Council of Belmont Organization, Inc. v. Dep't for the Aging

OATH Index No. 1163/12, mem. dec. (Mar. 14, 2012)

Prequalified vendor appeal. Vendor failed to establish that denial of its prequalified status due to a prior poor evaluation was arbitrary or capricious.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
COUNCIL OF BELMONT ORGANIZATION, INC.
Petitioner
- against -
DEPARTMENT FOR THE AGING
Respondent

MEMORANDUM DECISION

JOHN B. SPOONER, *Administrative Law Judge*

This is an appeal by petitioner Council of Belmont Organization, Inc. ("COBO" or "petitioner"), from a determination by respondent Department for the Aging ("DFTA") 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 section 3-10(m)(5) (Lexis 2011) ("PPB rules"), and the Rules of Practice of the Office of Administrative Trials and Hearings, 48 RCNY §§ 2-01 *et seq.*.

Petitioner filed the instant appeal on January 17, 2012. The notice of petition did not contain notice of respondent's time to serve and file an answer and was not accompanied by proof of service on respondent as required by OATH's rules. *See* 48 RCNY § 2-02 (2012). After being notified of the deficiencies, petitioner submitted an amended petition on February 14, 2012, which complied with the rules. DFTA served its answer on February 29, 2012. COBO submitted a reply on March 13, 2012, and requested an oral argument on the appeal.

For the reasons stated below, petitioner failed to establish that DFTA's decision was arbitrary and 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. 9 RCNY § 3-10(a). The PPB rules provide that the Agency Chief Contracting Officer ("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).

COBO is a vendor of congregate services for the elderly and has been operating as a Neighborhood Center for over 35 years. Its last contract with the City ran from July 1, 2009, through June 30, 2011 (Ans. Ex. B). On October 15, 2010, DFTA issued notice of its intention to award contracts for Neighborhood Centers for 2012 and released prequalification applications (Ans. Ex. A). The criteria for prequalification included a statement that "DFTA reserves the option to exclude any organization from pre-qualifying as a neighborhood center if it has received a rating of Poor or lower overall in City evaluated senior center contracts in the most recent year evaluated" (Ans. Ex. A). COBO submitted an application for prequalification in June of 2011. By letter dated November 28, 2011, DFTA's ACCO informed COBO that it had not been prequalified for Neighborhood Center solicitations due to its poor rating on a City evaluation of its prior contract (Ans. Ex. C). Petitioner appealed the ACCO's determination on December 15, 2011 (Pet. Ex. 2). By letter dated January 6, 2012, the Agency Head's authorized representative affirmed the decision that petitioner is not eligible for prequalification (Ans. Ex. E).

The facts underlying DFTA's decision to deny COBO's application for prequalification are not disputed. On February 3 and 4, 2011, DFTA conducted site visits to evaluate COBO's performance under that contract and by letter dated March 18, 2011, informed COBO of its findings (Ans. Ex. H). The letter identified numerous areas in which COBO's performance was deficient, instructed COBO to file a corrective action plan for the deficiencies identified, and stated that non-compliance citations would be removed for items corrected by COBO for which it submitted supporting documentation (Ans. Ex. H). The deficiencies identified included the unavailability of records needed for the case assistance review; poor cleanliness in restrooms; missing or dead light bulbs; out of order smoke detectors and emergency lights; staff not trained on participants' rights, emergency procedures, and the use of fire extinguishers; and failure to follow DFTA's guidelines for participant sign-in (Pet. Ex. H). The letter informed COBO that a future visit would be necessary to verify corrections that require on-site observation or inspection (Ans. Ex. H). COBO submitted a corrective action plan by letter dated April 18, 2011 (Ans. Ex. I). On June 29, 2011, DFTA revisited COBO's Neighborhood Center and found that few of the deficiencies had been corrected (Ans. Ex. J). DFTA mailed COBO its final assessment report on August 19, 2011 (Ans. Ex. K). The report noted several of the same deficiencies, and also noted that COBO provided too few lunches and not enough care assistance services to seniors and that the meals provided were below nutritional standards (Pet. Ex. J).

