STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by ModivCare Solutions, LLC with respect to the procurement of Non-Emergency Medical Transportation Brokerage Services conducted by the New York State Department of Health.

Determination of Bid Protest

SF–20220093

Contract Numbers – C037557 & C037558

May 30, 2023

The Office of the State Comptroller has reviewed a bid protest (Protest) filed by ModivCare Solutions, LLC (ModivCare) related to the above-referenced procurement conducted by the New York State Department of Health (DOH) for non-emergency medical transportation (NEMT) brokerage services for Upstate and Downstate New York. We have determined the grounds advanced by ModivCare are insufficient to merit overturning the contract awards made by DOH and, therefore, we deny the Protest. As a result, we are today approving the DOH contracts with Medical Answering Services LLC (MAS) for NEMT brokerage services for Upstate and Downstate New York.

BACKGROUND

Facts

DOH is responsible for ensuring the availability of NEMT for Medicaid enrollees in the State of New York (State) (Request for Proposals No. 17965R (RFP), Section 2.1, at p. 4). Social Services Law (SSL) § 365-h(4)(b), enacted as part of the State Fiscal Year 2020-21 budget, authorized DOH, following a competitive bidding process, "to contract with one or more transportation management brokers to manage [NEMT] transportation on a statewide or regional basis" (SSL § 365-h(4)(b); RFP, Section 2.1, at p. 5).

Accordingly, DOH issued the RFP on August 2, 2021, seeking "competitive proposals from qualified bidders to enter into a contract to provide [NEMT] brokerage management services for persons enrolled in the Medicaid program . . ." (RFP, Section 2.0, at p. 3). The RFP indicated that contracts would be awarded on a "regional basis," with DOH awarding "one contract for each of the two regions . . . or [ ] one contract for both regions" (RFP, Section 2.0, at p. 3). The two regions were Upstate[1] and Downstate[2] (RFP, Section 2.0, at p. 3). The RFP provided that NEMT broker(s) selected for contract award would be reimbursed under the contract(s) "in two ways: (1) an administrative fee on a per member per month ('PMPM') basis for each NY Medicaid enrollee that is eligible to have their [NEMT] services managed by the Contractor; and (2) a risk-sharing arrangement, by which the Contractor may be held responsible

[1] All State counties not specifically included within the "Downstate" region.
[2] New York, Kings, Queens, Bronx, Richmond, Nassau, Suffolk, Putnam, and Westchester counties.

financially depending on how the Contractor performs against a target budget for the [NEMT] services being managed by the Contractor" (RFP, Section 2.0, at p. 3).

The RFP provided that proposals would be evaluated on the basis of best value, with the technical proposal worth 70% and the cost proposal worth 30% of a proposal's total score (RFP, Section 8.1, at pp. 65-66). The RFP provided that a Technical Evaluation Committee would score technical proposals, and individual scores would be averaged to produce a raw score for each particular criterion. The raw scores for the criteria would be added together for a total raw technical score. The technical proposal with the highest raw score would receive a technical score of 70 points and the other technical proposals would receive a proportionate score according to the formula established in the RFP (RFP, Section 8.3, at pp. 66-67). The RFP provided that "[t]he Cost Proposals will be opened and reviewed for responsiveness to cost requirements including a review for actuarial soundness by [DOH's] independent actuary"[3] and "[i]f a cost proposal is found to be non-responsive, that proposal may not receive a cost score and may be eliminated from consideration" (RFP, Section 8.4, at p. 67). The RFP provided that a Cost Evaluation Committee would score cost proposals "based on a maximum cost score of 30 points" which would be "allocated to the proposal with the [lowest] Final Bid PMPM" with all other responsive cost proposals receiving a proportionate score based on their relation to the lowest Final Bid PMPM pursuant to the formula established in the RFP (*Id.*). Pursuant to the RFP, DOH would calculate a "Composite Score . . . for each region . . . by adding the bidders Technical Proposal and Cost Proposal Score for the region" (RFP, Section 8.5, at p. 67). The RFP provided that award would be made to the responsive and responsible offeror who had the highest composite score (RFP, Section 8.1, at p. 65; RFP, Section 8.7, at pp. 67-68).

DOH received four proposals in response to the RFP, three of which (including ModivCare) sought award for both regions and one of which sought award for the Upstate region only. Following evaluation and scoring of proposals, MAS was determined by DOH to be the responsive and responsible offeror with the highest composite score for both the Upstate and Downstate regions and was awarded contracts for both regions.

DOH provided ModivCare a debriefing on July 11, 2022. On July 18, 2022, ModivCare filed a protest with this Office (Protest). DOH filed a response to the Protest dated January 20, 2023, which was provided to all parties on March 14, 2023 (Answer). ModivCare replied to the Answer on March 16, 2023 (Reply). Finally, DOH filed a response, dated April 11, 2023, to the Reply (Response to Reply).[4]

[3] DOH's independent actuary, Deloitte Consulting LLP (Deloitte), conducted the actuarial analysis of all cost proposals and produced an actuarial memorandum detailing the results on November 3, 2022. Although, as ModivCare alleges and DOH concedes, the actuarial analysis was done after all scoring was completed, DOH did not find any offeror non-responsive based on the actuarial analysis. Therefore, when the actuarial analysis occurred does not have any substantive bearing on this determination.

