

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Green Jobs Training Center with respect to the grant awards for Weatherization Assistance Program training and technical assistance services by the New York State Division of Housing and Community Renewal.

**Determination
of Bid Protest**

SF-20170207

Contract Numbers – C09578GG and C09580GG

October 20, 2017

The Office of the State Comptroller has reviewed the above-referenced grant awards made by the New York State Division of Housing and Community Renewal (DHCR) for training and technical assistance (T&TA) services in connection with the United States Department of Energy's Weatherization Assistance Program (WAP). We have determined the grounds advanced by Green Jobs Training Center (GJTC) are insufficient to merit overturning the grant awards made by DHCR and, therefore, we deny the Protest.

BACKGROUND

Facts

The WAP seeks to reduce energy costs for low-income households by increasing the energy efficiency of their homes. The United States Department of Energy (DOE) provides core program funding to New York State which, in turn, contracts with local service providers (subgrantees) who deliver a range of services to those eligible to participate in the WAP. DHCR administers the WAP through its Office of Housing Preservation in accordance with a State plan filed each year with DOE (*see* 10 CFR § 440.12). DHCR is responsible for the overall monitoring and oversight of the WAP in New York and, as part of those duties, provides ongoing T&TA to the subgrantees (*see* 10 CFR §§ 440.12[b][6], [7]).

On March 20, 2017, DHCR submitted a request to this Office for an exemption from the publication requirements contained in the Economic Development Law for procurement of the T&TA services which this Office granted on March 27, 2017. DHCR then awarded single source contracts to the Association for Energy Affordability (AEA) and the New York State Weatherization Directors Association (NYSWDA) with proposed terms ending in 2020. GJTC filed a letter dated May 15, 2017 (GJTC May 15 Letter), protesting the award of the contracts for T&TA services. Shortly thereafter, this Office determined that the justification relied upon by DHCR in its March 20, 2017 Contract Reporter Exemption Request was in error. Accordingly, our Office declined to approve the original contracts for T&TA services entered into by DHCR. However, to avoid any disruption to DHCR's ongoing T&TA activities (and any negative impact on the WAP program), this Office agreed to consider a more limited one-year contract term for these T&TA service contracts, ending on March 31, 2018. Our consideration of the one-year

contracts was to avoid disruption of training during the current year and provide DHCR sufficient time to conduct a competitive procurement for the next award of these services. By letter dated September 8, 2017 (OSC September 8 Letter), this Office notified GJTC of the actions it had taken in response to the GJTC May 15 Letter and our decision to reduce the contract terms of the agreements to one-year, the minimum period of time we determined necessary for DHCR to conduct a new competitive procurement for T&TA services.

By letter dated September 22, 2017, GJTC filed a protest (Protest) to DHCR's award of the one-year contracts to AEA and NYSWDA.¹ NYSWDA responded to the Protest by letter dated October 2, 2017 (NYSWDA Answer), DHCR responded to the Protest by letter dated October 3, 2017 (DHCR Answer) and AEA responded to the Protest by letter dated October 6, 2017 (AEA Answer). GJTC filed a reply to the DHCR Answer by letter dated October 6, 2017 (GJTC Reply).²

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 the aforementioned responsibilities proscribed by SFL § 112, OSC has promulgated a Contract Award Protest Procedure that governs the process to be used when an interested party challenges a contract award by a State agency.³ This procedure governs 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 Title 2 of the Codes, Rules and Regulations of the State of New York.

In the determination of the Protest, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by DHCR with the DHCR/AEA and DHCR/NYSWDA single source contracts;
2. the correspondence between this Office and DHCR arising out of our review of the proposed DHCR/AEA and DHCR/NYSWDA single source contracts; and

¹ GJTC states in its Reply "we have no issues with NYSWDA or the methods in which the contract was awarded under a single-source contract for NYSWDA, since they are the only training center in the upstate New York region" (GJTC Reply, at pg. 1). However, both single source contracts were approved pursuant to DHCR's revised contract reporter exemption request on the basis that only AEA and NYSWDA could provide all of the T&TA services required by DHCR. Thus, the Protest applies to the approval of both contracts and NYSWDA is an "interested party" under OSC's Contract Award Protest Procedure (*see* 2 NYCRR § 24.2[e]).

