

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DELOITTE & TOUCHE LLP,)
)
 Petitioner,)
)
 vs.) CASE NO. 95-0727BID
)
 STATE OF FLORIDA, DEPARTMENT)
 OF HEALTH AND REHABILITATIVE)
 SERVICES,)
)
 Respondent.)
 and)
)
 UNISYS CORPORATION,)
)
 Intervenor.)
 _____)

RECOMMENDED ORDER

After notice to all parties, Don W. Davis, a hearing officer of the Division of Administrative Hearings, held a formal hearing in this case on March 9 and 10, 1995, in Tallahassee, Florida.

APPEARANCES

For Petitioner: William E. Williams
Rex D. Ware
Huey, Guilday, & Tucker, P.A.
106 East College Avenue, Suite 900
Tallahassee, Florida 32301

For Respondent: William A. Frieder
Assistant General Counsel
Florida Department of Health and
Rehabilitative Services
1323 Winewood Boulevard
Tallahassee, Florida 32399-0700

For Intervenor: W. Robert Vezina, III
Cummings, Lawrence & Vezina, P.A.
1004 DeSoto Park Drive
Post Office Box 589
Tallahassee, Florida 32302-0589

Steven A. Blaske
Unisys Corporation
4151 Ashford Dunwoody Road
Atlanta, Georgia 30319

STATEMENT OF THE ISSUE

Whether Respondent Florida Department of Health and Rehabilitative Services (HRS), acted illegally, dishonestly, fraudulently, arbitrarily or/and capriciously in determining to award the contract for RFP 95-142CM-FAP to Unisys Corporation (Unisys).

PRELIMINARY STATEMENT

On or about February 1, 1995, HRS posted a Notice of Award indicating intent to award the contract contemplated by the request for proposals (RFP) to Unisys.

The matter was transferred to the Division of Administrative Hearings by HRS after Petitioner Deloitte & Touche, LLP (Deloitte), filed a notice of protest and a formal petition protesting the award of the contract under RFP 95-142CM-FAP to Unisys.

By order dated February 23, 1995, the petition of Unisys to intervene in the proceeding, was granted.

At final hearing, Deloitte presented testimony of five witnesses and 27 exhibits. The witnesses were: HRS Secretary H. James Towey; HRS Deputy Secretary Lowell R. Clary; HRS Chief Information Officer Bill Belleville; HRS Staff Director John M. Holland, Jr.; and Elton Scott, Ph.D., an associate professor of finance at Florida State University. HRS presented testimony of one witness, Karin L. Morris, the Systems Programming Administrator charged with preparing the RFP, and nine exhibits. Unisys called no witnesses, but presented 15 exhibits.

The transcript of the final hearing was filed on April 10, 1995. Proposed findings of fact submitted by the parties are addressed in the appendix attached to this recommended order.

FINDINGS OF FACT

1. On November 14, 1994, HRS's Office of Information Systems distributed the RFP, entitled "FLORIDA System --Applications Programming Services." The RFP was designed to procure the programming services required by HRS to complete the software programming of, among other things, the state's federally mandated Child Support Enforcement System, and to maintain and enhance the system upon its completion.

2. Upon selection of the winning proposal, HRS intended to enter into the contract for thirty-six months, renewable upon agreement of the parties for an additional 12 months. The cost proposal rates for the initial three-year term would be binding for any subsequent work on the project. HRS also reserved the right to acquire additional consulting services from the contractor for related activities for up to one year after the termination of the Contract.

3. HRS began developing this RFP in the late spring or early summer of 1994 in anticipation of the expiration of the current contract with Deloitte for provision of applications programming services. Before release to prospective proposers, the RFP was approved by HRS' Office of Contract Services and the Information Technology Resources Procurement Advisory Commission (ITRPAC), a body consisting of various state officials including the head of the Division of Purchasing, which ensures that the RFP complies with state rules.

In addition, various federal agencies approved the RFP before its release to prospective proposers.

4. The RFP provided that 60 percent of the proposal scoring would be based on the technical proposals contained in the responses to the RFP, and that the remaining 40 percent of the score would be assigned to the costs as submitted in the proposals. After scoring and weighting of the scores, the weighted scores were to be combined to determine the winning proposal.

5. The breakdown of scoring between technical and cost components is based upon HRS' standard practice and its experience with the format required by other state and federal agencies with whom HRS works. The division of the scores was also intended to ensure that an unqualified vendor did not secure the bid solely on the basis of low cost.