[4] At this Office's request, DOH addressed the new allegations contained in the Reply (*see* 2 NYCRR § 24.4(j)).

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 the 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.[5] This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no protest process engaged in at the department level, the Protest is governed by section 24.4 of the OSC Protest Procedure.

In the determination of the Protest, this Office considered:

1. documentation contained in the procurement record forwarded to this Office by DOH with the DOH / MAS contracts;

2. correspondence between this Office and DOH arising out of our review of the proposed DOH / MAS contracts; and

3. the following correspondence/submissions from the parties (including the attachments thereto):

    a. Protest;
    b. Answer;
    c. Reply; and,
    d. Response to Reply.

ANALYSIS OF THE PROTEST

Protest to this Office

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

1. DOH failed to obtain required prior federal approval for the proposed change from its previous NEMT management model to the NEMT broker model;
2. DOH failed to comply with federal requirements requiring capitated payments under the Medicaid program to be actuarially sound;
3. The contract awards to MAS do not achieve best value because the rates proposed by MAS are not actuarially sound and thus do not represent actual cost to the State;
4. DOH's scoring of ModivCare's technical proposals for Upstate and Downstate was arbitrary and capricious because:

[5] 2 NYCRR Part 24.

a. DOH used unqualified evaluators that were unfamiliar with the NEMT benefit; and,
b. Evaluators' comments on ModivCare's technical proposals were inconsistent with the content of the actual proposals, including one evaluator in particular who assigned low scores as retaliation for failing to accommodate the evaluator's disability; and,

5. MAS is not a responsible vendor as it lacks the financial and organizational capacity to perform the award due to lack of experience providing NEMT brokerage services and its proposed rates being actuarially unsound.

DOH Response to the Protest

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

1. DOH complied with applicable federal notice requirements for its change to the NEMT broker model;
2. Capitation rates for NEMT are not required to be actuarially sound;
3. DOH determined that MAS provided the best value proposal in accordance with the requirements of SFL, which does not require rates to be actuarially sound;
4. DOH evaluators possessed appropriate knowledge and experience in the area of NEMT services;
5. All DOH evaluators scored technical proposals consistent with the technical evaluation tool and the content of ModivCare's proposal; and,
6. MAS has met all the elements of a responsible offeror in accordance with SFL, including being financially capable and exceeding performance expectations in its previous contracts with DOH.

ModivCare's Reply to the Answer

In its Reply, ModivCare challenges the procurement on the following additional grounds:

1. MAS is not a responsible vendor, for the following reasons:
   a. A lobbyist on behalf of MAS engaged in impermissible contacts during the restricted period for the procurement in violation of SFL;
   b. A 2022 federal Office of Inspector General report demonstrates MAS is not a responsible vendor based on its previous failure to properly administer State NEMT benefits; and,
   c. There is an open Commission on Ethics and Lobbying in Government investigation into various "pay to play" schemes coordinated by MAS to influence the outcome of the procurement by providing large donations to Governor Hochul.

DOH's Response to ModivCare's Reply

In its Response to the Reply, DOH contends that:

1. DOH did not engage in impermissible contacts with the lobbyists identified by ModivCare, the Executive Chamber, or the Legislature regarding this procurement;
2. DOH disputes findings in the 2022 OIG report and does not believe it warrants a finding of non-responsibility for MAS; and,
3. DOH has not been contacted by the Commission on Ethics and Lobbying in Government to discuss any pending investigation. Moreover, DOH states that the Executive Chamber was not involved in the selection process for this procurement.

DISCUSSION

Federal Approval

ModivCare alleges that DOH "has not received prior approval required from the Centers for Medicare and Medicaid Services ('CMS') for its changes to NEMT management" because it "fail[ed] to submit a public notice and [State Plan Amendment (SPA)] [for] the NEMT broker system" (Protest, at pp. 3, 9, 27-29). ModivCare alleges that, as such, DOH "fails to comply with both 42 CFR 447.220[6] and 42 CFR 440.170" and "places federal financial participation for these payments at risk" (*Id.*).

DOH asserts that it is "following the normal process for SPA [ ] approval by CMS, which does not require prior approval of the SPA, just prior notice" and, accordingly, DOH "issued a Federal Public Notice (FPN) in the NYS Register in 2020 [ ] prior to the effective date of the SPA in accordance with federal requirements in 42 C.F.R. § 447.205" (Answer, at p. 17). DOH further asserts that it "intends to submit a[n] SPA in accordance with all applicable CMS requirements (Please see Exhibits 5 and 6)[7] before the end of the quarter in which the change established in the [SPA] is effective [which is] standard practice and timing for CMS SPA approval" (*Id.*).

