

THOMAS P. DINAPOLI  
STATE COMPTROLLER



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STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

September 23, 2011

Ms. Beatriz Dias-Taveras  
Executive Director  
Catholic Charities Community Services  
1011 First Avenue  
New York, New York 10022

RE: RFA Number 1003220225  
Hunger Prevention and  
Nutrition Assistance Program

Dear Ms. Dias-Taveras:

This letter of determination is in response to the protest (hereinafter "Protest") filed on August 19, 2011, by Catholic Charities Community Services (hereinafter "CCCS") of the awards made by the Department of Health (hereinafter "DOH") for the Hunger Prevention and Nutrition Assistance Program (hereinafter "HPNAP").

The Office of the State Comptroller (hereinafter "this Office") has considered the Protest as well as the records submitted to this Office by DOH with the awards under HPNAP. As detailed below, we have determined that the issues raised in the Protest are not of sufficient merit to overturn DOH's awards under HPNAP.

In the Protest you assert that the evaluation process as established by DOH and outlined in the Request For Proposals (hereinafter "RFP") was not adhered to in a manner that would ensure that proposals were evaluated objectively and fairly. Specifically you make three contentions: 1) the evaluation matrix used by DOH to establish final contract recommendations and funding levels was not made clear in the RFP or any other solicitation documents; 2) no indication was made that a specific amount of funding would be assigned to particular contract types in New York City (hereinafter "NYC") or that there was a threshold for maximum and minimum awards within a contract type, which would have offered greater clarity as to how applicants should structure their proposals; and 3) the use of only one criteria, such as cost per meal, as the sole deciding factor for a funding award was not in accordance with the RFP or the New York State Finance Law (hereinafter "SFL") and New York State Procurement Guidelines.

Preliminarily, we note that SFL §163 generally applies to contracts for goods and services for the State. SFL §160(7) defines "services" as "...the performance of a task or tasks and may include a material good or a quantity of material goods, and which is subject of any purchase or other exchange." SFL §160(7) states that the definition of "services" in that section of the law is not applicable to "...contracts approved in accordance with article eleven-B..." This procurement relates to the award of grant contracts to not-for-profit organizations subject to provisions of Article 11-B of the SFL. Therefore, it is not a procurement for the award of a "service", and, as a result, it is not subject to the provisions of SFL §163 or the Procurement Guidelines.<sup>1</sup> While the resulting contracts are subject to Article 11-B of the SFL, that article is generally concerned with insuring that contracts, renewals, and payments thereunder, are processed in a prompt manner; it does not generally impose procedural requirements with respect to the selection of grant recipients.<sup>2</sup>

Your Protest pertains to the evaluation methodology adopted by DOH to evaluate proposals and determine awards. In evaluating proposals, it appears that DOH first looked at all applicants to determine if they met the mandatory requirements on a pass/fail basis. All applicants who met the mandatory requirements were then evaluated on six distinctive areas, inclusive of over thirty scoring criteria (valued at a maximum of 100 points). If applicants received a qualifying technical score of 65 or higher, they became eligible to receive funding and then grouped by region and service project type (as defined on Pages 3-11 of the RFP). Each geographical region had a predetermined funding amount available for that region, and each specific service type had a pre-determined baseline unit cost associated with it (e.g., food recovery cost per pound of \$.20 or soup kitchen cost per meal of \$1.25). The applicant's total funding request was divided by the proposed number of meals served or pounds of food distributed to determine the unit cost for that applicant. That unit cost was then compared to the established baseline cost. If the applicant's unit cost was below the established baseline cost, that applicant would be eligible to receive a higher award than it would be eligible to receive if its unit cost was above such baseline. However, to the extent that the total funding for a specific region, after providing for guaranteed funding for food banks,<sup>3</sup> was not sufficient to provide each eligible applicant with the full award for which it was eligible, then a process was established to allot the available funding. Specifically, in making awards by region the applicant with the highest score (regardless of service project type) received the full amount it was eligible to receive (or the full amount of available funding for that region after providing for the guaranteed funding to food banks). Thereafter, the next highest scoring applicant would receive the full amount for which it was eligible (or the remaining available funding, if that amount was less), and this process was repeated until all available funding for that region was exhausted.

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<sup>1</sup> The Procurement Guidelines, approved by the State Procurement Council, a council created by Article 11 of the SFL, expressly state in Part I(C) that such guidelines do not apply to "Contracts with not-for-profit organizations covered by Article 11-B of the New York State Finance Law."

<sup>2</sup> This Office has proposed legislation that would create a new Article 11-C to the SFL, which would impose statutory requirements for grant contract awards. While that legislation has not been enacted, we note that the process utilized by DOH in this case would satisfy the requirements of such proposed legislation.

<sup>3</sup> Under this award process, the highest ranking food bank in each region with a qualifying score was guaranteed funding.

