

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by MetriTech, Inc.
with respect to the procurement of services to
develop and administer statewide English language
proficiency assessments conducted by the New York
State Education Department.

**Determination
of Appeal**

SF-20220030

Contract Number – C014460

October 6, 2022

The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Education Department (NYSED) for development and administration of statewide English language proficiency assessments. We have determined the grounds advanced by MetriTech, Inc. (MetriTech)¹ are insufficient to merit overturning the contract award made by NYSED and, therefore, we deny the Appeal. As a result, we are today approving the NYSED contract with NCS Pearson, Inc. for implementation of NYSESLAT.

BACKGROUND

Facts

NYSED issued a request for proposals (RFP) seeking proposals “from highly qualified respondents with expertise in the development and administration of statewide English language proficiency assessments” including transitioning testing from a paper-based to a computer-based testing (CBT) platform (RFP, at pp. 1-3). NYSED is responsible for administering English language proficiency assessments to English language learner (ELL) students in grades K-12, to comply with federal and State law (*see id.*, at pp. 14-17).

Proposals were due no later than November 10, 2021 (*Id.*, at p. 97). The RFP set forth mandatory requirements that offerors were required to meet to be found responsive and proceed to technical evaluation (*see id.*, at pp. 12, 106). The RFP provided proposals would be evaluated according to specified technical criteria, including CBT which scores could be adjusted following a mandatory CBT demonstration, and cost (*see id.*, at pp. 98-106). The technical proposal was worth up to 70 points and the cost proposal up to 30 points (*see id.*). The RFP provided for the contract award to be made to the responsive and responsible offeror “whose aggregate technical and cost score is the highest among all the proposals rated” (*Id.*, at p. 106). NYSED reserved the right to request best and final offers (BAFO) from all responsive offerors; if NYSED exercised that right, contract award would be made to the responsive and responsible offeror with “the highest aggregate technical and financial score that results from the [BAFO]” (*see id.*).

¹ The Appeal was filed on behalf of MetriTech and its subcontractor, Data Recognition Corporation (DRC).

The RFP placed certain restrictions on subcontracting, providing, “Subcontracting will be limited to thirty percent (30%) of the total contract budget. A higher subcontracting limit will be allowed only when a bidder is proposing to subcontract for the provision of the CBT platform. In this case, the subcontracting limit will be increased to fifty percent (50%) of the total contract budget. In all other cases, the subcontracting limit will be 30%” (*Id.*, at pp. 2, 92).

Two offerors submitted responsive proposals by the deadline, MetriTech (along with its subcontractor DRC)² and NCS Pearson. NYSED decided to exercise its right to request BAFOs from all responsive offerors. Following receipt of BAFOs, NYSED awarded the contract to NCS Pearson, the offeror receiving the highest aggregate technical and financial score resulting from the BAFO.

Following notice of non-award, MetriTech requested a debriefing which was held by NYSED on February 7, 2022. MetriTech submitted a protest to NYSED on February 23, 2022 which NYSED denied on March 4, 2022. MetriTech submitted an appeal to this Office on March 18, 2022 (Appeal). NYSED filed an answer to the Appeal on July 12, 2022 (Answer).

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.³ 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 NYSED with the NYSED / NCS Pearson contract;
2. the correspondence between this Office and NYSED arising out of our review of the proposed NYSED / NCS Pearson contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. MetriTech’s protest to NYSED, dated February 23, 2022;

² MetriTech subcontracted with DRC for CBT at 21.6% of the total contract budget.

³ 2 NYCRR Part 24.

- b. NYSED’s protest determination, dated March 4, 2022;
- c. MetriTech’s Appeal to this Office, dated March 18, 2022 (Appeal); and,
- d. NYSED’s Answer, dated July 12, 2022 (Answer).

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, MetriTech challenges the procurement conducted by NYSED on the following grounds:

1. The evaluation methodology used to determine the score for the Program Management section (section 4.a)⁴ of the technical proposal was deficient, failed to align with the actual requirements of the RFP, and as a result, failed to comply with SFL § 163(9)(b).
2. The technical evaluators misunderstood the subcontracting relationship and communication between MetriTech and DRC, even though it was clearly explained in the proposal, which negatively impacted MetriTech’s technical score. As such, sections 2.c (Training and Technical Support for all CBT Administrations), 4.a (Program Management), and 4.b (Staffing Requirements)⁵ should be re-evaluated.
3. While subcontracting was allowed and even encouraged, as evidenced by the percentage of the overall cost that could be subcontracted for CBT, the fact MetriTech subcontracted improperly negatively impacted its score. MetriTech and its subcontractor DRC submitted a responsive proposal that met the criteria for selection of an award under the RFP.
4. The cost proposal spreadsheet contained numerous technical issues and errors that prevented NYSED from conducting a cost evaluation and scoring which complies with SFL §163(2)(b).