6. The selection of the evaluation criteria and weighting of evaluation points for this RFP were subject to the discretion of the Department at the time the RFP was prepared.

7. On December 12, 1994, HRS held a bidders' conference at which representatives of Deloitte and Unisys were in attendance.

EVALUATION OF RESPONSES

8. On January 6, 1995, Deloitte and Unisys submitted the only two proposals in response to the RFP. Both proposals were deemed responsive to the requirements of the RFP.

9. HRS appointed a five member Evaluation Committee to review and evaluate the proposals. HRS provided training to the Evaluation Committee members specifically directed to the proper method for reviewing and scoring proposals submitted in response to the RFP.

10. Each member of the Evaluation Committee was qualified by training, education and experience to review and evaluate the technical merits of each proposal.

11. The RFP defined the criteria by which the proposals would be reviewed, scored and ranked by the Evaluation Committee, and the contract awarded.

12. Included in the RFP were blank cost proposal forms which the proposers were to complete. Those forms did not include any blank spaces to be filled in referencing costs associated with any "renewal" periods or otherwise provide for including information about proposed costs for any renewal periods.

13. The Evaluation Committee members each independently reviewed the technical proposals submitted in response to the RFP over a period of approximately two weeks. Committee members submitted the raw scores from their technical evaluations to Karin Morris, the HRS System Program Administrator. The cost proposals were opened and scored on January 20, 1995 by Ms. Morris.

14. The RFP provided, in Section 6.0, that a comprehensive, fair, and impartial evaluation would be conducted of all proposals received. The RFP also provided for the grouping of evaluation criteria into six categories with points assigned as follows:

1 - Mandatory Requirements	0 points
2 - Management Summary	0 points
3 - Corporate Capabilities	200 points
4 - Project Staff	200 points
5 - Technical Approach	100 points
6 - Project Workplan	100 points
7 - Cost	400 points

15. Section 6.0 of the RFP also contained the following language:

Selection of the successful proposer will be based on the proposal that is determined to be in the best interest of the department, taking into consideration cost and other criteria set forth in the RFP.

16. Further, the RFP provided, in Section 6.1, that:

An Evaluation Committee will be established to assist the department in selection of the winning contractor(s). All proposals not meeting the mandatory requirements will be rejected. The committee will evaluate the technical approach, corporate capabilities and project staff of all responsive proposals. The committee will rank proposers by the resulting scores and make a recommended award. The committee will summarize their findings and prepare an evaluation report to the Deputy Secretary for Administration. The report will then be presented to the Secretary of HRS.

The Secretary will review the final report, pertinent supporting materials and make the determination of the final award, taking into consideration cost and other evaluation criteria set forth in the RFP. The Secretary reserves the right to take any additional administrative steps deemed necessary in determining the final award. (Emphasis added).

17. Most importantly, Section 6.3(D) of the RFP dealing with the evaluation of the cost proposals stated:

The points awarded for the three cost evaluation categories will be totaled and added to the points awarded for technical evaluation categories 3 through 6 to determine the winning proposer. (Emphasis added).

18. After reviewing and comparing the weighted scores of both proposals, the Evaluation Committee issued a "Final Report," with recommendations, on January 30, 1995.

19. The weighted technical scores reflected in the Evaluation Committee's Final Report are as follows:

	DELOITTE	UNISYS
Corporate Capabilities	200	186.36
Project Staff	200	159.07
Technical Approach	100	76.62
Project Workplan	100	76.73
TOTAL	600	499

20. The weighted cost scores were:

	DELOITTE	UNISYS
Fixed Price Tasks	10.0	2.27
Monthly Price	357.90	380.0
Hourly Price	7.77	10.0
TOTAL	375.67	392.2

21. Totaling all categories as required by paragraph 6.3(D) of the RFP, the Department's Evaluation Committee arrived at the following final ranking:

	DELOITTE	UNISYS
Technical Proposal	600	499
Business Proposal	376	392
TOTAL	976	891

22. Based upon the Evaluation Committee's scores, Deloitte's demonstrated technical capability is 20 percent higher than that of Unisys.

23. Under the terms of the RFP, there was no discretion involved in scoring the cost portion of the proposals, including the weight to be accorded costs in the final overall scoring to determine the winning bidder. Based upon HRS' inclusion of the specific criteria in the RFP, the cost portion scoring was merely a mechanical calculation.

