

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Hudson Guild Inc., with respect to the grant awards for the Advantage After School Program.

**Determination
of Appeal**

Procurement Record – CFS01-0000164-3400000

SF-20190199

January 3, 2020

The Office of the State Comptroller has reviewed the above-referenced grant awards for the Advantage Afterschool Program made by the New York State Office of Children and Family Services (OCFS). We have determined the grounds advanced by Hudson Guild Inc. (Hudson) are insufficient to merit overturning OCFS' decision to disqualify Hudson's grant application from consideration and, therefore, we deny the Appeal.

BACKGROUND

Facts

OCFS's mission is to serve New York's public by promoting the safety, permanency and well-being of New York's children, families and communities. As part of its mission, OCFS administers the Advantage After School Program (Program). OCFS issued a Request for Proposals (RFP) on May 3, 2019, seeking proposals "for the development and/or continuation of quality after-school programs in partnership with local schools/school districts for the [Program]" (RFP, at pg. 1). Offerors could be awarded up to three contracts under the RFP and were required to submit separate proposals for each region (*see* RFP, Section 2.3, at pg. 10). In addition, offerors could identify a maximum of two program sites within the same region/proposal (*Id.*; *see also* RFP, Section 6.2, at pg. 51). The RFP required offerors to submit a separate partnership agreement for each site (*see* RFP, Section 3.1, at pg. 12).

OCFS scored proposals according to an evaluation instrument established prior to the receipt of proposals and those proposals receiving an average score of at least 75 points were considered for award (*see* RFP, Section 6.2, at pg. 51). Funding was awarded based on highest to lowest average score within a region, or, in the case of New York City, within each borough (*Id.*).

Hudson submitted a proposal by the due date set forth in the RFP. However, on July 31, 2019, OCFS notified Hudson it was unable to accept Hudson's proposal because Hudson failed to submit a partnership agreement for each site to be served. By letter dated August 21, 2019, Hudson filed a protest with OCFS challenging OCFS' rejection of Hudson's proposal. OCFS denied Hudson's protest by letter dated September 16, 2019. Hudson appealed OCFS' denial by letter dated October 1, 2019 and OCFS denied Hudson's appeal by letter dated October 21, 2019.

Hudson filed an appeal with this Office by letter dated November 4, 2019 (Appeal) and OCFS responded to the Appeal by letter dated December 5, 2019 (Answer).

Comptroller's Authority and Procedures

Under State Finance Law (SFL) § 112(2), with certain limited exceptions, before any contract made for or by a state agency which exceeds fifty thousand dollars becomes effective, it must be approved by the Comptroller.

In carrying out this contract approval responsibility, OSC has promulgated a Contract Award Protest Procedure (OSC Protest Procedure) governing the process to be used by an interested party seeking to challenge a contract award by a State agency.¹ This procedure governs initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because this is an appeal of an agency protest decision, the Appeal is governed by section 24.5 of the OSC Protest Procedure.

In the determination of the Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by OCFS with respect to the grant awards;
2. the correspondence between this Office and OCFS arising out of our review of the grant awards; and
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. Hudson's Appeal dated November 4, 2019; and
 - b. OCFS' Answer dated December 5, 2019.

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, Hudson challenges the decision of OCFS to disqualify Hudson's proposal on the following grounds:

1. While Hudson does not dispute it failed to submit a partnership agreement for the second site identified in its proposal in error, OCFS failed to apply the provisions in the RFP which were designed to address such a mistake.

¹ 2 NYCRR Part 24.

OCFS Response to the Appeal

In its Answer, OCFS contends the Appeal should be rejected on the following grounds:

1. The RFP required offerors to submit a partnership agreement for each site, which Hudson did not do, and therefore, OCFS disqualified Hudson's proposal as non-responsive for failing to meet the minimum requirements set forth in the RFP. Furthermore, offerors not meeting the minimum qualifications to bid are not permitted to submit new materials after the deadline for submission of proposals.

DISCUSSION

Partnership Agreement for each Site as a Minimum Qualification

Hudson acknowledges it failed to submit a partnership agreement for one of two sites contained in its proposal but regards this oversight as a technical error attributable to a misunderstanding of the RFP's instructions (*see* Appeal, at pg. 1). OCFS responds Hudson's proposal did not include a partnership agreement for the second site and thus, did not meet the RFP's minimum qualifications, and, as a result, OCFS disqualified Hudson's proposal (*see* Answer, at pg. 2).

