

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CONSULTEC, INC., d/b/a GENERAL )  
AMERICAN CONSULTEC, INC., )  
in Florida, )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 91-5950BID  
 )  
STATE OF FLORIDA, DEPARTMENT OF )  
ADMINISTRATION, DIVISION OF )  
STATE EMPLOYEES' INSURANCE, )  
 )  
Respondent, )  
 )  
and )  
 )  
HEALTH CARE PHARMACY PROVIDERS, )  
INC., )  
 )  
Intervenor. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, William J. Kendrick, held a formal hearing in the above-styled case on October 9, 1991, in Tallahassee, Florida.

APPEARANCES

For Petitioner: William L. Hyde, Esquire  
Roberts, Baggett, LaFace & Richard  
101 East College Avenue  
Tallahassee, Florida 32301

For Respondent: John Carlson, Esquire  
Department of Administration  
435 Carlton Building  
Tallahassee, Florida 32399-1550

For Intervenor: Harry R. Detwiler, Jr., Esquire  
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STATEMENT OF THE ISSUES

At issue in this proceeding is whether the proposal of Health Care Pharmacy Providers, Inc. (HCPP), was responsive to the request for proposal issued by the Department of Administration (Department), and whether the Department departed

from the essential requirements of law in its evaluation of the responses to the request for proposal.

#### PRELIMINARY STATEMENT

These proceedings arose as a result of a request for proposal (RFP) issued by the Department on June 14, 1991, for a prescription drug card program. Following its review of the responses, the Department, on August 23, 1991, issued its notice of intent to award the contract to HCPP.

On August 23, 1991, Consultec, Inc. d/b/a General American Consultec, Inc. (Consultec), filed a protest and on September 3, 1991, a formal written protest challenging the selection of HCPP as the highest ranked proposer, as well as the propriety of the evaluation process. Subsequently, the matter was referred to the Division of Administrative Hearings for the assignment of a Hearing Officer to conduct a formal hearing pursuant to Section 120.57(1), Florida Statutes, and the petition of HCPP for leave to intervene was granted.

At hearing, Consultec called as witnesses: Richard Martz, Donna Butterfield, Andrew Lewis, and Gary Baranik. Consultec's exhibits 1-15 and 18 were received into evidence. The Department called Donna Butterfield as a witness, and its exhibits 1-2 were received into evidence. HCPP called Robert Davis as a witness, and its exhibits 1-4 were received into evidence.

The transcript of hearing was filed October 15, 1991, and the parties were granted leave until October 25, 1991, to file proposed findings of fact. The parties' proposed findings have been addressed in the appendix to this recommended order.

#### FINDINGS OF FACT

##### Background

1. On June 14, 1991, the Department of Administration, Division of State Employees' Insurance (Department), issued Request for Proposal No. 91-14 (hereinafter "the RFP") for a statewide prescription drug card program for full-time and part-time state employees, retired employees, COBRA recipients and eligible dependents covered by the State of Florida Employees' Group Health Self-Insurance Plan. The deadline for submitting sealed proposals in response to the RFP, as amended, was established as 2:00 p.m., August 2, 1991. At the time of the deadline, the Department had received a number of proposals, including those of petitioner, Consultec, Inc. d/b/a General American Consultec, Inc. (Consultec), and intervenor, Health Care Pharmacy Providers, Inc. (HCPP).

2. On August 22, 1991, following its evaluation of the proposals, the Evaluation Committee advised the Secretary of the Department that:

Based on the evaluation criteria contained in the RFP, the Committee would normally recommend that a contract be offered to Consultec, Inc. The company that was awarded the second most points is Health Care Pharmacies. However, considering the Plan's past claim's history, the Committee projects that, with a contract awarded to Consultec rather than Health Care Pharmacies, an additional claim's cost of approximately \$500,000 - \$600,000 would be

incurred annually. This difference is calculated based on the discount rates of 12.4% versus 15% respectively. The Committee feels it must, therefore, recommend that a contract be offered to Health Care Pharmacies. . . .

