

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by
New Broadview Manor Home for Adults, LLC
with respect to the funding awards for the
Superstorm Sandy Social Services Block
Grant

**Determination
of Appeal**

**SF-20140147
April 14, 2014**

The Office of the State Comptroller (OSC) has completed its review of the above-referenced funding awards for the Superstorm Sandy Social Services Block Grant. We have determined that the grounds advanced by New Broadview Manor Home for Adults, LLC (Protestor) are insufficient to merit the overturning of the funding awards by the various New York State agencies involved in this procurement and, therefore, deny the appeal.

BACKGROUND

Facts

On July 5, 2013, the Office of Children and Family Services (OCFS) issued a Request for Proposals (RFP) seeking applications for the distribution of \$200,034,600 in federal Superstorm Sandy Social Services Block Grant (Grant) funding from eligible health and human services providers. The Grant resources were dedicated to covering necessary expenses resulting from Superstorm Sandy, including social, health and mental health services for individuals, and for "repair, renovation and rebuilding" of health care facilities, mental hygiene facilities, child care facilities and other social services facilities. The funding was allocated to address four specific "Focus Areas": (A) repair, renovation and rebuilding; (B) uncompensated operational costs, including provision of critical services during/after Superstorm Sandy; (C) ongoing support and social services for those impacted by Superstorm Sandy; and (D) flexibility to ensure that additional eligible social services needs resulting from Superstorm Sandy can be addressed. Each Focus Area was then tied to one or more specifically defined "Funding Opportunities." Applicants were permitted to apply for one or multiple Funding Opportunities.

Although OCFS administered the procurement, the selection process was a multi-agency effort between OCFS and several other New York State agencies. OCFS received the responses to the RFP and then distributed them to a "Lead Agency" based on the scope of the applicant's proposal and whether the applicant had an existing relationship with one of the agencies involved in the procurement. The Lead Agency was then responsible for scoring the application based on an established selection process and criteria. Once the final award list was determined (after an additional inter-

agency review), the Lead Agency was also responsible for contract development and processing.

On August 30, 2013, the Protestor submitted its proposal for Grant funding under the first Focus Area for repair, renovation and rebuilding for which there was only a single funding opportunity, Funding Opportunity 1, and asked for \$240,000 to purchase and install a new generator. In its proposal, the Protestor explained that, during Superstorm Sandy, its facility lost power for four days and experienced a large amount of property damage and first floor flooding. This created a severe disruption to its operations and to the comfort of its elderly residents. The Protestor proposed that having a generator would prevent a similar incurrence of expense and inconvenience in the event of a future storm.

In October 2013, the Lead Agencies notified applicants of their eligibility for an award under the Grant. The New York State Department of Health (DOH), as the Lead Agency for the Protestor's proposal, determined that the purchase and installation of a new generator did not meet the eligibility criteria for any of the Grant's Funding Opportunities. Thereafter, the Protestor sought an informal review of that decision and, later, submitted a formal protest and appeal to DOH. The Superstorm Sandy Grant Team and DOH found the Protestor's arguments unavailing and denied the protest and appeal. After fully exhausting the protest procedure outlined in the RFP, the Protestor filed an appeal with our Office on March 4, 2014 (Appeal).

Procedures and Comptroller's Authority

Under Section 112(2) of the State Finance Law (SFL), before any contract made for or by a state agency, which exceeds fifty thousand dollars (\$50,000) in amount, becomes effective it must be approved by the Comptroller.¹

In carrying out the aforementioned responsibilities proscribed by SFL §112, this Office has issued Contract Award Protest Procedures that govern the process to be used when an interested party challenges a contract award by a State agency.² These procedures govern initial protests to this Office of agency contract awards and contract awards made by this Office and appeals of agency protest determinations. Because this is an appeal of an agency Protest decision, the Appeal is governed by this Office's procedures for protest appeals.

In the determination of this Appeal, this Office considered:

1. The documentation contained in the procurement record forwarded to this Office by OCFS with respect to the funding awards, including the agency-level protest and appeal filed with the Superstorm Sandy Grant Team and DOH, respectively.

¹ SFL §112(2).

² OSC Guide to Financial Operations, Chapter XI.17.

2. the correspondence between this Office and OCFS arising out of our review of the proposed Grant funding awards; and
3. The Appeal, dated March 4, 2014 (including the attachments thereto).

ANALYSIS OF BID PROTEST

Protest to this Office

In its Appeal, the Protestor challenges the decision by OCFS and DOH to reject its proposal on the ground that such determination is inconsistent with the terms of the RFP and written responses to questions issued by OCFS.

DISCUSSION

The rationale offered by OCFS and DOH (together with the other Lead Agencies for this procurement, collectively the State Agencies) for denying Grant funding to the Protestor was that "[future preparedness resources not previously owned by the applicant were ineligible for reimbursement under the [Grant]" in a letter from DOH to Caitlin Monjeau, dated February 20, 2014. In an earlier email, OCFS further elaborated that Grant funds "could be used to repair or replace a generator or its connections that were damaged or destroyed by Hurricane Sandy, but not be used to prevent or mitigate future loss of electrical power by purchasing a generator in the first instance." E-mail from Super Storm Sandy SSBG Team to Caitlin Monjeau, dated October 16, 2013. In short, the Protestor was told that proposals to repair generators were eligible to receive Grant funding, but proposals to install new generators were not. OCFS has demonstrated that this standard was applied consistently to all proposals received in response to the RFP.

