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OFFICE OF THE STATE COMPTROLLER

November 3, 2014

Thomas G. Phillips, Sr.
Executive Director
Hudson Valley Technology Development Center, Inc.
1450 Route 300
Building 1, Suite 1
Newburgh, NY 12550

Dear Mr. Phillips:

Re: SF20140385 – Appeal of Marketing,
Matching and Engagement Program Grant
Award

This Office is in receipt of your letter dated September 3, 2014, appealing the decision made by Empire State Development's Division of Science, Technology and Innovation (NYSTAR) to deny Hudson Valley Technology Development Center, Inc.'s (HVTDC) protest of the grant award made by NYSTAR to FuzeHub under the Marketing, Matching and Engagement Program (MMEP). HVTDC originally filed a protest by e-mail with NYSTAR dated July 1, 2014, which NYSTAR denied. By letter dated September 3, 2014, HVTDC forwarded that protest to this Office to be considered as an appeal of NYSTAR's denial (Appeal). NYSTAR filed an answer to the Appeal dated August 19, 2014 (Answer). In the Appeal, HVTDC makes two arguments: 1) FuzeHub had an unfair advantage in the procurement process, and 2) FuzeHub misstated its qualifications on the application it submitted for the grant award. As a result, HVTDC asserts that FuzeHub's application should have been disqualified.

NYSTAR's Procurement Process

In the Appeal, HVTDC makes a number of assertions to support HVTDC's argument that FuzeHub had an unfair advantage in the competition for the grant award and should have been disqualified from applying for the grant. Each of HVTDC's assertions are addressed below.

1. Two principals of FuzeHub were co-located with NYSTAR for over a year, including after submission of their application in response to the MMEP RFP.

In the Answer, NYSTAR acknowledges that the FuzeHub principals were indeed co-located with NYSTAR, but indicates that such co-location was the result of FuzeHub's work on another NYSTAR program. NYSTAR asserts that no impermissible contacts were made as a result of the co-location and that NYSTAR took specific steps to prevent FuzeHub from gaining a competitive advantage. Such steps included: 1) briefing all NYSTAR staff prior, during and after completion of the procurement about topics of discussion to avoid that could possibly create, or appear to create, an unfair advantage; 2) prohibiting NYSTAR staff from speaking about this procurement to non-NYSTAR staff during the competitive process; 3) limiting discussion of the RFP to reviewers of the applications; and, most importantly, 4) requiring FuzeHub staff to relocate for the period of time the RFP was being drafted, released and scored. In light of these preventive measures taken by NYSTAR to ensure a fair competition, and no evidence of an unfair advantage afforded to FuzeHub in the procurement record, we find no reason to sustain HVTDC's allegation that FuzeHub gained a competitive advantage in this procurement as a result of its co-location with NYSTAR on a separate grant program.

2. Prior to the RFP being issued, the management and supervision of the project was under the direct control of the New York Manufacturing Extension Partnership Program (NYMEP) manager with staff support from two FuzeHub principals who were employees of the Capital District Regional Technology Development Center (RTDC) at the time.

NYSTAR does not dispute that its staff manages the FuzeHub initiative as a part of the NYMEP, a separate and distinct NYSTAR program. The NYMEP manager oversees both the RTDC's programs and the FuzeHub initiative. However, NYSTAR explained that this situation is not unusual and that current NYSTAR contractors are often under the supervision of NYSTAR staff during an RFP competition. In fact, NYSTAR has advised that, as the Director of the Mid-Hudson RTDC, Mr. Phillips of HVTDC would be under the management of NYSTAR to the same extent as the two principals of FuzeHub. Given that this situation is consistent with NYSTAR practice, and NYSTAR undertook preventive measures to ensure a fair competition (see discussion addressing assertion #1 above), we find no reason to conclude that NYSTAR's management of the FuzeHub initiative tainted the procurement process.

3. Prior to the RFP being released, two FuzeHub principals formed a new not-for-profit organization utilizing the mission and name developed for the predecessor Technology Cooperative Agreement Recipient (tCAR) grant.

