

THOMAS P. DiNAPOLI
STATE COMPTROLLER



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ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

September 14, 2015

Carrie Laney
Executive Director
New York State Preferred Source Program
for People Who Are Blind
136 State Street, 2nd Floor
Albany, NY 12207

Dear Ms. Laney:

Re: Bid Protest Filed by NYSPSP Regarding
New York State Office for the Prevention of
Domestic Violence for New York State
Domestic and Sexual Violence Hotline –
SF20150249

I am writing in response to your protest letter dated August 20, 2015, challenging the award made by the New York State Office for the Prevention of Domestic Violence (OPDV) for a New York State Domestic and Sexual Violence Hotline (Hotline Contract).

In your protest, you assert that the New York State Preferred Source Program for People Who Are Blind (NYSPSP) should have been accorded first priority in the award of the contract as the Preferred Source vendor for call center services, as required by State Finance Law (SFL), Article 11. As stated in your protest and accompanying correspondence, it appears that OPDV contends: i) the Hotline Contract was a grant award and, thus, is not subject to the Preferred Source priority requirements under SFL Article 11; and ii) NYSPSP's proposal did not meet the form, function, and utility of the required services.

Article 11 of the SFL sets forth the process by which State agencies purchase commodities and services. However, "Contracts approved in accordance with [SFL Article 11-B]" are expressly carved out of the definition of "services" under Article 11 (SFL § 160[7]). Grant contracts are governed by SFL Article 11-B and, therefore, such contracts are not subject to the requirements of Article 11, including the preferred source/first priority requirements.

Since the law does not define what a "grant" procurement is, this Office initially asked OPDV to provide an analysis to support its position that the Hotline Contract was awarded as a grant. In an e-mail to this Office dated August 25, 2015, OPDV relied upon several factors,

including: i) the funding source for the Hotline contract deriving from the New York State General Fund Local Assistance budget bill which provides funding for many community-based initiatives across various State agencies aimed at benefiting all New York State citizens, rather than funding services to aid a particular agency's mission; ii) this funding source supports the OPDV Local Assistance appropriation which has historically provided funding for several domestic violence support initiatives; and iii) the fact that OPDV is not legally required to provide a domestic violence hotline; again, an indication that this is not a contract for services that OPDV would otherwise be required to provide.

Additionally, OPDV conducted the procurement for the Hotline Contract through the New York State Grants Gateway – the online system for coordinating and processing grant opportunities in the State. Based on the above factors and the general nature of the procurement, OPDV identified the Hotline Contract as a grant contract, rather than a contract for services subject to SFL Article 11. We find no reason to disagree with OPDV's classification of the Hotline Contract as a grant contract. Consequently, the Hotline Contract is governed by SFL Article 11-B and is not subject to the Preferred Source priority requirements in SFL Article 11.

OPDV additionally determined that NYSPSP's proposal did not meet the agency's form, function, and utility in this instance. Since we have determined that the Hotline Contract was the result of a grant award (and, therefore, not subject to SFL Article 11), we need not address this issue, but take this opportunity to offer the following observations. While, as you note in your letter, OGS has issued guidance indicating that, when making a purchase under SFL Article 11, agencies should use every effort to purchase from a Preferred Source, that same guidance also makes clear that ultimately, "the purchasing agency shall determine whether the service is in the form, function and utility required by the agency" (NYS Procurement Bulletin, Preferred Source Guidelines, <http://www.ogs.state.ny.us/procurecounc/pdfdoc/psguide.pdf>).

Moreover, notwithstanding the Comptroller's broad contract review authority under State Finance Law § 112, this Office generally gives significant deference to agency determinations regarding factual issues which are within the agency's technical expertise. Here, OPDV is the state agency charged with advising the Governor and Legislature on the most effective ways for state government to respond to the problem of domestic violence (*see* Executive Law § 575). In fulfilling this role, OPDV consults with experts in the field of domestic violence and acts as an advocate for domestic violence victims and programs. OPDV issued a Request for Proposals for the Hotline Contract that required detailed technical responses. In looking at NYSPSP's proposal, OPDV concluded a more experienced domestic violence service provider was needed. Under these circumstances, we would generally not disturb that determination.

For the reasons outlined above, this Office does not find sufficient merit to uphold your protest and will proceed in its review of the grant award. While unfortunately, NYSPSP did not receive a funding award from OPDV under the current program, we hope that you will continue to pursue other funding opportunities that New York State makes available.

In the event that your organization wishes to compete for a grant award in the future, please be advised that not-for-profit vendors looking to participate in grant procurements are required to prequalify on the Grants Gateway prior to submitting an application for a grant. In fact, state

agencies are instructed not to evaluate proposals for grant opportunities from vendors that are not prequalified in the Grants Gateway.¹ For more information on participating in State grant procurements, please visit www.grantsreform.ny.gov.

Sincerely,


Charlotte E. Breeyear
Director of Contracts

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cc: Christa M. Book, New York State Office for the Prevention of Domestic Violence

¹ New York State Budget Bulletin H-1032: New York State Grants Reform,
<https://www.budget.ny.gov/guide/bprm/bulletins/h-1032rev.html>.