

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Blackboard Inc.
with respect to the procurement of a digital learning
environment conducted by the State University of
New York.

**Determination of
Appeal**

SF-20210086

Contract Number – CM03740

September 24, 2021

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the State University of New York (SUNY) for a digital learning environment. We have determined the grounds advanced by Blackboard Inc. (Blackboard) are insufficient to merit overturning the contract award made by SUNY and, therefore, we deny the Appeal. As a result, we are today approving the SUNY contract with D2L Ltd (D2L) for a digital learning environment.

BACKGROUND

Facts

SUNY issued a request for proposals (RFP) on July 23, 2020 seeking proposals for “an online Digital Learning Environment . . . [that] should meet the online learning and educational needs of all participating SUNY campuses as well as SUNY Online” (RFP, *Overview*, at p. 3).¹ The stated goal was to “establish a university-wide agreement that may be utilized by any participating SUNY institution or affiliates [as identified in the RFP Attachment, *List of SUNY Institutions*]”² (*Id.*).

SUNY intended to award one contract to a responsive and responsible offeror on the basis of best value (*see* RFP, *Method of Award*, at pp. 7-8). Offerors were required to meet minimum qualifications, mandatory technical and data requirements, and functional requirements³ in order to proceed to proposal scoring (RFP, *Minimum Bidder Qualifications Review*, at p. 7; Attachment, *Bidder Qualifications Submission Form; Mandatory and Technical Data Requirements*, at p. 7; Attachment, *Technology Software: Mandatory Technical and Data Requirements*, at pp. 20-24; *Technical Evaluation*, at pp. 7-8; Attachment, *Technology Software:*

¹ The original RFP is not paginated nor are the sections consistently numbered. For purposes of the Determination, this Office includes page numbers as they would have appeared, if included, and identifies the referenced section by heading.

² RFP Attachment, *List of SUNY Institutions* included a list of thirty State-operated SUNY campuses as well as two statutory colleges, thirty community colleges, and other affiliates.

³ This mandatory minimum requirement was included within the technical evaluation and was also scored as part of the technical response score; however, it was determined prior to scoring whether the minimum requirement was met, and failure to meet a requirement precluded a proposal from proceeding to scoring.

Functionality and Accessibility, at p. 24). If an offeror was deemed to be responsive, the evaluation team would review and score its proposal, with the technical proposal comprising 75% (divided into a technical response worth 30% and a vendor presentation and demonstration worth 45%) and a cost proposal comprising 25% of the proposal's total score (RFP, *Method of Award*, at pp. 7-8). The offeror receiving the highest final composite score was eligible for contract award (RFP, *Selection*, at p. 9).

Prospective offerors were given the opportunity to ask SUNY questions prior to proposal submission, and SUNY publicly posted responses to same. Proposals were due on September 11, 2020, and SUNY received three proposals: one each from D2L, Instructure Inc., and the incumbent vendor, Blackboard.

Following evaluation, SUNY awarded the contract to D2L, the offeror receiving the highest final composite score, and notified all offerors on January 21, 2021. Blackboard requested a debriefing which was held with SUNY on February 1, 2021. Subsequently, Blackboard protested the award to SUNY on February 4, 2021 (Protest to SUNY), and SUNY denied the protest on March 17, 2021 (SUNY Protest Determination). Blackboard then appealed to SUNY on March 31, 2021 (Appeal to SUNY), and SUNY upheld its denial on May 6, 2021 (SUNY Appeal Determination). Blackboard appealed to this Office on May 19, 2021 (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 this contract approval responsibility, OSC has promulgated 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.⁴ This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because this is an appeal of an agency protest decision, the Appeal is governed by section 24.5 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 SUNY with the SUNY / D2L contract;
2. the correspondence between this Office and SUNY arising out of our review of the proposed SUNY / D2L contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):

⁴ 2 NYCRR Part 24.