Hudson claims it misread the instructions for Attachment #7 (Partnership Agreement between Community-based Organization and School) to the RFP as requiring an agreement for each partner (instead of each site) (*see* Appeal, at pg. 1). However, Attachment #7 clearly instructs an offeror to "[c]omplete a separate Attachment 7 for each site the applicant proposes to serve" (RFP, Attachment #7, *emphasis added*). Furthermore, the RFP contains four additional instructions to applicants directing the submission of a partnership agreement for each site (*see* RFP, Sections 3.1, 5.4 and 10.0, at pgs. 12, 43 and 71).

The RFP describes the partnership agreement as "the relationship between the school and the applicant organization [which] is one of the most critical elements in operating a successful program" (RFP, Section 5.3, at pg. 43). Further, the RFP clearly listed the partnership agreement as a minimum qualification to be eligible to apply (*see* RFP, Section 3.1, at pg. 12). Finally, the RFP provided that "[b]idders must meet the Minimum Qualifications to submit a Proposal [and] Bidders not meeting these requirements will be disqualified from further consideration" (RFP, Section 6.1, at pg. 51).

Based on the foregoing, it appears clear that the OCFS deemed the submission of a partnership agreement for each site as a minimum qualification to be eligible to apply for funding. Since Hudson failed to satisfy this requirement, we have no basis to upset OCFS's decision to find Hudson's proposal nonresponsive and disqualify it from consideration.

Waiver of Partnership Agreement Specification

Hudson further claims OCFS “failed to apply its own provision designed to address such mistakes, which exists to ensure that children are not denied service because otherwise meritorious proposals contain a ministerial error” (Appeal, at pg. 2). Hudson asserts its oversight warranted clarification or technical correction since the mistake did not affect the structure of its proposal or the design or quality of the services proposed.

(*Id.*). OCFS contends the rights to clarify or correct errors it reserved in the RFP do not apply to Hudson’s proposal since its proposal did not meet the minimum qualifications to bid, rendering the proposal nonresponsive (*see* Answer, at pgs. 2-3).

It is generally understood that a procuring entity may waive technical non-compliance with bid specifications or requirements if the defect is a mere irregularity and it is in the best interest of the procuring agency to do so (*see* OSC Bid Protest Determination SF20100328; *Le Cesse Bros. Contracting, Inc. v. Town Board of the Town of Williamson*, 62 AD2d 28 [1978]). However, the procuring entity may not waive a material or substantial requirement, and a proposal would have to satisfy each and every material specification to be considered responsive (*Id.*). A variance is material if it would impair the interests of the contracting public entity, place the successful bidder in a position of unfair economic advantage or place other bidders or potential bidders at a competitive disadvantage (*see* *Cataract Disposal, Inc. v. Town of Newfane*, 53 N.Y.2d 266 [1981]; *Fischbach & Moore v. NYC Transit Authority*, 79 A.D.2d 14 [2nd Dept. 1981]; *Glen Truck Sales & Service, Inc. v. Sirignano*, 31 Misc.2d 1027 [Sup Ct Westchester County, 1961]).

In this case, Hudson argues that “correcting [the omission of a partnership agreement for the second site] does not prejudice any other competing proposer. A non-substantive correction in the Minimum Qualifications section creates no harm to any other program. Moreover, all proposers are notified that OCFS has reserved itself the right clarify and seek correction of a non-substantive, ministerial error in a proposal” (Appeal, at pg. 2).

However, as discussed above, OCFS found that the partnership agreement requirement was a material or substantial requirement that was not correctable. Furthermore, even if we were to assume that the partnership requirement was not a material requirement, an agency’s decision as to whether or not to waive a non-material deviation is within its discretion (*see* *L. J. Coppola, Inc. v. Park Mechanical Corp.*, 131 AD2d 641 [2nd Dept 1987], OSC Bid Protest Determination SF20120222). An agency may decline a bid which fails to comply with the literal requirements of the specifications (*see* *Le Cesse Bros. Contracting, Inc. v. Town Board of the Town of Williamson*, *supra*, OSC Bid Protest Determination SF20010182).

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the determination of OCFS to disqualify Hudson’s grant application from consideration. As a result, the Appeal is denied.