

STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

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In the Matter of the Bid Protest filed by Health  
Management Systems, Inc. with respect to the  
Procurement of Medicaid Recovery Audit  
Contractor Services conducted by the Office of the  
Medicaid Inspector General

**Determination  
of Bid Protest**

**SF-20230156**

Contract Number – C202302

March 15, 2024

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The Office of the State Comptroller has reviewed the above-referenced procurement conducted by the New York State Office of the Medicaid Inspector General (OMIG) for Medicaid Recovery Audit Contractor (RAC) Services. We have determined the grounds advanced by Health Management Systems, Inc. (HMS) in its Protest of the award are of sufficient merit to overturn the contract award made by OMIG and therefore, we uphold the Protest. As a result, we are today returning non-approved the OMIG contract with Performant Recovery, Inc. d/b/a Performant Healthcare Solutions (Performant) for RAC services.

## **BACKGROUND**

### **Facts**

OMIG was established “to improve and preserve the integrity of the New York State Medicaid Program by conducting and coordinating fraud, waste, and abuse control activities for all State agencies responsible for services funded by Medicaid” (OMIG Request for Proposals for New York State RAC Services, issued July 10, 2023 (RFP), Section I.C, at p. 7). Accordingly, OMIG established the RAC program to “reduce improper payments through the efficient detection and collection of overpayments, the identification of underpayments, the reporting of suspected fraudulent and/or criminal activities, and the implementation of actions that will prevent future improper payments” (RFP, Section I.F, at p. 9). OMIG issued the RFP seeking proposals for a vendor to “assist and supplement OMIG’s mission of the RAC Program, as directed . . . includ[ing] the identification and recovery of improper payments” (*Id.*).

The RFP provided that OMIG would award one contract on the basis of best value to a responsive and responsible offeror (RFP, Section VIII.A, at p. 38; RFP, Section IX.D, at p. 43). Proposals deemed to be responsive following an initial compliance evaluation would proceed to technical and cost evaluations (RFP, Section VIII.C, at pp. 38-39). The Technical Proposal would be worth 75% of the offeror’s final score and would be evaluated according to criteria specified in the RFP (RFP, Section VIII.C, at pp. 39-40).

The Cost Proposal would be worth 25% of the offeror’s final score (RFP, Section VIII.C, at p. 41). OMIG would score Cost Proposals by awarding the offeror submitting the lowest total

Cost Proposal the full 25 points and awarding other offerors a proportionate score based on their relation to the proposal offering the lowest cost (*Id.*). The RFP provided that OMIG would select the responsive and responsible offeror who “provides the best value” to the State, meaning the highest combined technical and cost score (RFP, Section IX.D, at p. 43).

Prior to the proposal due date of August 28, 2023, OMIG received two proposals it deemed responsive (from HMS and Performant). Following evaluation of proposals, OMIG awarded the contract to Performant, the offeror it determined to be the responsive and responsible offeror who received the highest combined score. Subsequently, HMS requested a debriefing, which OMIG provided on October 11, 2023.

HMS filed a protest with this Office on October 18, 2023 (Protest). Performant responded to the Protest on November 14, 2023 (Performant Answer). OMIG responded to the Protest on December 19, 2023 (OMIG Answer). HMS filed a reply to Performant’s and OMIG’s Answers on December 22, 2023 (Reply). HMS filed a supplemental protest on February 9, 2024 (Supplemental Protest).<sup>1</sup> Performant responded to the Supplemental Protest on February 16, 2024 (Performant Answer to Supplemental Protest).<sup>2</sup> OMIG also responded to the Supplemental Protest on February 16, 2024 (OMIG Answer to Supplemental Protest).<sup>3</sup> HMS replied to Performant’s and OMIG’s Answers to the Supplemental Protest on February 20, 2024 (Supplemental Reply).<sup>4</sup>

### **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.<sup>5</sup> 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. the documentation contained in the procurement record forwarded to this Office by OMIG with the OMIG / Performant contract;

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<sup>1</sup> Pursuant to 2 NYCRR § 24.4(f), this filing is not permitted as of right. However, this Office exercised its discretion under 2 NYCRR § 24.4 to consider this submission in this determination.