- a. Protest to SUNY;
- b. SUNY Protest Determination;
- c. Appeal to SUNY;
- d. SUNY Appeal Determination;
- e. Appeal; and,
- f. E-mail from Michele L. Feathers on behalf of SUNY to this Office, dated July 30, 2021 (Feathers E-mail).

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, Blackboard challenges the procurement conducted by SUNY on the following grounds:

1. SUNY materially changed the terms of the procurement after contract award by mandating that all SUNY-affiliated schools use the vendor awarded pursuant to the RFP to obtain a digital learning environment;
2. SUNY is intentionally and improperly withholding procurement records that Blackboard requested pursuant to FOIL in order to hinder Blackboard's challenge to the RFP;⁵
3. SUNY's procurement did not result in a best value award because SUNY's technical scoring methodology was irrational and SUNY improperly failed to disclose its technical scoring methodology in the RFP;
4. SUNY's procurement did not result in a best value award because SUNY failed to consider massive costs and disruption relating to vendor transition;
5. SUNY improperly and unreasonably evaluated various aspects of Blackboard's technical proposal, and should have assigned higher scores to Blackboard based on its capabilities; and,
6. SUNY's failure to seek a "clarification" from Blackboard by allowing Blackboard to submit a revised version of the Functional Requirements form, after Blackboard submitted an incorrect version of the form with its proposal, adversely affected Blackboard's technical score.

SUNY Response to the Appeal

In its Answer,⁶ SUNY contends the Appeal should be rejected and the award upheld on the following grounds:

⁵ See Protest, at pp. 9-10. Consistent with the longstanding policy of this Office enunciated in prior bid protest determinations, issues related to a procuring agency's action or inaction on a FOIL request does not impact our review of the contract award and are not considered as part of our review of an appeal of an agency bid protest determination (see OSC Bid Protest Determinations SF-20200069, at fn. 5; SF-20180263, at fn. 5). Accordingly, the Determination will not specifically address this allegation.

⁶ SUNY determined an answer to the Appeal was unnecessary because the SUNY Protest Determination and the SUNY Appeal Determination "sufficiently covered the substantive issues raised by Blackboard" (Feathers E-mail). SUNY also provided additional relevant information in the Feathers E-mail. These three documents collectively comprise SUNY's "Answer" to the Appeal for purposes of this Determination.

1. Blackboard's claim that SUNY mandated that all SUNY-affiliated schools use the vendor awarded pursuant to the RFP to obtain a digital learning environment is incorrect. SUNY did not provide communication to its campuses specific to any particular contract but rather provided a reminder to its campuses to follow existing New York State procurement rules;
2. SUNY awarded the contract based on best value in accordance with State Finance Law and the RFP disclosed the number of points assigned to the technical and cost components of an offeror's proposal;
3. Cost proposals solicited implementation costs from all offerors which SUNY considered in its evaluation of cost proposals;
4. SUNY properly and comprehensively evaluated Blackboard's technical proposal using a predetermined, rational scoring rubric; and,
5. Allowing Blackboard to submit the correct Functional Requirements form would not constitute a clarification since the revised Functional Requirements form required an offeror to provide new, supplemental, and material information and instead would constitute an impermissible revision to Blackboard's proposal.

DISCUSSION

Change to the Scope of the Procurement After Contract Award

Blackboard asserts that SUNY “dramatically expand[ed] the scope of the RFP after the contract award was made” by “requir[ing] that all SUNY-affiliated schools use the RFP to obtain [learning management system] services, despite being told during the competition that the RFP was not mandatory, and that some schools may elect not to use that vehicle to meet their [] needs” (Appeal, at p. 7).⁷ Blackboard maintains that this “material modification” is one which offerors “would not have reasonably expected” based on the RFP and which requires “a fair and equal opportunity for all offerors to revise their proposals” (*see id.*, at p. 8). SUNY responds that Blackboard's allegation is incorrect in that information provided to SUNY-affiliated schools “[was] not specific to a particular contract, rather a general reminder to follow the hierarchy of existing New York State procurement rules” (Feathers E-mail). SUNY further indicates that the “communication does not apply to non-state campuses” and “some State-operated campuses may have existing campus specific agreements or other reasons why they cannot participate in a system-wide agreement” (*Id.*). As additional support that the scope of work in the RFP did not change after contract award, SUNY maintains that “the RFP clearly states: ‘This process is intended to secure a solution available to all campuses in the SUNY system’” (*Id.*).

