

STATE & LOCAL

New York State Comptroller Goes Public with Select Bid Protest Decisions

By DENNIS J. CALLAHAN



For over a century, New York State agencies have been required to present all large proposed contracts to the Office of the State Comptroller (OSC) for approval. In its contract review process, the OSC long has considered challenges to state agency awards, including those from disappointed bidders and of-

ferors, and has issued formal written determinations in answer to such challenges. Until recently, those decisions, though potentially controlling authority guiding the OSC's contract review and resolution of later bid protests, effectively were unavailable to contractors and their counsel. In July 2014, however, the OSC began revealing this hidden authority by posting select bid protest determinations on its website. As of this writing, the OSC had posted 137 such decisions in searchable format, including over 20 where the protest was upheld.¹

The publication of these decisions, which allow a direct examination of the OSC's view on recurring bid protest issues, is a very welcome development for practitioners litigating New York State contract awards. Indeed, given the determinations' precedential value, their publication was long overdue. The OSC's bid protest procedures provide that the OSC may summarily deny a protest that raises only legal issues that have already

been decided by the office.² And, as for the application of facts to law, the OSC routinely cites its previous determinations in deciding bid protests.³

This article stems from the author's work on a New York State bid protest of a major enterprise services award in early 2014. At the time, the OSC had published its bid protest procedures, and the New York courts had developed a fairly robust jurisprudence of contested public contract awards through decades of writ proceedings. But thorough online searches at the time uncovered only a handful of OSC bid protest determinations randomly posted by parties, or appended as exhibits to legislative reports. The great majority of the determinations resided only in the files of the OSC, and could be obtained only through requests under New York's Freedom of Information Law.⁴

From the newly published opinions, OSC's procedures, and statistical information on OSC's contract review outcomes, this article draws insights about the OSC's execution of its important role in the New York

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7. *Id.* at 1293, 1295; *id.* at 1304 (Reyna, J., dissenting).

8. *Id.* at 1304 (Reyna, J. dissenting) (citing *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 752 (Fed. Cir. 1999); *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1033 (Fed. Cir. 2004)).

9. For example, the rule in the Federal Circuit, repeated by the *Shell Oil* majority, is that extrinsic evidence of a contract deemed unambiguous is disallowed *unless* the judges want to use the extrinsic evidence to confirm what they've already decided. *Id.* at 1286 (citing *TEG-Paradigm Env't'l, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006)). The senselessness of this rule would seem to be so obvious as to brook no dissent.

10. Speaking generically, of course.

11. Other respects in which appellate judges may be unreasonable lie beyond the scope of these musings.

12. The dissenting judge in *Shell Oil* did not profess to dissent respectfully; he claimed that he was compelled to do so, with emphasis. *Id.* at 1307 (Reyna, J., dissenting) (“Therefore, I must *dissent*.”).

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State contracting process. In particular, this article finds that for procedural and substantive reasons, in comparison to New York State court actions, the OSC offers a more hospitable forum for contractors challenging agency contract awards. Historically, this forum appears to have been significantly underutilized relative to the potential benefits and advantages it affords protesters. The OSC's publication of its bid protest decisions should usher in a new era of award challenges before that office.

Comptroller's Contracts Review Role

If it were a country, New York State would rank among the world's 15 largest national economies, and the state has the procurement activity to match. In recent years, New York has awarded about 10,000 contracts per year of over \$15,000.⁵ The state has almost 40,000 active contracts at any given time, and a yearly contract spend of approximately \$14 billion.⁶

New York State finance law establishes the OSC as the steward of this spending. Section 112 requires that “[b]efore any contract [exceeding a threshold amount]⁷ made for or by a state agency . . . shall be executed or become effective . . . it shall first be approved by the comptroller and filed in his or her office.” The OSC's “final written determination” whether to approve proposed contracts is due within 90 days.⁸

The OSC takes its review function very seriously, and views its role to be to protect state taxpayers by validating that costs are reasonable; ensuring favorable contract terms; maintaining a fair bidding process for vendors; and stopping favoritism, waste, fraud, and corruption in the procurement process.⁹

The OSC's review is largely independent of bid protests brought as court actions, which typically are filed as New York Civil Practice Law and Rules Article 78 writ proceedings.