Following the site visit, DFTA completed COBO's Contract Performance Evaluation for the period beginning July 1, 2010, and ending on June 30, 2011 (Ans. Ex. B). The evaluation rated COBO's timeliness as "fair," rated COBO's fiscal administration and accountability as "good," and rated COBO's performance quality as "poor" (Ans. Ex. B). In the performance comments, the evaluation explained that:

> Vendor met most requirements but deviated substantially from some nutrition and program requirements. Poor responsiveness regarding DFTA requests for information, reports and submission of quarterly menus. Program did not meet contracted service levels for two core services. Program provided 75% of contracted units of Congregate Lunch and 71% units of Case Assistance. Supervision of Case Assistance service was inadequate; documentation does not support the units of services reports to DFTA. Client files do not contain Intakes and other required documents and there are not case notes documenting the type of assistance provided. Program does not follow appropriate procedure for meal sign-in to ensure legitimacy of client signatures.

(Ans. Ex. B). The evaluation gave COBO an overall rating of "poor" (Ans. Ex. B). DFTA's ACCO approved the evaluation for submission to the Mayor's Office of Contract Services on September 28, 2011 (Ans. Ex. B). It was this evaluation that DFTA relied upon in denying COBO's application to be prequalified for future Neighborhood Center contracts (Ans. Ex. C).

COBO appealed the denial to DFTA's ACCO on December 15, 2011, arguing that it had restructured its top management to ensure future compliance with DFTA's requirements and address deficiencies, and that it is unfair to de-fund COBO, which has been operating for 35 years, based on a single poor performance evaluation (Pet. Ex. 2).

The Agency Head's authorized representative affirmed the decision that COBO was not eligible for prequalification by letter dated January 6, 2012 (Ans. Ex. E). The authorized representative found that COBO's intent to make corrective actions in the future would not change the evaluation because it was for the period of July 1, 2010, through June 30, 2011 (Ans. Ex. E). Thus, the poor rating made it ineligible for prequalification for a Neighborhood Center.

The issue presented in this appeal is whether the Agency Head's decision was "arbitrary and 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. (Dec. 10, 1992). This tribunal does not provide a *de novo* review. *Promotech v. Dep't of Design & Construction*, OATH Index No. 1590/99, mem. dec. at 6 (Sept. 27, 1999); *Red Knox*, OATH 304/93 at 6. To prevail, petitioner 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). Petitioner has not met that burden.

The Evaluation

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 2011). Thus, consideration of the poor rating for COBO's prior Neighborhood Center program was well within DFTA's purview in determining whether COBO satisfied the prequalification requirements for another Neighborhood Center contract. Where a contractor disputes the validity of the evaluations, this tribunal has found it appropriate to look at the basis of the agency's negative evaluation. *Promatech, Inc. v. Dep't of Design & Construction*, OATH Index No. 1590/99, mem. dec. at 5-6 (Sept. 27, 1999); *Red Knox Architect v. Dep't of General Services*, OATH Index No. 304/93, mem. dec. at 9 (Dec. 10, 1992).

Here, COBO asserts that the evaluation was incorrect because the overall rating should have been an average of its rating in the three categories, timeliness, fiscal administration and accountability, and performance quality. COBO's ratings in these categories were "fair," "good," and "poor," respectively; accordingly, COBO asserts its overall rating should have been "fair." COBO also asserts that the inclement weather last winter kept seniors away from its program and DFTA failed to consider this in finding that COBO underperformed in providing services.

In response, DFTA submitted an affidavit from Karen Taylor, DFTA's Deputy Commissioner, regarding the evaluation ratings (Ans. Ex. G). In it Ms. Taylor explained that performance quality is the most important category on the evaluation. Accordingly, DFTA uses this as the overall rating unless the other two categories are "poor" or "unsatisfactory," in which case the overall rating would go down (Ans. Ex. G). Ms. Taylor also explained that the inclement weather was considered in determining whether vendors met requisite service levels; the year-end calculations excluded the months of December, January, and February (Ans. Ex. G). This is reflected in the final assessment report which states that the percentages of services provided were based on the months of July through November 2010 and March through May 2011 (Ans. Ex. K).

DFTA's arguments are convincing. In evaluating a vendor's performance, the quality of the vendor's performance is obviously an important consideration. It is reasonable that DFTA would weigh performance quality more heavily than timeliness and fiscal administration and accountability when rating a vendor's overall performance under a contract; the fact that a vendor provided unsatisfactory services in a timely manner and kept adequate records and invoices for those services, does not make the services themselves any less unsatisfactory. COBO has presented no legal or factual support to the contrary. Additionally, despite COBO's assertions, DFTA showed that it did in fact consider the inclement weather in determining performance levels. Thus, I find that the poor overall rating on COBO's prior evaluation was not arbitrary and capricious.