⁴ Section 4.a, Program Management, provides, “The Technical Proposal should include the bidder’s plan to provide and maintain one program manager who meets the minimum requirements specified in the ‘Program Manager Requirements’ section of this RFP.” The “Program Manager Requirements” specify that,

The program manager must, **at a minimum**, meet the requirements above and:

1. have a bachelor’s degree (a master’s degree or above, and project management certification through the Project Management Institute (PMI) as a Project Management Professional (PMP), or other recognized program management certification, is preferred.
2. be a fulltime employee of the organization,
3. be the central point of contact with NYSED for the contract,
4. have at least three years’ experience managing large-scale assessment projects from conception through completion,
5. have experience with the assessment of English language learners, Grades K-12, and knowledge or experience with cultural sensitivity/cultural responsiveness, and
6. have demonstrated knowledge of educational testing procedures.

(RFP, at pp. 81, 101) (emphasis added).

⁵ Section 2.c, *Training and Technical Support for all CBT Administrations* (see RFP, at pp. 79-80, 100); see fn. 4 for details on Section 4.a; Section 4.b, *Staffing Requirements* (see RFP, at pp. 80-84, 101-02).

NYSED Response to the Appeal

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

1. The RFP fully complied with SFL § 163(9)(b) as the minimum specifications or requirements were clearly stated and the general manner in which the evaluation and selection would be conducted was specified. Further, the Evaluation Committee evaluated each of the proposals received, including MetriTech's proposal, against the technical criteria set forth in the RFP using a standardized score sheet.
2. The NYSED Evaluation Committee awarded fewer points to certain areas of MetriTech's technical proposal based on weaknesses present in MetriTech's technical proposal as well as the demonstration, including communication, lack of clarity, and the role of MetriTech and DRC.
3. The mere use of a subcontractor in no way impacted MetriTech's score. NYSED agrees that MetriTech and DRC submitted a responsive proposal; however, another bidder submitted a responsive proposal and earned higher technical and cost scores.
4. Any errors in the cost proposal spreadsheet were addressed before final cost proposals were submitted and thus did not disadvantage MetriTech.

DISCUSSION

Technical Proposal Evaluation Methodology

MetriTech alleges that the RFP “did not adequately inform Offerors as to [the] level of specificity [NYSED] would evaluate and score section 4a⁶ [of the technical proposal]” and therefore the RFP “failed to comply with SFL § 163(9)(b) in that it failed to adequately disclose the required experience needed” (Appeal, at p. 3). Specifically, MetriTech alleges that “the RFP does not require the project manager to demonstrate experience with CBT administration” yet NYSED identifies as a weakness in MetriTech's technical proposal its failure to “demonstrate that the proposed project manager has experience with CBT administration” (*Id.*). MetriTech contends that the project manager “not only meets but exceeds all of the RFP requirements” (*Id.*).

NYSED responds that “the RFP was in full compliance with SFL § 163(9)(b) as the minimum specifications or requirements were clearly stated and the general manner in which the evaluation and selection shall be conducted were specified” (Answer, at p. 1 (emphasis in original)). NYSED asserts that “[t]he requirements of the RFP for the program manager position were listed as the minimum qualifications” and “[a]ddressing the minimum qualifications of an RFP does not necessarily result in an award of all of the points available” (*Id.*, at p. 2 (emphasis in original)). NYSED further contends that “[w]hile the RFP does not require the program manager to demonstrate experience with CBT administration, it is reasonable for NYSED's Evaluation Committee to consider whether the program manager has

⁶ See fn. 4, *supra*.

CBT administration experience [in scoring proposals], as the purpose of the RFP is the administration of CBT” (*Id.*).

NYSED awarded the contract under the RFP on the basis of best value. Best value is defined as “the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers” (SFL § 163(1)(j)). A “responsive” offerer is an “offerer meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency” (SFL § 163(1)(d)). 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).

Additionally, the New York State Procurement Guidelines indicate:

The RFP must present the criteria that will be used for the evaluation of proposals. At a minimum, the agency must disclose in the RFP the relative weights that will be applied to the cost and technical components of the proposals. An example would be: 30 percent for cost and 70 percent for technical. An agency may elect to include in the RFP a more detailed breakdown of the evaluation criteria, such as specifying the relative weights for detailed categories (e.g., Experience = 20 percent, Staffing = 15 percent, energy efficiency = 10 percent, and so forth).

