

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Appeal filed by Access:
Supports for Living, 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-20230018

Procurement Record – OPD01-0000302-3660243

May 16, 2023

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 Access: Supports for Living, Inc. (Access) are insufficient to merit overturning the grant award made by OPWDD to Young Adult Institute (YAI) and, therefore, we deny the Appeal.

BACKGROUND

Facts

OPWDD issued a request for applications (RFA) on September 28, 2022, seeking applications from not-for-profit providers for CSIDD in Region 3 (RFA, Section 1.1.1, at p. 5; RFA, Section, 1.3.2, at p. 6). Region 3 includes eighteen New York State counties, covering the Capital District, Hudson Valley, and Taconic areas (RFA, Section 1.3.1.2, at p. 6).

The RFA provided that an evaluation team of OPWDD staff would evaluate each application based on a “combination of technical merit and cost that would most benefit OPWDD” (RFA, Section 7.1.1, at p. 30; RFA, Section 7.1.3, at p. 31). The grant contract would be awarded to the applicant achieving the highest final composite score (RFA, Section 7.5.1, at p. 32; RFA, Section 7.5.2, at p. 33). The final composite score, worth up to 100 points, consisted of a technical proposal worth 80 points¹ and cost proposal worth 20 points² (RFA, Section 7.3, at pp. 31–32; RFA, Section 7.4, at p. 32; RFA, Section 7.5.1, at p. 32).

¹ Several evaluation criteria were scored as part of the technical proposal (RFA, Section 7.3, at pp. 31-32). These technical scoring criteria included: philosophy and mission; vision and goals; proposed staff; experience; description of services; technology; development plan for services; property for resource center use; and diversity practices (*Id.*).

² The cost proposal was scored based on the following evaluation criteria: lowest cost; an “[u]nderstanding of annual expenditure requirements for clinical team, Start-Up and Non-Personal Costs;” whether “[t]he applicant utilized correct and reasonable NPS/Admin fees;” whether “[t]he applicant’s budget reflected an adherence to a phased in staffing pattern;” “[a] Funding Request Summary . . . for each year, showing Medicaid Reimbursement amounts;” and “specific[ity] . . . when describing the anticipated costs associated with each operational element of their budget and how each line item will be phased in or required a[t] start up” (RFA, Section 7.4, at p. 32).

OPWDD received three proposals by the due date of November 3, 2022. OPWDD awarded the grant contract to YAI, the applicant with the highest final composite score. On December 15, 2022, OPWDD notified Access of non-award. On December 27, 2022, Access received a debriefing and on January 27, 2023, Access received a summary of their debriefing.

Thereafter, on February 2, 2023, Access submitted a protest of the grant award to OPWDD (Protest) pursuant to OPWDD's bid protest policy as outlined in the RFA. OPWDD denied Access' protest on February 16, 2023 (OPWDD Determination), and Access subsequently submitted an appeal to this Office on February 27, 2023 (Appeal). OPWDD submitted an answer on March 8, 2023 (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.³ 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 this Appeal, this Office considered:

1. the documentation contained in the procurement record forwarded to this Office by OPWDD with respect to the OPWDD / YAI 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. Protest;
 - b. OPWDD Determination;
 - c. Appeal; and
 - d. Answer.

³ 2 NYCRR Part 24.

Applicable Statutes

The grant award in question is subject to the requirements of Article 11-B of the SFL.⁴ 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.

ANALYSIS OF THE APPEAL

Appeal to this Office

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

1. OPWDD failed to clearly disclose the allocation of cost points available to applicants among the cost proposal evaluation criteria;⁵
2. OPWDD failed to score Access’ cost proposal consistent with the RFA and the cost proposal evaluation methodology as applied to the other cost proposals; and,
3. OPWDD evaluators and staff misunderstood the phased-in staffing requirements of the RFA, resulting in flawed deductions to Access’ cost proposal score.

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)).

⁵ Access raised this same issue in the Protest which OPWDD initially denied on the basis that Access failed to raise the issue during the time permitted by the RFA to ask questions and therefore had waived its right to raise it as a ground for protest (*see* Protest, at p. 1; OPWDD Determination, at p. 1). Notwithstanding, OPWDD did address the merits in both its agency-level determination and response to the Appeal filed with this Office (*see* OPWDD Determination, at p. 2; Answer at p. 2). Therefore, although Access also challenges OPWDD’s determination that this protest ground was untimely, this Office will instead consider the merit of the original grounds for protest (*see* Appeal, at p. 1).

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. OPWDD clearly disclosed the cost proposal evaluation criteria in the RFA;
2. OPWDD consistently applied its cost proposal evaluation methodology to all proposals; and,
3. OPWDD evaluators understood the RFA requirements pertaining to phasing-in staffing and scored that portion of Access' cost proposal accordingly.

