencies on the following grounds:<sup>8</sup>

1. The allocation of 30 points to State Fees and 10 points to Cardholder Fees in the scoring of the cost proposals was "material" and should have been disclosed in the RFP.
2. Allocating 75 percent of the points available for the cost proposal to State Fees does not support a best value determination under SFL § 163.
3. The RFP's cost scoring methodology for State Fees was flawed because it unintentionally rewarded an offeror who bid \$0 for State Fees "by ignoring real dollar value differences that could have been immaterial to the total contract." In addition,

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<sup>5</sup> SFL § 163(10).

<sup>6</sup> SFL § 163(1)(j).

<sup>7</sup> SFL § 163(1)(d).

<sup>8</sup> In the Appeal, BOA incorporates by reference the grounds advanced in its Agency Protest. Thus, in resolving the Appeal, we considered the arguments advanced in the Agency Protest, as well as those set forth in the Appeal.

this scoring methodology marginalized the value of the technical score to which the Agencies had assigned more weight (i.e. 60 percent).<sup>9</sup>

## **DISCUSSION**

### **Disclosure of Point Allocation for Cost Proposal**

As noted above, the RFP provided that 40 percent of the score (40 points) was allocated to cost (*see* RFP, Section 6, at pg. 63). However, while the Agencies had decided that 30 out of the 40 available cost points would be allocated to the State Fees and the remaining 10 points to the Cardholder Fees, this further breakdown was not disclosed in the RFP. With respect to the allocation of cost points, BOA asserts the Agencies “did not fully disclose important cost weighting information in advance of receipt of offers to promote fairness in contracting with businesses as is required by NYS procurement law” (Agency Protest, at pg. 1; *see* Appeal, at pg. 2). BOA claims such disclosure would have provided offerors with “better visibility [as] to how their RFP response would be evaluated and measured” and “would have allowed all bidders to adjust their pricing approach accordingly” (Agency Protest, at pg. 2; *see* Appeal, at pg. 2). DOL maintains SFL § 163 requires that the RFP disclose the “relative importance and/or weight of cost,” but does not require a more detailed breakdown of the evaluation of the cost component (*see* Agency Determination, at pg. 2).

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. 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 Appellate Division, Third Department, in *Transactive Corporation v New York State Department of Social Services* (236 AD2d 48 [1997]; *aff’d* 92 NY2d 579 [1998]), has interpreted this requirement, stating SFL § 163(9)(b) “does not require particularization, but only generalization” (*Id.* at 53). In *Transactive*, the Court determined that the RFP was sufficient “since it set forth the general evaluation criteria and the weight accorded to each [and] adequately advised the bidders as to the weight to be accorded to [pricing]” (*Id.* [internal citation omitted]).

In this case, the RFP stated the relative weight of cost in the overall scoring of the proposals (40 percent). In addition, the RFP set forth in detail the items to be included in the cost proposals, as well as the general manner in which the cost proposals would be scored (*see* RFP, Section 3 at pgs. 46-50; Section 6, at pg. 63; and Section 6.4.3, at pg. 65). Therefore, we are satisfied that the RFP met the disclosure requirements of SFL § 163(9)(b).

### **Best Value Determination**

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<sup>9</sup> BOA also claims that, as a direct result of the scoring methodology for State Fees, “a less experienced provider, lacking a comprehensive branch or proprietary ATM network in the State’s most populous regions” was awarded the contract (*see* Appeal, at pg. 2 [emphasis in original]). BOA did not, however, provide any evidence to support this assertion. Moreover, during the course of our review of the procurement record, we confirmed with DOL that KeyBank’s network of branches and ATMs is sufficient in all regions of the State, including the five boroughs of New York City.

BOA asserts “[t]he 30 point weighting on State Fees does not support “**Best Value**” as defined in New York State Finance Law” (Agency Protest, at pg. 2 [emphasis in original]). BOA claims this point allocation disproportionately weighted a component that accounts for a very small portion of the total contract value when compared to the Cardholder Fees which were afforded a maximum of 10 available cost points (*see* Agency Protest, at pg. 2; Appeal, at pg. 2). BOA asserts that since an offeror would derive most of its revenue under the contract from fees paid by the debit card users, more points should have been assigned to the evaluation of Cardholder Fees to “more appropriately reflect what the State is purchasing, a complex card program designed to bring the Best Value to NYS constituents, primarily the unemployed in this case” (Agency Protest, at pgs. 2-3).

DOL counters that cardholders were protected by the fact that the RFP placed strict limits on the fees an offeror could charge cardholders (*see* Agency Determination, at pg. 1). DOL further supports its allocation of cost points stating “value based upon Cardholder fees was largely built into the requirements of the RFP and value based upon State fees would be largely based upon the proposed charges by the bidder” (Agency Determination, at pgs. 1-2).

#### A. Cost-Benefit Analysis

As stated above, SFL § 163(1)(j) defines best value as “the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers. Such basis shall reflect, wherever possible, objective and quantifiable analysis.” Further, 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.”

In light of the requirements of SFL § 163 noted above, before rendering a best value award, an agency must undertake a cost-benefit analysis and adopt an evaluation methodology reasonably designed to effectuate such analysis (*see Transactive Corporation v New York State Department of Social Services, supra*, 236 AD2d 48 [1997]). Our review of the procurement record shows the Agencies undertook the requisite cost-benefit analysis and developed an evaluation methodology, prior to the initial receipt of offers, based on a variety of technical and cost factors to assess the merits of the proposals consistent with such analysis.