SFL § 163(9)(a) requires a State agency to select a formal competitive procurement process which includes, among other things, a clear statement of need and a description of the required specifications governing performance.

Here, SUNY provided sufficient information regarding the scope of services in the RFP, which included use of the services sought in the RFP by any, and potentially all, SUNY

⁷ Blackboard alleges that “during a May 5th conversation with two SUNY attorneys [], Blackboard was told that the RFP was to be an exclusive vehicle to obtain [learning management system] solutions for any SUNY-affiliated school” (*see* Appeal, at p. 8). Aside from this statement, Blackboard has provided no support for this allegation.

institution(s) identified in the RFP (*see RFP, Overview, at p. 3; Attachment, List of SUNY Institutions*). The stated goal of the RFP was to “establish a university-wide agreement that may be utilized by any participating SUNY institution or affiliates [as identified in the RFP Attachment, *List of SUNY Institutions*]” (RFP, *Overview, at p. 3*). The RFP reiterated this plan for participation numerous times throughout, providing that the proposed solution would need to be “available to all campuses in the SUNY system listed in [RFP Attachment, *List of SUNY Institutions*],” “[able] to meet the current and future needs of the SUNY Online initiative along with all 64 SUNY campuses,” and “capable of meeting the current needs of SUNY and be scalable for potential future growth to a million or more users” (RFP, *Overview, at p. 3; Overview of the SUNY Digital Learning Environment, at p. 5*).

Not only did the RFP provide repeated references to the scope of campuses to be served under this procurement, SUNY also provided prospective offerors with the opportunity to ask questions regarding the scope of the RFP before submitting a proposal. For example, in a response to one question, SUNY indicated that “the resultant agreement will be used by campuses that are part of the SUNY Online program” and “SUNY will work with the Contractor after [contract] execution and throughout the contract term to continuously grow participation throughout the system” (*Implications of RFP Award, eThink Education, 8/19/2020*).⁸ SUNY also indicated that “[t]his Request for Proposal is for a university wide agreement that may be utilized by any SUNY institution as well as SUNY Online” (*Individual Campus Opt-In, D2L LTD, 8/14/2020*).

In addition, the cost proposal itself necessitated tiered pricing based on varying rates of campus participation in the proffered services (*see RFP Attachment, Cost Proposal Submission Form*). Blackboard completed its cost proposal accordingly.

Moreover, even *assuming arguendo*, all eligible SUNY-affiliated schools were required to use the contract awarded under the RFP, as demonstrated above, there was no material change to the scope of the procurement since the RFP already advised offerors that all SUNY campuses identified were eligible to participate and might participate, SUNY’s responses to the prospective offerors’ questions made it clear that all campuses would be encouraged to participate, the full number of campuses were disclosed in an attachment to the RFP, and offerors were even required to submit different costing structures to account for varying levels of participation by campuses. Accordingly, Blackboard’s assertion that SUNY made an impermissible material change to the scope in the RFP after contract award is without merit.

Best Value Determination

1. Technical Proposal Evaluation Methodology

Blackboard contends that SUNY’s technical scoring methodology of “assigning only half of the available points under the Technical and Demonstration factors to offerors who fully complied with the technical requirements” was irrational because “there is no rational basis for

⁸ The posted questions and answers are not numbered. For purposes of the Determination, this Office identifies questions and answers by the subject heading, prospective offeror posing the question, and the date the answer was posted.