As an initial matter, DOH is authorized to establish an NEMT brokerage program under 42 CFR § 440.170(a)(4) which provides,

> a State plan may provide for the establishment of a non-emergency medical transportation brokerage program in order to more cost-effectively provide non-emergency medical transportation services for individuals eligible for medical assistance under the State plan who need access to medical care or services, and have no other means of transportation.

[6] 42 CFR § 447.220 does not exist.

[7] Exhibit 5 is a copy of 42 CFR § 447.256; Exhibit 6 is a copy of 42 CFR § 430.20 (This section pertains to effective dates of State plans and plan amendments. For plan amendments that change the State's payment method and standards, such as the change to the NEMT broker model at issue here, 42 CFR § 447.256 applies).

To effectuate an SPA to include an NEMT brokerage program, DOH must (1) satisfy the notice requirements of 42 CFR § 447.205 and (2) obtain CMS approval in accordance with the applicable requirements of 42 CFR § 447.256.

DOH is required to "provide public notice of any significant proposed change in its methods and standards for setting payment rates for services" 42 CFR § 447.205(a). Such notice "must [[ ] [b]e published before the proposed effective date of the change" and "[a]ppear as a public announcement in one of the following publications [which include] [a] State register similar to the Federal Register" (42 CFR § 447.205(d)). DOH published notice of its planned transition "to a single Medicaid Transportation Broker" in the April 1, 2020, issue of the New York State Register (*see* Answer, Exhibit 4). Therefore, DOH has complied with this notice requirement.

DOH is also required to obtain CMS approval for "State plan and plan amendment changes in payment methods and standards" for which "CMS bases its approval on the acceptability of the Medicaid agency's assurances that the requirements of § 447.253 have been met, and the State's compliance with the other requirements of this subpart" (42 CFR § 447.256(a)(2)). Federal regulations contemplate a retroactive effective date, as follows: "A State plan amendment that is approved will become effective not earlier than the first day of the calendar quarter in which an approvable amendment is submitted" (42 CFR § 447.256(b)). DOH has advised that it intends to submit the SPA to CMS for approval after its contracts with MAS for NEMT brokerage services for Upstate and Downstate New York have been approved by this Office. This is allowable and consistent with the past practice of DOH in submitting SPAs relating to the NEMT program to CMS for approval subsequent to the desired effective date.[8] Based on applicable law and past practice, we find ModivCare's assertion that CMS approval of the SPA to incorporate the NEMT broker model is a precondition to DOH's issuing the RFP or awarding these contracts unavailing.

Actuarial Soundness

ModivCare alleges that "[u]nder 42 CFR § 438.4, capitated payments under the Medicaid program must be actuarially sound" and DOH did not comply because the RFP "failed to require brokers to propose actuarially sound rates" which was "fatal to the RFP" (Protest, at pp. 3, 8, 30-31). DOH contends that "Modivcare misinterprets the applicability of [42 CFR § 438.4] which is limited to capitation rates established for Medicaid managed care plans . . . [t]here is no legal requirement for NEMT capitation rates to be actuarially sound" (Answer, at p. 15).

[8] *See* SPA # 15-52, *available at* https://www.health.ny.gov/regulations/state_plans/status/non-inst/ (submitted to CMS on September 15, 2015 with a proposed effective date of July 1, 2015, and approved by CMS on November 30, 2015 with the July 1, 2015 effective date); *see also* SPA # 13-23 *available at* https://www.health.ny.gov/regulations/state_plans/status/non-inst/ (submitted to CMS on September 30, 2013 with a proposed effective date of July 1, 2013, and approved by CMS on December 4, 2013 with the July 1, 2013 effective date).

As an initial matter, we address whether offerors were required to propose actuarially sound rates and, accordingly, whether DOH was obligated to include that requirement in the RFP. 42 CFR § 438.4(b) provides, "Capitation rates for [managed care organizations], [prepaid inpatient health plans], and [prepaid ambulatory health plans] must be reviewed and approved by CMS as actuarially sound." Unlike the aforementioned health plans requiring actuarially sound rates, NEMT brokerage services are a benefit available to Medicaid enrollees and thus this requirement does not apply. Accordingly, there is no merit to this basis for protest.