Because adjudicating bid protests is an activity subsumed within the OSC's mandatory contracts review process, OSC does not lose jurisdiction when a protester also brings a court action to overturn the same contract award. By the same token, that the OSC has not made a determination whether to approve a proposed contract does not impact the trial court's jurisdiction, i.e., the OSC bid protest process does not constitute an administrative remedy that must be exhausted before filing suit.¹⁰ As a result, it is not uncommon for disappointed bidders to prosecute a bid protest in court while its OSC bid protest is pending.¹¹

The close scrutiny the OSC applies to large procurements is evident in the results of its review process, even where no bid protest is filed. On its own initiative, the OSC refuses to approve approximately 2,000 transactions (new contract and contract amendments meeting the review threshold value) per year.¹² In the great majority of cases where OSC publishes the reasons for not approving proposed contracts,¹³ OSC has called out a seemingly easily correctable technical error.¹⁴ But, the OSC also returns contracts as “non-approved” for what are evidently substantive reasons, such as “award not made in accordance with solicitation,”¹⁵ “change in contract scope after ad or solicitation,”¹⁶ or “solicitation document fatally flawed.”¹⁷

Protesters Enjoy Significant Success Before the OSC

Because OSC bid protests are independent from those pursued in court, there is no legal impediment to disappointed bidders proceeding simultaneously in both forums.¹⁸ Not only does pursuing an OSC protest provide a second chance of overturning an award, but protesters have been quite successful before the OSC. Over the last five years (Fiscal Year (FY) 2009–2010 to FY 2013–2014), OSC reports that it has resolved 132 protests, with results as seen in the table below.¹⁹

Taking “upheld” and “moot” protests together, according to the OSC, protesters have achieved a favorable result in 35 of 132 protests over the past five years, an “effectiveness rate” of 27 percent.²⁰ While this effectiveness rate is somewhat lower than the 42–43 percent rate experienced by protesters of federal contract actions before the Government Accountability Office (GAO),²¹ it nonetheless demonstrates that protesters have enjoyed a substantial amount of success in the OSC forum.

Moreover, given the circumstances in which OSC bid protests arise, their effectiveness rate suggests that

OSC Bid Protest Outcomes 2009–2014

	FY09-10	FY10-11	FY11-12	FY12-13	FY13-14	Total
Denied	28	12	20	17	17	94
Upheld	3	3	5	2	0	13
Moot	5	5	4	4	4	22
Withdrawn	0	1	1	1	0	3
Total	36	21	30	24	21	132

disappointed bidders should be more active in that forum. It is fair to presume that most “technical” defects in awards (missing signatures, missing documents in the review package the agency forwards to the OSC, etc.) are either weeded out before the protest, or are unknown to the disappointed bidder and, thus, could not be a valid basis of protest.

OSC bid protests, on the other hand, are much more likely to center on alleged “substantive” flaws in the procurement, such as evaluations that do not match the criteria set forth in the solicitation, incorrect price evaluations, or positive awardee responsibility determinations that may be subject to attack. Such allegations cannot be assessed in a mechanical “check-the-box” fashion, but, rather, have to be teased from the procurement and public record. Disappointed offerors are industry insiders who likely have been involved in the procurement for months, and are motivated and better positioned than OSC to uncover such substantive, and likely non-obvious, deficiencies in the procurement.

Matter of Bank of America, N.A.,²² illustrates the point. There, the protester nominally protested two separately awarded “modules” in a single procurement, but provided supported arguments for its challenge to the award of only one module. Although the OSC upheld the protest with respect to the module about which Bank of America made “substantive objections,” because the protester “provided no basis for [OSC] to withhold [its] approval [of the other module],” the OSC approved that module without comment.²³ The *Bank of America* determination leaves the strong impression that the OSC would have approved both modules if its review was not informed by the protester’s submissions.