[SUNY] to award fewer points to an offerer who meets all the solicitation requirements” (*see* Appeal, at pp. 13-14). Blackboard posits that such scoring methodology “warps the [] ‘best value’ award concept into a ‘most technically advanced’ concept” where SUNY “*overemphasized* [the Technical and Demonstration] factors in violation of the [RFP] criteria” (*Id.*, at p. 14). SUNY responds that it “awarded the contract based on best value in accordance with State Finance Law” (SUNY Appeal Determination, at p. 2 (citing and affirming SUNY Protest Determination)). SUNY further asserts that “[t]o assign the highest score available in the Technical and Demonstration categories on the basis that bidders met the minimum RFP requirements would be akin to a pass/fail checklist of minimum requirements, without an assessment of quality of each requirement” and such “scoring methodology would effectively convert a ‘best value’ RFP into a ‘low cost’ IFB” (*Id.*).

SUNY awarded the contract under the RFP on the basis of best value which “optimizes quality, cost and efficiency, among responsive and responsible offerers” and “[s]uch basis shall reflect, wherever possible, objective and quantifiable analysis” (SFL § 163(1)(j)). A “best value” determination shall “be based on clearly articulated procedures which require . . . a balanced and fair method, established in advance of the receipt of offers, for evaluating offers and awarding contracts” (SFL § 163(2)(b)).

The RFP clearly outlined how the technical evaluation would be conducted and set forth specific criteria to be scored. The RFP provided that the technical proposal would comprise 75% of an offeror’s total score, with a technical response worth 30% and a vendor presentation and demonstration worth 45% (*see* RFP, *Method of Award*, at pp. 7-9). The criteria reviewed in the technical response included functional requirements, accessibility (conformance report), and scope of services (*see* RFP, *Technical Evaluation*, at pp. 7-8). The product demonstration was “highly structured” and “include[d] a series of scripts to verify the system’s functionality, and user experience” (*see* RFP, *Product Demonstration*, at p. 8). Offerors were provided with a demonstration script with detailed instructions and an agenda (*see* RFP Attachment, *Bidder Demonstration Script*). The evaluation team consisted of multiple evaluators who were provided with detailed evaluation instructions and training.⁹ The evaluation worksheets contained detailed instructions and a scoring rubric that guided evaluators’ scoring. SUNY correctly points out that “[a]bsent such a pre-established point scale, the evaluation would not be objective and scoring could be inconsistent among the evaluators” (SUNY Appeal Determination, at p. 5).

The scoring rubrics for the functional requirements and demonstration portions of the technical response generally instructed evaluators to award 50% of the available points for a criterion if a proposal met the relevant requirements of that criterion, leaving latitude to evaluators to award additional points to those proposals that exceeded their expectations. This scoring methodology is not meant to be a cap, but rather a method of allowing evaluators a breadth of points to fully evaluate the strengths and weaknesses of a proposal. Furthermore, this method is consistent with the New York State Procurement Guidelines which provide, “The

⁹ The technical response evaluation was conducted by four evaluation teams. Four evaluators reviewed the scope of services, five evaluators reviewed the technical requirements, five evaluators reviewed accessibility, and eight evaluators reviewed user requirements. The product demonstration evaluation was conducted by three evaluation teams. Five evaluators reviewed the accessibility demonstration, five evaluators reviewed the technical demonstration, and eight evaluators reviewed the functional user demonstration.

technical evaluation measures the extent by which a proposal will meet the agency's needs and relies upon the evaluators' expertise in assessing the strengths and weaknesses of each response" (New York State Procurement Guidelines, Section H, at p. 34).