² While GJTC submitted additional correspondence to this Office, including the letters dated October 12, 2017, and October 18, 2017, these submissions were outside the scope of documentation permitted as of right under 2 NYCRR part 24. Therefore, while considered, that correspondence is not referenced or formally addressed in this Determination.

³ 2 NYCRR Part 24.

3. the following correspondence/submissions from the parties (including the attachments thereto):
 - a. GJTC's letter dated May 15, 2017;
 - b. GJTC's Protest dated September 22, 2017;
 - c. NYSWDA's Answer dated October 2, 2017;
 - d. DHCR's Answer dated October 3, 2017;
 - e. AEA's Answer dated October 6, 2017; and
 - f. GJTC's Reply to the DHCR Answer dated October 6, 2017.

Applicable Statutes

The contracts in question are the result of grant awards subject to the requirements of Article 11-B of the SFL.⁴ Therefore, the procurement conducted by DHCR is not subject to the competitive bidding requirements of SFL § 163 since those statutory competitive bidding requirements do not apply to “contracts approved in accordance with article eleven-B of [the State Finance Law]” (SFL § 160[7]).

While Article 11-B does not require competitive bidding, the Comptroller, in fulfilling his statutory duty of assuring that state contracts are awarded in the best interest of the State, requires that agencies undertake a competitive process for grant awards or, alternatively, document why competition is not appropriate or feasible. Thus, notwithstanding the inapplicability of SFL § 163, this Office generally requires that grant contracts be awarded after a fair and impartial competitive procurement process which provides a level playing field for all potential award recipients, except where the agency can document a sole source, single source or emergency justification for a non-competitive award (consistent with the documentation for such awards under SFL § 163). In light of these non-statutory standards, we will proceed to analyze the issues raised in this Protest.

ANALYSIS OF THE PROTEST

Protest to this Office

In its Protest, GJTC challenges the procurement conducted by DHCR on the following grounds:

1. DHCR did not properly procure T&TA services and, as a result, the T&TA vendors should not have been awarded single source contracts.
2. DHCR violated its obligations under Executive Law Article 15-A in connection with procuring T&TA services by failing to give “preferred” status to GJTC as a minority and/or women-owned business enterprise (MWBE). Moreover, DHCR failed to follow the New York State Weatherization Assistance Program Policy and Procedures Manual (revised April 2017) (PPM), as well as DOE Financial Assistance Rule 10 CFR § 600.144(b), relating to MWBE utilization for this procurement.

⁴ Article 11-B of the SFL applies to grant awards to not-for-profit organizations as part of a program plan developed by a State agency (*see* SFL § 179-q[1],[2],[6],[10]).

DHCR's Response to the Protest

In its Answer, DHCR contends the Protest should be rejected and the awards upheld on the following grounds:

1. DHCR properly awarded the single source contracts pursuant to a Contract Reporter Exemption Request granted on the basis of DHCR's representation that no other vendors could provide the required services.
2. DHCR is in compliance with all applicable MWBE requirements. Further, AEA and NYSWDA are contractually obligated to subcontract with MWBEs to achieve the requisite utilization goals.

NYSWDA's Response to the Protest

In its Answer, NYSWDA contends the Protest should be rejected and the awards upheld on the following grounds:

1. GJTC is not certified with the New York State Division of Minority and Women Business Development as a qualified MWBE.
2. This particular training for WAP subgrantees can only be provided by an accredited institution and GJTC does not possess that required accreditation. Only NYSWDA and AEA meet this requirement in New York.

AEA's Response to the Protest

In its Answer, AEA contends the Protest should be rejected and the awards upheld on the following grounds:

1. Certification for this particular training is required to be provided by organizations with training programs accredited by the Interstate Renewable Energy Council (IREC). AEA and NYSWDA are the only organizations that have such accredited training programs. GJTC is not accredited by IREC to provide this particular training.
2. Any interruption in providing T&TA services halfway into the current program year would have a major, detrimental impact on the WAP.