Procedural Aspects of OSC Bid Protests

OSC bid protests arose as an adjunct to the office’s contract review mission. The state finance law (SFL) does not explicitly provide for bid protests, nor has the office promulgated bid protest regulations under the general requirements of SFL § 112. Having received and answered bid protests for many years, however, in July 2008, the OSC regularized the protest process by issuing procedures for protesting contract awards by state agencies.²⁴

The OSC only hears post-award protests. As an initial matter, under the OSC procedures, protests to the office “may only be filed after the procuring agency has made a contract award.”²⁵ There is no pre-award recourse to the OSC for potential bidders who believe that a solicitation is ambiguous or unduly restrictive of competition, such as requirements that are unnecessarily favorable to a particular prospective bidder’s capabilities. In this situation, would-be bidders are limited to raising pre-award objections with the agency, such as through clarifying questions regarding the solicitation, and may proceed with an OSC protest only after award.

In *Matter of U.S. Filter Operating Services*,²⁶ the protester argued that the evaluation criteria for selecting the

operator for a wastewater treatment plant improperly relied solely on price, while giving the technical merits of the proposals no weight.²⁷ In response to this allegation, the awardee/intervenor contended that the protest was untimely, because the protester had not questioned the evaluation criteria through the solicitations’ mandatory clarification process. Noting that no statute or regulation prevented an unsuccessful bidder from challenging an award,²⁸ the OSC rejected the awardee-intervenor’s timeliness challenge. In doing so, the OSC reasoned that because its “protest determination role . . . emanates from [its] contract approval role,” the OSC may consider any argument, regardless of when it was raised.²⁹

The OSC’s inability to consider pre-award protests can be inefficient, as typically six months or more elapse between the issuance of a solicitation and the resolution of a bid protest by the OSC, often with a great deal of activity in between (proposal preparation, agency evaluations, negotiations, proposed contract, protest proceedings, etc.)³⁰ For protests upheld due to a defective solicitation, the procurement goes back to square one.

The OSC considers all arguments presented to it, regardless of who complains. OSC procedures purport to allow protests only by an “interested party,” which is defined as “a participant in the procurement process and those whose participation in the procurement process has been foreclosed by the actions of the contracting agency.”³¹ In reality, the OSC has put little bite in this limitation, as there appears to be slim practical difference between what the OSC today defines as an “interested party” and anyone else.

The OSC broadly applies the “interested party” definition, and accepts protests from would-be contractors who were merely discouraged, and not necessarily “foreclosed,” from bidding by the solicitation’s terms. In *Matter of Bank of America, N.A.*,³² for example, the protester chose not to bid on the procurement for debit card services because it believed that the contract terms were prohibitively generous regarding the number of free ATM transactions allowed per month. Despite this choice, the OSC heard Bank of America’s appeal of the denial of its agency level protest, which argued that in the post-proposal negotiations the agency effectively allowed the two bidders to amend their bids.

In *Matter of Vector Foiltec*,³³ the protester was a manufacturing subcontractor to an unsuccessful bidder, and the OSC dismissed the protest, concluding that Vector Foiltec was not an “interested party” under OSC’s bid protest procedures and state court precedent. Nonetheless, the OSC treated the putative protest as a “complaint” about the procurement, and stated that it would “carefully consider the issues Vector Foiltec [had] raised” in the OSC’s review of the proposed contract.

Bank of America and *Vector Foiltec* continue the OSC’s practice, implemented before it issued written bid protest procedures, of putting very little stock in the identity of the protester, or of the protester’s role in the

procurement. In the 2001 *U.S. Filter* case, the OSC rejected the awardee-intervenor's timeliness objection, noting that it "may consider any argument whether or not it was raised by a party to the protest." Indeed, in *U.S. Filter*, the OSC took "very seriously" the allegations and information interjected into the bid protest proceedings by a public interest group, Riverkeeper, regarding the environmental compliance of the parties vying for the wastewater treatment services contract.³⁴ The OSC did so without examining whether Riverkeeper would qualify for association standing under New York law.

By contrast, New York State courts apply jurisdictional standing requirements in determining whether an entity is entitled to protest a contract award in an Article 78 proceeding. In *Transactive Corp.*,³⁵ two protesters, Transactive and Check Cashers, sought to vacate a contract award to provide debit card services for recipients of public benefits. The court conferred standing on Transactive due to Transactive's proposed role as the primary subcontractor of a bidder and its leading national position in performing much of the scope of work for other customers.³⁶ The court found, however, that Check Cashers, a trade association for check cashing companies, which could not qualify as a bidder, "lacked standing because its interest does not fall within the zone of interest protected by the State Finance Law."³⁷ The court then addressed only Transactive's arguments against the award.³⁸

