

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by The Legal Aid Society of Rockland County, Inc. with respect to the grant awards for the delivery of civil legal services to low-income persons and the improvement of the administration of justice made by the Interest on Lawyer Account Fund of the State of New York.

**Determination
of Bid Protest**

SF-20210070

October 15, 2021

Procurement Record – IOL01-0000022-1210200

The Office of the State Comptroller has reviewed the above-referenced grant awards made by the Interest on Lawyer Account Fund of the State of New York (IOLA) for the delivery of civil legal services to low-income persons and the improvement of the administration of justice. We have determined the grounds advanced by the Legal Aid Society of Rockland County, Inc. (LASRC) are insufficient to merit overturning the grant awards made by IOLA and, therefore, we deny the Protest.

BACKGROUND

Facts

IOLA's mission is to "support those qualified non-profit organizations throughout New York State that will most efficiently and effectively provide stable, economical and high quality civil legal representation to eligible clients and will improve the administration of justice" (IOLA FY 2022 & 2023 Grant Cycle Application Instructions and Forms, hereinafter referred to as the RFP, at p. 2; *see* State Finance Law (SFL) §§ 97-v(3)(a), (f); *see also* 21 NYCRR Part 7000). To further this mission, IOLA is responsible for disbursing grant funds to not-for-profit tax-exempt entities for the purpose of delivering civil legal services (CLS) to low-income persons and for purposes related to the improvement of the administration of justice (AOJ) (*see* SFL § 97-v(3)(a); 21 NYCRR § 7000.5).

In December 2020, IOLA released a request for proposals for the IOLA grant cycle for fiscal years 2022 and 2023 seeking applications to fund not-for-profit providers of CLS and AOJ services across the State (*see* RFP, at pp. 2-3). The RFP specified criteria for CLS and AOJ providers¹ and indicated that IOLA would make the final determination as to whether an applicant

¹ The RFP, which mirrored IOLA's Board of Trustee's regulations, stated that CLS providers would "provide direct civil legal services in multiple substantive areas without charge to low income persons within particular geographical areas in New York State." AOJ providers would:

Provide[] services that seek to:

- (a) enhance civil legal services to low income persons through innovative and cost-effective means;

was CLS or AOJ, using criteria found in 21 NYCRR § 7000.12 and based on a review of the application and supporting documentation submitted (*Id.*, at p. 3).

The RFP provided that IOLA staff and the Board of Trustees would review each applicant's eligibility as well as budget and financial information, and evaluate each application; however, the "full Board of Trustees makes grant decisions" (*Id.*, at p. 17). The RFP made clear that applications would be evaluated as follows: supporting documents (2 points each for a total of 6 points); program specific narrative, including community need (10 points), organizational strength (19 points), and program description (40 points); financial evaluation, including current budget, revenue and staffing (10 points), and financial narrative (10 points); and, existing grantee in good standing (5 points) (*Id.*, at p. 18). An applicant could be awarded up to a total of 100 points, up to 3 points could be deducted for formatting errors, and an application needed to score 85 points or above to be eligible for funding (*Id.*). Potential applicants were provided with the opportunity to ask questions prior to the deadline for application submission, and IOLA provided responses to such questions publicly on January 15, 2021.

Applications that were received by the due date of January 22, 2021 were evaluated by the Executive Director and General Counsel of IOLA. The evaluators presented their recommendations for funding, based on applicants who received scores of 85 and above, to the Board's Grants Committee. Once approved by the Grants Committee, the Committee forwarded the staff recommendations to the full Board which approved the list of applicants on March 17, 2021.

LASRC received notice on March 17, 2021 that it was not awarded a grant. LASRC requested a debriefing, which was held with IOLA on April 20, 2021. Thereafter, LASRC filed a protest with this Office on April 27, 2021 (Protest). IOLA submitted an answer on May 10, 2021 (Answer). LASRC replied to IOLA's answer on May 13, 2021 (Reply).

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 the 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.² This procedure governs

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- (b) provide direct civil legal services either to groups of clients currently underserved by legal services (such as the elderly or disabled), or in an area of representation (whether substantive or geographical) that cannot be or is not effectively served by individual qualified legal services providers;
 - (c) provide legal, management or operational training, or legal, management, support service, or technical assistance, or direct legal assistance, informational advocacy or litigation support to qualified legal services providers; or
 - (d) otherwise promote the improvement of the administration of justice.

