STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VISION CARE, INC., d/b/a VISION SERVICE PLAN, Petitioner,	)	
vs.	)	CASE NO. 87-1162BID
THE SCHOOL BOARD OF BROWARD COUNTY, Respondent,	)	
and	)	
FEA/UNITED VISION CARE PLAN, Intervenor-Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, the above matter was heard before the Division of Administrative Hearings by its duly designated Hearing Officer, Donald R. Alexander, on April 15, 1987 in Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Edward O. Savitz, Esquire
220 South Franklin Street
Tampa, Florida 33602

For Respondent: Edward J. Marko, Esquire
Post Office Box 4369
Fort Lauderdale, Florida 33338

For Intervenor: William S. Bischoff, Esquire
Suite 100, 2424 Allen Road
Tallahassee, Florida 32312

BACKGROUND

On September 23, 1986, respondent, The School Board of Broward County, gave notice to qualified vendors that it would receive bids on Request for Proposal (RFP) 87-269A which involved vision care for covered school employees. Bids were thereafter filed by petitioner, Vision Care, Inc. d/b/a Vision Service Plan, and intervenor-respondent, FEA/United Vision Care Plan. On January 22, 1987 the Board's purchasing agent advised intervenor that she would recommend to the Board that petitioner be awarded the contract. This prompted a protest by intervenor-respondent. In response to the protest, on February 3, 1987 the Board staff recommended the original recommendation be reversed and that both bids be rejected and the item rebid. This recommendation was approved at a Board meeting on February 5, 1987. Petitioner then filed its formal protest on

February 11, 1987. The matter was reconsidered by the Board and its earlier action reaffirmed by a 4-2 vote on February 18, 1987. Proposed agency action in the form of a Final Order was entered by the Board on March 17, 1987 wherein it proposed to reject all bids and rebid the contract on the ground an ambiguity in the specifications existed.

The matter was referred to the Division of Administrative Hearings by respondent on March 20, 1987, with a request that a Hearing Officer be assigned to conduct a hearing. Thereafter, a final hearing was scheduled for April 13, 1987 in Fort Lauderdale, Florida. At the request of the parties the matter was rescheduled to April 17 and then to April 15 at the same location.

At final hearing the parties stipulated to the admission of joint exhibits 1-19. The undersigned also took official notice of Section 112.00, Florida Statutes (1985), and Rule 6A-1.012(5), Florida Administrative Code.

In an effort to expedite this matter, this Recommended Order was prepared without the benefit of a transcript of hearing. In addition, the parties waived their right to file proposed findings of fact and conclusions of law.

The issue is whether respondent acted arbitrarily and capriciously when it rejected all bids filed in response to RFP 87-269A.

Based upon all of the evidence, the following findings of fact are determined:

FINDINGS OF FACT

1. On September 23, 1986 respondent, The School Board of Broward County (Board), through its purchasing department, issued a notice of release of Request for Proposal (RFP) 87-269A. This notice was sent to three hundred seventy-seven vendors and contained instructions on how to receive a copy of the RFP. Ultimately, some forty vendors did so. The RFP invited vendors to submit bids for vision care for covered employees of the Board for the period from March 1, 1987 through December 31, 1988. Such bids were to be submitted to the Board on or before 2:00 p.m. on October 29, 1986. In general terms, and as stated in section 1.1 of the RFP, the objective of the proposal gas to "solicit proposals for a closed panel vision plan and an indemnity vision plan." According to section 2.0 of the RFP, the Board desired the following services:

> The School Board of Broward County wishes to offer its employee [sic] (and their eligible dependent family members) in addition to its present closed panel vision plan, an indemnity vision plan.
>
> This RFP is soliciting quotations for two types of plans:
>
> 1. The currently offered closed panel type with the current level of benefits shown in Exhibit #1, entitled "FEA/United Vision Care Plan" and
>
> 2. A "freedom of choice" indemnity arrangement as an alternative arrangement to the closed panel, as all other SBBC health

benefits also offer a choice between self-selected providers or closed panels.

For the sane premiums as the current closed panel plan, providers are requested to quote their plan benefits, following the outline provided, in Exhibit #1.

