



STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

December 9, 2010

David A. Hoover, Esq.
Office of the School Attorney
Erie1 BOCES
West Seneca Service Center
355 Harlem Road
West Seneca, New York 14224-1892

RE: RFA#0908070330
SF-20100338

Dear Mr. Hoover:

This letter of determination is in response to the protest (hereinafter "Protest") filed on July 19, 2010 by Erie 1 BOCES (hereinafter "Erie1") of the award by the New York State Department of Health (hereinafter "DOH") to Genesee Valley Educational Partnership (hereinafter "GVEP") for the grants program Comprehensive School Health Policies for Tobacco, Physical Activity and Nutrition, Catchment Area: Niagara, Erie, Orleans, Genesee, and Wyoming counties.

This Office has reviewed the issues raised in the Protest along with our review of the proposed grant awards made by DOH. As part of our review, this Office considered the record submitted to this Office by DOH with the awards under the above-referenced grant program, the issues raised in your July 19 and August 24, 2010 protest letter; letters dated September 3, 2010 and September 15, 2010 from the attorney for DOH answering the protest, a letter dated July 26, 2010 from the superintendant of GVEP answering your letter of July 19;

along with telephone conversations between DOH and this Office.¹ As detailed below, we have determined that the issues raised in your protest are not of sufficient matter to overturn DOH's award to GVEP.

Applicable Statutes

The Comptroller reviews bid protests pursuant to his authority under section 112 of the State Finance Law to review and approve state contracts. Pursuant to section 112(2) of the State Finance Law, expenditure contracts, including grant contracts, awarded by state agencies that exceed \$50,000 are not effective or binding unless approved by the Comptroller.²

Timeliness of Protest

While GVEP asserts that the protest is untimely, it provides no support for this assertion. We find the protest to be timely.

Memorandums of Understanding (hereinafter "MOU's") Not Signed by Authorized Staff Person

You have alleged that GVEP's award should not be approved because the MOU's submitted with its application were not signed by persons authorized to bind the school. In this regard, we note that the Request for Applications (hereinafter "RFA") required that the applicant propose to work with 5-6 school districts within the first 21 months and to attach MOU's from each school district. A sample MOU was provided by DOH for reference.

We asked DOH for clarification on this point. In a telephone conversation, DOH informed us that the MOU's were not intended to be binding contracts, but rather non-binding letters of intent illustrating potential working relationships. Further, in a letter dated September 15, 2010 DOH informed us that a sample MOU, signed by a building principal, was included in the RFA. The DOH states there was no requirement specifying that the MOU submitted with the ap-

¹ This Office contacted DOH to clarify certain aspects of its September 3 letter; additionally, DOH provided additional clarification in its September 15 letter.

² Higher thresholds apply to SUNY, CUNY and OGS.

plication be signed by a school official who could bind the school. We would also note that the application submitted by Erie 1 contains a timeline purporting to have all MOU's signed by the appropriate school official within the first month after the award of the contract (see page 23 of Erie 1 Exhibit 1). This suggests that Erie 1 recognized and understood that the MOU's need not be in final binding format at the time of the application.

We are satisfied that it was understood that the MOUs were non-binding letters of intent, and, therefore, that it was not relevant whether the letters were signed by a person with the legal authority to bind the school district.

Alleged unsigned MOU's

You have alleged that some of the MOU's submitted with GVEP's application lacked any signature and therefore cannot be valid. We requested further clarification from DOH on this issue. DOH provided to us proof that all MOU's were in fact signed. It appears that the copies you were furnished in response to your Freedom of Information Law (FOIL) request were incomplete.

Buffalo Public Schools no longer partnering with GVEP/Effect on Score

You indicate that you were advised that the Buffalo Public Schools notified GVEP that it did not intend to partner with GVEP in this project (see Erie1's July 19, 2010 letter).³ You observe that:

"Presumably [GVEP's] total of 81 points was based in some significant part upon the participation of the largest school system in Western New York; a system with 80% of its students eligible for free and reduced lunch. The reviewers found it notable enough to highlight it as 'strength.'" (see Erie1's July 19, 2010 letter, *citation omitted*).