<sup>2</sup> Pursuant to 2 NYCRR § 24.4(f), this submission is not permitted as of right. However, this Office exercised its discretion under 2 NYCRR § 24.4 to consider this submission in this determination.

<sup>3</sup> Pursuant to 2 NYCRR § 24.4(j), this Office requested that OMIG submit a response to the grounds raised in the Supplemental Protest.

<sup>4</sup> Pursuant to 2 NYCRR § 24.4(f), this submission is not permitted as of right. However, this Office exercised its discretion under 2 NYCRR § 24.4 to consider this submission in this determination.

<sup>5</sup> 2 NYCRR Part 24.

2. the correspondence between this Office and OMIG arising out of our review of the proposed OMIG / Performant contract; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
  - a. Protest;
  - b. Performant Answer;
  - c. OMIG Answer;
  - d. Reply;
  - e. Supplemental Protest;
  - f. Performant Answer to Supplemental Protest;
  - g. OMIG Answer to Supplemental Protest; and,
  - h. Supplemental Reply.

## **ANALYSIS OF THE PROTEST**

### **Protest to this Office**

In its Protest and Supplemental Protest, HMS challenges the procurement conducted by OMIG on the following grounds:

1. Performant's proposal was non-responsive to a material requirement of the RFP giving Performant an unfair competitive advantage and therefore should have been disqualified from contract award;
2. Performant is not a responsible vendor because it does not have the financial ability to perform the contract and OMIG's vendor responsibility review of Performant was flawed;
3. HMS's proposal was unreasonably penalized because the technical evaluation was based on unstated criteria; and,
4. OMIG's scoring of HMS's Technical Proposal had no rational basis because OMIG deducted a significant number of points despite HMS addressing every element of the technical proposal in detail.

### **OMIG Response to the Protest**

In its Answers to the Protest and Supplemental Protest, OMIG contends the Protest, as supplemented, should be rejected and the Award upheld on the following grounds:

1. Performant's proposal met all material mandatory requirements and was therefore deemed responsive and eligible for contract award;
2. OMIG conducted an independent vendor responsibility review of Performant, including reviewing Performant's financial ability to perform the contract, and found Performant to be a responsible vendor;
3. OMIG scored Technical Proposals using only technical evaluation criteria disclosed in the RFP; and,

4. OMIG's scoring of HMS's Technical Proposal was based on weaknesses in specific scoring areas where HMS failed to provide sufficient details.

### **Performant Response to the Protest**

In its Answers to the Protest and Supplemental Protest, Performant contends the Protest, as supplemented, should be rejected and the award upheld on the following grounds:

1. Performant met all material RFP requirements and was found responsive by OMIG; to the extent that Performant did not meet an RFP requirement, it was immaterial;
2. Performant is a responsible vendor because it has the financial ability to perform the awarded contract, including sufficient liquidity and access to capital; and,
3. The scoring metrics were clearly and adequately disclosed by OMIG in the RFP.

### **HMS Reply to the Answers**

In its Reply and Supplemental Reply to OMIG's and Performant's Answers to the Protest and Supplemental Protest, HMS expounds upon the grounds set forth in the Protest and Supplemental Protest.