Outside Circumstances

In its petition, COBO further argues that even if the poor rating was proper, DFTA should have considered the extenuating circumstances which led to that rating and the fact that those circumstances have since been remedied in determining COBO's pre-qualification status. In 2007, its long-serving executive director died and Joseph Marano, the Assistant Director, was designated to handle the day-to-day operations. COBO's practice had been to give all correspondence directly to Mr. Marano, even if it was addressed to the executive director's or another staff member's attention. According to COBO, it thereby became the victim of gross misconduct by Mr. Marano, who never informed its Board about DFTA's preliminary report and its opportunity to remedy the deficiencies identified. COBO asserts that its Board only learned about the negative evaluation when its executive director received DFTA's letter dated November 28, 2011, denying its prequalification status. Since learning about Mr. Marano's "cover up," the Board terminated Mr. Marano, hired new staff, and "implemented controls" so that this type of incident would not reoccur. COBO alleges that it has "addressed every concern raised" by the evaluation. COBO further contends that DFTA failed to consider that without prequalification, it would be ineligible to receive a state grant which would help address the issues raised in the evaluation.

These arguments are unpersuasive because COBO's actions taken after its prequalified status was denied, however laudable, do not diminish the reasoning of the denial decision itself. It is also notable that COBO's appeal to the agency head contained no information regarding Mr. Marano and his alleged malfeasance (Pet. Ex. 2). That alone establishes that the agency head's failure to consider it was not unreasonable. Moreover, COBO's attempt to put all the blame on Mr. Marano ignores the fact that it is responsible for his actions; it was COBO who hired Mr. Marano and it was COBO who gave him the authority to intercept mail, even where it was directed to the Board or executive director. Accordingly, the agency head's failure to find that these circumstances mitigated the poor evaluation was not arbitrary and capricious.

Likewise, COBO's allegation that every concern raised by the evaluation had been addressed was not before the agency head. In its submission to the agency head, COBO stated that the new program director and the case assistance manager would start in the beginning of 2012 to review all DFTA program evaluations and insure that deficiencies are addressed. There was no indication in that submission that any of COBO's deficiencies had been remedied. Even if such information had been before the agency head, this tribunal has found that program corrections made after the evaluation period do not affect the evaluation or make an agency head's reliance on a poor evaluation arbitrary and capricious. *See Sunnyside Community Services, Inc. v. Dep't for the Aging*, OATH Index No. 2352/11, mem. dec. at 6 (June 16, 2011).

As for COBO's argument regarding the state grant it will lose if prequalification is denied, neither that argument nor any documentary support showing that COBO was in fact entitled to the grant was before the agency head. It was not arbitrary and capricious for the agency head to fail to consider information that COBO did not put before it.

Past Performance

As noted above, the Charter and the PPB Rules state that an agency may consider past performance in making its pre-qualification decision. *See* Charter § 324(a); 9 RCNY § 3-10(d)(1), (2); *Jewish Ass'n for Services for the Aged v. Dep't for the Aging*, OATH Index No. 2413/11, mem. dec. at 6 (June 24, 2011); *Sunnyside Community Services, Inc.*, OATH 2352/11 at 6.

Here, COBO maintains that in considering its past performance, the agency head erred in placing so much weight on its last evaluation, which covered less than three percent of its operating history. COBO alleges that it has received satisfactory ratings for 34 out of the past 35 years and that it was arbitrary and capricious for DFTA to only consider its performance in one of those years.

Again, COBO's arguments are not persuasive. The prequalification application put vendors on notice that their most recent performance evaluations might be considered in determining their prequalification status. This was not an unreasonable consideration. Vendors applying to be Neighborhood Centers are organizations, not individuals. As demonstrated by the events described above, employees and management of organizations come and go. Thus, an organization's performance five, ten, or fifteen years ago may not be an accurate predictor of future performance, particularly where key management has been replaced. It is not arbitrary and capricious, therefore, to weigh an organization's most recent performance more heavily when deciding whether or not to award it future contracts.

COBO's position was stated in its petition and reiterated in its reply and I see no need to hear it repeated again at oral argument. Prequalified vendor appeals are intended to provide limited and expedited review of the decision already made by the agency. *Red Knox Architect v. Dep't of General Services*, OATH Index No. 304/93, mem. dec. at 6 (Dec. 10, 1992). Thus, the rules permit oral argument only when the administrative law judge finds it necessary to make its decision on the appeal. 48 RCNY § 2-04 (Lexis 2012). I find nothing in COBO's request that demonstrates why the issues here could not be adequately reviewed on the petition, answer, and other papers filed. Accordingly, COBO's request for oral argument is denied.

CONCLUSION

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

John Spooner
Administrative Law Judge

March 14, 2012

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