You allege that this fact alone is sufficient to uphold the protest or at least require re-scoring of GVEP's proposal.

³ This was confirmed by GVEP's July 26, 2010 letter and DOH's September 3, 2010 letter.

The DOH in their September 3, 2010 letter, state they received a notice from Buffalo Public Schools that it would not be executing a MOU with GVEP and that that communication “has no bearing on the award determination process.” Further, DOH states that GVEP “will conduct work with other schools in the catchment area.” As to the presumption that weight given because of Buffalo Public Schools participation with GVEP, DOH states that your presumption “is incorrect.”

We note that the relevant section of the evaluation tool, Section two, relates to the “Statement of Need” and nowhere therein is there any indication that the proposals should be scored on the basis of the specific school districts identified in the proposal, or size or demographics of such school districts. Rather, per the evaluation tool, the section rates the *description of*:

- the proposed catchment area to be served;
- the 5-6 school districts who the proposer will work with in the first 21 months, along with a description of how the proposer will prioritize among the schools; and,
- how the proposer will work with high-need schools.

Therefore, we have no basis to assume that the evaluators based their scores for GVEP in any material respect upon the fact that GVEP had identified the Buffalo Public Schools as one of the districts with which they had an MOU. While you cite Exhibit 9 for your conclusion that weight was given to Buffalo Public Schools’ participation, Exhibit 9 is simply a summary of the team discussion between the evaluators. Notwithstanding such team discussion, the actual evaluations completed by the reviewers do not mention Buffalo Public School’s partnership with GVEP other than to critique GVEP’s proposal that it was unclear if all schools in the Buffalo Public school district would participate.

Accordingly, we have no basis to conclude that failure of Buffalo Public Schools to partner with GVEP is a material factor in the award requiring that your protest be upheld.

Scores not Supported by Statements of Reviewers

First, you allege that the reviewers failed to properly evaluate the applications because they did not support all point deductions. Secondly, you alleged that Reviewer A failed to write an explanation for two of the questions in the evaluation.

We reviewed the instructions for evaluation of the proposals and found that it required that "Scores must be supported by written comments for each section." Furthermore, based upon our review, it appears that, in fact, with one exception discussed below, the evaluators complied with this requirement by providing comments with respect to each section. However, the instructions did not provide that all deductions be specifically addressed in the written comments. Accordingly, we do not find that the reviewers' failure to comment on all point deductions in contravention with the instructions.

As to Reviewer A's failure to support with written comments his score for Erie 1 with respect to two questions, inasmuch as the evaluation instructions specifically state all scores must be explained, we find that Reviewer A failed to comply with this requirement. In order to conduct an appropriate evaluation the evaluators must follow the methodology prescribed by the awarding agency. However, for the reasons set forth below, we find that in this instance Reviewer A's failure to comply with the evaluation instructions amounts to harmless error because this error did not impact the award process. In reaching this conclusion we note that even if the three points deducted by Reviewer A from Erie 1's scores for these questions is restored to Erie 1's score, Erie 1 would still not have scored higher than GVEP.⁴ Therefore, Reviewer A's failure to comply with the evaluation instructions did not impact the results of the award process.

Scoring Inconsistencies

You have alleged there are scoring inconsistencies which favored GVEP. The DOH in their September 15, 2010 states that they do

⁴ Additionally, we note that Reviewer A's scores were in line with Reviewer B and C's.

not believe there are any scoring inconsistencies. Based upon our review of the Procurement Record, with the exception to the two questions discussed above lacking explanation, it appears the reviewers followed the evaluation methodology as set forth in the evaluation instructions. As to the specific scores given for each question, this Office has no basis to substitute its judgment for the technical expertise of DOH.

Conclusion

This Office finds that the award process followed by DOH was reasonable and the evaluation method was adhered to with the exception of a harmless error noted above. Therefore, your Protest is denied and the award to GVEP will be approved.

Sincerely,

A handwritten signature in cursive script, appearing to read "Charlotte E. Breear", written in dark ink.

Charlotte E. Breear
Director, Bureau of Contracts

CEB:arr

cc: Michael Glover – GVEP
Richard Coutant – Health Dept.
Barbara Wallace – Health Dept.