Notwithstanding the foregoing, DOH did, in fact, conduct an actuarial analysis of the cost proposals submitted by all offerors as part of its responsiveness review (*see* RFP, Section 8.4, at p. 67). DOH states that "[Deloitte] provided to DOH an Actuarial Memorandum documenting its approach to and observations across all bidders, with a particular focus on the reasonableness of the cost proposal submitted by the awarded vendor in each region . . . [and] confirms not only the responsiveness of all bids, but also the reasonableness of each bidders' Cost Proposals, and most importantly, MAS' Cost Proposals" (Answer, at pp. 9, 16). These contentions by DOH are supported by the procurement record, which includes the Actuarial Memorandum.[9]

Best Value Determination

ModivCare alleges "the successful bid does not represent 'best value' as the Department has failed to conduct an appropriate cost analysis and therefore failed to determine the actual cost to the State for the successful bid" (Protest, at p. 17). ModivCare contends that "[a] PMPM is a form of a capitated payment [that] only reflect[s] the actual cost of service delivery if [it is] actuarially sound" and "[DOH] did not conduct an actuarial analysis of any of the bids" and therefore does not know "whether the proposed PMPM . . . falls within an acceptable range" (*Id.*, at p. 16). ModivCare further alleges that "[the gain sharing] arrangement incentivized bidders to submit PMPM bids that were not actuarially sound [and so low that they] can only be achieved through reductions in transportation expenses that would imperil access to Medicaid members" (*Id.*, at p. 17).

DOH responds, "There is no actuarial review component to determining 'best value,' only bid responsiveness . . . DOH determined MAS met the requirements of the procurement, presented the highest scoring technical proposal for both Regions, offered the most cost-effective solution for both Regions, and should be awarded the resulting contracts based on best value" (Answer, at p. 10). DOH further contends that "DOH determined, and subsequently confirmed with its actuary, that MAS' proposed PMPM is financially sound, access for members will not be inhibited, and services for enrollees will continue to be available when required" (*Id.*, at p. 13). Additionally, DOH asserts that while "Modivcare appears to believe the only avenue available to propose a lower PMPM to the DOH is to reduce payments to transportation providers to an unsustainable rate . . . [to the contrary] the gain sharing arrangement motivates bidders to submit PMPM rates which 1) allows them to be financially sustainable, and 2) be competitive and conscious that any profits received greater than 3% are shared with the DOH" (*Id.*, at p. 11).

[9] ModivCare provides its own actuarial analysis of the cost proposals, concluding that "there is not a scenario wherein the successful bid is a viable PMPM" (Protest, at pp. 12-13, 16, Exhibit 4). However, such analysis does not represent an independent, professional actuarial opinion, in contrast with the independent, professional actuarial opinion supplied by DOH.

As set forth above, a review of actuarial soundness for the proposed PMPM capitation rates is not required under federal or State law; rather, under State law, State agencies are required to award service contracts based on best value (SFL § 163(10)). 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)). The basis must "reflect wherever possible, objective and quantifiable analysis" (*Id.*). Additionally, the solicitation issued by the procuring State agency must "prescribe the minimum specifications or requirements that must be met to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted" (SFL § 163(9)(b)). Finally, the contracting agency must 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(7)).

It is well-established that SFL § 163 "implicitly requires [, as part of a best value determination,] that the cost evaluation methodology have a reasonable relationship to the anticipated *actual* costs to be incurred by the State under the terms of the contract" (OSC Bid Protest Determination SF-20150153, at p. 11; *see* OSC Bid Protest Determination SF-20080408, at p. 9; *see also* OSC Bid Protest Determination SF-20100156, at p. 6). Therefore, when evaluating cost, the State agency awarding the contract "must generally consider all expected costs and must weigh such costs in a manner reasonably designed to predict actual costs under the contract" (OSC Bid Protest Determination SF-20080408, at p. 9; *see* OSC Bid Protest Determination SF-20100156, at p. 6).

The RFP required offerors to submit monthly rates for administrative as well as service costs[10] for members for each of the five years of the contract(s) (RFP, Attachment B, Cost Proposal). The submitted rates were calculated to arrive at an annual PMPM rate for managed long-term care (MLTC) and non-MLTC members, utilizing DOH's estimated number of Medicaid enrollees for whom the broker(s) would arrange NEMT services (*Id.*). Those annual PMPM rates were then aggregated to arrive at a Final Bid PMPM for all five years of the contract(s), which was used to evaluate cost proposals (*Id.*; *see* RFP, Section 8.4, at p. 67). As noted above, the RFP provided that NEMT broker(s) selected for contract award would be reimbursed under the contract(s) "in two ways: (1) an administrative fee on a [PMPM] basis for each NY Medicaid enrollee that is eligible to have their [NEMT] services managed by the Contractor; and (2) a risk-sharing arrangement [also referred to as the 'Gain Sharing Arrangement'], by which the Contractor may be held responsible financially depending on how the Contractor performs against a target budget for the [NEMT] services being managed by the Contractor" (RFP, Section 2.0, at p. 3; RFP, Section 5.4, at p. 47). Pursuant to the Gain Sharing

[10] Administrative costs included the broker's personnel and administrative expenses, with line items such as claims management, training, facility expenses, and software. Service costs included the transportation expenses for the services of the transportation providers, with line items such as ambulance, parking/tolls, public transit, and taxi/livery/rideshare.

Arrangement in the RFP, the transportation broker/contractor would share net income on an annual basis over limits as specified in the RFP[11] (RFP, Section 4.2.20, at pp. 36-37).