## **DISCUSSION**

### **Responsiveness of Performant**

HMS contends "Performant's proposal must be deemed non-responsive and Performant should be disqualified from the RAC procurement" because Performant "violated, time and time again, the RFP's express prohibition against referring to the monetary value of services rendered" in its Technical Proposal (Supplemental Protest, at pp. 4-5). HMS further contends that "[i]n so doing, Performan[t] enjoyed a material unfair competitive advantage" (*Id.*, at p. 3). HMS alleges that "Performant admits that its Technical Proposal included at least three references to 'the monetary value of Performant's services'" and "[t]he RFP explicitly warned that violation of the information submission requirements would lead to a proposal being 'automatically disqualified'" (Supplemental Reply, at p. 2). HMS posits that, in contrast, "HMS complied with [OMIG's] direction and did not include in its proposal 'the monetary value of services rendered' (Supplemental Protest, at p. 2).

OMIG responds that "Performant's proposal was deemed responsive and therefore eligible for award because its proposal met all material mandatory requirements" (OMIG Answer to Supplemental Protest, at OMIG Answer #1). OMIG explains "[t]he language in question, 'although it is acceptable for the Offeror to use its experience in providing similar services to complete this section [Section II], the Offeror must not refer to the monetary value of the services rendered,' was not intended to dissuade or even disallow an Offeror from including prior performance metrics, such as the value of successful payment recoveries, but rather to ensure that the Offeror's financial proposal, or 'cost to render services under the contract in question, C202302,' was kept separate from its Technical Proposal" (*Id.*). OMIG further contends that "[b]oth [HMS and Performant] included information regarding prior performance metrics within

their proposals which neither advantaged nor disadvantaged the Offerors” (*Id.*, at OMIG Answer #2).

Performant responds “‘Section II’ is the only ‘section’ referenced in the [RFP requirement not to refer to the monetary value of the services rendered]” and “Performant’s Technical Proposal, Section II, Scope of Work . . . contains just three passing references to the monetary value of Performant’s services . . . [which] should therefore be viewed as immaterial to any evaluation of that section” (Performant Answer to Supplemental Protest, at p. 2). Performant asserts “OMIG already made an express determination that Performant was a responsible offeror and that its proposal met all of the material requirements of the RFP . . . [t]o the extent there were a few technical deviations from the [RFP requirement not to refer to the monetary value of the services rendered] in Section II of Performant’s Technical Proposal, OMIG necessarily deemed them to be immaterial . . .” (*Id.*, at p. 2). Performant concludes that “HMS was not prejudiced because Section IV [Program Integrity Experience] of the Technical Proposal portion of the RFP provided both HMS and Performant the opportunity to disclose the monetary value of their services” and “there was no disadvantage to HMS even if it failed to disclose that monetary value in its Technical Proposal because OMIG was already aware of that information” since HMS is the incumbent contractor for RAC services (*Id.*, at pp. 3-4).

The RFP provided, in Section VII, “Proposal Submission Guidelines,” subsection B, “Technical Proposal,”

“The Technical Proposal must contain the Offeror’s response to each of the required portions from Section II, ‘Scope of Work.’ An Offeror’s Checklist has been included as Attachment 1 and may be used to ensure that all mandatory requirements are met. All aspects of the Technical Proposal must be sent as a separate document labeled ‘RFP# OMIG 23-02 Technical Proposal.’ Although it is acceptable for the Offeror to use its experience in providing similar services to complete this section, **the Offeror must not refer to the monetary value of the services rendered.**”

(RFP, Section VII.B, at p. 36 (emphasis added)). The RFP specifically prescribed requirements for proposal submission and stated that “[a]n Offeror must meet the requirements of Section VII, Proposal Submission Guidelines in order to have its financial proposal considered for final Contract Award” (RFP, Section VII, at p. 34). The RFP also provided that “[a] proposal that does not comply with the requirements and does not include all the information requested **may** be negatively affected in the overall evaluation and **could** be subject to rejection” (*Id.* (emphasis added)). The RFP further provided “OMIG reserves the right . . . to waive technicalities, irregularities, and omissions if, in its sole judgment, such action will be in the best interest of the State” and “[i]f there are no satisfactory proposals, which fully comply with the proposal specifications, OMIG reserves the right to consider late or non-conforming proposals” (RFP, Section VII.I, at p. 38).

