

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Family Residences and Essential Enterprises, Inc. with respect to the grant award for the provision of Crisis Services for Individuals with Intellectual and/or Developmental Disabilities conducted by the New York State Office for People with Developmental Disabilities.

**Determination
of Appeal**

SF-20220055

July 25, 2022

Procurement Record – OPD01-0000295-3660243

The Office of the State Comptroller has reviewed the above-referenced grant award made by the New York State Office for People with Developmental Disabilities (OPWDD) for Crisis Services for Individuals with Intellectual and/or Developmental Disabilities and Resource Center(s) for OPWDD’s Region 3 (CSIDD). We have determined the grounds advanced by Family Residences and Essential Enterprises, Inc. (FREE) are sufficient to merit overturning the grant award made by OPWDD to Young Adult Institute, Inc. (YAI) and, therefore, we uphold the Appeal. As a result, we are today returning non-approved the OPWDD grant award for Region 3 CSIDD to YAI.

BACKGROUND

Facts

On December 1, 2021, OPWDD issued a request for applications (RFA) seeking applications from not-for-profit providers of CSIDD for its Region 3 (*see* RFA, Section 1.1.1, at p. 5).¹ Region 3 includes eighteen New York State counties, covering the Capital District, Hudson Valley, and Taconic areas (*Id.*, Section 1.3.1.2, at p. 6). OPWDD intended to award one grant contract as a result of the RFA (*Id.*, Section 1.1.1, at p. 5). The awardee would be required to become certified by the Center for START Services at the Institute on Disability at the University of New Hampshire (*Id.*, Section 1.3.2, at p. 6).

A team of OPWDD staff evaluated applications (*Id.*, Section 7.1.3, at p. 32). The RFA provided for a contract to be awarded based on a “combination of technical merit and cost that would most benefit OPWDD” (*Id.*). The applicant with the highest final composite score (up to 100 points, including the technical, cost, and interview scores minus any penalty points) would be awarded the grant contract (*Id.*, Sections 7.7 and 7.8, at p. 35). The technical proposal was

¹ CSIDD is available to individuals 6 years of age or older who meet medical necessity criteria and are eligible for OPWDD services (*see* RFA, Section 1.3.3.1, at pp. 6-7). The goal of CSIDD is to provide short-term crisis services to help stabilize individuals with intellectual and/or developmental disabilities, who have significant behavioral or mental health needs, within their existing care networks (*Id.*).

worth up to 70 points and included the following scoring criteria: philosophy and mission; vision and goal; proposed staff; experience; description of services; technology; development plan for services; property for resource center use; and diversity practices (*Id.*, Sections 6.7 and 7.3, at pp. 26-30, 33). The cost proposal was worth a maximum of 20 points and considered several factors (*Id.*, Sections 6.8 and 7.4, at pp. 30-32, 33-34).² Penalties could be imposed in the form of a points deduction³ if an applicant's required cover letter was incomplete in any material respect (*Id.*, Sections 6.6.2.1 and 7.2.2, at pp. 25, 33). Applicants whose proposals earned the three highest intermediate scores (up to 90 points including the technical and cost scores minus any penalty points) would advance to an interview, worth up to 10 points (*Id.*, Sections 7.5 and 7.6, at p. 34). OPWDD also reserved the right to adjust the technical score based on material differences OPWDD identified between the technical proposal and the substance of the interview (*Id.*, Section 7.6.7, at pp. 34-35).

Applications were due on January 14, 2022. YAI, FREE, and two other vendors submitted applications by the due date and OPWDD awarded the grant contract to YAI, the applicant with the highest final composite score. FREE requested a debriefing, which was held with OPWDD on February 28, 2022.

Thereafter, on March 16, 2022, FREE submitted a protest of the grant award to OPWDD (Protest to OPWDD) pursuant to OPWDD's bid protest policy, as contained in the RFA (*Id.*, Section 8.16, at pp. 47-48). OPWDD denied FREE's protest in a written determination on April 12, 2022 (OPWDD Determination). FREE then appealed such denial to this Office on April 26, 2022 (Appeal). OPWDD submitted a response to the appeal on May 10, 2022 (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.⁴ 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.