Thereafter, on August 23, 1991, the Department notified Consultec that it had selected the proposal of HCPP, as the most advantageous to the state, and accorded Consultec notice of its opportunity to contest the Department's decision.

3. Consultec filed a timely notice of protest and formal written protest to contest the Department's decision. Such protest charged that the Department materially departed from the evaluation criteria contained in the RFP, and that the proposal of HCPP was not responsive to the RFP.

The Request for Proposal

4. Pertinent to this case, General Conditions 3 and 6 of the RFP provided:

3. PROPOSAL OPENING . . . A proposal may not be altered after opening of the price proposals. . . .

\* \* \*

6. AWARDS:As the best interest of the State may require, the right is reserved to reject any and all proposals or waive any minor irregularity or technicality in proposals received. . . .

The RFP, as amended, further provided:

#### SECTION IV

##### PROPOSAL COMPLETION

1. Any proposal submitted in response to this RFP must include the certification of compliance on pages 25 and 26 signed by an authorized representative of the respondent. By the signature, the respondent certifies that all provisions of this RFP have been read, understood and agreed. The absence of such certification at the time of bid opening will render the proposal invalid and it will not be evaluated.

\* \* \*

3. Each respondent must submit the original of the following in a single envelope:

\* \* \*

C. Complete information requested in the 12 subsections of the Proposal Requirements. The respondent must respond to each statement in the same order as they appear in Section VI. Do not re-format or group your replies or your proposal will result in a non-responsive bid.

D. Complete the Cost Proposal as outlined in Section VIII. . . .

\* \* \*

6. DOA reserves the right to request verification, validation or clarification of any information contained in the proposal submitted. This may include checking references.

#### SECTION V

#### INQUIRIES

\* \* \*

2. Questions regarding this RFP will be answered at the pre-bid conference at the time, date and address shown in the Schedule of Events . . . Responses to such advance written questions, as well as questions raised at the conference, will be recorded in comprehensive written minutes which will be distributed to all parties who received the RFP and who record their presence at the conference.

3. Any changes made in this RFP which are not part of the official minutes of the pre-bid conference will be communicated in writing as an RFP amendment to all parties who received this RFP and who record their presence at the pre-bid conference.

\* \* \*

8. The State of Florida reserves the right to reject any and all proposals, to make no award or to issue a new Request For Proposals.

#### SECTION IV

#### PROPOSAL REQUIREMENTS

##### 1.0. LICENSE ORGANIZATION AND HISTORY

\* \* \*

1.4 Provide audited financial reports for 1987, 1988, 1989 and 1990, summarizing revenue and expenses for the operation of the prescription drug card benefit program of your business and the total operation of your prescription drug card business.

\* \* \*

##### 2.0 FINANCIAL RESPONSIBILITY

\* \* \*

2.2. Provide evidence of a \$1 million Performance Bond.

\* \* \*

### 3.0 PROVIDER NETWORK

3.1 Develop a statewide network of pharmacies which agree, by contract, to submit claims for participants and to accept the contractor's allowance along with the participant's co-payment as full payment. There must be participating pharmacies in all of Florida's 67 counties.

\* \* \*

## SECTION VIII

### CRITERIA FOR EVALUATION

The Department of Administration shall evaluate each proposal by assessing the respondent's reply to all issues addressed in this RFP. The evaluation process shall include:

1. The adherence and response to the Proposal Requirements as specified in Section VI. Lack of response to each point in Section VI will result in a nonresponsive bid. Do not reformulate or group your replies.
2. The Cost Proposal.

## SECTION IX

### EVALUATION OF PROPOSALS

CRITERIA: Each evaluation shall be done using the criteria listed in Section VIII.

WEIGHTING: The weighted criteria is as follows:

#### ADMINISTRATIVE FEES

Category 1	1/1/92 - 12/31/92	40%
Category 2	1/1/93 - 12/31/93	40%

Enrollment data on the number of state subscribers is found in APPENDIX I of this REP.