24. Both of the proposers' cost proposals fall within the agency's budgetary limits for the current year for accomplishing the work requested by the RFP.

25. Four of the five members of the HRS Evaluation Committee recommended award of the contract to Deloitte, in the following language:

Deloitte & Touche scored higher in all areas including recommendations. Deloitte and Touche is the incumbent contractor and therefore there are no risks associated with the transition. Deloitte understood the requirements of the RFP and addressed them more completely in their proposal. Therefore, it is our recommendation that the contract should be awarded to Deloitte & Touche. (Emphasis added).

One member of the Evaluation Committee recommended the decision be left to the Secretary of HRS. None of the members of the HRS Evaluation Committee recommended award of the contract to Unisys.

HRS SECRETARY'S DECISION TO AWARD TO UNISYS

26. On January 27, 1995, prior to preparation of the recommendations contained in, or the issuance of, the Evaluation Committee's Final Report, HRS

Secretary James Towey convened a meeting with Deputy Secretary Lowell Clary, John Holland, Bill Belleville and the department's legal counsel to discuss the contract award process, a draft of the Evaluation Committee's Final Report and other matters the Secretary felt relevant to HRS' ultimate decision on the RFP.

27. At the meeting, Towey was informed by Bill Belleville that Deloitte's proposal was the "best." Towey was also informed by John Holland and Bill Belleville that both companies could perform under the contract. However, neither Holland's nor Belleville's assessments were based on responses to the RFP, but rather upon their own experience with the two vendors outside of this RFP process. Belleville conceded that he believed that a proposer was qualified to perform the contract by merely meeting the "mandatory" requirements of the RFP, a category that was accorded zero points in the scoring criteria.

28. Informed that both companies could perform under the contract, Towey "zeroed in" on costs as the major consideration for the award of the contract. At the meeting, he considered a present-value calculation of the payments that the State would make over the course of a contract, if the contract had been for a 48 month term. The calculation had been prepared by Dean Modling, an HRS senior management analyst supervisor, although the RFP had been approved by the Department of Management Services without provision for such an analysis.

29. The RFP not inform proposers that a present-value analysis would be performed and provision for the present-value of a contract was not included in the scoring criteria for the proposals. Present value calculation became an issue when it was raised and discussed at the January 27, 1995 meeting, and subsequently used in the Secretary's decision to award the contract to Unisys.

30. Towey also considered, in deciding to award the contract to Unisys, a calculation of "raw costs," provided after the January 27, 1995 meeting. These "raw costs" were presented on two charts. Both added up the amounts submitted by each proposer for fixed price tasks and monthly costs, over 36 months. Although the RFP did not request, and neither proposer submitted costs for a 48 month contract, the two charts included a calculation for a hypothetical 48 month contract using the same monthly payments submitted for the 36 month contract. In addition, one of the two charts included a 5.8 percent factor for overtime, which was also not addressed by the RFP or by the proposals submitted in response to the RFP. There was no evaluation criteria contained in the RFP which dealt with the issue of "raw costs" over the term of the contract.

31. Prior to the decision to award to Unisys, HRS never performed and Towey never considered a present value analysis for the 36 month contract period provided for in the RFP.

32. Finally, as a result of concern expressed at the January 27, 1995 meeting regarding whether Unisys could handle the immediate tasks required by the contract, including requirements of the Child Support Enforcement and federal certification programs, Towey considered whether there would be any risk of transition if Unisys were unable to hire some of Deloitte's employees and subcontractors should he decide to award the contract to Unisys. Towey specifically requested Deputy Secretary Clary to research this issue. In order to obtain information, Clary had HRS personnel directly contact Deloitte's subcontractors. Clary responded to Towey three days later on January 30, 1995, the day before the decision by Towey to award the contract to Unisys, that Deloitte's subcontractors would not be prohibited from working for Unisys.

33. Consideration of overtime and risk of transition were not criteria contained in the RFP, nor were these elements evaluated and scored by the HRS Evaluation Committee.

34. By way of a January 31, 1995 memorandum to Clary announcing the award of the contract to Unisys, Towey stated:

I have now had an opportunity to review the report of the evaluators of this RFP, the recommendations contained therein, the raw data submitted with the proposals, and the RFP. I understand the nature of the project and its importance to the agency. Based upon my review of the information presented to me and my understanding of similar projects in the past, my decision is to award the contract to Unisys as the proposal most advantageous to the state of Florida, taking into consideration the price and other criteria set forth in the RFP.