#### B. Allocation of Cost Points

The RFP required offerors to provide 12 services to cardholders free of charge, while offerors could elect to charge Cardholder Fees for certain other services (*see* RFP, Section 3.6, at pgs. 48-50; Amended Attachment A-2). The mandatory services provided at “no fee” to the cardholders included: bank teller withdrawals of any amount; 24/7 telephone access to obtain account information; and a minimum of five surcharge-free in-network ATM cash withdrawals per month (*see* RFP, Section 3.6.1, at pgs. 48-49). The State Fees consisted of fees for (i) developing and implementing the services required by the RFP, (ii) issuing the initial debit

cards and start-up costs of the related card system, and (iii) performing other ongoing banking services (*see* RFP, Amended Attachment A-1). Although the RFP mandated offerors provide a few services at no cost to the State, by and large, the RFP did not limit the fees offerors could charge the State (*see* RFP, Section 2.1.1, at pg. 18; Section 2.5.3.1(12), at pg. 29; Section 2.8(8), at pg. 36; and Section 2.17, at pg. 45).

Initially, we note that the Cardholder Fees permitted under the RFP are only triggered upon certain actions of the cardholder (for example, cash withdrawals at “out of network” ATMs, cash withdrawals in excess of the five monthly no-fee withdrawals at “in-network” ATMs, or international ATM cash withdrawals), while the various State Fees accrue to the vendor as a matter of course. Thus, it is not certain that Cardholder Fees would in fact account for the vast majority of revenue under the contract and BOA has not provided any evidence to support its assertion in this regard.

Furthermore, this Office generally provides significant deference to an agency’s determination of point allocations except where the allocation results in an award that fails to achieve best value, or is so distorted that it impairs the fairness of the procurement (OSC Determination of Bid Protest SF20100130, at pg. 8). In this case, BOA and KeyBank scored very close on their technical merit (46.93 for BOA and 41.14 for KeyBank), on proposed Cardholder Fees (8.67 for BOA and 8.17 for KeyBank), and BOA’s charges to the State exceeded KeyBank’s no cost bid by \$1,333,515.50 over the term of the contract. Thus, there is no evidence to support a finding that the award to KeyBank did not achieve best value. Finally, especially in light of the limits on Cardholder Fees imposed by the RFP, we find no evidence that the allocation of points between Cardholder Fees and State Fees impaired the fairness of the procurement.

### **Cost Scoring Methodology**

In accord with the RFP, the offeror submitting the lowest State Fees would receive the full point value (*see* RFP, Section 6.4.3, at pg. 65). KeyBank bid \$0 for all State Fees and, therefore, received full point value – 30 points. A mathematical formula was used to compute the scores of the other State Fee cost proposals. The formula is as follows:  $\text{Cost Score} = 30 \times (\text{Lowest Cost} / \text{Cost Being Evaluated})$ . Applying this predetermined formula to the other State Fee cost proposals resulted in the other proposals receiving zero points, regardless of the amount of State Fees proposed, since the multiplier being used (KeyBank’s bid) was zero.

BOA asserts this methodology was flawed because it “unintentionally rewarded zero dollar bids and ignored real dollar value differences that could have been immaterial to the total contract” (Appeal, at pg. 2). To illustrate, BOA points out that a “\$1 bid on state fees would have received the same value as a \$1MM bid” (*Id.*). BOA further alleges the cost scoring methodology for the State Fees marginalized the technical evaluation score and “made it almost impossible for any other bidder to overcome the loss of these 30 points” (Appeal, at pg. 2).

The formula used in this procurement is commonly used to compare cost proposals and compute relative cost scores (*see* New York State Procurement Guidelines, Section V.I, <http://www.ogs.ny.gov/bu/pc/Docs/Guidelines.pdf>, Revised May 2014). While this Office would recommend that a procuring agency develop its cost scoring methodology to address a \$0 bid (e.g.,

by ascribing a nominal value to a \$0 bid so that other proposals receive at least some relative points), the Agencies did not do so here. However, while the cost scoring methodology used could have resulted in a flawed result,<sup>10</sup> we do not believe that happened in this instance.

BOA recommends that the State “realign its 30/10 cost proposal scoring” suggesting that “[t]he 40 point cost allocation should be at minimum reversed to 10 points for State Fees and 30 for Cardholder Fees” (Agency Protest, at pg. 2). BOA has not provided any evidence supporting the basis for its suggested cost point allocation; however, even under such an allocation (10 points to State Fees and 30 points to Cardholder Fees), while BOA’s overall score would have increased, such a “realignment” would not have altered the outcome of the procurement. The proposal submitted by KeyBank would remain the proposal with the highest total points scored.<sup>11</sup>

Additionally, as we have previously stated, SFL § 163 requires that a state agency develop a cost evaluation methodology that bears a reasonable relationship to the costs anticipated to be incurred under the contract (*see* OSC Determination of Bid Protest SF2008040, at pg. 9, and OSC Determination of Bid Protest SF20100156, at pg. 6). For the reasons discussed in the previous section, the Agencies allotted more points to State Fees. We have not been provided any evidence that the cost allocation used by the Agencies did not bear a reasonable relationship to the anticipated costs under the contract.

Finally, we find no support in the procurement record for BOA’s claim that the cost component scoring methodology marginalized the more heavily weighted technical component of the evaluation.

## **CONCLUSION**

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

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<sup>10</sup> For example, while not present here, assume the following factual scenario: A proposal was submitted that received a materially superior technical score, a higher score on the Cardholder Fee costs, and assessed a \$1 State Fee cost. If the \$1 State Fee cost resulted in the proposal receiving 0 State Fee cost points and resulted in a contract award to a technically inferior and ostensibly more costly proposal, clearly, the result would be flawed.

<sup>11</sup> Although in its Agency Protest BOA also alludes to an even more aggressive division of cost points (i.e., 5 points for State Fees and 35 points for Cardholder Fees), this Office need not speculate further about hypothetical point allocations.