#### DISCOUNT PERCENTAGE RATE

Category 3	1/1/92 - 12/31/93	20%
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## FORMULA FOR CLAIMS PAYMENT

Payment will be the Average Wholesale Price (AWP) less a discount percentage rate, plus a dispensing fee minus a co-payment.

Information on prescriptions for participants in the last two fiscal years and partial amounts for the 1991-1992 fiscal year are found in Appendix 2 of this RFP.

**METHODOLOGY:** In order to determine the relative value of the weighted criteria, a 100 point system will be used. Respondents submitting the lowest administrative fees will be awarded the most points. Respondents submitting the highest discount percentage rate will be awarded the most points. Conversion to the 100 point scale will be determined as follows:

The administrative fees and discount percentage rate for each of the respondents will be added by category. The sum of each category will be divided by the number of respondents to arrive at the mean for that category.

### ADMINISTRATIVE FEES

The mean for administrative fees will be accorded a value of 20 points per year.

Each respondent's response, by category, will be divided into the mean for that category.

This factor will be multiplied by the point value of the mean (20 points) to determine the points awarded for the category. Calculations will be rounded to the fifth decimal.

An administrative fee of 0 will receive a value of 40 points per year.

### DISCOUNT PERCENTAGE RATE

The mean for the discount percentage rate will be accorded a value of 10 points.

Each respondent's response will be divided by the mean for that category. This factor will be multiplied by the point value of the mean (10 points) to determine the points awarded for that category.

The total points for each of the three categories will result in that respondent's

total points awarded. Maximum points will be 100.

SECTION X

COST OF PROPOSAL

1. Provide the monthly cost per year for all administrative services per claim for each year of the contract.

1/1/91 - 12/31/92 \_\_\_\_\_  
1/1/93 - 12/31/92 \_\_\_\_\_

2. Provide the discount percentage rate for the two-year contact period.

1/1/92 - 12/31/93 \_\_\_\_\_

SECTION XI

CERTIFICATE OF COMPLIANCE

\* \* \*

We propose to furnish and deliver any and all of the services in the attached Request for Proposals.

It is understood and agreed that this proposal constitutes an offer which, when accepted in writing and subject to the terms and conditions of such acceptance, will constitute a valid and binding contract between the undersigned and the State of Florida, Department of Administration.

It is understood and agreed that we have read the State's specifications shown or referenced in the RFP and that this proposal is made in accordance with the provisions of such specifications. By our written signature on this proposal, we guarantee and certify that all items included in this proposal meet or exceed any and all such State specifications. We further agree, if awarded a contract, to deliver services which meet or exceed the specifications. . . .

5. In accordance with Section V of the RFP, Consultec submitted the following question to the Department:

What is meant by "providing evidence"? Do you want written assurance that we have the capability to provide these bonds and insurance should we be the successful bidder?

The Department answered:

Provide evidence means the respondent must show written proof that it acquired the bonds and general liability insurance as required in the RFP and that the State shall be notified by the insurer of any cancellation of the bonds and liability insurance required.

6. While the Department's answer to Consultec's question stated that a respondent "must show written proof that it acquired the bonds," the proof at hearing demonstrated that insurance companies do not issue performance bonds until a contract has actually been awarded. Consequently, no respondent could "provide evidence" of a \$1 million performance bond in the manner delineated by the Department.

The responsiveness of Consultec's proposal

7. Consultec's proposal was fully responsive to the requirements of the RFP, and contained no material omissions or deviations from those requirements.  
1/

8. In response to Section X of the RFP, as amended, Consultec proposed a monthly cost-per-year for all administrative services per claim for each year of the contract (January 1, 1992 - December 31, 1992, and January 1, 1993 - December 31, 1993) of Zero dollars (\$0.00). Consultec also proposed a discount percentage rate from the average wholesale price (AWP) for prescription drugs for the two-year contract period of 12.4 percent.