DOH evaluated administrative costs as part of the Final Bid PMPM and will reimburse administrative costs to the contractor. DOH also evaluated service costs as part of the Final Bid PMPM and the contractor will share net income over a specified percentage of revenues received (i.e., profits) with DOH – administrative and services costs are a reasonable predictor of net income. Therefore, we believe that the cost evaluation methodology used by DOH was reasonably related to the anticipated actual costs to be incurred under the contracts. As discussed more fully below relating to the general scoring of technical proposals, our review of the procurement record shows that DOH evaluated the proposals in accordance with the evaluation criteria set forth in the RFP and its evaluation tools.[12] Accordingly, the RFP was consistent with the SFL's requirements for a contract awarded on the basis of best value, and DOH's award of the contracts to MAS, the offeror with the highest composite score for both the Upstate and Downstate regions, was based on a best value determination.

Moreover, as noted above, DOH did have a review conducted by an independent third party, Deloitte, for actuarial soundness. This included review of MAS' PMPM rates, which encompassed review of the service rates that the broker proposes to pay to the transportation providers. The procurement record reflects that MAS' cost proposals for both the Upstate and Downstate regions were actuarially sound. We further note that the gain sharing arrangement provides a mechanism by which the broker is encouraged to maintain payment of reasonable rates to its transportation providers by removing any incentive to negotiate a rate that would lead to a profit greater than 5% over total revenues received, as such profit would be forfeited to DOH.

Scoring

1. Qualifications of Evaluators Scoring Technical Proposals

ModivCare alleges that DOH "utilized evaluators from offices and bureaus that were unfamiliar with the NEMT benefit" and such "lack of substantive knowledge about NEMT prejudiced ModivCare's Technical Proposal [scoring]" (Protest, at p. 25). DOH responds that it "selected individuals with appropriate knowledge and experience [in the area of NEMT services] to populate the Evaluation Team, and conducted training on how to perform evaluations, apply the rating scales, and use the scoring sheets" (Answer, at pp. 3, 16).

This Office generally defers to agency determinations where they are properly within the agency's expertise and supported by the procurement record. Clearly the choice of evaluators is within DOH's expertise and therefore, we defer to DOH in its selection. Further, our review of

[11] For example, in Contract Year 1, the broker will retain all net income that is equal to or less than 3% of the total revenues received; the broker will share equally with DOH all net income that is over 3% but less than or equal to 5% of the total revenues received; and, DOH will receive all net income that exceeds 5% of the total revenues received by the broker.

[12] With harmless exceptions as noted herein, at pp. 11-12.

the procurement record indicates each evaluator fully scored the technical proposals for the assigned regions using the scoring sheets to provide comments as each evaluator deemed appropriate, and thus we find no basis to question their qualifications.

2. General Scoring of Technical Proposals

ModivCare alleges that there are "inconsistencies in [DOH's] responses [during the debriefing] about weaknesses regarding ModivCare's proposal and the actual text of ModivCare's proposal" and such inconsistencies resulted in scoring by DOH that was "arbitrary and capricious" (Protest, at pp. 25, 27). DOH responds that "the evaluation process was anything but arbitrary and capricious" as "evaluators received training prior to review and agreed to adhere to all requirements presented in the technical evaluation document" (Answer, at p. 17). DOH further responded that "[i]t is not uncommon for a reviewer to offer comments on both strengths and weaknesses on the same item of a bidder's Proposal [as doing so] offers insight on what a bidder explained well . . . and also offers the possibility of identifying some missing details which ultimately led to the sub-optimal score indicated on the evaluator's evaluation document" (*Id.*, at p. 16).

As stated above, this Office generally defers to a State agency in matters within that agency's expertise (*see* OSC Bid Protest Determination SF-20170192, at p. 7). This Office is particularly 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 "according to the pre-established technical proposal evaluation tool" (*see* OSC Bid Protest Determination SF-20170192, at p. 7). 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" and "[there were no] contradictions between an evaluator's written comments and the score assigned by such evaluator to [the technical] proposal."); *see also* OSC Bid Protest Determination SF-20200069, at p. 6).

The procurement record includes a technical evaluation tool that was established prior to receipt of proposals and shared with technical evaluators. The technical evaluation tool includes a scoring rubric for evaluators to use to score all technical criteria from 0 to 5.[13] Based on our

[13] The following ratings received the following scores:

- "Excellent" received 5 points ("The proposal significantly exceeded the expectations for the item being evaluated. The proposal clearly and concisely demonstrated a superior level of performance and/or provision of services, and reflected an innovative and sound approach.");
- "Very Good" received 4 points ("The proposal clearly and concisely demonstrated a high level of performance and approach.");
- "Good" received 3 points ("The proposal demonstrated an adequate level of performance and approach.");
- "Fair" received 2 points ("The proposal did not clearly demonstrate an adequate level of performance.");
- "Poor" received 1 point ("The proposal did not provide enough information to adequately assess performance."); and,
- "Not provided" received 0 points ("The proposal did not include information to address the criteria being evaluated.")