(RFP, at p. 3; *see* 21 NYCRR § 7000.12).

² 2 NYCRR Part 24.

initial protests to this Office of agency contract awards and appeals of agency protest determinations. Because there was no protest process engaged in at the department level, the Protest is governed by section 24.4 of the OSC Protest Procedure.

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by IOLA with respect to the grant awards;
2. the correspondence between this Office and IOLA arising out of our review of the grant awards; and,
3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. LASRC's Protest;
 - b. IOLA's Answer; and,
 - c. LASRC's Reply.

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, LASRC challenges the decision by IOLA to deny funding of its application on the following grounds:

1. IOLA's scoring of applications was arbitrary, subjective, and inconsistent and did not satisfy the requirements of SFL § 163;
2. IOLA abused its discretion by unilaterally and arbitrarily deciding that LASRC's application was for AOJ funding rather than CLS funding; and,
3. The debriefing provided to LASRC by IOLA was deficient because IOLA refused to permit the debriefing to be recorded or transcribed.³

IOLA Response to the Protest

In its Answer, IOLA contends the Protest should be rejected on the following grounds:

1. Grant contracts to non-profit organizations are expressly carved out of the strict competitive bidding rules set out in SFL § 163;

³ It is undisputed that there is no requirement, statutory or otherwise, that a debriefing in this matter be recorded or transcribed (*see* Reply, at pp. 20-21 (“LASRC does not argue that IOLA was *required* to record the debriefing.”)). LASRC concedes “the refusal to have the Debriefing recorded or transcribed is not sufficient, in and of itself, to overturn or alter IOLA’s contract award” and thus, not proper grounds for protesting the contract award (*see* Protest, at p. 34). Since LASRC’s allegation that the debriefing was deficient is based solely on IOLA’s refusal to permit the debriefing to be recorded or transcribed, this Determination will not address that allegation.

2. IOLA followed a fair evaluation process for its RFP, and scored LASRC's application consistently with the RFP;
3. IOLA followed the RFP with respect to designating CLS and AOJ and properly determined LASRC should be considered AOJ. Moreover, IOLA's designation of LASRC as AOJ had no effect on LASRC's score; and,
4. IOLA properly handled the debriefing with LASRC.⁴

LASRC Reply to the Answer

In its Reply, LASRC further expounds upon the original arguments raised in the Protest.

DISCUSSION

Scoring Methodology

LASRC contends that "IOLA's scoring system is arbitrary, subjective, and inconsistent" (Protest, at pp. 28-31).⁵ LASRC further contends that "IOLA's evaluation tool is far from specific enough to ensure a fair scoring process" and "[t]he actual scoring sheet . . . uses extremely vague criteria that are capable of significant manipulation" (Reply, at pp. 3, 6). In further support of its position, LASRC alleges that the two IOLA evaluators "were not independent and unbiased enough to ensure a fair evaluation process" due to the lack of any "[training] materials [to] help[] create uniformity in scoring," "the lack of "written comments" by the evaluators, and one evaluator's involvement in "exert[ing] pressure on LASRC to merge with Legal Services of the Hudson Valley" (*Id.*, at pp. 3, 8-9).⁶

IOLA responds "[t]he fairness of IOLA's RFP is based on whether (1) IOLA's scoring system was clear and (2) the scores were reasonable" (Answer, at p. 5 (*citing* OSC Bid Protest Decision SF-20150159)). IOLA claims that it "set out a scoring rubric in its RFP and scored LASRC consistently with that RFP" (*Id.*, at p. 5). To further bolster its position, IOLA states it "employed appropriate legal professionals with extensive experience and expertise" to conduct the evaluations (*Id.*).

⁴ See fn. 3, *supra*.