Contemporaneous with the Article 78 proceeding, Transactive and Check Cashers also pursued an OSC bid protest.³⁹ Unlike in the court action, the OSC considered at length arguments raised only by Check Cashers—that the contract award was not in the best interest of the state because the awardee was not equipped to provide access to benefits to those living in traditionally underserved neighborhoods, and that the agency improperly failed to consider the impact of the award on existing check cashing services and their employees.⁴⁰

The difference between how courts and the OSC view issues of standing may be best understood as a manifestation of the courts' role to adjudicate disputes presented to them, versus OSC's role to protect taxpayers by ensuring that state contracts are awarded fairly and on competitive terms. While two bites at the apple are better than one for protesters generally, recognizing the OSC's broad view of its role and the source of arguments it may consider in reviewing proposed contracts is especially important for those with questionable standing to maintain a court challenge. Single members of joint ventures, subcontractors, or advocacy groups should assert their protests to the OSC.

The OSC places few limitations on the materials it will consider. Bid protests are presented to the OSC in one of two ways. If the procuring agency has written bid protest procedures, the initial protest should be filed with the contracting agency.⁴¹ If the contracting agency

denies the protest, that determination, and the protest filings and submitted supporting documentation, become part of the record the agency forwards to the OSC, regardless of whether the protester lodges an appeal to the OSC.⁴² Where the contracting agency does not have a protest procedure, or fails to include it in the solicitation, or where the facts gave the protester no reason to know of the basis for its protest, the protester can file its initial protest with the OSC,⁴³ and must do so within 10 business days.⁴⁴

The OSC's conduct in bid protest proceedings, like its contract review role generally, is active and investigative relative to a court's typical posture of adjudicating disputes as they are presented by the parties. Thus, in addition to the procurement record the agency provides to the OSC, the office will raise its own concerns, and engage the contracting agency and offerors for answers.⁴⁵ The OSC may also call a fact-finding hearing or seek additional information from "any outside source."⁴⁶ Unlike somewhat more rigid and formal court proceedings, the OSC takes full advantage of its investigative role.⁴⁷ Moreover, unlike a court, the OSC acknowledges its subject matter expertise, and brings it to bear in its decision making.⁴⁸

Last, one procedural limitation to the OSC forum bears noting. The office does not issue protective orders, and will not accept materials from parties who are not willing to provide copies to all other parties.⁴⁹ Thus, if the assertion of a protest ground alleges that the contracting agency misvaluated part of the protester's proposal that contains trade secret or other proprietary information that the protester is unwilling to reveal, the protester will have to assert that ground in court, if at all.

Substantive Aspects of OSC Bid Protests

While it is difficult to generalize about the substantive advantages and disadvantages for contractors contemplating whether to protest contract awards before the OSC or the courts, or both, it appears that the OSC forum holds two distinct substantive benefits for disappointed offerors. The OSC is less deferential to agency factual findings than are courts, and, accordingly, the OSC appears to be more amenable to sustaining protests. Also, the OSC seems somewhat more concerned than courts with fostering competition as a means to protect the public fisc, thus, the OSC may be more suspicious of solicitations that do not foster robust competition.

The OSC is less deferential to agency fact-finding than courts. In bid protests brought as writ proceedings, New York courts limit their review to determining whether a rational basis exists to support the award decision, and the protester bears the burden of proof for vacating the award.⁵⁰ Thus, the courts will vacate a contract only upon finding that the agency acted arbitrarily in making the award. In conducting its rational basis review a court may not consider the facts *de novo* or substitute its judgment for that of the agency.⁵¹

As the steward of the public fisc, the OSC's standard of review of proposed agency contracts is "not so narrowly confined" as a court's rational basis review.⁵² Rather than being legally prohibited from upsetting an agency's factual determination or judgment, the OSC noted that it "generally" defers to agency fact findings in the agency's area of expertise, and is "reluctant" to substitute its judgment for the agency's.⁵³

The OSC confirmed its fact-finding prerogative in *Matter of Motorola, Inc.*⁵⁴ There, the OSC stated that the office "do[es] not believe that OSC is limited to in its analysis to consideration of whether there was a rational basis for the agency's determination."⁵⁵ Rather, the OSC stated that it is entitled to "conduct a *de novo* review of the record and make its own analysis of the facts pertaining to the procurement."⁵⁶ The OSC also announced that it is more likely to defer to agency factual determinations that are within the technical expertise of the agency and are supported by the record.⁵⁷