Although I have considered the risk of transition to a new contractor, I find that I am unable to ignore the dollar savings which will result in awarding the contract to Unisys. Since you and your staff have assured me that both companies are technically competent to perform the work, I believe the monetary savings outweigh any risk that might exist in the transition of contractors. Therefore, I have determined that it is in the state's best interest to award the contract to Unisys.

Please take whatever steps are necessary to implement this decision. (Emphasis added).

35. By his actions, Towey exercised more than the prerogative conferred by the RFP to "take any additional administrative steps deemed necessary in determining the final award" and actually evaluated criteria other than that contained in the RFP in reaching his decision to award the contract to Unisys. Further, in awarding the contract to Unisys, Towey effectively altered the relative weight of the criteria as specified in the RFP.

36. Towey relied upon the advice of Clary. Illustrative of Clary's perspective is his testimony at the final hearing that he believed the 60/40 weighting contained in the RFP to be inapplicable to decision making by the Secretary of HRS.

37. Neither Bill Belleville nor John Holland reviewed, in detail, the proposals submitted in response to the RFP. Neither performed their own independent analysis of the responses. Further, Clary never reviewed the RFP nor the proposals submitted in response to the RFP.

38. In the course of his decision making process with regard to award of the contract to Unisys, Towey relied on the advice of Clary, Belleville and Holland, referred to by Towey as his "top managers", despite their undisputed lack of familiarity with the Deloitte and Unisys proposals.

39. While his memorandum dated January 31, 1995, states he reviewed the RFP, Towey admitted in his testimony at the final hearing that he had not personally reviewed the document. Further, he never reviewed or performed his own analysis of the two proposals submitted in response to the RFP.

40. The members of the Evaluation Committee members were the only persons to fully and carefully evaluate the two proposals and score them under the criteria contained in the RFP. Since that time, no one else from HRS has attempted to reevaluate or re-score the proposals. Neither Towey nor anyone else involved in the January 27, 1995 meeting disagrees with the analysis and scoring of the proposals by the Evaluation Committee.

PRESENT-VALUE ANALYSIS

41. Section 1.2 of the RFP, states, in part:

This RFP will result in a thirty-six month contract.

42. Further, Section 4.12(C) of the RFP states, in part:

Upon selection of the winning proposal, the department shall enter into a contract for thirty-six (36) months.

43. Although the possibility of renewal of the contract for a maximum of a single, one year term is contained in the RFP, there is no provision in the RFP which requires that HRS renew the contract after 36 months or that the contractor accept a renewal after 36 months for any specific term.

44. By the terms of the RFP, any renewal of the contract for a period beyond the 36 month term is subject to negotiation between the contractor and the department. While proposals submitted by Unisys and Deloitte commit to maintaining the same costs in the event of renewal, negotiation as to the length, price and staffing for any renewal period less than a year, is not excluded by the terms of the RFP. Neither HRS nor the contractor is bound, under the terms of the RFP, to any extension of the contract.

45. HRS' own manual, HRSP 75-3, entitled "Developing a Request for Proposal," states, in the section on contract renewals:

If Contract Renewals have been provided for in this RFP, include the following recommended language in the Special Provisions subsection of the RFP:

This contract may be renewed on a yearly basis not to exceed two (2) years beyond the initial contract or for a period no longer than the term of the original contract whichever period is longer. Such renewals shall be contingent upon satisfactory performance evaluations as determined by the department and shall be subject to the availability of funds. As specified in the provider's response to the RFP/ITB, the total cost for the contract under the ' first year renewal will not exceed \$ _____ and the second

year renewal will not exceed \$ _____. Each renewal shall be confirmed in writing and shall be subject to the same terms and conditions set forth in the initial contract. (Emphasis added).

46. Another in-house document at HRS is HRS manual, HRSM 75-2 (May 1, 1994 update), entitled "Contract Management System for Contractual Services". Chapter 5 of that document, entitled "Contractual Procurement Requirements," states, in pertinent part:

The dollar amount and the manner in which the costs for the . . . renewals will be calculated must be specified in the response to the RFP and in the resulting contract document.

47. By contrast, the RFP contains none of the language specified in either HRS manual regarding renewal. Section 4.12(c) of the RFP merely states:

This contract term shall be renewable for a maximum of a one year term upon the mutual agreement in writing of the contractor and the department. (Emphasis added).