(New York State Procurement Guidelines, at p. 30). The New York State Procurement Guidelines also expressly provide that “criteria and sub-criteria may, but are not required, to be disclosed in the RFP” (*Id.*, at p. 35).

The RFP required offerors to meet the mandatory requirements set forth in the RFP in order to be responsive (*see* RFP, at p. 12). In addition, the RFP clearly outlined the general manner in which the technical evaluation method and selection process would be conducted, including the criteria to be scored, and the weight to be allocated to each criterion. Specifically, the technical proposal would be worth up to 70 points, comprised of five broad categories, outlined in detail throughout the RFP, with the following maximum point values available for each: test development requirements for the NYSESLAT (25 points); CBT for the NYSESLAT, interim assessments, and NYSITELL (15 points); printing, duplication, and shipping of test materials (10 points); program management and staffing requirements (10 points); and data security, data privacy, and appropriate use (10 points) (*see id.*, at pp. 20-90, 98-103, 105-06). Contrary to MetriTech’s assertions, applicable law and guidelines do not require further specifics regarding the criteria used in NYSED’s evaluation method and selection process to be disclosed in the RFP.⁷ Thus, we are satisfied the RFP complies with applicable law and guidelines set forth above.

⁷ This conclusion applies likewise to dispel MetriTech’s assertion that “SED needed to include detailed specificity about the communication between a contractor and a subcontractor, if it was going to be included, as a critical and necessary component of the overall evaluation” (Appeal, at p. 7).

Scoring of MetriTech’s Technical Proposal

MetriTech alleges that “the scoring metric [should] be re-evaluated and the scoring for section[s] 2.c, 4.a, and 4.b re-examined” because the “collaboration [between MetriTech and DRC relating to CBT administration] . . . was misunderstood by one or more of the technical reviewers and this lack of understanding impacted the overall technical score” (Appeal, at pp. 4-7).⁸ Additionally, MetriTech contends that “[w]hile subcontracting was allowed and even encouraged, as evidenced by the percentage of the overall cost that could be subcontracted for CBT, the fact MetriTech subcontracted negatively impacted the scoring” even though “MetriTech [and its subcontractor] DRC, submitted a responsive proposal that met the technical requirements [of the RFP]” (*Id.*, at p. 7).

NYSED counters that its “Evaluation Committee evaluated each of the proposals received against the technical criteria set forth in the RFP using a standardized score sheet” (Answer, at p. 3). NYSED asserts that “[c]ommunication, lack of clarity, and the role of MetriTech and DRC were identified as areas of weakness in sections 2c, 4a, and 4b . . . these issues were present throughout both the technical proposal as well as in the [mandatory CBT] demonstration, and affected MetriTech and DRC’s overall technical proposal score” (*Id.*, at p. 4). NYSED contends that “[t]he mere use of the subcontractor in no way impacted MetriTech’s score” (*Id.*, at p. 5). Finally, NYSED “agrees that MetriTech and DRC submitted a responsive proposal” but adds that “[t]he onus remained on MetriTech to explain how they, along with their chosen subcontractor (DRC), could provide a superior service (*Id.*, at p. 5).

Generally, this Office gives significant deference to a State agency in matters within that agency’s expertise and, furthermore, is unwilling to substitute its judgment for that of an agency in matters within an agency’s realm of expertise where the agency scored technical proposals in accordance with a pre-established technical proposal evaluation tool (*see* OSC Bid Protest Determination SF-20170192, at p. 7). We have long recognized that evaluators bring their own subjective views to the evaluation process and may interpret information in proposals differently. However, 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* OSC Bid Protest Determination SF-20200069, at p. 6; *see also* OSC Bid Protest Determination SF-20210006, at p. 6). Our review of the procurement record indicates NYSED scored MetriTech’s technical proposal according to the criteria set forth in the RFP and used the evaluation tool that was crafted prior to receipt of proposals. Moreover, the procurement record reasonably supports the scores the evaluators assigned to MetriTech’s technical proposal. Therefore, we have no basis to disturb the scores NYSED awarded to MetriTech.

⁸ *See* fn. 5, *supra*.