## 1. Interpretation of Plain Meaning of RFP Requirement

Here, OMIG, HMS, and Performant all have varying views on the interpretation of the RFP requirement that “the Offeror must not refer to the monetary value of the services rendered” (Requirement).<sup>6</sup>

“In interpreting a contract, the court must read the document as a whole ‘to determine the parties’ purpose and intent, giving a practical interpretation to the language employed so that the parties’ reasonable expectations are realized” (*Gutierrez v. State of New York*, 58 A.D.3d 805, 807 (App. Div. 2d Dep’t 2009) (quoting *Snug Harbor Sq. Venture v. Never Home Laundry*, 252 A.D.2d 520, 521 (App. Div. 2d Dep’t 1998)). “[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms” (*Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (N.Y. 2002); *see also W.W.W. Assocs.*, 77 N.Y.2d 157, 162-163 (N.Y. 1990)). Notably, “ambiguity in [contract] language will not be found to exist merely because two conflicting interpretations may be suggested;” instead “where the parties differ concerning the meaning of [a] contract, the court will be guided by a reasonable reading of the plain language of the [contract]” (*Westchester Fire Insur. Co. v. Schorsch*, 186 A.D.3d 132, 140 (App. Div. 1<sup>st</sup> Dep’t 2020)).

Here, we will apply the standards of contract interpretation set forth by the courts in interpreting the Requirement; like contract terms, the terms of a solicitation must be interpreted according to their plain meaning. First, we must determine the practical interpretation of the plain language of the Requirement. The RFP permits offerors to include “experience in providing similar services” but prohibits reference “to the monetary value of the services rendered” (RFP, Section VII.B, at p. 36). Based on the plain language, the prohibition is referring to services similar to those being solicited by the procurement (namely, RAC services) and use of the words “experience” and “rendered” indicate that the RFP is referring to the offeror’s past experience performing RAC services. Contrary to OMIG’s interpretation, the plain language of the Requirement cannot be read to refer to the “cost to render services under the contract in question C202302” as it does not point to the present services at all. While it is indisputable that including Cost Proposal information in the Technical Proposal is prohibited, this is achieved through separate, unambiguous RFP provisions.<sup>7</sup> “The monetary value of the services rendered” could reasonably mean fees paid to the offeror for performing past RAC services and/or any monetary

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<sup>6</sup> OMIG interprets the Requirement to prohibit offerors from including financial proposal information, namely the “cost to render services under the contract in question C202302,” in their Technical Proposal (OMIG Answer to Supplemental Protest, at OMIG Answer #1). HMS interprets the Requirement to prohibit offerors from including the monetary value of “prior recoveries” in their entire Technical Proposal (Supplemental Reply, at p. 3). Performant interprets the Requirement to prohibit offerors from including “the monetary value of their [other] RAC contracts” in only Section II of their Technical Proposal but emphasizes that this was permitted in Section IV of the Technical Proposal (Performant Answer to Supplemental Protest, at pp. 2-3).

<sup>7</sup> See RFP, Section VII, at p. 34 (“The Technical Proposal and the Financial Proposal, including Financial Statements, should be sent separately with the subject ‘RFP# OMIG 23-02 Technical Proposal’ or ‘RFP# OMIG 23-02 Financial Proposal’”); *see also* RFP, Section VII.C, at p. 36 (“All aspects of the Financial Proposal should be sent as a separate document labeled ‘RFP# OMIG 23-02 Financial Proposal.’ Complete the Cost Proposal Form and submit it only with your Financial Proposal.”).

values associated with the offeror performing past RAC services (including, but not limited to, monetary values identified for recovery and monetary values ultimately recovered).<sup>8</sup>