review of the procurement record, DOH evaluators, with the exception of Evaluator 3 for the Downstate region (hereafter "Evaluator 3") which is discussed below, evaluated technical proposals according to the clearly articulated criteria set forth in the RFP and consistent with the evaluation instructions/technical evaluation tool. Our review of evaluators' scores and comments (with the exception of Evaluator 3) did not reveal any contradictions between an evaluator's written comments and the scores assigned by such evaluator to ModivCare's technical proposals. Thus, we are satisfied that these evaluators scored ModivCare's technical proposals in a manner consistent with the RFP and technical evaluation tool and will not disturb the technical scores awarded by these DOH evaluators.

3. Scoring of ModivCare's Downstate Technical Proposal

With respect to Evaluator 3, ModivCare contends that DOH's scoring of ModivCare's Downstate technical proposal was "arbitrary and capricious" because this "visually impaired" evaluator "punished [ModivCare] for an inability to accommodate his or her disability [by providing the entirety of its technical proposal in black and white]" as required by the RFP (Protest, at pp. 13, 24-25). DOH responds that Evaluator 3 "scored the items in question to the best of their ability" and "[t]here is no evidence that [Evaluator 3] demonstrated animus towards Modivcare and completed an apparently non-biased and consistent evaluation of Modivcare's Technical Proposal" (Answer, at p. 16). DOH further contends that Evaluator 3's "scores remained intensely consistent with the other 3 evaluators who scored Modivcare's Downstate Region Technical Proposal" and "items scored a '1' were valid scores due to elements of Modivcare's proposal being illegible to this individual" (*Id.*, at p. 8).

Although DOH points out that it could have disqualified ModivCare's proposal for failure to follow format requirements set forth in the RFP,[14] DOH, in fact, evaluated ModivCare's technical proposal for the Downstate region, and therefore we must examine whether Evaluator 3 evaluated all technical proposals for the Downstate region consistent with the RFP and pre-established technical evaluation tool.

The procurement record shows that Evaluator 3 scored technical proposals inconsistently with the technical evaluation tool.[15] The procurement record shows that, in several instances for each of the offerors' technical proposals, Evaluator 3 assigned scores that were inconsistent with the other three evaluators.[16] As a result, we cannot conclude that Evaluator 3 evaluated proposals consistent with the RFP and technical evaluation tool.

[14] DOH asserts that "the black and white format . . . of [ ] proposals was required in the RFP Section 7.0 Proposal Submission," DOH provided ModivCare "the opportunity to submit a Technical Proposal which met the requirements," and "[a]lthough . . . not all of the revised Technical Proposal submitted by ModivCare was in black and white, [NYSDOH] accepted ModivCare's response in order to proceed with the competitive procurement and allow a potentially capable vendor's proposal to be evaluated" even though NYSDOH could have disqualified the proposal (Answer, at pp. 6-7).

[15] Evaluator 3 "scored [certain items] a 1 . . . due to elements of ModivCare's proposal being illegible to this individual" (Answer, at p. 8); whereas, the technical evaluation tool provides for a score of "1" for a "Poor" rating, defined as "[t]he proposal did not provide enough information to adequately assess performance."

[16] A review of the Downstate technical proposal scores shows that Evaluator 3's scores varied by two or more points from the other three evaluators in several instances for each of the three offerors for that region.

Nevertheless, this Office has long recognized the doctrine of excusable, harmless error in the procurement process. That is, while there may have been an error in the procurement process, the correction of the error would not change the outcome (i.e., the award) and, therefore, the error is harmless. Since our review of the procurement record shows that Evaluators 1, 2, and 4 for the Downstate region scored technical proposals according to the clearly articulated criteria set forth in the RFP and used the scoring rubric that was crafted prior to receipt of proposals, as set forth in the technical evaluation tool, the scores of Evaluators 1, 2, and 4 are valid. Eliminating the scores of Evaluator 3 for all offerors for the Downstate region does not change the procurement's outcome and MAS would still be the offeror with the highest composite score for the Downstate region.

Based on the foregoing, to the extent Evaluator 3 scored technical proposals for the Downstate region inconsistently with the RFP and technical evaluation tool, such error was harmless.

Vendor Responsibility

SFL provides that "[s]ervice contracts shall be awarded on the basis of best value to a responsive and responsible offerer" (SFL § 163(4)(d)). "Prior to making an award of contract, each state agency shall make a determination of responsibility of the proposed contractor" (SFL § 163(9)(f)). For purposes of SFL § 163, "responsible" means the financial ability, legal capacity, integrity and past performance of a business entity (SFL § 163(1)(c)).