² These factors included: lowest cost; understanding of annual expenditure requirements for clinical team, start-up and non-personal costs; whether the applicant utilized correct and reasonable NPS/Admin fees; whether the applicant's budget reflected an adherence to a phased-in staffing pattern; whether a Funding Request Summary was provided for each year, showing Medicaid Reimbursement amounts; and, the extent to which the applicant was as specific as possible when describing the anticipated costs associated with each operational element of their budget and how each line item would be phased in or required at start-up (*Id.*, Section 7.4, at pp. 33-34).

³ The RFA provided that "[u]p to two points may be deducted for each missing element and in each instance where the prescribed format is not followed" (RFA, Section 7.2.2, at p. 33).

⁴ 2 NYCRR Part 24.

In the determination of the Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by OPWDD with respect to the grant award;
2. the correspondence between this Office and OPWDD arising out of our review of the proposed OPWDD / YAI grant award; and,
3. the following correspondence / submissions from the parties (including the attachments thereto):
 - a. FREE's Protest to OPWDD;
 - b. OPWDD's Determination;
 - c. FREE's Appeal; and,
 - d. OPWDD's Answer.

Applicable Statutes

The grant award in question is subject to the requirements of Article 11-B of the SFL.⁵ Therefore, the procurement conducted by OPWDD 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 SFL]” (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). To determine whether the procurement process is fair and impartial, we look to 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). In light of these non-statutory standards, we will proceed to analyze the issues raised in this Appeal.

⁵ 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)).

ANALYSIS OF THE APPEAL

Appeal to this Office

In its Appeal, FREE challenges the grant award decision by OPWDD on the following grounds:

1. FREE's cover letter statement in response to RFA Section 8.32.2.6 was complete, thus FREE should not have lost a point for failing to include the words "providing a prudent amount";
2. OPWDD should not have deducted points from FREE's score in connection with OPWDD's inability to locate FREE's attachment to its proposal as FREE made no error in uploading the attachment with FREE's application submission;
3. The technical proposal evaluation was not conducted according to the rubric provided to the OPWDD evaluators;
4. OPWDD inaccurately scored FREE's technical proposal in the following instances:
 - a. OPWDD did not identify specific weaknesses in FREE's responses to the Vision and Goal, Proposed Staff, Linkages and Outreach, and Treatment Plan criteria, therefore FREE may have lost points in these criteria incorrectly; and
 - b. FREE's proposal included descriptions of cost estimates as well as fencing around the exit of the property in the Property Use and Property Renovation criteria, so these criteria should have been scored higher.
5. OPWDD's summary of FREE's interview responses does not accurately reflect FREE's answers and the details FREE provided during the interview; therefore OPWDD did not accurately score FREE's responses.

OPWDD Response to the Appeal

In its Answer, OPWDD contends the Appeal should be rejected and the grant award upheld on the following grounds:

1. The RFA set forth the cover letter requirements, including the use of specific language regarding insurance coverage. Even if OPWDD had not deducted a point for this cover letter error, FREE would have ranked the same;
2. No points were deducted as a result of OPWDD's clarification request relating to FREE's attachment;
3. To the extent that FREE alleges that OPWDD is required to share evaluation documents with FREE, OPWDD is not required to share evaluation documents with FREE before contract approval;
4. OPWDD provided FREE with details in the debriefing summary regarding specific information that was not included in FREE's technical proposal for Vision and Goal, Proposed Staff, Linkages and Outreach, and Treatment Plan criteria, and had such information been included FREE would have received a higher score for those criteria;
5. FREE's technical proposal lacked certain details for Property Use and Property Renovation criteria that, had they been included, would have earned them a higher score for those criteria; and,

6. With respect to OPWDD’s summary of FREE’s interview responses, while there were strengths in FREE’s staffing plan there were also weaknesses and, had FREE provided more detail, it would have received a higher score.

DISCUSSION

Technical Evaluation Methodology

FREE contends that the “technical proposal evaluation provided [by OPWDD] does not include the scoring as indicated in the rubric” (Appeal, at p. 1). OPWDD responds that, “[t]o the extent that [FREE is alleging] that OPWDD should have shared evaluation documents with FREE...OPWDD is not required to share [those] documents with FREE before contract approval” (Answer, at p. 1).