Next, we reviewed the Requirement in the context of the entire RFP to determine whether the Requirement applied to only Section II of the Technical Proposal or the Technical Proposal as a whole. The Requirement includes a reference to “this section” which suggests a potential reference back to Section II of the Technical Proposal which is mentioned earlier in the paragraph.<sup>9</sup> However, such a narrow reading of the applicability of the Requirement is not reasonable in the context of the RFP as a whole.<sup>10</sup> The RFP provides that the entire Technical Proposal is to be submitted together as one package (*see* RFP, Section VII.B, at p. 36); the procurement record shows that the entire Technical Proposal was evaluated by the same team of evaluators. As the Technical Proposal was both submitted and evaluated as a whole, not by section, to prohibit the inclusion of monetary values in one section of the Technical Proposal but allow it in other sections would render the prohibition contained in the Requirement meaningless.

Accordingly, the practical interpretation of the plain language of the Requirement, interpreted in the context of the RFP as a whole, prohibited reference, in the entirety of an offeror’s Technical Proposal, to fees paid to the offeror for performing past RAC services and any monetary values associated with the offeror performing past RAC services.

## 2. Responsiveness of Performant to Plain Meaning of Requirement

Next, we will look to whether Performant was responsive to the Requirement, according to the practical interpretation of the plain language of the Requirement set forth above.

State Finance Law provides that contracts for services shall be awarded on the basis of best value to a responsive and responsible offeror (SFL § 163(4)(d); § 163(10)). 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.” A “responsive” offeror is an “offeror meeting the minimum specifications or requirements described in a solicitation for commodities or services by a state agency” (SFL § 163(1)(d)).

As Performant itself admits, it was not responsive to the Requirement. Performant concedes that its “Technical Proposal, Section II, Scope of Work . . . contains [ ] three [ ] references

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<sup>8</sup> HMS contends that the references to monetary values in its Technical Proposal did not constitute services rendered because they referred to the identification of monies that could potentially be recovered but did not indicate that they were recovered (HMS Supplemental Reply, at p.3 (“In its Technical Proposal, HMS explained that it had leveraged data mining in order to identify a potential source of overpayments. HMS never said it recovered those funds. To the contrary, and as the Agency knows, identifying possible overpayments is only the first step in a lengthy and complex process that may or may not result in a recovery. Thus, HMS never referenced ‘the monetary value of services rendered.’”)). Such a narrow reading of the Requirement is not reasonably supported by its broad language. Indeed, the RFP’s Scope of Work refers to both the identification and recovery of payments as required services under the contract; “similar services” would include the same (*see* RFP, Section II).

<sup>9</sup> This is Performant’s position (*see* Performant Answer to Supplemental Protest, at pp. 1-2).

<sup>10</sup> We agree with HMS’s position that “the only logical reading of that provision is that it applies to the entire Technical Proposal” (Supplemental Reply, at p. 3, fn. 2 (internal quotations omitted)).

to the monetary value of Performant’s past RAC services (on pages 19, 43, and 49)” (Performant Answer to Supplemental Protest, at p. 2). This Office identified an additional five references to the monetary value of Performant’s services in its Technical Proposal, for a total of eight references.<sup>11</sup>

We also note that HMS was not responsive to the Requirement. This Office identified two references to the monetary value of HMS’s past RAC services in its Technical Proposal.<sup>12</sup>

Accordingly, OMIG erred in finding Performant responsive to the Requirement.

Although Performant was non-responsive to the Requirement, as discussed above, the RFP does not automatically require disqualification from contract award and, moreover, OMIG “reserve[d] the right . . . to waive technicalities, irregularities, and omissions . . . [and] consider [ ] non-conforming proposals (RFP, Section VII.I, at p. 38).

In order to determine whether OMIG was able to properly waive the proposal defects of Performant, we must determine whether the defects were material.