Any unusual and/or special benefits are encouraged and should be included in your offering.
The availability of services and supplies for a population distributed throughout Broward County, North Dade County, and South Palm Beach County, Florida, will be very important.

School Board employees need services available to them after 3:00 p.m. daily (Monday through Friday) and also weekend and evening hours (at least one or two nights a week) if possible, so as not to interfere with their school schedules and responsibilities.

Providers must submit along with their proposals a list of current clients and a list of names and locations of participating optometrists.

2. Section 1.11 of the RFP is also relevant and provided that "the School Board of Broward County, Florida, expressly reserves the right to waive any formality in any proposal and to reject any and all proposals."

3. Only three bids were filed in response to RFP 87-269A. Of those, only two were complete. Those were by petitioner, Vision Care, Inc., d/b/a Vision Service Plan (Vision Care or petitioner), and intervenor-respondent, FEA/United Vision Care Plan (FEA/United or intervenor).

4. Intervenor is the existing supplier of vision care to the covered employees of the Board. Until this dispute is resolved, it continues to provide vision care services for the Board's employees. Under intervenor's existing contract, employees are referred to a closed plan of specific doctors. This means they have no option to see any physician except those listed on the "panel." The new proposal requested bidders to provide not only a closed panel plan but to also provide for a freedom of choice plan whereby employees could utilize a doctor of their own choice (not on the panel) and receive indemnification for all or a part of the costs. Bidders were also instructed to use the premium charged under intervenor's existing contract ($3.00 per employee per month). Therefore, the RFP called for a $3.00 per month premium and a composite closed plan/freedom of choice proposal.

5. Prior to bids being submitted, a "bidder's conference" was held on October 8, 1986 at which time potential bidders asked questions of Board representatives concerning the PFP. Representatives of only four potential bidders attended the conference. Among other things, a representative of intervenor asked the following questions:

Mr. Brown: Regarding 2.0, I have four questions. Can a provider quote both plans, closed panel and indemnity, in one composite plan? Question two: Must a provider quote both plans, closed panel and indemnity, in one composite plan? Question three: Can a provider quote only the indemnity selection with the indemnity play and, four, can a provider quote only the closed panel plan?

Mr. Thomas (Board director of fringe benefits): Thank you. Good questions. I think they will serve to clarify that particular section.

6. Later on, the Board's purchasing department prepared written answers to all questions asked at the conference. With regard to the four questions asked by Brown, the following answers were given:

Q. Must a provider quote both plans, closed panel and indemnity, in one composite plan?
A. A provider may quote both plans in a composite plan or quote them separately.
Q. May a provider quote both a closed plan and indemnity plan.
A. Yes, they may.
Q. Must a provider quote both plans, closed panel and indemnity, in one composite plan?
A. A provider may quote both plans in a composite plan or quote them separately.
Q. May a provider quote just one plan or the other, closed panel and/or indemnity?
A. Yes, a provider may select the way he wants to submit his quotation and may quote either a closed panel or an indemnity plan, or both.

7. The above questions and answers, and others, were reduced to writing, incorporated as an Addendum No. 1 to the RFP, and mailed to all bidders on October 17, 1986.

8. Other than the inquiry made above, there is no evidence that any bidder asked for clarification regarding the specifications in RFP 87-269A. According to sections 1.5 and 1.6 of the RFP, written questions or objections relating to the specifications were to be filed by October 3, 1986. None were filed.

9. The Board engaged the services of a consulting firm, Fringe Benefit Consultants, Inc. (FBC), to assist it in reviewing the bids and to make a recommendation. In addition, a vision care insurance committee made up of various Board employees was created to consider FBC's recommendation and to advise the Board. On January 8, 1987 FBC and the committee met to evaluate the two bids. After a "blind" evaluation, the committee selected petitioner by a 3-0 vote. This advice was conveyed to the superintendent by memorandum dated January 9, 1987. The superintendent concurred with this recommendation and recommended that petitioner's bid in the amount of $924,000 be accepted at the next Board meeting.