GJTC's Reply to DHCR's Answer

In its Reply, GJTC elaborates on the arguments set forth in the Protest.

DISCUSSION

The Protest raises issues that generally fall into two main categories, the single source nature of the contract awards and the compliance with the MWBE requirements.

I. Single Source Awards

GJTC asserts DHCR did not justify its request for a single source exemption for the T&TA services contracts (*see* GJTC May 15 Letter, at pg. 7; Protest, at pgs. 1- 2). GJTC also asserts DHCR failed to publicly announce the procurement of T&TA services as required by law, and did not respond to GJTC's inquiries related to the procurement (*see* GJTC May 15 Letter, at pgs. 1, 2; Protest, at pgs. 1- 2). Further, GJTC alleges "[a]t no time was there any objective and quantifiable analysis conducted to ensure if there are any other prospective bidders or qualified vendors" (GJTC May 15 Letter, at pg. 2). DHCR responds it properly conducted a single source procurement for the T&TA services and awarded the resulting contracts pursuant to an exemption from the advertising requirements granted by OSC and supported by DHCR's representation that no other vendors could provide the required T&TA services (*see* DHCR Answer, at pg. 1).

1. Law Governing Single Source Procurements

SFL § 163(10)(b) provides:

- (i) Single ... source procurements for services or commodities, or procurements made to meet emergencies arising from unforeseen causes, may be made without a formal competitive process and shall only be made under unusual circumstances and shall include a determination by . . . the state agency that the specifications or requirements for said purchase have been designed in a fair and equitable manner. The purchasing agency shall document in the procurement record, subject to review by the state comptroller, the bases for a determination to purchase from a single source . . ., or the nature of the emergency giving rise to the procurement.
- (ii) State agencies shall minimize the use of single source procurements and shall use single source procurements only when a formal competitive process is not feasible. State agencies shall document in the procurement record the circumstances and the material and substantial reasons why a formal competitive process is not feasible. The term of a single source procurement contract shall be limited to the minimum period of time necessary to ameliorate the circumstances which created the material and substantial reasons for the single source award.

As stated above, although SFL § 163 does not apply to grant awards, this Office did require DHCR to document in the procurement record its single source justification for a non-competitive award of the T&TA services contracts. When considering such a justification, this Office uses the provisions of SFL § 163(10)(b) as a guide.

2. Justification of DHCR's Single Source Award

DHCR's original justification for an exemption from the publication requirements contained in the Economic Development Law was erroneous and, accordingly, this Office declined to approve the originally submitted single source contract with AEA (*see* Letter from

OSC to GJTC, dated September 20, 2017, at pg. 1).⁵ In response to this decision, DHCR advised that DOE requires DHCR to submit a technical assistance plan as part of its annual application for Federal Government funding. The plan already submitted for the current funding period identified AEA and NYSWDA as DHCR's technical assistance providers (*see* email from DHCR to OSC, dated August 28, 2017, supporting DHCR's revised contract reporter exemption request). DHCR asserted "AEA and NYSWDA are also essential to our compliance with other DOE requirements ..." (*Id.*). DHCR also represented that it would advertise a competitive procurement opportunity for the training tasks for next year's program (*Id.*). Furthermore, in a letter to GJTC dated July 6, 2017, DHCR asserted that it provided public notice and an opportunity for public comment, in January and February 2017, as required under DOE's regulations (*see* 10 CFR § 440.14[a]). GJTC has not refuted this representation by DHCR.

DHCR then formally submitted a revised single source exemption request for T&TA services to this Office on the basis that "no other vendors...could provide the range of services we need" (DHCR Answer, at pg. 1). In support of that assertion, DHCR states DOE's regulations governing the WAP require each building where WAP funds are used to be inspected by a quality control inspector (QCI) certified by a training provider accredited by the Interstate Renewable Energy Council (IREC) (*see* DHCR Answer, at pg. 2). DHCR alleges only AEA and NYSWDA possess such accreditation for QCI training in New York (*Id.*). Moreover, NYSWDA asserts GJTC is not accredited by IREC "and, as such, they are not qualified to deliver any training in preparation for any [Job Task Analysis] specific examinations" as required by DOE's Weatherization Program Notice 15-4, effective October 21, 2014 (WPN 15-4) (*see* NYSWDA Answer, at pg. 2; *see also* AEA Answer, at pg. 3).