The responsiveness of HCPP's proposal

9. HCPP's proposal was not responsive to the requirements established by the RFP in at least two material particulars. First, it failed to comply with the requirement that it provide audited financial statements for 1987-1990, and second, it failed to provide evidence of a \$1 million performance bond.

10. As heretofore noted, Section VI of the RFP required that HCPP provide audited financial reports for 1987 through 1990. The specific requirement read as follows:

1.4 Provide audited financial reports for 1987, 1988, 1989, and 1990, summarizing revenue and expenses for the operation of the prescription drug card benefit program of your business and the total operation of your prescription drug card business.

In response to such requirement, HCPP submitted a consolidated balance sheet and consolidated statement of operations for National Intergroup, Inc., and its subsidiaries. National Intergroup, Inc., is HCPP's parent company.

11. The financial statements, assuming they were audited, which was not demonstrated by competent proof in these proceedings, failed to include any auditor's notes. More importantly, such statements were consolidated statements of National Intergroup and its subsidiaries, and it is impossible to ascertain from such documents any information concerning the financial health of HCPP, the entity proposing to contract with the Department. Moreover, such statements



fail, as required by the RFP, to summarize "revenue and expenses for the operation of the prescription drug card benefit program of [HCPP's] prescription drug card business." Under such circumstances, HCPP's response to the provision of the RFP regarding the provision of financial reports was not responsive.

12. HCPP's response to Section VI of the RFP, that it "Provide evidence of a \$1 million Performance Bond" was likewise nonresponsive. Regarding such requirement, HCPP responded:

HCPP does not have a Performance Bond as it is not applicable.

13. Following bid opening, the Department contacted HCPP regarding its response to the performance bond requirement and was advised by HCPP that it had framed its response based on its assumption that a performance bond would not be required for a company of its stature. Upon being advised that it indeed was required, HCPP agreed to provide such a bond. Notably, however, HCPP's proposal contained no evidence of its ability or inclination to provide such a bond, and its agreement to do so occurred subsequent to bid opening. Under such circumstances, HCPP's proposal was not responsive to the performance bond requirement of the RFP.

14. HCPP's response to Section VI of the RFP, that it agree to develop a statewide network of pharmacies with participating pharmacies in all of Florida's 67 counties was ambiguous. Pertinent to this requirement, HCPP responded:

HCPP proposes a statewide network of pharmacies including Eckers, Kmart, Pharxnor and numerous independent pharmacies. The total preferred network consists of 820 stores in 53 counties.

15. Upon review of HCPP's response, the Evaluation Committee was of the opinion that HCPP's response evidenced an intention to provide a statewide network, with participating pharmacies in all 67 counties, and that HCPP currently had a network of pharmacies in 53 counties. To clarify such point, the committee contacted HCPP following the bid opening, and HCPP confirmed that the committee's interpretation of its response was accurate. At hearing, the proof confirmed the accuracy of the committee's interpretation of HCPP's response. Under such circumstances, the Department's request for clarification was appropriate, and HCPP's response that it had in fact proposed a 67-county statewide network was not a post-bid opening alteration of its proposal.

16. Finally, HCPP's proposal failed to contain any specific response to paragraphs 5.8, 5.10, 11.1, 11.2, and 11.3 of Section VI of the RFP, as required by paragraph 3C of Section IV and paragraph 1 of Section VIII of the RFP. Such failing, more likely than not, was inadvertent and the fault of the typist who prepared the response, since any response to such paragraphs required no more of the bidder than its agreement to comply with such requirements. HCPP's proposal was, nonetheless, not responsive to paragraphs 5.8, 5.10, 11.1, 11.2, and 11.3 of the RFP.