ModivCare makes several allegations that MAS, the contract awardee, is not a responsible vendor and that DOH erred in its finding of responsibility (Protest, at pp. 3, 18-23; Reply, at pp. 3-9). DOH asserts that it determined MAS met all the elements of a responsible offeror and none of ModivCare's assertions merit a finding of non-responsibility with respect to MAS (Answer, at pp. 13-15; Response to Reply, at pp. 1-4). Each claim related to the responsibility of MAS is addressed separately below.

1. Financial Ability and Legal Capacity

ModivCare alleges that "MAS does not have the financial or organizational capacity to perform the award and is therefore not a responsible bidder" (Protest, at p. 19). ModivCare contends that MAS "has no experience providing NEMT brokerage services" and "has never managed an at-risk contract, nor a statewide contract" (*Id.*, at pp. 3, 19). ModivCare further contends that MAS "has proposed rates that would leave them ultimately unable to manage this business from a financially sound position" and "cannot be considered actuarially sound" (*Id.*, at pp. 21, 23).

DOH responds that it determined that MAS "met all the elements of a 'responsible' bidder in accordance with State Finance Law" and "MAS has proven to be a financially capable vendor, remains legally authorized to conduct business in NYS, has exceeded performance expectations in its previous contracts with the DOH, and has demonstrated a superior level of integrity among members of its organization" (Answer, at pp. 13-14). DOH asserts that that MAS has been managing NEMT services in New York for nearly 20

years, currently oversees five out of six regions that include 60 counties and nearly 6.55 million enrollees, and DOH is "confident in [MAS'] ability to manage NEMT services in a Regional or statewide broker model" (*Id.*, at p. 14). Further, DOH states that it "does not believe that experience as a vendor under a risk-based NEMT brokerage services agreement is a prerequisite to achieving success in managing NEMT services in the State of New York (*Id.*).

ModivCare's allegations that MAS has no relevant experience and is not financially capable of performing under the contracts are speculative and unsupported by evidence. Our review of the procurement record confirms DOH conducted a vendor responsibility review of MAS and reviewed MAS' financial ability, legal capacity, integrity, and past performance, as statutorily required. As documented in the procurement record, DOH determined MAS to be a responsible offeror that can successfully perform the services under the contracts for the prices submitted in MAS' cost proposals. Moreover, as part of our review of the DOH / MAS contracts, this Office examined and assessed the information provided in the procurement record and conducted an independent vendor responsibility review of MAS. Our review did not provide any basis to overturn DOH's responsibility determination on this ground.

2. Contacts During Procurement Lobbying Law Restricted Period

ModivCare alleges that "lobbyists registered to represent [MAS] . . . lobbied the Executive Chamber on [NEMT] at least seven times on behalf of [MAS]" on the subject of "Medicaid funding" during the restricted period imposed by SFL § 139-j (Reply, at p. 5).[17] ModivCare alleges that "such meetings are impermissible contacts under State Finance Law" because "a reasonable person could infer that there was no legitimate purpose in meeting with the Executive Chamber" (*Id.*). ModivCare alleges that the lobbyists, on behalf of MAS, "pursued these contacts in a knowing and willful manner" which "should disqualify MAS as a bidder for this procurement as a non-responsible bidder" (*Id.*, at p. 6).

DOH responds that "not all lobbying is prohibited" and ModivCare's "claim makes numerous inferences and assumptions which are not supported by any facts about the intent of the alleged lobbying to the Executive Chamber" (Response to Reply, at p. 1). DOH states that "no member of the Department involved in this procurement had any contact with any of the lobbyists identified in ModivCare's reply" and "there was no impermissible contact between the Department and the Executive Chamber or Legislature regarding the procurement" (*Id.*, at p. 2).

SFL § 139-j(3) provides that "[e]ach offerer that contacts a governmental entity about a governmental procurement shall only make permissible contacts with respect to the governmental procurement." SFL § 139-j(1)(c) defines "contacts" to mean "any oral, written or

[17] ModivCare cites to bi-monthly reports with the New York State Commission on Ethics and Lobbying in Government, showing lobbying communications from July 2021 to August 2022 between O'Donnell & Associates, LLC on behalf of MAS, and various members/staff of the Senate and Assembly as well as the Executive Chamber. The stated subject was "TRANSPORTATION – GENERAL" and the focus was "STATE FUNDING" for the "STATE [NEMT] PROGRAM." Note, we will not address, and ModivCare does not raise, the involvement of Senate and Assembly members/staff in these meetings, as members/staff of the State legislature are exempt from the restrictions on contacts in SFL § 139-j when acting in their official capacity (SFL § 139-j(4)).

electronic communication with a governmental entity under circumstances where a reasonable person would infer that the communication was intended to influence the governmental entity's conduct or decision regarding the governmental procurement." A knowing and willful violation of SFL § 139-j(3) "shall result in a determination of non-responsibility for such offerer" (SFL § 139-j(10)(b)).