10. On January 22, 1987 the Board's purchasing agent prepared and mailed to intervenor a "notice of intent to award proposal" to petitioner and giving intervenor a 72-hour window after receipt of the notice in which to file a protest. The next day intervenor submitted its notice of protest. A formal protest was later filed on January 28, 1987. The protest, which has been received in evidence as part of joint exhibit 10, suggested, inter alia, that section 2.0 of the RFP called for bidders to submit three types of plans, and stated that intervenor had submitted six proposals (A through E) in order to meet that requirement.

11. On February 3, 1987 FBC sent the Board purchasing agent a letter stating in part:

> We have reviewed FEA/United Vision Care's protest letter dated January 28, 1987, and we recommend that all bids be rejected and the vision plan be rebid.
>
> We believe it was not made sufficiently clear to all bidders that a single $3.00 quotation level of benefits was being solicited for a composite closed panel/indemnity option vision plan.

12. The same date the acting superintendent (Dorothy Orr) prepared the following written recommendation:

> It is my recommendation that the Superintendent's recommendation in the matter of the award of the Vision-Care contract be changed and that the new recommendation be to reject all bids. If this suggestion is accepted, it is further recommended that the vision-care plan be rebid.
>
> This action is predicated in part on the recommendations of our consultants, Fringe Benefit Consultants, Inc., who have advised us as follows:
>
> "We believe it was not made sufficiently clear to all bidders that a single $3.00 quotation level of benefits was being solicited for a composite closed panel/ indemnity option vision plan.
>
> In further reviewing the section of the vision-care RFP pertaining to the vision services sought, I believe that there is evidence to suggest that sufficient ambi- guity exists in the wording which could lead a Proposer to construe that the School Board was seeking more than one plan containing a closed panel and an indemnity option.
>
> Our consultants, acting in good faith, evaluated the responses from two finalists

> and limited their evaluation to quotations which met the one plan with closed panel and indemnity criteria only.
>
> It has been brought to our attention through the filing of a formal protest by FEA United Vision, the present contract holder, that they did not understand that they were being asked to bid on a single plan. Their objection specifies: "the first three paragraphs of Section 2.0 clearly indicate that The School Board of Broward County is requesting proposals for three types of plans." Fringe Benefit Consultants, author of the RFP, agrees with this contention.
>
> In the considered opinion of both, Fringe Benefit Consultants and myself, it appears that there is sufficient merit in the challenge to warrant a change in the Superintendent's recommendation.

13. On February 5, 1987 the Board met and decided that "all bids received be rejected and that the item be re-bid." This action was conveyed to petitioner the same date in a letter prepared by the Board's purchasing agent. Petitioner thereafter filed its notice of protest on February 6 and its formal protest on February 11, 1987.

14. In response to petitioner's protest a second Board meeting was conducted on February 18, 1987 at which time both petitioner and intervenor were allowed to state their positions and answer any Board questions. In addition, two FBC representatives and a Board employee voiced their reasons for recommending that the Board find the RFP contained an ambiguity. At the conclusion of the meeting, the Board voted 4-2 to reject all bids and rebid the matter. Proposed agency action in the form of a Final Order was thereafter entered on March 17, 1987. The order provided in relevant part:

> THE SCHOOL BOARD finds that the ambiguity existed in the bid specifications and that said ambiguity was supported on Page 3 of 8, Question 3 in the Bidders' Conference, as well as Pages 11 and 12 on the R.F.P.

15. At the Board meeting on February 18, 1987 an FBC representative (George Corkun) explained that the above ambiguity stemmed from an answer given to a question raised by intervenor's representative at the bidders' conference on October 8, 1986. The question and answer, which are referred to as "Question 3" in the Board's Final Order, were as follows:

> Q. Must a provider quote both plans, closed panel and indemnity, in one composite plan?
> A. A provider may quote both plans in a composite plan or quote them separately.