WPN 15-4 provides that Tier 1 training, or "comprehensive, occupation-specific training which follows a curriculum aligned with the JTA [Job Task Analysis] for that occupation," must be provided by, or in cooperation with, a training provider accredited by IREC, DOE's accreditation body (*see* Department of Energy Weatherization Program Notice 15-4, at Section 4). DHCR is required to comply with WPN 15-4 for Tier 1 training (such as the training at issue herein) paid with WAP funds received for T&TA services (*see* U.S. Department of Energy Weatherization Assistance Program for Low-Income Persons Application Instructions for 2017 Application, V.8.4., at pg. 43). In the State's WAP Plan for 2017, which is required to be submitted to DOE as part of DHCR's application for WAP funding from the Federal Government, DHCR did in fact identify AEA and NYSWDA as the providers for Tier 1 training (*see* New York State Weatherization Assistance Plan Program Year 2017 State Plan, *see also* 10 CRF § 440.12).

AEA and NYSWDA state that they are the only organizations in New York accredited by IREC to provide Tier 1 training (*see* AEA Answer, at pg. 3; NYSWDA Answer, at pg. 4). While IREC identifies AEA and NYSWDA as the only accredited training providers for the QCI occupation in New York, other New York organizations are accredited to provide training for other JTAs. However, since QCI training is part of the T&TA services DHCR provides to the subgrantees, and DHCR determined it was appropriate to bundle this training along with all other

⁵ At that time, while the DHCR/AEA contract was under review by this Office, DHCR had not submitted the NYSWDA contract to this Office. However, DHCR had requested the original contract reporter exemption for both contracts and thus the determination not to approve effectively applied to both contracts.

JTAs provided to subgrantees, DHCR's assertion that only AEA and NYSWDA can provide all the T&TA services it needs is technically accurate for purposes of the 2017 State WAP Plan (*see* DHCR Answer, at pg. 1). Notwithstanding the Comptroller's broad contract review authority under SFL § 112, this Office generally defers to the procuring agency's determinations on matters properly within the agency's expertise. The selection of the T&TA services to be provided to subgrantees is within DHCR's expertise and, furthermore, is consistent with the 2017 State WAP Plan submitted to DOE.

As stated in SFL § 163(10)(b), a single source procurement is appropriate in unusual circumstances when a formal competitive process is not feasible.⁶ Additionally, the term of the single source contract must be limited to the minimum amount of time needed to mitigate the particular circumstances. Here, DHCR initially contracted with AEA and NYSWDA for T&TA services and those vendors were identified in the 2017 State WAP Plan to DOE as T&TA providers. Furthermore, failing to provide a short term contract to AEA and NYSWDA to continue their ongoing training services through March 2018 would likely be detrimental to the State's current WAP program, and we believe one year is the minimum period of time necessary for DHCR conduct a new competitive procurement for T&TA services. As such, we find that the short term single source contracts were appropriate and authorized.