17. While not responsive to such paragraphs, the Department and HCPP contend that such failing is a minor irregularity since, by execution of Section XI (the Certificate of Compliance), HCPP obligated itself to comply with such requirements. A fair reading of Section XI comports with the position espoused

by such parties. Accordingly, it is found, under the circumstances, that HCPP's failure to specifically respond to such paragraphs was a minor irregularity, appropriately waived by the Department. The same conclusion cannot, however, be drawn regarding HCPP's failure to provide audited financial statements or to provide evidence of a \$1 million performance bond. Such requirements were required as part of the proposal, and were not so submitted. Additionally, HCPP's response in these particulars was contrary to the express requirements of the RFP. Under such circumstances, HCPP's mere execution of the Certificate of Compliance does not cure the deficiencies of its proposal as to such requirements.

18. In response to Section X of the RFP, as amended, HCPP proposed a monthly cost-per-year for all administrative services per claims for each year of the contract (January 1, 1992 - December 31, 1992, and January 1, 1993 - December 31, 1993) of forty cents (\$.40). HCPP also proposed a discount percentage rate from the AWP for the two-year contract period of 15 percent.

#### Evaluation of the cost proposals

19. Applying the weighted criteria established by Section IX of the RFP to Consultec's cost proposal, the Evaluation Committee awarded it the maximum number of possible points (80 points) for its proposed administrative costs, since the proposal reflected no charge for such expenses, and 21.440 points based on its proposed discount percentage rate of 12.4 percent. In all, Consultec received 101.440 points. By comparison, HCPP was awarded 51.666 points for its proposed administrative costs and 25.936 points based on its proposed discount rate of 15 percent. In all, HCPP received 77.603 points. 2/

20. Notwithstanding that Consultec was the superior respondent, based on the evaluation criteria contained in the RFP, the Evaluation Committee recommended, and the Secretary concurred, that the contract be awarded to HCPP. Such result was occasioned by the committee's conclusion that, notwithstanding the fact that Consultec received the most points under the evaluation criteria, awarding the contract to Consultec rather than HCPP would cost the state an additional \$500,000 - \$600,000 annually when the cost proposals are evaluated in light of the Plan's past claims history. 3/

21. The Department, as well as HCPP, do not concede that the Department departed from the methodology established by the RFP but, rather, contend that the point system by which the cost proposals were to be evaluated was but a "starting point" for the evaluation of the cost proposals. Supportive of such contention, those parties note that no where in the RFP was it specifically stated that the proposal with the most points would be awarded the contract and, therefore, the Department's decision to award the contract based on the lowest cost, as opposed to the most points, was not a departure from the established methodology or otherwise improper. Such contention is rejected as being contrary to the terms of the RFP, and otherwise not persuasive.

22. Section VIII of the RFP establishes a two-pronged test for awarding the contract: (1)"The adherence and response to the Proposal Requirements as specified in Section VI," and (2)"The Cost Proposal." 4/ Pursuant to Section X of the RFP, the cost proposal of a vendor is to be evaluated under the weighted criteria established by Section IX of the RFP. Neither Section VIII, IX or X contemplate any other factor, and nothing in the RFP establishes any other test or methodology by which to compare the various responses. Accordingly, under the literal terms of the RFP, Consultec was the prevailing bidder because it

received the highest number of points under the methodology established by the Department.

23. While the proof demonstrated that Consultec is the successful bidder when the methodology established by the RFP is properly applied, it further demonstrated that the methodology established by the Department was fatally flawed since, among other things, it neither provided for an exact comparison of bids, nor secured the best values for the public at the lowest possible expense. In this regard, the proof showed that while Consultec proposed zero administrative costs, it in fact proposed to recover such costs by being able to obtain drugs from participating pharmacies at a greater discount than the discount quoted to the state. 5/ Accordingly, while Consultec did have administrative costs, and was planning to recoup those costs, such costs were subsumed in its discount rate, and the methodology established by the Department did not permit an exact comparison of bids. Further, as heretofore, found, the methodology adopted by the Department was not designed to secure the best values for the state. 6/

24. Considering the flawed methodology adopted by the Department to evaluate the proposals submitted in response to the subject RFP, it is concluded that it is in the best interests of the State of Florida to reject all bids and to extend a new RFP.

#### CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Sections 120.53(5)(d)2 and 120.57(1), Florida Statutes.

26. Here, Consultec contends that it should be awarded the subject contract based on the Department's misapplication of the evaluation methodology established by the RFP, as well as the nonresponsive character of HCPP's response to the RFP. As the protestant, Consultec has the burden of establishing, by a preponderance of the evidence, that the Department's actions or decisions departed from the essential requirements of law. Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778 (Fla. 1st DCA 1981).

27. Competitive bidding requirements, such as those imposed upon the Department, have as their purpose and object the following:

[T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids.

Wester v. Belote, 103 Fla. 976, 138 So. 721, 723-24 (Fla. 1931); Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So.2d 1190-92 (Fla. 2d DCA 1977).

28. In soliciting and accepting competitive bids, an agency has wide discretion, and its decision, if based on an honest exercise of this discretion, will not be overturned even if reasonable persons may differ with the outcome. See *D.O.T. v. Groves-Watkins Constructors*, 530 So.2d 912 (Fla. 1988); *Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So.2d 505 (Fla. 1982). Its discretion, while broad, is not, however, unbridled. It must exercise such discretion in a manner that is not illegal, dishonest, fraudulent, arbitrary, or in any other way that would subvert the purpose of competitive bidding. See *D.O.T. v. Groves-Watkins Constructors*, supra; *Caber Systems v. Department of General Services*, 530 So.2d 325 (Fla. 1st DCA 1988); *Couch Construction Company, Inc. v. Department of Transportation*, 361 So.2d 172 (Fla. 1st DCA 1978); and *Wood-Hopkins Contracting Company v. Roger J. Au & Sons, Inc.*, 354 So.2d 446 (Fla. 1st DCA 1978). Here, for the reasons that follow, it is concluded that Consultec has demonstrated that the Department's decision to award the contract to HCPP departed from the essential requirements of law.

29. In exercising its discretion, an agency may not accept a proposal that is materially at variance with the request for proposal. However, although a proposal containing a material variance is unacceptable, not every deviation from the request for proposal is material. It is only material if it affects the price of the proposal, gives the offeror an advantage or benefit not enjoyed by other offerors, or adversely impacts the interests of the agency. See: *Tropabest Foods, Inc. v. Department of General Services*, 493 So.2d 50 (Fla. 1st DCA 1986); *Robinson Electrical Co., Inc. v. Dade County*, 417 So.2d 1032 (Fla. 3d DCA 1982); *Harry Pepper & Asso., Inc. v. City of Cape Coral*, supra, and Rule 13A-1.001(32), Florida Administrative Code. Here, HCPP's failure to submit audited financial statements with its proposal, as well as its failure to comply with the performance bond requirements at the time it submitted its proposal, were material variations from the RFP since their absence adversely affected the interests of the agency and gave HCPP an advantage not enjoyed by other bidders. Succinctly, the absence of any evidence of its intention in the RFP to provide the performance bond was contrary to the Department's interests, and its failure to comply with the audited financial statement requirement of the RFP gave it an advantage not enjoyed by other bidders since by submitting the balance sheet of its parent company, as opposed to its own financial statements, HCPP effectively precluded any assessment of its own financial soundness.

30. Notably, the Department has never suggested, nor could it reasonably suggest, that the provisions of the RFP requiring audited financial statements and evidence of a performance bond were not important to its interests, and that they were not material requirements of the RFP. Rather, it has contended that the consolidated balance sheets submitted by HCPP satisfied the RFP requirements for audited financial statements and that HCPP's post-bid opening agreement to provide a performance bond was a permissible "clarification" of its proposal. For the reasons heretofore noted in the findings of fact, the Department's conclusion that HCPP's proposal satisfied the RFP requirement for audited financial statements was erroneous. See e.g., *Humhosco, Inc. v. Department of Health and Rehabilitative Services*, 561 So.2d 388 (Fla. 1st DCA 1990). Moreover, HCPP's post-bid opening agreement to provide a performance bond was not a "clarification" of its proposal, but a post-bid alteration. Such alternations are not permissible. Rather, the responsiveness of a proposal is to be determined based on the documents submitted with the proposal. *Harry Pepper & Asso., Inc. v. City of Cape Coral*, supra, and Rule 13A-1.001(10), Florida Administrative Code. Accordingly, HCPP's proposal was not responsive to the RFP.

