Prequalified vendor appeal. Petitioner vendor failed to establish that respondent’s denial of its application for prequalification for a particular program was arbitrary or capricious.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
SUNNYSIDE COMMUNITY SERVICES, INC.
Petitioner
- against -
DEPARTMENT FOR THE AGING
Respondent

MEMORANDUM DECISION

INGRID M. ADDISON, Administrative Law Judge

This is an appeal by petitioner Sunnyside Community Services, Inc. (“Sunnyside” or “petitioner”), from a determination by respondent Department for the Aging (“DFTA” or “respondent”) denying its application for prequalified vendor status. The appeal is brought pursuant to section 324(b) of the New York City Charter, the Rules of the Procurement Policy Board, 9 RCNY § 3-10(m)(5) (Lexis 2010) (“PPB rules”), and the Rules of Practice of the Office of Administrative Trials and Hearings, 48 RCNY §§ 2-01 et seq.

Petitioner filed its appeal on May 5, 2011, after respondent denied it prequalification for an Innovative Service Center. The notice of petition omitted notice of respondent’s time to serve and file an answer as required by OATH’s Rules of Practice. See 48 RCNY § 2-02(b) (2011). I afforded petitioner an opportunity to cure this deficiency by amending the petition, and advised both parties that respondent’s time to file an answer would begin to run pending receipt of the revised notice. Petitioner submitted its amended notice on May 12, 2011, and respondent filed its answer on May 27. Petitioner filed no reply to respondent’s answer and the record closed on June 13.

For the following reasons, petitioner failed to establish that DFTA’s decision should be reversed because it was arbitrary or capricious. Accordingly, the appeal is denied.
ANALYSIS

Prequalification is the method through which an agency evaluates the qualifications of vendors to provide certain goods or services before it issues solicitations for a specific contract, based on criteria determined by the Agency Chief Contracting Officer (“ACCO”). 9 RCNY § 3-10(a). The PPB rules provide that the ACCO may consider a vendor’s current and past experience with similar projects, and past performance, among other listed criteria, and shall deny prequalification if the vendor’s qualifications fail to satisfy the established criteria. 9 RCNY §§ 3-10(d)(1), (2); 3-10 (l)(1). A vendor may appeal the ACCO’s denial to the agency head who shall consider the appeal and make a decision with respect to its merits. 9 RCNY § 3-10(m)(3). A vendor has the right to appeal the agency head’s decision to OATH. 9 RCNY § 3-10(m)(5).

Sunnyside is a vendor of case management services for the elderly. In November 2010, it submitted an application to prequalify as a vendor of senior congregate services through a Neighborhood Center and an Innovative Service Center. By letter dated February 25, 2011, DFTA’s ACCO denied Sunnyside prequalification for an Innovative Service Center on grounds that it had not met the eligibility requirements because of its poor Vendor Information and Exchange System (“VENDEX”) rating on an existing contract for case management services (Pet. Ex. I). Sunnyside appealed the ACCO’s determination on March 11, 2011 (Pet. Ex. J). By letter dated April 18, 2011, the agency head’s authorized representative affirmed the ACCO’s decision (Pet. Ex. K). Following are the circumstances surrounding the agency’s decision.

In April 2008, Sunnyside entered into a contract with DFTA (the 4MB program contract) to provide case management services to the elderly (Pet. Ex. A). From June 7 through June 11, 2010, DFTA conducted an annual site assessment of the 4MB program, and in a letter dated July 29, 2010, informed Sunnyside of its findings (Pet. Ex. C). The letter identified numerous areas in which its performance was deficient, instructed Sunnyside to file a corrective action plan within three weeks, and notified it that DFTA would revisit Sunnyside’s 4MB program within 90 days to ensure progress (Pet. Ex. C). The letter further advised that DFTA would remove non-compliance citations if Sunnyside remedied the problems and provided supporting documentation.