The procurement record does not reflect any impermissible contacts by MAS or any agent of MAS during the restricted period for this procurement. Nevertheless, ModivCare alleges that meetings between MAS and the Executive Chamber *de facto* constituted impermissible contacts; however, this alone is insufficient to conclude that impermissible contact(s) occurred under governing law. SFL § 139-j prohibits communications with a governmental entity that occur under circumstances where a reasonable person would infer that the communication was intended to influence the governmental entity's conduct regarding a governmental procurement. DOH asserts and the record corroborates that it and not the Executive Chamber conducted the instant procurement. ModivCare has produced no evidence to show that the MAS or the Executive Chamber attempted to influence DOH's actions relating to the procurement, and there are no allegations that MAS attempted to influence DOH directly. In fact, as noted above, the procurement record shows that DOH established a methodology for evaluating proposals prior to receipt of proposals and evaluation and scoring was conducted by staff level evaluators who followed such methodology.[18]

Moreover, the information supplied by ModivCare is insufficient to support the contention that there were impermissible contacts, much less support the contention that such alleged impermissible contacts were knowing and willful. Therefore, based on our review, we find there is insufficient evidence to disturb the responsibility determination made by DOH.

3. Findings of United States Department of Health and Human Services Office of Inspector General Report

ModivCare contends that "[t]he OIG report[19] detailed severe failings by MAS . . . that imply MAS has not properly administered the transportation benefit it manages for New York State's Medicaid program" and such "past performance should disqualify [MAS] from this bid, and further, should compel OSC to find that MAS is not a responsible bidder" (Reply, at pp. 6-7). Specifically, ModivCare claims "the OIG report implicates two prongs of responsibility determination: integrity and past performance" (Answer, at p. 7).

DOH responds that "the OIG audit should not cast a negative perception on MAS as a capable or responsible bidder given the transition issues with the previous vendor [ModivCare]" (Response to Reply, at p. 3). DOH further responds that it "disagrees with several findings in the OIG audit," and "[i]t would be unfair to deem MAS a non-responsible bidder over findings

[18] With harmless exceptions as noted herein, at pp. 11-12.

[19] United States Department of Health and Human Services, Office of Inspector General, Report No. A-02-21-01001: New York claimed $196 million, over 72 percent of the audited amount, in federal reimbursement for NEMT payments to New York City transportation providers that did not meet or may not have met Medicaid requirements (September 2022).

which [DOH] itself disputes" (*Id.*). DOH concludes that it "does not believe [the OIG report] warrants a finding of non-responsibility" for MAS (*Id.*).

The procurement record reflects that DOH addressed the 2022 OIG report in its vendor responsibility review. This Office also reviewed the report as part of its independent review. Our review revealed that the focus of the OIG audit was DOH's management and oversight of the NEMT program and not a specific vendor.[20] Accordingly, the OIG report does not sufficiently support the allegation that MAS is a non-responsible bidder to override DOH's responsibility determination. Therefore, we will not disturb the responsibility determination made by DOH.

4. Potential Pending Investigation by the Commission on Ethics and Lobbying in Government

ModivCare contends that "various [news] articles allege a 'pay to play' scheme whereby [MAS] sought to influence the awarding of the RFP through large donations to Governor Kathy Hochul" and "[on] or about August 11, 2022 . . . the Republican candidate for Attorney General, Michael Henry, formally filed an ethics complaint with JCOPE, requesting that it investigate the RFP award [to MAS]"[21] (Reply, at p. 8). ModivCare contends that "there is a prima facie case" of "favoritism, fraud, corruption, or a material and substantial irregularity that undermined the fairness of the [RFP] process" and, as such, "[i]t would be improper for OSC to approve the [contract] award[s] during the pendency of the Commission's investigation" (*Id.*).

DOH responds that it "cannot comment on whether there is an active investigation by the Commission based on this alleged complaint but to date has not been contacted by any member of the Commission to discuss it" and, in any event, "the Executive Chamber does not provide input on procurements managed by [DOH] and was not involved in the selection of the awards in this procurement" (Response to Reply, at p. 3).

We are unable to confirm or deny the existence of the alleged CELG investigation. In this regard, we note that pursuant to State law and an Executive Order[22] applicable to DOH, vendors must remain responsible for the duration of the contract. Should a finding be made by CELG or others relevant to this procurement, further responsibility review could be warranted. Therefore, based on our review of the procurement record as it stands today, and this Office's independent vendor responsibility review of MAS, we find no reason to disturb DOH's determination that MAS is responsible.

[20] DOH disputes several findings in the OIG report; we note that we do not take a position on such findings, and it is not necessary for us to resolve the disputes between OIG and DOH to make our determination on the Protest.

[21] The State Joint Commission on Public Ethics no longer exists and was succeeded by The Commission on Ethics and Lobbying in Government or CELG.

[22] Executive Order No. 192, effective January 15, 2019, under former Governor Cuomo; continued via Executive Order No. 1 by Governor Hochul.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the contract awards by DOH. As a result, the Protest is denied and we are today approving the DOH / MAS contracts for NEMT brokerage services for Upstate and Downstate New York.