48. Terms of the RFP did not invite proposers to submit a specific cost or any other information for a renewal period or explain how costs for a renewal period would be calculated. Neither did the RFP contain any language that renewals would be conditioned on satisfactory performance by the contractor.

49. Proposers, on blank cost forms, were requested in the RFP to provide HRS with their proposed prices for fixed price items, monthly costs and hourly costs. The forms, contrary to the requirements of HRS manuals applicable in situations where information for a renewal term is requested, did not provide a place for proposers to indicate costs for any renewal term or to demonstrate how those costs were calculated.

50. Both contractors understood that any renewal would be subject to negotiation. The "Standard Contract" contained in the RFP provides only for a term of 36 months and a cost for that specific contract term.

51. Consistent with the terms of the RFP that the contract was for a 36 month term, HRS submitted, on more than one occasion, materials to ITRPAC. In those materials, HRS represented that the proposed budget amounts of \$25 million and \$28 million for the project were for a three year term contract.

52. The Notice of Award which HRS issued stated that a three year contract was to be awarded.

53. Although the RFP addressed staffing at a maximum of 107 persons, HRS was aware that 100 percent staffing might not always occur. Section 2.1(B)(5) of the RFP permits 90 percent of the maximum staffing level at a given time without the vendor incurring a penalty.

54. At one point in the RFP preparation, a draft of the RFP required 95 percent staffing. Even that level was considered by HRS to be too restrictive and anti-competitive and was amended to 90 percent out of fear that a 95 percent staffing level would discourage submission of competitive proposals.

55. The 90 percent figure was also used in the RFP to account, in part, for projected attrition of contractor employees that HRS had historically experienced on this project. From the standpoint of budgetary allowances by HRS for the project, it is realistic to believe that the job will be staffed at somewhere between 90 percent and 95 percent rather than at the maximum staffing level of 107 employees.

56. Although Section 4.15(D)(5) of the RFP states that the State is not responsible for paying contractor's employees for leave or vacation time, the testimony of Petitioner's financial expert, Dr. Elton Scott, establishes that a reasonable assumption is to assume that each employee is entitled to, and would take, at least two weeks vacation. Such an assumption should also be included when performing a present value analysis, particularly when assuming 100 percent staffing.

57. Depending on budget allocations for this project, it is possible that HRS would only require that the contractor provide as few as 46 employees.

58. The present value calculation performed by HRS indicated that, over 48 months, at 100 percent staffing (107 employees), the monetary cost of awarding the contract to Unisys would be approximately \$500,000 less than the cost of awarding the contract to Deloitte, a savings of approximately 1.5 percent over the term of the contract.

59. As demonstrated by HRS' subsequent present value calculation performed at final hearing in this cause, for the 36 month actual contract period, at maximum staffing, HRS would realize a savings of no more than \$39,802 by awarding the contract to Unisys, a savings of less than 2/10ths of 1 percent.

60. None of HRS' present value calculations accounted for leave/vacation time or for any staffing levels under 100 percent for any other reasons.

61. Based upon the terms of the RFP, the language of HRS' procurement manuals, and the expert testimony of Dr. Scott, any valid present-value analysis should have included a 36 month term contract. Any such analysis should also have taken into account varying levels of staffing, leave/vacation time, and overtime if staffed at the minimum required.

62. A properly performed present-value analysis indicates that Deloitte's proposal is less expensive than the Unisys proposal in the following amounts over a 36 month contract term, at the staffing levels indicated:

Employees	Leave/Vacation Time	Overtime	Deloitte Savings
107	2 weeks	none	\$12,791
96	none	none	\$109,062
96	none	5.8 percent	\$ 18,327
46	none	none	\$844,473

(Pet. Exh. 15)

63. The only scenario in which the Unisys proposal is less costly than the Deloitte proposal, using the proper present value analysis, would be at 107 employees, with no accounting for leave time. This unlikely future scenario would result in a savings of no more than \$47,378, or less than 2/10ths of 1 percent of the contract amount over 36 months.

64. Because it requires an up-front payment of more than \$1,600,000 (as compared to \$78,000 for Deloitte), the Unisys proposal places the State of Florida at substantially more financial risk than the Deloitte proposal in the event of nonperformance by Unisys.