### 3. Materiality of Performant’s Proposal Defects

It is generally understood that a procuring entity may waive technical non-compliance with bid specifications or requirements if the defect is a mere irregularity and it is in the best interest of the procuring agency to do so (*Le Cesse Bros. Contracting, Inc. v. Town Board of Williamson*, 62 A.D.2d 28, 31-32 (App. Div. 4<sup>th</sup> Dep’t 1978)). However, the procuring entity may not waive a material or substantial requirement (*Id.*). A defect is material if it would impair the interests of the contracting public entity, place the successful bidder in a position of unfair economic advantage or place other bidders or potential bidders at a competitive disadvantage (*see id.*; *see also Cataract Disposal, Inc. v. Town Board of Newfane*, 53 N.Y.2d 266, 272 (N.Y. 1981); *Fischbach & Moore, Inc. v. NYC Transit Authority*, 79 AD.2d 14, 20 (App. Div. 2nd Dep’t 1981)).

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<sup>11</sup> The eight references are as follows:

- (1) “For example, Performant identifies \$[ ] in over payments on . . .” (Performant’s Technical Proposal, at p. 11);
- (2) “Performant processes over \$[ ] in successful payment recoveries per year” (*Id.*, at p. 19);
- (3) “For example, Performant identifies \$[ ] in over payments on . . .” (*Id.*, at p. 31);
- (4) “. . . on all \$[ ] in direct recovery payments processed by Performant each year” (*Id.*, at p. 43);
- (5) “. . . for the receipt and reconciliation of over \$[ ] in recovery payments” (*Id.*, at p. 49);
- (6) “Total Contract Value \$[ ] per annum” (*Id.*, at p. 56);
- (7) “Performant has delivered approximately \$[ ] in healthcare savings to our clients in the past decade” (*Id.*, at p. 62); and,
- (8) “Total Contract Value \$[ ] per annum” (*Id.*, at p. 67).

<sup>12</sup> The two references are as follows:

- (1) “For instance, for one of our RAC clients we recently identified [\$] of dollars in overpayments . . .” (HMS’s Technical Proposal, at p. 24); and,
- (2) “For instance, when analyzing [ ] cost for one client, we saw payments of [\$] of dollars . . . which is significantly outside of general benchmarks . . .” (*Id.*).



Despite OMIG's assertion that "the inclusion of prior performance metrics, such as the value of successful payment recoveries, would not have impacted the evaluation, as it was not a component of review," the procurement record indicates otherwise (OMIG Answer to Supplemental Protest, at OMIG Answer #2). Here, the procurement record shows that OMIG's Technical Proposal evaluators considered the monetary values Performant included in its Technical Proposal in scoring such proposal. In fact, despite the prohibition in the Requirement, one evaluator included explicit reference to monetary values in its comments to support a score given to Performant's Technical Proposal. Although the precise influence on overall Technical Proposal scoring is impossible for this Office to quantify, we attempted to determine the impact by revising the Technical Proposal scores of both Performant and HMS to neutralize scores given on responses that included reference to monetary values in violation of the Requirement: Performant received a revised score of zero for eight Technical Proposal responses and HMS received a revised score of zero for two Technical Proposal responses. By removing the potential advantage afforded by including monetary values, the Technical Proposal scores sufficiently changed as to change the outcome of the procurement.<sup>13</sup> As a result, HMS was disadvantaged by the defects in Performant's proposal, and Performant was likewise advantaged by such defects;<sup>14</sup> accordingly, the Requirement was material.

Accordingly, OMIG could not waive the material defects in Performant's Technical Proposal and consequently erred in finding Performant eligible for contract award.

Notwithstanding the merit of the foregoing protest ground, we will address the additional contentions raised by HMS in the Protest.

### **Vendor Responsibility**

HMS alleges that "Performant is not a responsible offeror" based on "Performant's own public filings with the U.S. Securities and Exchange Commission ('SEC') [which] demonstrate a deteriorating financial situation, whereby Performant itself admitted that any new contract awards may be adversely impacted by its lack of access to capital and credit" (Protest, at pp. 1-2). HMS contends that OMIG's responsibility assessment was "materially flawed because it apparently overlooked the publicly-disclosed statements in Performant's most recent [SEC filings]" and "[OMIG] did not examine Performant's financial statements, as it is required to do when conducting a responsibility determination" (*Id.*, at pp. 2, 8).