Sunnyside submitted a corrective action plan on August 17, 2010 (Pet. Ex. D) and on September 15, 2010, DFTA revisited the 4MB program. On October 4, 2010, DFTA wrote
Sunnyside and complimented the improvements it had observed but noted that not all of the previously identified deficiencies had been addressed and rectified (Pet. Ex. E). The letter cautioned that Sunnyside’s failure to address the outstanding issues within the next 90 days may trigger DFTA’s invocation of the contract provisions regarding remedial and/or termination procedures.1

On October 21, 2010, DFTA completed an evaluation of Sunnyside’s performance under the 4MB contract for the period beginning July 1, 2009 through June 30, 2010 (Pet. Ex. F). The evaluation identified that Sunnyside had poor responses to client needs and DFTA requirements; provided inadequate services to frail clients; and had deficiencies in key program areas. DFTA gave Sunnyside an overall rating of “poor.” DFTA’s ACCO approved the evaluation for submission to the Mayor’s Office of Contract Services (“MOCS”) on October 27, 2010 (Pet. Ex. F). The MOCS e-mailed Sunnyside a copy of the evaluation on December 2, 2010, with the subject line “Performance Evaluation” (Resp. Ex. 8). A cover letter in the e-mail informed Sunnyside that it had 15 days to submit a written response and failure to timely reply “shall constitute your agreement with the contents of the evaluation” (Resp. Ex. 8). Sunnyside claims that it unintentionally treated the MOCS December 2 e-mail as spam because it was sent from an unfamiliar e-mail address (Pet. at ¶ 15).

On December 29, 2010, more than six months after its June 2010 site visit, DFTA paid another visit to Sunnyside’s 4MB program to reassess and reevaluate the outstanding deficiencies. By letter dated January 24, 2011, DFTA expressed satisfaction that the program had continued to show improvement and address the issues identified in the assessment based on DFTA’s June 2010 visit (Pet. Ex. H).

In the interim, DFTA issued notice of its intention to award contracts for congregate services in the form of Neighborhood Centers and Innovative Senior Centers, and released prequalification applications on October 15, 2010 (Resp. Ex. 1). The criteria for prequalification for Innovative Service Centers included “fair/satisfactory performance or better for the last two years, as well as fair/satisfactory performance or better on all underlying performance and fiscal categories for the most recent evaluations” of City-evaluated contracts relevant to social services

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1 The remedial procedures in the contract permit respondent to suspend or limit new requests for services under the contract, and to reduce petitioner’s caseload upon its failure to correct deficiencies (Pet. Ex. A at 16). The termination procedures in the contract permit respondent to terminate the contract upon petitioner’s failure to comply with its terms and conditions (Pet. Ex. A, Appendix A at 10).

By letter dated February 25, 2011, DFTA deemed Sunnyside prequalified for a Neighborhood Center but found that it did not satisfy the prequalification criteria for an Innovative Senior Center due to its poor VENDEX rating on the 4MB contract (Pet. Ex. I).

Sunnyside appealed the denial to DFTA’s ACCO on March 11, 2011, advancing the following arguments: 1) the poor rating should not be considered because DFTA’s October 4, 2010 letter granted Sunnyside 90 days to rectify its deficiencies, and therefore DFTA erred by submitting the VENDEX evaluation before that time period had run; and 2) since DFTA’s October 4, 2010 letter, Sunnyside had made significant improvements to the 4MB program (Pet. Ex. J).

The agency head’s authorized representative affirmed the decision that Sunnyside was not eligible for prequalification in a letter dated April 18, 2011. The authorized representative found that Sunnyside’s corrective measures to the 4MB program were implemented outside the evaluation period of July 1, 2009 through June 30, 2010, and as such, would not have changed the poor rating it received (Pet. Ex. K).

The issue presented on appeal is whether the agency’s decision was “arbitrary or capricious.” See 9 RCNY § 3-10(m)(5); 48 RCNY § 2-06 (2011); Norway Electric Corp. v. Dep’t of Housing Preservation & Development, OATH Index No. 203/06, mem. dec. at 2 (Nov. 28, 2005); Rod Knox Architect v. Dep’t of General Services, OATH Index No. 304/93, mem. dec. at 4 (Dec. 10, 1992). To prevail, Sunnyside must establish that DFTA’s decision lacked a rational basis. Sullivan County Harness Racing Assoc., Inc. v. Glasser, 30 N.Y.2d 269, 277-78 (1972). Sunnyside has not met that burden.