31. In addition to accepting, as the prevailing bidder, a proposal that was at material variance with the requirements of the RFP, the Department also departed from the essential requirements of law when it based its award on criteria not specified in, and contrary to, the evaluation criteria established by the RFP.

32. The state's competitive bidding statutes are designed and intended to preclude favoritism and bias in its various forums and to afford an equal advantage and opportunity to all desiring to do business with public authorities. Department of Transportation v. Groves-Watkins Contractors, supra. In this regard, Section 287(3), Florida Statutes, provides:

(3) When an agency determines in writing that the use of competitive sealed bidding is not practicable, contractual services shall be procured by competitive sealed proposals. A request for proposals which includes a statement of the services sought and all contractual terms and conditions applicable to the procurement of contractual services, including the criteria, which shall include, but need not be limited to, price, to be used in determining acceptability of the proposal shall be issued. . . .

33. By departing from the evaluation criteria established by the RFP, the Department compromised the competitive bid process. As stated in Boozar v. Department of Health and Rehabilitative Services, 11 FALR 4823, 4839-40 (1989):

Part of the reciprocity achieved under the competitive bidding process is achieved in the bid specifications and weighted bid evaluation criteria. All potential bidders are to be advised in advance of the requirements to be met in order to receive the contract award, as well as the standards by which each bid will be evaluated by the agency and each standard's relative importance to the agency. A potential bidder can then determine whether he can meet the bid specifications and criteria and thereby determine whether he wishes to go to the time, expense and trouble of preparing and submitting a fairly lengthy and detailed bid proposal. Therefore, central to the integrity and reciprocity of the competitive bid process is the requirement that an agency's action on a bid be expressed within the bid specifications and evaluation criteria which it created, and adhere to them during the selection process. In other words, should an agency accept a bid based on reasons not in the bid specifications and evaluation criteria, that action would go to the integrity of the competitive bidding process and would be arbitrary and capricious . . .

See also, *Aurora Pump v. Gouldo Pump, Inc.*, 424 So.2d 70 (Fla. 1st DCA 1982), and *Ecceston Properties, Ltd. v. Department of Health and Rehabilitative Services*, 11 FALR 1185 (1989).

34. While the Department's departure from the evaluation criteria established by the RFP was improper, it does not necessarily follow that Consultec should be awarded the subject contract. Rather, as heretofore found, it is apparent that the evaluation criteria that were established were fatally flawed, as the Department recognized during its evaluation, since they were not designed to accord an exact comparison of bids or to secure the lowest cost to the state. Under such circumstances, the appropriate decision for the Department to have made was to reject all proposals, and to extend a new RFP. See *Harry Pepper & Asso., Inc. v. City of Cape Coral*, supra.

#### RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is recommended that a final order be entered which rejects all proposals, and that a new request for proposals be extended.

RECOMMENDED in Tallahassee, Leon County, Florida, this 13th day of November 1991.

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WILLIAM J. KENDRICK  
Hearing Officer  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-1550  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 13th day of November 1991.