The first contention you make in the Protest is that the use of a matrix by a second DOH panel to establish *final contract recommendations and funding levels* was not made clear in the RFP. The RFP issued by DOH, at page 22, stated that:

proposed budgets of those applications receiving scores of 65 or above will be reviewed by a second DOH panel to establish final contract recommendations and funding levels . . . . The panel will review applicant proposals, service areas, county or regional need information and additional benefits offered by the sponsoring agency and services and costs to the state to make selection recommendations.

Although DOH did not expressly state that the second panel would use a formula in establishing the recommendations, the formula it used, because it included consideration of the applicant's technical score, ultimately did consider, either directly or indirectly, all of the factors listed on Page 22 of the RFP and, thus, made final contract funding recommendations consistent with the methodology set out in the RFP. More importantly, the formula was, as required by this Office, developed before the initial receipt of proposals. Additionally, it should be noted that DOH is not statutorily required to provide specific elements of the evaluation tool, such as the formula, which might influence the applicant's response.<sup>4</sup> This Office does require, at a minimum, that the state agency disclose in the RFP the weight given to each evaluation category; and we note that DOH provided that information on Pages 21 and 22 of the RFP.

The second contention you make in the Protest is that there was no indication in the RFP or at the bidders conference that HPNAP intended to assign a specific amount of funding to a particular contract type in NYC or that there was a threshold for maximum and minimum awards within a contract type. As stated above, on Page 22 of the RFP, DOH states that they will use regional criteria to award grants. The allocation and distribution of funding on a geographical basis is commonly used by grant-making State agencies to ensure that resources are allocated to the areas with the greatest levels of unmet need. In addition, the RFP on Page 1 indicates that it is anticipated that \$29.7 million will be available. On Page 2, Section II, Paragraph A, the RFP requires a minimum application budget of \$100,000, thus some funding parameters are indicated. Furthermore, as noted in connection with our analysis of your first contention, DOH was not required to disclose the detailed evaluation methodology in the RFP. Indeed, disclosing the baseline costs used in determining the amount of funding to be awarded to applicants might result in applicants structuring their bids to meet the baseline numbers. The method utilized by DOH resulted in the submission of sound numbers by the applicants and allowed DOH to make awards accordingly.

The third contention you make in the Protest is that DOH used only one criterion (cost per meal) as the sole deciding factor for a funding award, and that this was not consistent with

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<sup>4</sup> Indeed, even if this were a procurement subject to SFL §163, which as discussed previously it is not, the agency would not be obligated to disclose the entire evaluation methodology in the RFP. Rather, section 163(7) requires only that the agency establish the evaluation methodology prior to the initial receipt of offers, and document such methodology in the procurement record. As noted in the text, DOH did so here.

the more detailed evaluation methodology described in the RFP.<sup>5</sup> However, as described previously, an applicant had to first pass the review for compliance with mandatory requirements **and** receive a qualifying score of 65 on their technical evaluation, in order to even be eligible for an award. Furthermore, while it is true that with respect to New York City, the sole basis for determining the funding level for each applicant receiving an award was the relationship of the applicant's unit cost to the pre-determined baseline unit cost (because the funding allocated to that region was sufficient to provide each qualifying applicant with the full amount for which it was eligible), this was not the case in all regions, nor was this known in advance. Other regions were not allotted sufficient funding to be able to award all of the qualifying applicants in that region the amount they were eligible to receive and, as a result, some qualifying applicants with lower, but still qualifying, technical scores did not receive any funding, or did not receive the full amount for which they were eligible.

As noted above, the funding budget allotted to New York City, however, was sufficient to fund awards to all the qualifying applicants in that region for the amounts they were eligible to receive. Since your cost per meal was greater than the baseline cost of \$0.25, you were eligible to receive only the lower funding amount of \$150,000, and indeed were awarded that amount. This evaluation methodology was consistent with the methodology described by DOH in the RFP at Page 22.

For the reasons outlined above, this Office finds that the award process followed by DOH was reasonable and that DOH adhered to the evaluation methodology. Thus, the Protest lacks sufficient merit to overturn the awards made by DOH. The Protest is hereby denied, and this Office will be approving the awards made by DOH under this procurement.

Sincerely,



Charlotte E. Breeyear  
Director, Bureau of Contracts

CEB:arr

cc: Lewis Clark, DOH

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<sup>5</sup> In your third contention, you also assert that DOH's actions were "not in accordance with State Finance the New York State Procurement Guidelines." We assume you intended to reference Article 11 of the SFL and the Procurement Guidelines. However, as noted previously, this procurement is not subject to Article 11, and there are no other statutes imposing procedural requirements with respect to the selection of grant recipients. Furthermore, as noted in footnote 1, the Procurement Guidelines are not applicable to this type of grant procurement.