The Protestor does not dispute that its proposal was to reimburse costs associated with the purchase and installation of a new back-up generator, and that its proposal did not seek reimbursement of expenses related to damage actually sustained during Hurricane Sandy. E-mail from Caitlin Monjeau to Super Storm Sandy SSBG Team, dated October 15, 2013; Protest letter from Caitlin Monjeau to State Agencies, dated October 22, 2013. Indeed, in its proposal, the Protestor explicitly stated that the purpose of its request was to protect against "future catastrophic weather events" and that the proposal "is one for future expenditures" in the Protestor's proposal, at p. 2, 10. However, the Protestor contends that Funding Opportunity 1 under the RFP allowed for such funding. Thus, the resolution of the Appeal turns on the interpretation of the RFP's eligibility requirements.

At the outset, we note that the operating principle of state procurement is that the competitive process be fair. See e.g. Conduit and Foundation Corp. v Metropolitan Transp. Auth., 66 NY2d 144, 148 (1985). Furthermore, bid specifications must be sufficiently clear to enable intelligent bidding and not deter qualified bidders from

bidding in the first instance. See Sagamore Auto Body, Inc. v County of Nassau, 104 AD2d 818, 821 (2d Dept 1984).

Turning to the specifics of the RFP, Funding Opportunity 1 was aimed at “repair, renovation and rebuilding” for eligible facilities and, more specifically, would fund “[u]reimbursed costs of facility repair, rebuilding and renovation, *including installation of back-up power systems....*” RFP, at 4-5 (emphasis added). The Protestor points to this language, as well as language in the Questions and Answers (Q&A) document, for its contention that its proposal should have been granted funding. In the relevant Q&A, a potential proposer explained that (similar to the Protestor) it had lost power during Hurricane Sandy and that it would like to install a back-up generator if a portion of the cost could be recouped. The State Agencies answered “[i]f a facility was damaged by Sandy, the organization may include as part of its repair, rebuilding or renovation plan, costs to improve resiliency, which may include the installation of a backup power system.” Q&A, at p. 7. Furthermore, the Protestor cites page 11 of the RFP where “Resiliency” is listed as one of its evaluation criteria and defined such criteria as follows: “While addressing the immediate needs of those impacted by Superstorm Sandy, how does the proposal, as a collateral benefit, also promote future resiliency by addressing location- and population-based vulnerabilities and, for capital projects, proposing to rebuild/repair to a greater level of resilience?” The Protestor argues that the above quoted language “is absolutely clear” that facilities damaged by the storm could propose reimbursement for new back-up generators, even if such generator is unrelated to the damage actually sustained. Appeal, at 1 (see also Protest letter from Caitlin Monjeau to State Agencies, dated October 22, 2013 [“the question and answer here plainly contemplated the addition of a power system where there was none before”).

Preliminarily, we acknowledge that the RFP and Q&A language cited by the Protester could have been clearer. Ultimately, however, any issue concerning the clarity of the RFP is irrelevant in this case because, as outlined below, OCFS has documented that the Federal Government prohibited this federally-funded Grant from being used to mitigate potential effects of a future storm. Specifically, in the Questions and Answers document issued by the Office of Community Services, the Federal agency responsible for administering the Grant to the states, a question was asked “can this money be used to purchase future supplies and/or equipment which will aid in future disasters?” and the answer from the federal agency was “No, 2013 Supplemental SSBG Funds cannot be used to purchase supplies and/or equipment that will aid in future disasters. The supplemental SSBG funds are solely to address necessary expenses resulting from Hurricane Sandy.” Although the Protestor described how its facility was damaged during Hurricane Sandy, those damages did not include injury to an existing generator that needed to be replaced. Instead (and as conceded by the Protestor), the generator was intended to prevent a power outage during a future disaster. Under the standards imposed by the Federal agency administering these federal funds, such expenditure is not eligible. Clearly, the State could not award a grant for purposes that were not permitted under the Federal guidelines.

Furthermore, notwithstanding any issues concerning the clarity of the RFP or the State Agencies' Q&A, we are satisfied that this procurement process was conducted in a fair manner, and that any asserted ambiguities did not impair participation by any potential recipient. Our review of the procurement record indicates that the State Agencies applied the same eligibility criteria to all applicants. Additionally, even if other potential applicants were to have interpreted the eligibility criteria in the manner advanced by the Protestor, such an interpretation would not have deterred any potentially qualified applicants.

CONCLUSION

For the reasons outlined above, we have determined that OCFS and DOH properly interpreted the eligibility criteria for Funding Opportunity 1. Since the Protestor's proposal sought to fund a generator that was not damaged or directly impacted during Hurricane Sandy, that proposal was, under the restrictions imposed by the Federal government, ineligible for funding. As a result, the Appeal is denied.