DISCUSSION

Disclosure of Cost Proposal Evaluation Methodology

Access contends “[t]he lack of transparency surrounding the distribution of points in the cost scoring section makes the award procedurally flawed” (Protest, at p. 1). Specifically, “a distribution of points across sections of the cost proposal was not outlined in the RFA, as was the case for the technical proposal” (Protest, at pp. 1–2). Access asserts it is “unaware of how many points were given for low cost, and other sections of the Cost Proposal Evaluation process” (Appeal, at p. 1). OPWDD counters “Section 7.4.1.1 of the RFA specifically stated that, ‘Lowest Cost will not be the only criteria considered in the Cost Proposal Evaluation,’ and Section 7.4 ‘Cost Proposal Evaluation (20)’ of the RFA lists several cost scoring criteria” (Answer, at p. 1).

As outlined above, this Office looks to whether the scoring system was clear to determine whether the grant award was fair and impartial. Here, the RFA clearly articulated the general manner for the evaluation of applications, with technical proposals worth 80 points and cost proposals worth 20 points (RFA, Section 7.3, at pp. 31–32; RFA, Section 7.4, at p. 32). The RFA further specified the cost evaluation criteria that would be used to evaluate and score cost proposals (RFA, Sections 7.4.1.1–7.4.1.6, at p. 32). As previously stated, SFL § 163 does not apply to the RFA, however, it is instructive. SFL § 163 does not require solicitations to set forth the points or weighting applicable to each criterion of a cost or technical proposal.⁶ Therefore, even if the standards of SFL § 163 did apply here, OPWDD would not be required to include any more specificity regarding the allocation of the 20 available cost points. Therefore, we are satisfied OPWDD sufficiently disclosed the cost proposal evaluation methodology resulting in a fair and impartial procurement process.

⁶ SFL § 163(9)(b) provides that the “solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted. Where appropriate, the solicitation shall identify the relative importance and/or weight of cost and the overall technical criterion to be considered by a state agency in its determination of best value.”

Cost Proposal Scoring

1. Generally

Access asserts “[i]t is unclear whether Access’ proposal was scored by the same scoring criteria as the other proposers” (Appeal, at p. 1). OPWDD contends that it is “demonstrated in the procurement record, [that] the same scoring criteria and points breakdown were used to evaluate and score all bidders’ cost proposals” (Answer, at p. 2).

The procurement record reflects prior to the receipt of proposals, OPWDD established a cost evaluation instrument that was consistent with the cost evaluation criteria outlined in the RFA. Based on our review of the procurement record, we are satisfied that all cost proposals were scored according to the clearly articulated cost evaluation criteria outlined in the RFA and the pre-established cost evaluation instrument.

2. Phased-In Staffing Plan

Access asserts that the failure to “understand[] the [phased-in staffing] requirements of [RFA Section 2.1.2] by [OPWDD] evaluators and [] staff may have led to a detrimental [cost] score [for Access]” (Appeal, at p. 2). Specifically, Access concedes “[i]t is true that Clinical Coordinators are a necessary component of a Crisis Intervention Services and Resource Center in the OPWDD regulations” but contends “the RFA indicated that [the Clinical Coordinator was] a position that could be phased in” (*Id.*).

OPWDD asserts that “Access’ argument that evaluators misunderstood the phased-in staffing requirement is [] erroneous and misplaced” and “OPWDD’s scoring is consistent with the phase-in described in RFA Section 2.1.2” (Answer, at p. 2). OPWDD asserts that “[t]he issue was not that Access had proposed to phase-in staffing . . . [r]ather, the issue was that its proposed phase-in was to hire [Clinical] Coordinators in the seventh month of the award” (*Id.*). OPWDD adds “Access could have scored higher [for this criterion of the cost proposal] if it had indicated an earlier hiring of the Clinical Coordinators to support the transition of CSIDD from state-operated services” (*Id.*).

The RFA provided that an “applicant will demonstrate that it employs or has access to staff sufficient to form the comprehensive Region 3 CSIDD team and Resource Center and will outline an initial staffing plan as well as a plan for phased-in staffing . . . [which] must include, but is not limited to . . . Clinical Team Coordinators” (RFA, Sections 2.1.2 and 2.1.3, at p. 10). The RFA further provided that the cost proposal evaluation would include the following relevant criteria: the applicant’s “understanding of annual expenditure requirements for clinical team, Start-Up and Non-Personal Costs” as well as “[t]he applicant’s budget reflected an adherence to a phased in staffing pattern” (RFA, Sections 7.4.1.2 and 7.4.1.4, at p. 32).

With respect to specific scores assigned by 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 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; OSC Bid Protest Determination SF-20210070, at p. 5).

The procurement record reasonably supports the scores assigned to Access’ cost proposal, including those related to the phased-in staffing plan proposed—which were clearly within OPWDD’s expertise to evaluate. In addition, the comments provided in the evaluation instruments further support the evaluators’ scores. Therefore, there is no basis to disturb the cost proposal scores OPWDD awarded to Access.

CONCLUSION

For the reasons outlined above, we have determined the issues raised in the Appeal are not of sufficient merit to overturn the grant award by OPWDD to YAI. As a result, the Appeal is denied.