OMIG asserts that HMS's references to Performant's SEC filings were "taken out of context from a section wherein the company discusses all potential risks associated with its

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<sup>13</sup> Notably, even if we limit our revised scoring to Section II of the Technical Proposal, the outcome of the procurement still changes.

<sup>14</sup> Performant contends that HMS was not disadvantaged because as the incumbent contractor, OMIG "was already thoroughly familiar with the monetary value of the RAC services that HMS was providing" (Performant Answer to Supplemental Protest, at p. 4). There is no support in the record for the speculation that OMIG's technical evaluators were aware of monetary values associated with HMS's performance of RAC services. Additionally, technical evaluators were specifically instructed to rely on the content of the technical proposals in scoring, specifically to "write a justification for each area [of the technical proposal scored], citing specific criteria within the [technical] proposal that demonstrated the strengths and weaknesses that led to the rating." No evidence has been presented to show that the evaluators did not follow these instructions.

operations as a course of general business . . . even if those risks are not imminent, or even likely” (OMIG Answer, at p. 1). OMIG responds that “Performant actually states in its [SEC] filing that it is well-positioned to take on additional work in the healthcare space and document[s] [its] numerous federal RAC contracts [ ] to support its assertion” (*Id.*). OMIG further states it “conducted an independent Vendor Responsibility review” of Performant and “[t]he financial portion of the review consisted of, but was not limited to, OMIG researching Performant’s most recent SEC filings” (*Id.*, at p. 2). OMIG contends that this review “resulted in no adverse findings” (*Id.*).

Performant responds that the referenced statements in their SEC filings were made “to comply with SEC requirements about disclosing all possible material risks to investors, even if the likelihood of such risks actually occurring were remote” and adds that “[t]hese disclosures do not signify imminent ‘financial peril’ or ‘dire financial straits’ as HMS suggests” (Performant Answer, at pp. 1-2). Performant asserts it is “well capitalized and has sufficient cash flow to manage both its existing business and the new OMIG contract” (*Id.*, at p. 2).

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

Our review of the procurement record confirms OMIG conducted a vendor responsibility review of Performant, which included Performant’s financial and organizational capacity, legal capacity, integrity, and past performance as statutorily required. The procurement record specifically shows that OMIG reviewed Performant’s 2022 SEC filing (including financial statements). As a result, OMIG determined that there was no adverse information that would impact Performant’s ability to perform the contract.

Moreover, as part of our review of the OMIG / Performant contract, this Office examined and assessed the information provided in the procurement record related to vendor responsibility. Our review did not provide any basis to overturn OMIG’s responsibility determination and thus we will not disturb the responsibility determination made by OMIG.

## **Evaluation and Scoring of HMS’ Technical Proposal**

### **1. Evaluation Methodology for Technical Proposals**

HMS contends that OMIG “penalized HMS by applying unstated evaluation criteria to HMS’ Technical Proposal” (Protest, at pp. 1, 14). OMIG replies that its “technical and financial evaluators . . . meticulously assessed each proposal against the established criteria, assigning scores as outlined in the RFP” and proposals “were evaluated solely on [their] merits and adherence to the predefined criteria” (OMIG Answer, at p. 2). Performant asserts “[t]he scoring metrics were adequately disclosed in OMIG’s RFP, and there was no lack of clarity and no questions from a bidder’s perspective” (Performant Answer, at p. 16).

The RFP provided for the award of the OMIG contract on the basis of best value which shall “reflect, wherever possible, objective and quantifiable analysis” and “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(1)(j)); § 163(2)(b)). “Where 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(7)). The solicitation shall “describe and disclose the general manner in which the evaluation and selection shall be conducted” (SFL § 163(9)(b)).