The City Charter and the PPB rules permit an agency to consider an applicant’s past performance when determining eligibility for prequalification. Charter § 324(a) (Lexis 2011); 9 RCNY § 3-10(d)(1),(2) (Lexis 2010). Thus, the poor rating entered into the VENDEX database for Sunnyside’s 4MB program was well within DFTA’s purview for determining whether Sunnyside satisfied the prequalification requirements for an Innovative Senior Center (Pet. Ex. F). If an applicant vendor disputes the validity of the evaluation of an existing program that affects its chances for prequalification for another program, this tribunal has found it appropriate to review the basis for the agency’s negative evaluation.

Sunnyside does not deny that its prior performance was poor. That, by itself, is sufficient for DFTA to deny it prequalification for the Innovative Senior Center, which required, as a prerequisite “fair/satisfactory performance or better for the last two years, as well as fair/satisfactory performance or better on all underlying performance and fiscal categories for the most recent evaluations” of City-evaluated contracts relevant to social services to seniors. Notably, DFTA did not deny Sunnyside prequalification for the Neighborhood Center which had a lower eligibility threshold.

Sunnyside argues that it should have had 90 days from receipt of the October 4, 2010 letter to address the deficiencies before an evaluation was entered into VENDEX. I disagree. The 4MB program was first inspected in June 2010, and the program’s deficiencies were brought to Sunnyside’s attention via DFTA’s July 29 letter. The letter made certain demands of Sunnyside, and notified it that the program would be revisited within 90 days. Further, DFTA’s October 4, 2010 letter regarding Sunnyside’s deficient performance neither suggested nor provided guarantees that a final evaluation would be undertaken only after another 90-day period had elapsed. Rather, it cautioned that if the deficiencies in the 4MB program were not corrected within 90 days, DFTA might invoke the remedial and/or termination provisions of the 4MB contract (Pet. Ex. E). Neither correspondence can be reconciled with Sunnyside’s notion that DFTA should have delayed entry of its evaluation into the VENDEX database.

As the agency head’s authorized represented correctly noted, the VENDEX evaluation was for the time period July 1, 2009 through on June 30, 2010 (Pet. Ex. F). This annual evaluation is required by the PPB rules. 9 RCNY § 4-01(b) (Lexis 2010). Upon receipt of its evaluation, a vendor has 15 days to submit a written response to the agency. Failure to do so is deemed an agreement with the evaluation’s contents. 9 RCNY § 4-01(c).

Sunnyside’s assertion that it treated the MOCS’ e-mail as SPAM and never received a hard copy in the mail seeks to cast blame on the MOCS for Sunnyside’s failure to timely respond to the poor evaluation. First, it points to nothing in the rules that prescribes the manner in which an evaluation should be remitted to a vendor, so long as the evaluation is provided in writing. Thus, I find nothing inappropriate about the MOCS’ remittance of the evaluation by e-mail.
Second, even if Sunnyside had received a hard copy of the 4MB evaluation, it articulated no substantive challenge to the inadequacies listed on the evaluation.

It is worth reiterating that DFTA first visited petitioner’s 4MB program in June 2010, towards the end of the evaluation period. Petitioner was given feedback in July, and the program was revisited in September 2010, by which time it had not yet corrected all the outstanding deficiencies. Petitioner’s corrections to the 4MB program were not deemed acceptable until approximately six months after respondent’s first site visit. Thus, not only was there substantial evidence that as of the conclusion of the evaluation period, petitioner’s performance on the 4MB program was poor, but the agency head’s representative appropriately concluded that petitioner’s corrections to the 4MB program were made well outside the evaluation period and would have had no effect on its rating. Instead, those corrections would reflect in the VENDEX database for the period in which they were done. I find nothing arbitrary or capricious about this conclusion. Accordingly, DFTA appropriately denied petitioner prequalification for the Innovative Senior Center because of the poor rating of its 4MB program.

Based upon the evidence presented, Sunnyside has failed to meet its burden of proving that DFTA’s decision was arbitrary or capricious. The agency’s denial of prequalification is affirmed and Sunnyside’s appeal is denied.

Ingrid M. Addison
Administrative Law Judge

June 16, 2011

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