⁵ A substantial portion of this contention hinges on the allegation that IOLA's scoring of LASRC's proposal was inconsistent with suggestions for improvement provided to LASRC by IOLA at a 2018 debriefing relating to LASRC's application for the same grant program. LASRC presents numerous examples of how the 2021 scoring did not accurately reflect improvements LASRC made to its proposal as a result of guidance from IOLA at the 2018 debriefing; or, conversely, how IOLA did not provide sufficient or complete guidance during the 2018 debriefing for LASRC to improve its scores, identifying certain deficiencies in LASRC's proposal for the first time in 2021 (*see* Protest, at pp. 14-25, 29-30; Reply, at pp. 2-8). The requirements for debriefings in SFL § 163 do not apply to this procurement (*see* fn. 7, *infra*); however, the RFP provided applicants with an opportunity for a debriefing. While debriefings are generally intended to provide guidance to unsuccessful offerors concerning how to improve future proposals, they do not establish precedent that will bind evaluators in future procurements. A debriefing conducted in a past IOLA procurement is outside of the scope of this Protest and, although this Office considered allegations of improvidence based on the content of the 2018 debriefing in its review of the Protest as a whole, same will not be specifically addressed in this Determination.

⁶ LASRC failed to provide support for its allegation that one of the evaluators was exerting pressure on LASRC to merge with Legal Services of the Hudson Valley and thus, this Office will not address this allegation.

Initially, we note that SFL § 163 does not apply to the instant grant awards.⁷ Rather, as this Office has previously pointed out, we review grant awards based on “a fair and balanced process that gives an equal opportunity to all bidders,” as demonstrated by whether: “1) the scoring system itself was clear; and 2) the evaluators, in assigning scores, arrived at reasonable conclusions” (OSC Bid Protest Determination SF-20150159, at p. 3).

The RFP set forth the criteria to be evaluated, the number of available points for each criterion, and the methodology IOLA would use to score applications (*see* Protest, at pp. 17-18). The pre-established scoring tool was consistent with the program information and narrative responses requested in the RFP (*Id.*, at pp. 7-10).

With respect to the specific scores assigned by the evaluators, this Office generally defers to agency determinations where they are properly within the agency’s expertise and supported by the procurement record. Accordingly, this Office “will generally not disturb a rationally reached determination” of an evaluator unless “scoring is clearly and demonstratively unreasonable” (OSC Bid Protest Determination SF-20160188, at p. 8 (upholding technical scores where “review of the procurement record confirms the evaluators scored the proposals in a manner consistent with the evaluation/scoring instructions”); *see also* OSC Bid Protest Determination SF-20200069, at p. 6; OSC Bid Protest Determination SF-20210006, at p. 6).

Based on our review of the procurement record, we find the scoring methodology employed by IOLA was clearly set forth in the RFP and the IOLA evaluators scored applications according to the clearly articulated criteria set forth in the RFP and used the scoring tool that was crafted prior to the receipt of applications. Accordingly, we will not disturb the IOLA’s scoring of LASRC’s application.

⁷ This Office has previously explained SFL § 163’s inapplicability to the award of grant contracts to not-for-profit organizations:

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. While the resulting contracts are subject to Article 11-B of the SFL, that article is generally concerned with ensuring 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.

(OSC Bid Protest Determination SF-20110219, at p. 2). Notably, neither IOLA nor LASRC disputes this point (*see* Reply, at p. 2; Answer, at p. 5).

Funding Stream Determination

1. IOLA's Authority to Make CLS/AOJ Determination

LASRC alleges that “IOLA abused its discretion by unilaterally and arbitrarily deciding that LASRC’s application was for AOJ funding rather than CLS funding” (Protest, at p. 31). LASRC claims that, even if IOLA is permitted to determine what funding is being applied for, IOLA staff needed “specific authorization” from the Board of Trustees to do so and the Board of Trustees failed to delegate such authority to the staff (*see* Protest, at pp. 31-33). IOLA contends it “properly followed the RFP with respect to designating CLS and AOJ[,] and the staff recommendations, including as to CLS/AOJ status, were reviewed and approved by the IOLA Board’s Grant Committee and full Board” (Answer, at p. 7).

As an initial matter, we must determine whether the Board of Trustees is permitted to delegate application review duties to the staff and the scope of that authority. The regulations of the IOLA Board of Trustees provide the trustees with the power to “review applications for grants and contracts using staff and other available resources” (21 NYCRR § 7000.5(a)(7)). The regulations further allow the Board of Trustees to “delegate the screening of the funding applications to its staff or other entity it deems appropriate” (21 NYCRR § 7000.15(a)). Accordingly, the IOLA Board acted within its authority when delegating the review of applications to the two evaluators, who are IOLA staff members.