In the great majority of cases, OSC determinations will comport with New York State court bid protest decisions, and indeed, most OSC determinations cite such judicial decisions. The court decisions are persuasive, not binding, precedent, however, and New York State courts recognize the OSC's special role in the state's procurement regime.⁵⁸

In sum, the OSC's unique role in state procurements assigns the office a much broader mandate in reviewing agency awards than courts. This mandate is revealed most clearly in the OSC's expansive view of its ability to question the facts contracting agencies present to the office. On balance, a disappointed bidder's chances to prevail should be better before the OSC.

The OSC is particularly suspicious of procurements where competition is restricted. While it is difficult to generalize, the OSC's newly published opinions give the sense that the office is particularly concerned that agencies open their competitions as widely as possible. This characteristic of the OSC's bid protest determinations may best be viewed as a structural protection of the public fisc: free and open competitions, unburdened by restrictions on who may compete, promote the award of contracts that are in the best interests of the state.

The OSC has shown its particular scrutiny and suspicion of structural impediments to competition in several circumstances. In *Tailwind Associates*, the OSC determined that the agency had no justification for requiring offerors to provide IT services to post a \$250,000 letter of credit, which the protester argued dissuaded many small businesses from bidding.⁵⁹ Although the OSC upheld the protest on other grounds, the office doubted whether the costs of this requirement had a corresponding benefit.⁶⁰ Similarly, in *Matter of Konefal*, the OSC upheld the protest where the experience requirement for a concession contract to operate a cafeteria was so specific that the procuring agency received only one responsive bid.⁶¹ While the OSC agreed that it was reasonable

for the agency to require offerors to have high-volume restaurant experience, the office determined that there was no justification for the further restriction that such experience be in the role of a concessionaire.⁶² In reaching this conclusion, the OSC rejected the agency's posited rationale that the concessionaire/contract manager relationship has unique properties.⁶³

The OSC also exerts particularly close scrutiny on "brand name" procurements in which the agency does not adequately consider equivalent products. In *Matter of American Sports & Fitness Services and G&G Fitness Equipment*, the OSC applied the office's previously articulated four-part "compelling interest" test, and rejected a proposed award where the solicitation did not allow substitutions for specified fitness equipment.⁶⁴ While acknowledging that the specified equipment was unique and offered a "slight advantage" over competing brands, the OSC determined that the benefits of the named equipment could be obtained by other brands, and that whatever advantage the named equipment possessed could not justify the resulting price premium.⁶⁵

Conclusion

The New York Office of the State Comptroller plays an important and expert gatekeeping role in the state's procurement system. The office's bid protest determinations are a rich new resource for contractors and their counsel who seek to overturn (or retain) proposed awards from New York State agencies. 

Endnotes

1. See OFFICE OF THE STATE COMPTROLLER (OSC), BID PROTEST DECISIONS listing, at <http://tinyurl.com/mgc3jxe> (last visited February 20, 2015).

2. See OSC, CONTRACT AWARD PROTEST PROCEDURES, § 3(g), at <http://tinyurl.com/prbmw6r> (last visited February 20, 2015).

3. See, e.g., *Matter of Computer Aid, Inc.*, OSC Bid Protest No. SF-20100156, at 5–6 (Oct. 21, 2010) (relying on earlier OSC determinations that required agencies to evaluate all elements of cost); *Matter of Tailwind Associates*, OSC Bid Protest No. SF-20070056, at 7, n.9 (June 11, 2007) (distinguishing cases where the OSC had upheld an agency's requirement that offerors provide a letter of credit from the procurement at hand, where the OSC concluded that the requirement was unjustified); *Matter of American Sports & Fitness Services*, OSC Bid Protest No. SF-0898057, at 4–6 (Sept. 9, 1998) (drawing from earlier determinations the considerations relevant to deciding whether a sole source procurement is in the public interest).