65. On February 1, 1995, HRS posted its notice of intent to award the Contract to Unisys. Deloitte filed its timely notice of intent to protest on February 3, 1995, and filed its timely formal protest and request for hearing on February 13, 1995.

CONCLUSIONS OF LAW

66. The Division of Administrative Proceedings has jurisdiction over the parties and the subject matter of this proceeding. Sections 120.53(5) and 120.57(1), Florida Statutes.

67. Deloitte has standing to challenge the actions of HRS in this proceeding and to seek award of the contract at issue.

68. Unisys has standing to intervene in this proceeding.

69. In *Wester v. Belote*, 138 So. 721, 724 (Fla. 1931), the Court held that competitive bidding requirements:

. . . serve the object of protecting the public against collusive contracts and prevent favoritism toward contractors by public officials and tend to secure fair competition upon equal terms to all bidders, they remove temptation on the part of public officers to seek private gain at the taxpayer's expense, are of highly remedial character, and should receive a construction always which will fully effectuate and advance their true intent and purpose and which will avoid the likelihood of same being circumvented, evaded, or defeated. *Emphasis added*).

70. Petitioner's burden in this proceeding is to prove that the actions of the agency were either illegal, dishonest, fraudulent, arbitrary and/or capricious. *Department of Transportation v. Groves-Watkins Constructors*, 530 So. 2d 912 (Fla. 1988). "[I]ntervention to prevent the rejection of a bid should occur only when the purpose or effect of the rejection is to defeat the object and integrity of competitive bidding." *Id.* at 913.

71. The discretion afforded state agencies in soliciting and accepting bids is not unbridled and can be overturned when the purpose of competitive bidding has been subverted. *Wood Hopkins Contracting Co. v. Roger Au and Son, Inc.*, 354 So. 2d 446 (Fla. 1st DCA 1978); *Caber Systems v. Department of General Services*, 530 So. 2d 325 (Fla. 1st DCA 1988).

72. An agency's actions are considered to be arbitrary and capricious when they are not supported by facts or logic, or are despotic. *Agrico Chemical Company v. Department of Environmental Regulation*, 365 So. 2d 759 (Fla. 1st DCA 1979).

73. An arbitrary agency action includes "one which is decisive but not governed by fixed rule or standard." *Youth Crime Watch of America v. Department of Health and Rehabilitative Services*, 619 So. 2d 405 (Fla. 3rd DCA 1993).

74. As found by the Hearing Officer in *Courtney v. Department of Health and Rehabilitative Services*, 12 F.A.L.R. 2226 (Final Order - 1990), in determining that HRS had subverted the competitive procurement process and improperly awarded a contract:

Part of the reciprocity achieved under the competitive bidding process is achieved in the bid specifications and weighted bid evaluation criteria. Potential bidders are 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. In essence, this advance notice enables a potential bidder to gauge the agency's notions of the type of bid best suited to its purpose for the money involved. 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 bidding process is the requirement that an agency's action on a bid can be expressed within the bid specifications and evaluation criteria which it created. In other words, should an agency reject a bid for reasons not given weight in the bid evaluation criteria, that action would go to the integrity of the competitive bidding process and would be arbitrary and capricious. (Emphasis added).

[See also: *Adlee Developers v. HRS*, 14 F.A.L.R. 4938 (Final Order - July 28, 1992), citing *Aurora Pump v. Gould Pumps*, 424 So. 2d 70 (Fla. 1st DCA 1982) ("An agency issuing an ITB must evaluate the bids received thereunder solely on the criteria stated in the ITB."); and *Bay Plaza I v. HRS*, 11 F.A.L.R. 2854 (Final Order - April 13, 1989) ("However, the agency issuing the invitation must evaluate bids received solely on the criteria stated in the invitation to bid and prospective bidders are entitled to rely upon the completeness of the terms stated therein.") (also citing *Aurora Pump*)].

EVALUATION OF PROPOSALS

75. Section 287.057(2), Florida Statutes, states, in part, that if an agency chooses to procure contractual services through an RFP, it must include:

. . . a statement of the . . . contractual 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 . . . (Emphasis added).

76. Section 287.057(2), Florida Statutes, also provides:

The award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state, taking into consideration the price and the other evaluation criteria set forth in the request for proposals. . . (Emphasis added).

77. Further, Section 287.012(16), Florida Statutes, states, in part:

Requests for proposals shall state the relative importance of price and any other evaluation criteria. (Emphasis added).