Following evaluation of the applications, the staff prepared recommendations, including designation of the applicants as CLS or AOJ, which were approved by the Grants Committee and, ultimately, the Board (*see* Answer, at p. 7). The regulations described above are broad enough to include staff recommendations for either CLS or AOJ funding as part of the staff’s review of applications, so long as the Board properly makes the final funding determinations (as was the case in this instance). Therefore, we are satisfied IOLA acted consistent with the scope of its authority with respect to the Board’s delegation of duties to IOLA staff members, including the review of applications and the designation of applicants as CLS or AOJ.

2. Designation of LASRC as AOJ

LASRC further contends that IOLA’s “decision was arbitrary and capricious” because “LASRC has never been, nor is it now, a provider of specialized legal services, as contemplated for the providers of AOJ services” (Protest, at p. 32; *see* Reply, at p. 10). IOLA asserts that “LASRC does not offer the depth and breadth of legal services typically found among IOLA CLS grantees . . . [t]hus, IOLA properly determined that LASRC should be considered AOJ and not CLS” (Answer, at pp. 7-8).

The RFP provided that IOLA would determine whether an applicant would be considered for CLS or AOJ funding according to factors set forth in 21 NYCRR § 7000.12 and based on the applications and all supporting documentation submitted by the applicant (*see* RFP, at p. 3; *see also* Questions and Answers, Nos. 8-12). Moreover, in recognition of the fact that available IOLA funding may not be sufficient to fund all applicants, the RFP set forth certain factors to be considered in establishing funding priorities (*see* RFP, at pp. 17-18; *see also* 21 NYCRR §

7000.12(c)). This Office generally defers to an agency on matters within the agency's expertise where supported by the procurement record. Here, the review and classification of legal services and programs to be provided by applicants in furtherance of IOLA's mission are properly within IOLA's expertise. Our review of the procurement record shows that IOLA followed applicable regulations and its RFP in classifying LASRC as an AOJ applicant. As a result, we will not disturb IOLA's determination.

3. Notice to Applicants that IOLA Would Make Designation and Effect on Scoring

Lastly, LASRC contends that since "the focus of the application for CLS funding is very different than the focus of an AOJ application" funding applicants "should be advised that they are not allowed to choose for what source of funding they are applying" (Protest, at p. 33; *see* Reply, at pp. 10-11). LASRC claims the description of services in its application would have been entirely different had it chosen to apply for AOJ funding and "the determination whether LASRC was applying for CLS or AOJ funding is crucial to determining the merits of its application" (Reply, at p. 10; *see* Protest, at p. 33). IOLA contends that "the RFP directly put applicants on notice that IOLA would make the determination [of CLS or AOJ]" and this matter "was further addressed in answers to applicant questions, which were posted and made available to all applicants as indicated in the RFP, and the answers repeatedly reiterated that IOLA would determine the CLS/AOJ issue" (Answer, at p. 7). Regardless, IOLA avers "the same scoresheet and criteria were applied to all applicants and IOLA's designation of LASRC as AOJ had no effect on its score" (*Id.*).

Contrary to LASRC's contention, and as previously noted, applicants were advised in the RFP that IOLA would make the final determination as to whether an applicant was applying for CLS or AOJ funding (*see* RFP, at p. 3). In addition, IOLA's responses to multiple questions submitted by potential applicants reiterated that IOLA would make the final determination regarding CLS or AOJ classification (*see* Questions & Answers, Nos. 2, 9, 11, and 12).

LASRC emphasizes the need for advance knowledge of the stream of funding being applied for in order to properly complete its application and fairly compete for a grant award (*see* Reply, at p. 11). However, the scoring tool submitted as part of the procurement record, which follows the criteria set forth in the RFP, includes, as is relevant here, a description of the organization's principal activities and mission, the kinds of services to be provided, to whom they will be provided, and where the recipients of those services reside (*see* RFP, at p. 8). Thus, LASRC had the opportunity to fully describe its program and proposed services in its application, irrespective of funding stream designation. Therefore, LASRC's contention that not knowing whether IOLA would ultimately designate it as CLS or AOJ affected LASRC's ability to complete its application and fairly compete for the grant award is without merit. Furthermore, the scoresheet does not differentiate between an applicant's potential CLS/AOJ status; therefore, LASRC's contention that IOLA's ability to designate, and its subsequent designation of, LASRC as AOJ affected IOLA's evaluation of its application is also without merit.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Protest are not of sufficient merit to overturn the grant awards by IOLA. As a result, the Protest is denied.