16. According to Corkum, he was concerned that a protest had been filed and the "appeals process" could take as long as a year to be resolved. He felt that in view of the answer to question three, "somebody could have felt that

there was an ambiguity there," and that with "the remote possibility of an ambiguity," it was best to rebid the matter. Another FBC representative (Dr. Benjamin Stevenson) stated that the specifications called for a $3.00 per month premium and a composite closed panel/freedom of choice of plan, and alluded to a perceived ambiguity since five of intervenor's six proposals did not meet both requirements. Finally, a Board employee (Richard Thomas) pointed out that intervenor's proposal contained "six different bids" (proposals A-E) when in fact the RFP called for only one. To him, that "constituted...enough ambiguity to warrant" a recommendation that the contract be rebid.

17. Petitioner had no difficulty in interpreting the specifications and offered a bid proposal which was responsive to the Board's request. Although five of intervenor's proposals were non-responsive, it did submit a composite plan at a $3.00 premium (proposal E) which was responsive to section 2.0 of the specifications. Indeed, Board and FBC representatives acknowledged at the February 18 meeting that proposal E was responsive to the RFP.

18. Except for the submission of joint exhibits 1-19, there was no other evidence concerning the ambiguity or lack thereof in the specifications. Accordingly, no testimony was heard from the individuals who prepared the specifications, who made the recommendation that the bids be rejected, or who filled out the bid documents on behalf of petitioner and intervenor. There was also no evidence to support the charge that the decision was based on "politics" or that any other misconduct occurred during the bidding process.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties thereto pursuant to Subsection 120.57(1), Florida Statutes (Supp. 1986).

20. At issue is the propriety of respondent's proposed agency action entered on March 17, 1987 which rejected all bids on the ground an ambiguity existed in the specifications. It also directed that RFP 87-269A be relet. Since the agency had not yet proposed to award the bid to any party, the issue of who submitted the lowest and most responsive bid is not before the undersigned. Standing for petitioner and intervenor to participate in this cause has been stipulated to by the parties.

21. Initially, a brief comment is necessary concerning the nature of a bid proceeding arising under Subsection 120.57(1) and the burden placed upon the challenging party. This proceeding arises because of proposed agency action (the Board's vote of February 18 as memorialized in its order of March 17) which affected petitioner's substantial interests. Even so, to trigger a request for a Section 120.57(1) hearing, disputed facts must necessarily exist. This in turn contemplates an evidentiary hearing in a de novo setting and not simply a "review" of the agency's preliminary action. This is because "section 120.57 proceedings are intended to formulate final agency action, not to review action taken earlier and preliminarily, McDonald v. Department of Banking and Finance, 346 So.2d 569, 584 (Fla. 1st DCA 1977); Capeletti Brothers, Inc. v. State, Department of General Services, 432 So.2d 1359, 1363-64 (Fla. 1st DCA 1983). Moreover, "a formal 120.57(1) hearing...commences a de novo proceeding." Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778, 785 (Fla. 1st DCA 1981). However, a bid case differs in many respects from the conventional regulatory proceeding, and certain constraints must necessarily apply as to the type of evidence that may be presented by a party. That is, the events surrounding the bid decision are "frozen" in time, and a party cannot

present evidence at final hearing to cure deficiencies that were present when the bids were initially submitted. See, for example, Baxter's Asphalt and Concrete, Inc. v. Department of Transportation, 475 So.2d 1284, 1287-88 (Fla. 1st DCA 1985). The reasons for this are obvious, for case law teaches us that this would give an unfair advantage to a party submitting an otherwise deficient bid proposal. However, a party is clearly entitled to look behind the reasons underpinning the agency's decision and to question the underlying facts and circumstances in a de novo setting. Within this framework, the issue here is whether the agency's decision to reject all bids on the ground an ambiguity in the specifications existed was correct. Stated differently, was the agency arbitrary and capricious in its action? To answer this question in the affirmative, a party must prove that the reason(s) given by the agency for rejecting all bids were not based on facts which reasonably support its conclusion, Mayer Printing Co. v. Flowers, 154 So.2d 859, 864 (Fla. 1st DCA 1963), and that the agency was not "proceeding rationally within the bounds of discretion." Couch Construction Co., Inc. v. Department of Transportation, 361 So.2d 172, 175 (Fla. 1st DCA 1973). To do this, petitioner must present a prima facie case that the purported ambiguity relied upon by the Board does not exist. Having done so, the burden then shifts to the agency (and intervenor) to show that, notwithstanding those indicia of clarity in the specifications, other facts or circumstances lend support to the Board's action. Assuming this showing is met, the burden then shifts back to petitioner to counter the agency's proof, and to demonstrate that the reasons asserted by the agency lack a factual basis or are irrational and unreasonable.