4. The short deadlines that govern bid protest proceedings often effectively defeated the prospect of obtaining relevant OSC bid protest determinations from the office's files through FOIL requests in time to be useful. Further, this process was hit-or-miss, as requesters either had to know of the existence of the determination sought, or had to rely on OSC staff to pull determinations relevant to the issue the requester was researching.

5. The statistics are taken from the "Summary Overviews" of the New York State Comptroller's Procurement Stewardship Act Reports for FY 2009-10 to FY 2013-14. These reports are available at <http://www.osc.state.ny.us/contracts> (last visited February 20, 2015). The awards include procurement contracts, competitive and non-competitive grants, and other contracting vehicles.

6. *Id.*

7. The current threshold triggering OSC review is \$50,000 for most agencies, and \$85,000 for Office of General Services procurements. N.Y. State Finance Law (“SFL”) § 112(2). Special review thresholds apply to some agencies, such as the state university system, and are set by other statutes. *See, e.g.*, N.Y. Education Law § 355(5).

8. SFL § 112(2). The comptroller may extend the 90-day deadline for good cause, or longer with the agreement of the contracting agency. *Id.*

9. OSC, STATE CONTRACTS BY THE NUMBERS: LONGSTANDING CONTRACT OVERSIGHT AUTHORITY SERVES TAXPAYERS (January 2014), at <http://tinyurl.com/q3opd2p> (last visited February 20, 2015).

10. The OSC’s refusal to approve a contract is subject to rational basis review in court. *Konski v. Levitt*, 69 A.D.2d 940 (N.Y. 3d Dept. 1979).

11. *See, e.g.*, *Global Tel*Link v. New York State Dept. of Correctional Servs.*, 70 A.D.3d 1157, 1158 (N.Y. App. Div. (3d Dept. 2010)) (Article 78 proceeding and OSC bid protest litigated simultaneously); *Transactive Corp. v. New York State Dept. of Social Servs.*, 236 A.D.2d 48, 51 (N.Y. App. Div. (3d Dept. 1997)) (Article 78 action commenced before OSC approval of the contract).

12. *See, e.g.*, OSC Procurement Stewardship Act Report for 2013-14 (2,256 contracts non-approved); OSC Procurement Stewardship Act Report for 2012-13 (1,926 contracts non-approved).

13. Of the 2,256 contracts non-approved in 2013-14, the reason given for 1,009 non-approvals was “other (see comments).”

14. For example, in 2013-14, about 750 contracts were non-approved due to errors on the contract encumbrance form, and dozens of other were returned because signatures were missing or required documents were not submitted in the review package.

15. *Id.* (3 instances in 2013-14).

16. *Id.* (1 instance in 2013-14).

17. *Id.* (4 instances in 2013-14).

18. Of course, legal considerations are far from the only relevant factor in a contractor’s decision to protest. Among other things, contractors must also weigh the costs, in financial and distraction/opportunity terms, of protest litigation, and the potential reputational effects with agency officials protesting may carry.

19. Outcomes compiled from OSC Procurement Stewardship Act reports, at <http://www.osc.state.ny.us/contracts> (last visited February 20, 2015).

20. It is proper to include moot protests in the effectiveness rate, as this signals that the awarding agency has taken an action with respect to the protested award that at least in part answers the protester’s concerns.

21. GAO Bid Protest Annual Report to Congress for Fiscal Year 2014, B-158766, Nov. 18, 2014, at p. 7 (reporting effectiveness rates, which combine voluntary corrective actions by agencies and sustained protests, of 42% or 43% in each of the past five fiscal years).

22. OSC Bid Protest No. SF-20100328 (Oct. 26, 2010).

23. *Id.* at 2, n.4.

24. *See* OSC, CONTRACT AWARD PROTEST PROCEDURES, at <http://tinyurl.com/prbmw6r> (last visited February 20, 2015).

25. OSC, CONTRACT AWARD PROTEST PROCEDURE FOR CONTRACT AWARDS SUBJECT TO THE COMPTROLLER’S APPROVAL, at <http://tinyurl.com/nzwu2fu> (last visited February 20, 2015) [hereinafter OSC BID PROTEST PROCEDURES].

26. OSC Bid Protest No. SF-20010084 (March 30, 2001).

27. SFL § 163[10] requires that services contracts be awarded on a “best value” basis, which typically requires an evaluation of technical merit and price. *See* SFL § 163[1][j] (“Best value’ means the basis for awarding contracts for services to the offeror which optimizes quality, cost and efficiency, among responsive and responsible offerors.”).