The RFP set forth specific criteria required to be addressed in the Technical Proposal and the maximum number of points assigned to each evaluation criterion (*see* RFP, Section VIII.C, at pp. 39-41; RFP, Attachment 1, at pp. 67-85). The technical evaluation consisted of the following criteria worth up to a total of 75 points: Scope of Work: Sections B-O (worth up to 20 points); Secure Web-Based Provider Portal (worth up to 10 points); Free-Standing Recovery Claims Database (worth up to 10 points); Collections & Case Tracking System (worth up to 10 points); Receipt and Documentation of Recovered Funds (worth up to 10 points); Provider Education and Outreach Program (worth up to 5 points); and Program Integrity Experience (worth up to 10 points) (RFP, Section VIII.C, at pp. 39-40). RFP Attachment 1, *Offeror’s Checklist*, provided further details regarding what would be scored within each of the criteria (RFP, Attachment 1, at pp. 67-85). The RFP further provided that each response would be scored on a scale of 0-3 (RFP, Section VIII.C, at p. 40). The RFP provided that, following scoring by a team of evaluators, “evaluators’ scores will be totaled together, per section [and] [o]nce the section is calculated, all seven (7) sections will be added together to obtain the composite technical score for each Offeror” (*Id.*).

The procurement record shows that OMIG established an evaluation instrument that was consistent with the Technical Proposal requirements and the *Offeror’s Checklist* set forth in the RFP. The procurement record shows that OMIG’s technical evaluators were provided with the pre-established technical evaluation instrument and used same to evaluate and score proposals in accordance with the requirements of the RFP.

Our review of the procurement record confirmed that OMIG evaluators scored written Technical Proposals in accordance with the clearly articulated criteria set forth in the RFP. Thus, notwithstanding the discussion on responsiveness above, we are satisfied OMIG met the applicable legal requirements with respect to the methodology used to evaluate the Technical Proposals.

## 2. Application of Evaluation Criteria to Technical Proposals

HMS contends that OMIG had “no rational basis to materially down-score HMS” in its technical evaluation (Protest, at p. 15). HMS further contends that the RFP contained “numerous individual technical requirements, all of which needed to be addressed in the proposal” and that “HMS’ proposal addressed each of these proposal elements in substantial detail” (*Id.*). HMS found it “impossible to determine from the evaluation material the State has provided which particular portion of HMS’ response in these areas generated the weakness” resulting in “apparent significant technical deductions” (*Id.*). OMIG asserts that HMS’s Technical Proposal contained “notable

weaknesses, wherein its responses failed to elaborate on the solutions to provide comprehensive details on how the work was to be performed or illustrate a novel approach” (OMIG Answer, at p. 2).

Generally, this Office gives significant deference to a State agency in matters within that agency’s expertise (*see* OSC Bid Protest Determination SF-20170192, at p. 7). It is incumbent upon the agency to assess its needs in relation to a particular program and develop solicitation document and corresponding evaluation instrument that effectively meets those needs (*see* OSC Bid Protest Determination SF-201700297, at p. 6). This Office 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 “according to the 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” 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).

As discussed above, OMIG evaluators scored HMS’s written Technical Proposal consistent with the RFP and evaluation instrument. Further, every score was supported by a written explanation from the evaluator and our review did not reveal any contradictions between an evaluator’s written comments and the scores assigned by such evaluator to HMS’s written Technical Proposal. Thus, notwithstanding the discussion on responsiveness above, there is no basis to disturb the technical scores awarded by OMIG to HMS’ Technical Proposal.

## **CONCLUSION**

For the reasons outlined above, we have determined the issue raised in the Supplemental Protest relating to OMIG’s improper finding that Performant is responsive is of sufficient merit to overturn the contract award by OMIG to Performant. As a result, the Protest, as supplemented, is upheld and we will not be approving the OMIG / Performant contract for the procurement of RAC services.