Based on our review of the procurement record, we conclude that the methodology SUNY used to evaluate and score technical proposals was balanced, fair, and included an objective and quantifiable analysis. Thus, we find no basis to question the evaluation methodology SUNY used for the technical proposals.¹⁰

2. Disclosure of Technical Proposal Evaluation Methodology

Blackboard contends that "nothing in the RFP indicated that . . . [offerors] must exceed requirements to achieve the highest scores, nor were offerors put on notice that failing to propose capabilities in excess of the requirements announced would be treated less preferentially" which violated SFL § 163(9)(b)'s requirement that the RFP apprise offerors of the general manner in which evaluation and selection will be conducted (Appeal, at p. 13). SUNY responds that its "RFP disclosed the number of points assigned to the Technical evaluation [] and the Demonstration []" and "[t]he scoring instrument was established prior to the bid opening" (SUNY Appeal Determination, at p. 4). SUNY maintains that it "was under no obligation to disclose the 'quantification of the application of the criteria to the rating of proposals' in the RFP" (SUNY Protest Determination, at p. 2). SUNY also asserts it "properly applied a predetermined, rational scoring rubric to responsive [technical] proposals" and that its "scoring approach was rationally based and follows NYS procurement practice" (*Id.*).

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)(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" (emphases added).

¹⁰ Blackboard claims that "[w]hile best value does not require award to be made to the lowest priced offeror, it does require SUNY to fully consider and document why a higher price solution is technically superior to the degree that it justifies a higher cost" (Appeal, at p. 23). Blackboard, however, misconstrues what is required for an award based on best value under New York State law. SFL § 163(10)(a) requires state agencies to include the basis for determining the award and a written determination of selection and award in the procurement record submitted to this Office. As previously stated, best value "means the basis for awarding contracts for services to the offeror which optimizes quality, cost and efficiency, among responsive and responsible offerors" (SFL § 163(1)(j)). A best value award is a flexible concept based on a balancing of the cost and the technical benefits that turns on the particular circumstances of a given procurement. Moreover, agencies are not required to ascribe equal weights, or any other fixed weights, to cost and technical. For purposes of the RFP, the best value was the offeror whose proposal received the highest total combined score for the categories of cost (25 points), technical (30 points) and demonstration (45 points). As a result, an offeror, like Blackboard, with a superior cost proposal may not be the best value offeror, dependent upon such offeror's technical proposal in relation to other offerors.

As set forth above, the RFP clearly outlined how the technical evaluation would be conducted, including specific criteria to be scored, and the weight to be allocated to the technical components. Contrary to Blackboard's assertions, further specifics regarding SUNY's evaluation method and selection process were not required to be disclosed in the RFP (*see* OSC Bid Protest Determination, SF-20170111, at pp. 5-6). Moreover, as we concluded above, the scoring methodology, including the scoring rubric, SUNY developed as part of this procurement, was sufficient to meet the applicable legal requirements.

3. Cost Proposal Evaluation Methodology

Blackboard alleges SUNY failed to consider the significant costs and disruption caused by a transition to D2L and that "the minimum total migration costs" for D2L would be over \$3 million more than for Blackboard (*see* Appeal, at pp. 15-16). Blackboard further contends that "[t]here are substantial additional costs in time, money and goodwill of a D2L migration" including, among others, "at least 24 months" for all schools to migrate, "system-wide training required when introducing a new system," and "lost functionality and required workarounds where D2L is unable to seamlessly migrate or offer seamless functionality" (Appeal, at pp. 16-17).¹¹ To refute Blackboard's allegation, SUNY states "Part 3 of the Cost Proposal Submission Form solicited Implementation Costs from all bidders . . . and such costs were factored into the overall Cost Proposal scores" (SUNY Appeal Determination, at p. 7). SUNY further points out "[a]lthough Blackboard received the full 25 points allocated to the Cost Proposal which undoubtedly reflected that as the incumbent vendor its implementation costs might be lower, Blackboard was not the highest scoring bidder overall" (*Id.*).