II. Compliance with MWBE Requirements

1. Executive Law Article 15-A

GJTC asserts DHCR violated the State's MWBE policy set forth in Executive Law Article 15-A (Article 15-A) in the T&TA services procurement and, as a result, DHCR's "conduct prohibits fair and equal opportunities for all M/WBE [sic] throughout the state of NY" (GJTC May 15 Letter, at pgs. 4-5). GJTC avers it is an MWBE that should have been considered for the award of the T&TA services contract (*see* GJTC May 15 Letter, at pgs. 2, 4).⁷ GJTC further claims Article 15-A requires DHCR to give preferred status to MWBEs (*see* Protest, at pg. 1). Additionally, GJTC alleges DHCR failed to make a good faith effort to encourage MWBE utilization as set forth in the PPM and DOE's financial assistance rules in 10 CFR § 600.144(b) (GJTC May 15 Letter, at pg. 4). DHCR responds it "complies with Article 15A, concerning utilization of minority and women-owned (M/WBE) businesses. Since WAP is administered by non-profit organizations and local governments that cannot themselves qualify as M/WBE firms, these obligations are passed through to [AEA] and [NYSWDA] as a contractual obligation. Typically, the obligation is satisfied through subcontracts with vendors, which include the requisite percentage of M/WBE providers" (DHCR Answer, at pg. 1). DHCR further maintains it complies with "all" applicable MWBE requirements (*see* DHCR Answer, at pg. 2).

⁶ A single source procurement may also be granted based on an emergency arising from unforeseen causes. DHCR has stated "the basis for the exemption request was not that an emergency existed," thus, we need not address this as a potential justification (*see* DHCR Answer, at pg. 1).

⁷ We note that GJTC, in its February 10, 2017 letter to DHCR requesting to be considered as a provider of T&TA services, neglected to raise any assertion regarding its MWBE status (*see* GJTC May 15 Letter, Exhibit D).

Article 15-A sets aspirational goals for state contracts made directly or indirectly to *certified* MWBEs and was enacted to promote “maximum feasible participation in the performance of state contracts” by *certified* MWBEs (*see* Executive Law § 313[1], [2]; 5 NYCRR § 141.7). State agencies are required to structure procurement procedures that aspire to meet these goals and to report to the New York State Department of Economic Development (DED) with respect to activities undertaken to increase participation by *certified* businesses with respect to state contracts and subcontracts (*see* Executive Law § 315; *see also* 5 NYCRR § 142.2).

MWBEs are certified pursuant to a formal procedure promulgated by DED’s Division of Minority and Women’s Business Development (DMWBD) (*see* Executive Law § 314; 5 NYCRR Part 144). DMWBD then prepares a directory of certified businesses for use by contracting agencies and contractors in carrying out the provisions of Article 15-A (*see* Executive Law § 314[2]; 5 NYCRR § 141.2[b]). Our independent investigation verified GJTC is not certified with DMWBD as an MWBE. Thus, in this instance, GJTC cannot assert any harm as a result of noncompliance with Article 15-A. Moreover, even if GJTC was a certified business, its assertion that it should be given contract award “preference” under Article 15-A is incorrect. Finally, GJTC has submitted no evidence to support its assertion that DHCR has failed to comply with Article 15-A in any manner in this procurement.

2. PPM and DOE Rules

In response to certain statements in GJTC’s May 15 Letter, we also reviewed DHCR’s compliance with the PPM and the DOE Financial Assistance Rules. The PPM lists actions to be taken by subgrantees, in their subcontracts, to further DHCR’s goals to utilize MWBEs for WAP contracts and supports DHCR’s assertion that it fulfills its obligations by contractual agreement with AEA and NYSWDA (*see* PPM, subsection 8.04, at pgs. 199-200). Initially, we note that Section 600.144(b) of Title 10 of the Code of Federal Regulations cited by GJTC (*see* GJTC’s May 15 Letter, pgs. 4-5) relates to DOE grants to institutions of higher education, hospitals and other nonprofit organizations performing work under awards and identifies steps those organizations must follow to meet the goal of utilizing MWBEs (*see* 10 CFR § 600.104). As such, that DOE Financial Assistance Rule would not impose obligations on DHCR. The DOE Financial Assistance Rule set forth at 10 CFR § 600.236 applies to DOE grants to state governments (*see* 10 CFR § 600.200). This rule provides “[w]hen procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds” (10 CFR § 600.236[a]; *see also* 2 CFR § 200.317). Under this rule, DHCR’s compliance with the provisions of Article 15-A would be sufficient to ensure DHCR’s compliance with the DOE Financial Assistance Rules. Therefore, we also find no evidence that DHCR has failed to comply with the PPM or DOE’s Financial Assistance Rules.

CONCLUSION

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