While not entirely clear, we believe FREE is alleging OPWDD’s technical proposal evaluation is inconsistent with the scoring rubric developed by OPWDD. As further described below, our review of the procurement record shows that OPWDD’s technical proposal evaluation is inconsistent with its scoring rubric; therefore, the scoring system is not clear.

The RFA set forth the number of available points for the technical proposal as well as the categories of criteria to be evaluated (RFA, Section 7.3, at p. 33). OPWDD further crafted an Evaluation Plan prior to the receipt of applications that was provided to evaluators, setting forth the number of points available for each category of criteria within the technical proposal: philosophy and mission (4 points); vision and goal (4 points); proposed staff (4 points); experience (6 points); description of services (30 points)⁶; technology (4 points); development plan for services (4 points); property for resource center use (10 points); and diversity practices (4 points, rounded to the nearest whole number). The Evaluation Plan also included a scoring rubric to be used by evaluators to rate the technical criteria:⁷

Rating	Description	Value
Unsatisfactory/ No Response	The Applicant is not capable of completing the services required or information demonstrating this ability is not included in the application.	0
Minimal – barely meets requirements	The Applicant demonstrates minimal ability to complete the services required and minimal ability to meet the needs of OPWDD.	1
Adequate – meets minimum requirements	The Applicant’s ability to complete the services required and to meet the needs of OPWDD is adequate.	2
Very Good	The Applicant’s ability to complete the services required and to meet the needs of OPWDD is very good. Detailed, articulate, sound understanding of requirements with some Strengths.	3
Outstanding	The Applicant’s ability to complete the services required and to meet the needs of OPWDD is outstanding. Demonstrates exceptional understanding, capabilities and strengths.	4

⁶ According to the technical evaluation score sheets, these 30 points were further broken down into 12 questions, worth 3, 2, 3, 3, 2, 3, 3, 3, 1, 3, 1, and 3 points, respectively.

⁷ OPWDD provided the rubric to FREE in the debriefing summary.

Since the rubric values only spanned from 0-4 and the points available for the technical criteria ranged from 0-6, OPWDD needed to convert the rubric values into point scores for each technical criterion. The method for conversion is not included in the RFA or Evaluation Plan. Notably, the procurement record does not contain the raw, pre-converted scores of the evaluators, but only the post-conversion scores.⁸ The procurement record shows that a conversion chart was created and provided to the evaluators on January 19, 2022 (after receipt of proposals). However, our review of evaluators' score sheets revealed conflicting comments describing how evaluators converted values from the rubric to final scores.

In addition to the obvious inconsistencies in conversion formulas found in the procurement record, the scores themselves show that the conversion chart could not possibly have been used in certain instances. Specifically, one evaluator awarded 4 points to a vendor for a technical criterion that was worth up to 6 points; however, according to the conversion chart, 4 points are not available for a 6-point question. Likewise, another evaluator awarded 2 points to a vendor for a technical criterion worth up to 5 points, which, according to the conversion chart, was not possible.

Based on the above, it is clear the technical proposals were not scored consistently among evaluators in accordance with the RFA, the Evaluation Plan and scoring rubric. Furthermore, although it is unlikely the conversion chart was crafted prior to the receipt of applications, evaluators still did not uniformly follow that formula to convert raw scores to final scores. As a result, we cannot conclude that the technical evaluation methodology was fair and balanced. Accordingly, OPWDD's award to YAI cannot stand. Therefore, while it is not necessary to address the other grounds raised in the Appeal, we offer the following guidance on those issues.

Application Component Scoring

FREE claims OPWDD failed to score certain components of its application appropriately as described below.

1. Cover Letter

With respect to penalty points deducted for cover letter deficiencies, FREE makes two allegations.⁹

First, FREE alleges that its cover letter statement in response to RFA Section 8.32.2.6 was complete, thus FREE should not have lost a point (Appeal, at p. 1). OPWDD responds that "the RFA described the cover letter requirements for bidders in section 6.6, including the specific

⁸ OPWDD confirmed that they did not retain raw scores for this procurement. Thus, there is no opportunity to convert raw scores in accordance with the conversion chart to determine if such conversion would have altered the outcome.