As stated above, SUNY awarded the contract under the RFP on the basis of best value which "optimizes quality, cost and efficiency, among responsive and responsible offerers" and "[s]uch basis shall reflect, wherever possible, objective and quantifiable analysis" (SFL § 163(1)(j)). A "best value" determination shall "be based on clearly articulated procedures which require . . . a balanced and fair method, established in advance of the receipt of offers, for evaluating offers and awarding contracts" (SFL § 163(2)(b)).

The RFP specified that the cost proposal would comprise 25% of an offeror's score (*see* RFP, *Cost Evaluation*, at p. 8). Offerors were provided with a Cost Proposal Submission Form with detailed instructions and a comprehensive list of specific categories to submit pricing for (*see* RFP Attachment, *Cost Proposal Submission Form*).¹² Notably, costs for implementation were sought, including for initial training, data conversion, and implementation costs on a per-campus basis (*Id.*). SUNY advised that the pricing provided in the cost proposal would be "applied to a conceptual model of projected use and based on a phased implementation" (RFP,

¹¹ As an initial matter, if we were to accept Blackboard's argument that the costs of transitioning to a new vendor are insurmountable, an agency would never be permitted to award a procurement contract to any vendor other than the incumbent. This runs contrary to State procurement requirements that a State agency employ a "reasonable process for ensuring a competitive field" and provide "a fair and equal opportunity for offerors to submit responsive offers" (SFL § 163(9)(a)).

¹² Specific categories of pricing included: software license cost, hosting service cost, content storage costs, environment costs per year, annual costs for client support manager, support services costs, implementation costs, etc. Within these categories, additional pricing categories were itemized further.

Cost Evaluation, at p. 8). The offeror with the lowest cost would receive the maximum available points and other offerors would be scored proportionately using a predetermined formula (*Id.*). Clearly, SUNY considered implementation costs applicable when migrating to a new vendor in its cost proposal evaluation. Blackboard has provided nothing to support its additional claim that SUNY failed to account for disruption caused by transition to D2L. Thus, we are satisfied SUNY evaluated the cost proposals according to the RFP.

Technical Proposal Scoring

Blackboard asserts SUNY's evaluation of Blackboard's technical proposal demonstrates SUNY's "irrational failure to recognize the unparalleled capabilities of Blackboard Data" (Appeal, at p. 23). More specifically, Blackboard contends that SUNY "made a number of [] arbitrary findings when it evaluated various aspects of Blackboard's technical proposal" including,

- (1) SUNY "fail[ed] to reasonably consider [Blackboard's] independent third party-validated reports and unique Ally solution" when evaluating Blackboard's accessibility proposal. Blackboard contends that it should have been awarded "full credit" (4.0 points) and "it was unreasonable for the evaluators to conclude otherwise" (awarding 2.5 points);
- (2) SUNY "fail[ed] to fully credit Blackboard's demonstrated capabilities" when evaluating Blackboard's demonstration. Blackboard contends that, as it "fully executed each of the required scripts, it was unreasonable for the evaluators to conclude that Blackboard should only receive 28.9 points [out of 45.0 possible] for its demonstration because it executed them in the most logical sequence for Blackboard's platform [rather than in the demonstration script order provided by SUNY]";¹³
- (3) The low rating¹⁴ Blackboard received for its multi-tenant hosting capability was irrational (*see id.*, at pp. 18-23).

In essence, Blackboard claims that, based on these shortcomings in SUNY's technical evaluation, Blackboard was awarded fewer technical points than it deserved. SUNY responds that it "used a robust instrument to comprehensively evaluate the technical aspects of each bidder's accessibility options . . . [and Blackboard] achiev[ed] a score that exceeded the RFP's requirements for enhanced functionality" (SUNY Appeal Determination, at p. 8). SUNY further responds, with respect to the demonstration, that "the script instructions contained in the RFP . . . cautioned bidders that any failure 'to follow scripts may not provide evaluators an accurate view of Solution's functionality which may negatively impact scoring'" and "any points that Blackboard may have lost were due to [Blackboard's] actions and not a result of any improper, unreasonable or negligent act on SUNY's part" (*Id.*, at pp. 9 (citing and affirming SUNY Protest Determination)). With respect to Blackboard's multi-tenant hosting capabilities, SUNY responds that "evaluators provided positive comments" and "a reduction in Blackboard's score, if any, is more likely due to Blackboard's Demonstration deficiencies" (*Id.*, at p. 12).