Based on the information that we have been provided, it appears that one of the individuals who is now a principal of FuzeHub, was significantly involved in creating the platform that the tCAR grant is based upon. As a result, it does not seem unreasonable that FuzeHub principals formed a new not-for-profit organization utilizing the mission and name developed for the tCAR grant. Furthermore, these actions do not appear to have had an influence on the grant award.

4. FuzeHub was openly promoted by NYSTAR before the RFP was issued and on two occasions during the application process.

As indicated by NYSTAR, it routinely promotes the funded partners it works with in order to make it easier for businesses to determine what assistance is available and how best to access it. NYSTAR explained that it promoted FuzeHub for its work on the tCAR grant in accordance with such routine practice. NYSTAR also notes that HVTDC, along with other RTDCs that submitted applications in response to the RFP, were also highlighted by NYSTAR as part of a series of success stories. Thus, it does not appear that FuzeHub was unfairly promoted over other bidders, or that such promotion affected the competitive process.

FuzeHub's Qualifications

In the Appeal, HVTDC makes three assertions to support its argument that FuzeHub may have misstated its achievements, successes and qualifications in its response to the RFP. These assertions are addressed below.

1. The majority of the successful marketing events, matches and engagements reported by FuzeHub were the result of the efforts of the RTDCs and their staff personnel including the Regional Innovation Specialists.
2. The Success stories published under the FuzeHub brand were the result of RTDC efforts and capabilities.
3. The winning proposers have no known prior experience in generating matching funds as required by the RFP.

All three of these assertions go to the technical scoring of the applications. In that regard, we note that, notwithstanding the Comptroller's broad contract review authority under State Finance Law § 112, this Office generally gives deference to agency determinations regarding factual issues which are within the agency's technical expertise. Thus, where the technical conclusions of the reviewers are supported by the procurement record and are consistent with the pre-established evaluation criteria, this Office will not disturb them.

Here, NYSTAR issued an RFP that required detailed technical responses. NYSTAR, as the state agency charged with administering the MMEP, employs professionals who have extensive experience and expertise in this area. The panel selected by NYSTAR to review the applications consisted of NYSTAR staff and other experts selected from the science, business and academic communities (RFP, Page 12).

Turning to the specific assertions made by HVTDC, #1 and #2 appear to challenge the qualifications of FuzeHub as set forth in its application, but are not supported with anything beyond speculation. As indicated by NYSTAR, the expert review panel was familiar with the past work product of both FuzeHub and the RTDCs. Therefore, these reviewers were in the best position to accurately assess whether the accomplishments noted in FuzeHub's application were attributable

to FuzeHub or were actually the result of the RTDCs' efforts. These reviewers concluded that FuzeHub accurately depicted its own past accomplishments in its application and, as noted above, this conclusion is not contradicted by the record before us.

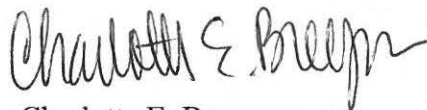
As to assertion #3, HVTDC appears to be referring to the requirement of the RFP providing that the "[a]pplicant must demonstrate the ability to meet the matching funds requirements ... based on the funding for this program a 1:1 match will be required." (RFP, Page 3.) Under this provision, demonstrating prior experience in generating matching funds was not required. Rather, applicants were required to demonstrate how they would meet the matching funds under this program. The NYSTAR reviewers who, according to NYSTAR, had experience in generating matching funds, found that the application submitted by FuzeHub satisfactorily demonstrated how FuzeHub would meet the program's matching funds requirement. Additionally, our review of the procurement record confirms that FuzeHub did identify over \$3 million in matching funds – exceeding the \$2 million of available funding under the program.

Since NYSTAR's determinations with regard to FuzeHub's qualifications appear to be supported by the procurement record and are consistent with the pre-established evaluation criteria, we find no reason to upset NYSTAR's determination.

Conclusion

Based on the information before this Office, including our review of the procurement record, we find no evidence that FuzeHub possessed an unfair competitive advantage in this procurement, or that it misstated its qualifications in response to the RFP. Therefore, this Office does not find sufficient merit to uphold your Appeal and will proceed in its review of the grant award.

Sincerely,



Charlotte E. Breeyear
Director of Contracts

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