28. This proposition is self-evident from the observation that there is no statute or regulation establishing OSC’s treatment of bid protests.

29. OSC Bid Protest No. SF-20010084 (March 30, 2001); *see* Matter of Trade-Winds Environmental Restoration, Inc., OSC Bid Protest SF-20070098 (May 18, 2007) (protest upheld and contract returned to the agency unapproved because the solicitation’s formula for weighting offerors’ line item in determining total evaluated prices did not have a close nexus to the agency’s likely actual needs).

30. In Matter of Tailwind Associates, OSC Bid Protest No. SF-20070056 (June 11, 2007), over 10 months elapsed between the issuance of the RFP and the OSC’s determination that the solicitation imposed an unjustified letter of credit requirement.

31. OSC BID PROTEST PROCEDURE § 2(c).

32. OSC Bid Protest No. SF-20100328 (Oct. 26, 2010).

33. OSC Bid Protest No. SF-20100069 (Apr. 1, 2010).

34. Matter of U.S. Filter Operating Services, OSC Bid Protest No. SF-20010084 (March 30, 2001).

35. 236 A.D.2d 48 (N.Y. 1997). The OSC’s *Vector Foiltec* determination relied in part on *Transactive’s* reasoning.

36. *Id.* at 51.

37. *Id.* at 52.

38. *Id.* at 52–54.

39. Matter of Electronic Benefit Transfer Services Contract No. C007589 (Sept. 13, 1996).

40. *Id.* at 11–12.

41. OSC BID PROTEST PROCEDURE § 3(a).

42. OSC BID PROTEST PROCEDURE § 4(a); *see* Matter of Group Health Incorporated & Value Options, OSC Bid Protest No. SF-20080408, at 4 (March 27, 2009) (listing the documents from agency-level protest considered by OSC); Matter of Computer Aid, OSC Bid Protest No. SF-20100156, at 3 (Oct. 21, 2010) (same).

43. OSC BID PROTEST PROCEDURE § 3(a).

44. OSC BID PROTEST PROCEDURE § 3(c).

45. *See* OSC BID PROTEST PROCEDURES § 3(j), § 4(f) (stating that the OSC may require the agency or the contractor parties to address issues raised by the office).

46. OSC BID PROTEST PROCEDURES § 3(j), § 3(k), § 4(f), § 4(g).

47. *See, e.g.*, Matter of Group Health Inc. & Value Options, OSC Bid Protest No. SF-20080408, at 4 (March 27, 2009) (noting that the OSC considered, among other things, correspondence between itself and the contracting agency, a conference call and memorializing e-mail from the agency, agency answers to questions posed by the OSC, and party responses thereto); Matter of Motoral, OSC Bid Protest No. SF-20050147, at 13, n. 12 (Sept. 19, 2005) (noting that the OSC retained a consulting firm to aid the office’s understanding of the technical issues raised in the protest); Matter of U.S. Filter Operating Servs., SF-20010084, at 8 (March 30, 2001) (consulting the New York City Watershed Inspector General for technical assistance regarding the complexity of operating a wastewater treatment plant).

48. *See, e.g.*, Matter of Tailwind Associates, OSC Bid Protest No. SF-20070056, at 7 (June 11, 2007) (noting that “based upon [the office’s] experience,” it could see no reason for the solicitation requirement in question); *id.* (stating that “based upon prior procurements reviewed by [the] Office,” that it would expect more bidders were the offensive solicitation requirement removed).

49. *See* OSC BID PROTEST PROCEDURES § 3(c)-(e), §4(c) (requiring simultaneous delivery of filings to all parties); Matter of U.S. Filter Operating Servs., SF-20010084, at 3, n.3 (March 30, 2001) (rejecting consideration of a filing that the protester informed the OSC contained “confidential proprietary information, not to be shared with others”).

50. *Global Tel*Link v. Department of Correctional Servs.*, 70 A.D.3d 1157, 1158 (N.Y. 3d Dept. 2010); *Brereton & Assocs., Inc. v. Regan*, 94 A.D.2d 886, 887 (N.Y. 3d Dept. 1983).