22. At the same time deference must be accorded to the fact that under Rule 6A-1.012, Florida Administrative Code, and the specifications themselves, the agency reserved the right to reject all bids. This is important since decisional law holds that `where an agency reserves the right to reject all bids and to call for new bids, it has wide discretion to do so. See, for example, Couch Construction Co., Inc. v. Department of Transportation, 361 So.2d 172, 175 (Fla. 1st DCA 1978). Further, in exercising the power to reject any and all bids, and proceeding anew with the awarding of the contract,

> the (agency) cannot act arbitrarily or capriciously, but must observe good faith and accord to all bidders just consideration, thus avoiding favoritism, abuse of discretion, or corruption.

23. Wood-Hopkins Contract Co. v. Roger J. Au & Son, Inc., 354 So.2d 446, 450 (Fla. 1st DCA 1978).

24. Applying the above principles to the evidence herein, it is initially observed that, although the parties were entitled to an evidentiary hearing, they opted only to offer certain documentation received as joint exhibits 1-19. To satisfy its burden, petitioner, by way of argument, referred to certain portions of the documentation to demonstrate that there was no ambiguity in section 2.0 of the specifications. It relied primarily upon the clarification given at the bidders' conference, the lack of a request for clarification by any bidder, the responsive bid by intervenor (proposal E), the fact that no ambiguity was noted by the committee or FBC when the two bids were initially screened and evaluated, and statements by an FBC representative on February 18 that suggest the reletting of bids was the quickest way to resolve the pending protest. Collectively, these facts and circumstances present a prima facie case that no actual or real ambiguity existed. In response, respondent and intervenor pointed to the fact that six proposals were filed by intervenor when

in fact the RFP called for only one, and that intervenor's initial protest reflected some confusion on its part as to the number of plans that should have been submitted. This showing was not controverted by petitioner. These latter facts and circumstances tend to reasonably support the Board's decision, and to show that it was acting rationally within the bounds of discretion. Therefore, it cannot be concluded that respondent's action was arbitrary or capricious. This is especially true since there was no evidence to show that the reasons cited by the Board were simply a pretext for not awarding the bid to petitioner. This being so, petitioner's claim for relief must be DENIED.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that a Final Order be entered rejecting all bids on RFP 87-269A and that the contract be relet.

DONE AND ORDERED this 21st day of April, 1987, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Hearing Officer
Division of Administrative Hearings
The Oakland Building
2009 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of April, 1987.

ENDNOTES

1/ Although the Board has cited Section 120.53, Florida Statutes (1985), in several documents that relate to this matter, and has apparently utilized some of the procedures set out therein, this case arises under Subsection 120.57(1). This is because Subsection 120.53(5) relates to bidding procedures for contracts entered into under specified statutory provisions, none of which are relevant or applicable to this case. Whether by local rule the Board has adopted similar procedures to those codified in Subsection 120.53(5) was not disclosed.

2/ A notice by the Board's purchasing agent on January 22, 1987 that she intended to make a staff recommendation in favor of petitioner is not proposed agency action requiring a protest (as the agent requested), but rather is one step in the "free-form" process leading up to the proposed agency action of February 13, as formalized by the order of March 17.

COPIES FURNISHED:

Edward O. Savitz, Esquire
220 South Franklin Street
Tampa, Florida 33602
813/224-9255

Edward J. Marko, Esquire
Post Office Box 4369
Fort Lauderdale, Florida 33338
305/563-3401

William S. Bischoff, Esquire
Suite 100, 2424 Allen Road
Tallahassee, Florida 32312
904/385-0055

Dr. William J. Leary, Superintendent
School Board of Broward County
1320 Southwest Fourth Street
Fort Lauderdale, Florida 33312