#### ENDNOTES

1/ In reaching such conclusion, the fact that Consultec did not provide evidence in its proposal that it had actually acquired a \$1 million performance bond has not been overlooked. However, considering the fact that it was impossible for Consultec to secure such a bond absent award of the contract, as well as the fact that Consultec provided a letter from its insurance carrier with its proposal that committed to provide such bond, as required by the RFP, should Consultec be awarded the contract, it is concluded that the Department correctly assessed Consultec's proposal as responsive to the RFP. Of a similar nature, the Department's post-bid opening request for clarification, pursuant to Section IV 6 of the RFP, regarding a perceived inconsistency between Consultec's response to Section VI 7.1 of the RFP, where it indicated that it would bill the Department for its administrative costs once each month, and its response to Section X, where it proposed an administrative cost of zero dollars, was an appropriate reaction by the Department, and Consultec's confirmation that its administrative costs would indeed be zero dollars was not a post-bid opening alteration of its proposal.

2/ While the evaluation criteria provided a maximum of 20 points for the discount percentage rate for the two-year term of the contract, the Department made a separate award for each of the two years. Consequently, the possible maximum number of points established by the RFP at 100, was inflated to 120. Such misapplication of the methodology does not, however, affect the ultimate ranking in this case, although it did serve to inflate HCPP's total points. If the methodology had been applied as required by the RFP, Consultec would have received 90.72 points and HCPP would have received 64.63 points.

3/ At hearing, the persuasive proof demonstrated that awarding the contract to Consultec rather than HCPP would conservatively cost the state an additional \$734,855 in the first year of the contract, and \$829,705 in the second year of the contract.

4/ While the RFP requires that the Department evaluate "The adherence and response to the Proposal Requirements as specified in Section IV," the proof demonstrates that the Department did not actually do so. Rather, it considered such requirements as a "threshold," which was passed if the vendor responded to the requirements, and the sole basis for its award was based on the cost proposals. Accordingly, the Department did not evaluate the relative responses to such requirements in making its award of the contract, including the financial soundness of the vendors.

5/ For example, Consultec's contract with Eckerds provided a discount rate of 15 percent. Based on its bid, Consultec would enjoy a 2.6 percent margin on drugs purchased through Eckerds upon which to cover its expenses and realize its profit.

6/ To Consultec's defense, if it needs any, the RFP actually invited proposals in the form submitted by Consultec since it specifically provided, at Section IX, that "an administrative fee of 0 will receive a value of 40 points per year."

#### APPENDIX TO RECOMMENDED ORDER, CASE NO. 91-5950BID

Consultec's proposed findings of fact are addressed as follows:

- 1 & 2. Unnecessary detail.
- 3. Addressed in paragraph 1, otherwise unnecessary detail.
- 4-19. Addressed in paragraphs 4 and 16.
- 20-22. Addressed in paragraph 5.
- 23. Unnecessary detail.
- 24-31. Addressed in paragraphs 6-8.
- 32-54. Addressed in paragraphs 9-18, and footnote 1.
- 55-69. Addressed in paragraphs 2 and 19-22.

The Department's proposed findings of fact are addressed as follows:

- 1-3. Unnecessary detail.
- 4. Addressed in paragraph 1, otherwise unnecessary detail.
- 5-7. Addressed in paragraph 5, otherwise unnecessary detail.
- 8-10. Addressed in paragraphs 1, 7 and 8.
- 11-15. Addressed in paragraphs 1, and 9-18.
- 16-22. Addressed in paragraphs 1-3, otherwise unnecessary detail.
- 23. Not a finding of fact.
- 24. Addressed in paragraph 4, otherwise unnecessary detail.

25. Addressed in paragraphs 16 and 17.  
26 & 27. Not a finding of fact.  
28-31. Unnecessary detail.  
32-45. Addressed in paragraphs 2, and 7-22, otherwise not relevant or unnecessary detail.

HCPP's proposed findings of fact are addressed as follows:

1. Unnecessary detail.  
2 & 3. Addressed in paragraph 1.  
4-8. Addressed in paragraphs 2, 3, and footnote 4.  
9-21. Addressed in footnote 1 and paragraphs 9-18.  
22-29. Addressed in paragraphs 19-23.  
30-32. Supported by the proof, but not necessary to the result reached.  
33. Addressed in paragraphs 16 and 17.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS:

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.