¹³During Blackboard's demonstration, SUNY made multiple requests to Blackboard to follow the script and Blackboard's failure to follow the order of the script caused confusion among the evaluators (*see* SUNY Protest Determination, at p. 3).

¹⁴ Blackboard received 2.0 out of 3.0 possible points for the "Multi-Tenant" criterion, and 1.0 out of 2.0 possible points for the "Hosting" criterion.

This Office generally defers to agency determinations where they are properly within the agency's expertise and supported by the procurement record. Accordingly, this Office "will generally not disturb a rationally reached determination of a duly constituted evaluation committee" unless "scoring is clearly and demonstratively unreasonable" (OSC Bid Protest Determination SF-20160188, at p. 8 (upholding evaluation committee's technical scores where "review of the procurement record confirms the evaluators scored the proposals in a manner consistent with the evaluation/scoring instructions"); *see also* OSC Bid Protest Determination SF-20200069, at p. 6; OSC Bid Protest Determination SF-20210006, at p. 6).

Our review of the procurement record indicates SUNY scored Blackboard's technical proposal according to the clearly articulated criteria set forth in the RFP and used the detailed scoring rubric that was crafted prior to receipt of proposals. Therefore, we will not disturb the technical scores SUNY awarded to Blackboard.

Clarification of Functional Requirements Form

Blackboard alleges that when it "erroneously submitted an earlier version of the amended Functional Requirements form with its proposal" SUNY should have "alert[ed] Blackboard to the clerical error" by requesting "clarification" from Blackboard (Appeal, at p. 22). Blackboard asserts that SUNY's failure to seek such "clarification" from Blackboard was "not a fair process" and resulted in a lower technical score for Blackboard (*Id.*). SUNY responds that the amended form "sought new, supplemental and material information" and "could not be characterized as a clerical matter;" instead, "a revision to the Form would be a material change in Blackboard's proposal" (SUNY Appeal Determination, at p. 11). SUNY further provides that pursuant to State Finance Law 163(9)(c), "[r]evisions . . . can only be sought from 'all offerers'" (*Id.*).

The State Finance Law provides State agencies with the authority to seek clarifications from proposers "for purposes of assuring a full understanding of responsiveness to the solicitation requirements" and SUNY reserved the right to seek clarifications in the RFP (*see* SFL § 163(9)(c); RFP, *Cost Proposal Submission Instructions*, at p. 10). Moreover, an agency's decision as to whether to seek a clarification is discretionary.

SUNY stated the amended Functional Requirements form contained new, supplemental, and material information, and "Blackboard's submission of the incorrect [Form] could not simply have been rectified by a clarification" (SUNY Protest Determination, at p. 5). Furthermore, SUNY determined "[t]he difference between the original and amended [Forms] was a request for additional information to support some of the stated requirements" (*Id.*). Therefore, allowing Blackboard to submit a revised Functional Requirements form would not have been a clarification of its initial bid, but rather a supplementation of its bid to conform the bid to the RFP requirements. It is fully within SUNY's discretion not to seek a clarification in this instance. Additionally, our review of the procurement record confirmed the amended Functional Requirements form sought additional information from offerors. Based on the foregoing, we have no basis to disturb SUNY's decision not to seek a clarification.

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 SUNY. As a result, the Appeal is denied and we are today approving the SUNY / D2L contract for a digital learning environment.