⁹ The procurement record shows that OPWDD deducted four points total as penalty points for cover letter deficiencies pursuant to RFA Section 7.2.2. The procurement record identifies four areas of the cover letter that OPWDD deemed deficient, including the two areas referenced in FREE's two allegations. However, the procurement record fails to specify exactly how many points were deducted for each identified deficiency. The RFA indicates up to two points may be deducted for each cover letter deficiency (RFA Section 7.2.2, at p. 33). For purposes of this Determination, we will assume one point was deducted for each of the four identified deficiencies, making up the total four points.

requirements in section 6.6.1” and, even if OPWDD had not deducted a point for this deficiency, FREE would have ranked the same overall (Answer, at p. 1). The RFA required the cover letter to include a two-part attestation regarding insurance coverage: (1) “Warrant the Applicant is willing and able to obtain an errors and omissions insurance policy providing a prudent amount of coverage for the willful or negligent acts, or omissions of any officers, employees or agents thereof” **and** (2) “provide proof of Workers Compensation and Disability Insurance and a Certificate of Insurance in accordance with Section 8.32.2.6” (RFA Section 6.6.1, at p. 24 (emphasis added)). In its cover letter, FREE only attested that it “is willing and able to obtain an errors and omissions insurance policy in accordance with Section 8.32.2.6 of this RFA.” The RFA was clear that if the prescribed format of the cover letter was not followed or if it was incomplete in any material respect, points would be deducted (RFA, Section 7.2.2, at p. 33). Therefore, OPWDD appropriately deducted a point for FREE’s failure to include this attestation requirement in its cover letter.

Second, FREE asserts OPWDD should not have deducted points resulting from OPWDD’s failure to locate an attachment referenced in FREE’s proposal as FREE made no error when it uploaded the attachment with its application submission (Appeal, at p. 1). OPWDD responds that “no points were deducted as a result of FREE’s clarification request” (Answer, at p. 1). The procurement record shows that a request for clarification involving “the attachment referenced in FREE’s application submission” was one of the cover letter deficiencies for which points were deducted.¹⁰ Although the procurement record is inconsistent with OPWDD’s assertion, based on the above determination that OPWDD did not score proposals consistent with the RFA, we do not need to further consider whether OPWDD’s point deduction in this instance was improper and, in any event, the deduction of one point would not have affected FREE’s overall ranking.

2. Technical Proposal and Interview

Lastly, FREE makes several allegations that OPWDD scored its technical proposal inaccurately: (1) “FREE’s response to the Vision and Goal, Proposed Staff, Linkages and Outreach, and Treatment Plan were complete and thorough. In multiple sections ‘weaknesses’ was listed but there was no mention as to what those weaknesses were, therefore additional points may have been lost incorrectly”; and (2) “For the Property Use, as well as Property Renovation, the answer did include description of cost estimates as well as fencing around the exit of the property” (Appeal, at pp. 1-2). FREE also claims OPWDD’s summary of “the questions and responses during the interview do not accurately reflect the answers and details” FREE provided in the actual interview (Appeal, at p. 2).

With respect to FREE’s technical proposal, OPWDD responds that had FREE provided more details and specifics in its proposal, FREE would have received a higher score (*see* Answer, at p. 2). With respect to the scoring of FREE’s interview responses, OPWDD stated, as an example, “while there were strengths in the staffing plan, such as highly qualified leadership, there were also weaknesses, such as the lack of clarity regarding the number of staff that would need to be hired to achieve a full staffing pattern” and similarly claimed that if FREE had provided more detail in its interview responses, it would have received a higher score (Answer, at p. 2).

¹⁰ *See supra* at fn. 7.

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).

However, as we concluded above, the procurement record shows that the evaluators did not score technical proposals/interviews consistently among themselves using a pre-established scoring methodology and, as a result, we are unable to conclude FREE's scores are supported by the procurement record.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are of sufficient merit to overturn the grant award by OPWDD to YAI. As a result, the Appeal is upheld and we will not be approving the grant award for Region 3 CSIDD to YAI.