Cost Proposal Evaluation

MetriTech alleges that “[t]he cost proposal spreadsheet contained numerous technical issues and errors that prevented SED from conducting a cost evaluation and scoring which complies with State Finance Law §163(2)(b)” (Appeal, at p. 8). MetriTech contends that the “[RFP] did not provide a balanced and fair method to evaluate the cost proposal prior to receiving offers since the cost proposal spreadsheet had technical errors which resulted in SED re-issuing the cost proposal” (*Id.*, at p. 8). MetriTech further alleges that offerors submitting their BAFO “were allowed to revise the cost proposal workbook or work off a blank copy creating an evaluation process where the cost proposals of vendors could not be fairly compared. In addition, efforts by NYSED to correct the errors did not fix all of the problems and were not established ‘in advance of the receipts of offers’” (*Id.*, at p. 10).

NYSED avers that although “initially, the cost proposal spreadsheet contained a few technical issues and errors” “[i]nitial errors in the cost proposal spreadsheet were addressed before final cost proposals were submitted by bidders and are, therefore, irrelevant” (Answer, at p. 6). NYSED states that, nevertheless, “[p]reviously identified and corrected errors in the cost proposal spreadsheet had no bearing on MetriTech and DRC’s cost proposal score” and “[t]he only number analyzed in determining [the] cost proposal score was the ‘Total for All 3 Years’ amount in cell D189” and “MetriTech did not identify any issues related to cell D189” (*Id.*).

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 procurement record shows NYSED revised the cost proposal spreadsheet and posted it to its website with the Questions and Answers, prior to the November 10, 2021 proposal due date; however, our review found the revised spreadsheet still contained the seven errors identified by MetriTech (*see* Appeal, at p. 9). Nonetheless, such errors did not harm either of the two offerors as, on December 22, 2021, both offerors (MetriTech and NCS Pearson) were invited to submit a BAFO to NYSED and both offerors did so. For the BAFO, NYSED instructed the offerors to “resubmit[t] a complete cost proposal” by either “revis[ing] the workbook originally submitted,” namely the revised cost proposal spreadsheet that had been posted with the Questions and Answers, or using a blank copy provided by NYSED with the BAFO invitation. Both MetriTech and NCS Pearson used the cost proposal spreadsheet provided with the BAFO invitation to submit a BAFO.

The procurement record shows that the cost proposal spreadsheet provided with the BAFO and used by the offerors contained one error. Specifically, cell D123 in the Deliverables tab contained the formula “=D57” which copied the cost entered in cell D57 automatically into cell D123.⁹ Unless the formula was deleted, the error would also affect the Total Price for Year 3 in cell D187, which contained the formula “=SUM(D122:D186)” that automatically added the cost in cells D122 through D186. Likewise, cell D189, the Total Price of All 3 Years would be affected, as it contained the formula “=SUM(D187, D120, D54)” that automatically added the

⁹ MetriTech points out this error in its Appeal, stating, “On the DELIVERABLES tab – Row 123 . . . Column D . . . contains a formula copying the contents of Row 57 . . .” (Appeal, at p. 10).

cost in cells D187, D120, and D54. As a result, contrary to NYSED's assertion that cell D189 (i.e., the only number analyzed in determining the cost proposal score) was not impacted by any spreadsheet errors, the error in cell D123 could have affected cell D189.

However, despite this error, the procurement record shows that both offerors identified and resolved the error with their submitted BAFO cost proposal spreadsheet by removing the formula and entering their desired cost in cell D123. Therefore, neither offeror was prejudiced by the error in the cost proposal spreadsheet used to submit a BAFO. MetriTech admits that cell D123 "could be typed over if the issue was identified," and, in fact, submitted a BAFO cost proposal spreadsheet reflecting that MetriTech had done exactly that (*see* Appeal, at p. 10). Further, MetriTech fails to allege that any errors in the cost proposal spreadsheet prevented it from submitting either an initial proposal or subsequent BAFO reflecting its intended costs (*Id.*).

Moreover, there is no evidence in the procurement record to indicate that the error in the cost proposal spreadsheet had any effect on evaluators' ability to evaluate cost proposal submissions according to the RFP methodology. Since both offerors identified and resolved the single error remaining in the spreadsheet at the time of the BAFO, nothing prevented NYSED from evaluating the BAFO cost proposals according to the clearly articulated methodology set forth in the RFP, established prior to the receipt of proposals. Thus, we are satisfied evaluators scored MetriTech's cost proposal as required by applicable law and will not disturb the cost scores awarded by NYSED.

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 NYSED. As a result, the Appeal is denied and we are today approving the NYSED / NCS Pearson contract for development and administration of statewide English language proficiency assessments.