78. As noted in System Development Corporation v. HRS, 423 So. 2d 433 (Fla. 1st DCA 1982), an Invitation To Bid (ITB) must be considered on the basis of cost, i.e. the lowest and best bid, whereas a response to an RFP should be considered on the basis of technical excellence as well as cost.

79. In this case, HRS determined that it was advisable to use the request for proposal process to select the appropriate contractor for the services sought in the RFP. The RFP provided that the winning proposer would be chosen based on the evaluation criteria contained in the RFP, assigning 60 percent of possible points to technical excellence and 40 percent to cost.

80. In the initial stages of the process of evaluating the responses, HRS adhered to correct procedures in selecting a qualified evaluation committee, training its members and having the members independently score each proposer's technical capability. Subsequently, in accordance with the RFP, the cost proposals were opened and mechanically assigned the weighted cost scores across the three subcategories described in the RFP. Finally, the weighted technical scores and weighted cost scores were combined to reveal that Deloitte was the "winning proposer." The evaluation committee thus recommended award to Deloitte.

81. HRS departed, however, from the evaluation and scoring methodology set forth in the RFP commencing with the meeting of January 27, 1995. It is clear that HRS, prior to Secretary Towey's announced decision, considered factors outside the evaluation criteria contained in the RFP, and more importantly, reweighted the relative importance of those criteria so that cost became the major consideration, contrary to the terms of the RFP.

82. Alternatively stated, the scoring process was ignored contrary to dictates of the RFP that the scoring process would determine the winning proposal and that Towey would only utilize "administrative steps" to perfect an award. In actuality, the HRS Secretary went far beyond mere administrative, clerical steps in his discard of the scoring process. On the advice of managers operating without benefit of personal review of the substantive data, he considered both proposers as equals and determined the award totally by a cost estimate resulting from a flawed analysis.

83. In reality, had the requirements of the RFP governed the selection process, cost considerations would have been considered secondary to technical

superiority. If the HRS Secretary had determined the results of the initial scoring process with regard to technical ability (weighted at 60 percent) to be flawed, it is conceivable that justification would have existed sufficient for him to have ordered that the proposals be rescored. But such was not the case in the instant matter. Notably, the correctness of the original evaluators or scoring was not questioned or challenged by management.

84. Bidders justifiably rely on the criteria set forth in an RFP. To allow HRS to alter the evaluation criteria set forth in the RFP, and/or the relative weight placed on those criteria, contrary to the terms contained in the RFP, serves to completely compromise the purpose of the competitive bidding process. If such a procedure were permissible, an agency could set forth seemingly fair evaluation criteria in an RFP, inducing the submission of proposals, and then alter the importance of the announced criteria to improperly select a favored contractor.

85. It is not only the actual presence of favoritism or impropriety, but the appearance of favoritism or other impropriety which the law seeks to eliminate. In the present case, because HRS clearly considered factors in a manner contrary to that announced in the RFP and required under applicable law, i.e. overtime, risk of transition, and a reweighting of the relative importance of cost, the acts of HRS were illegal, arbitrary and capricious and therefore impermissible.

86. As noted in Courtney, supra, it is arbitrary and capricious for HRS to propose award in the instant case to Unisys based upon what must be labeled "improper award factors" and "incorrect weighting of the criteria."

87. Although this procurement was an RFP, the matter has essentially been treated by HRS as an Invitation To Bid (ITB) by the determination to make the proposed award to Unisys. HRS chose to issue an RFP in which price accounted for only 40 percent of the scoring. Subsequently, Secretary Towey ultimately decided that if the proposers each met the minimum mandatory technical requirements of the RFP (which was accorded zero points in category 1 of the scoring criteria), price would be the determining factor. An agency cannot invite a proposal on an RFP to be evaluated as was proposed here, and ultimately award the contract as if it were an ITB.

88. The facts in Latecoere International, Inc. v. Department of Navy, 19 F.3rd 1342 (11th Cir. 1994), are also similar to the present case. There, although the solicitation documents indicated that cost was not the most important factor and the challenger was determined to have submitted the technically superior proposal, the Navy improperly applied the solicitation criteria to award the contract to another company whose cost was 7.8 percent lower than that of the challenger. The Court noted:

. . . it is improper to induce an offer representing the highest quality and then reject it in favor of a materially inferior offer on the basis of a relatively insignificant price difference. [citation omitted] In awarding a contract, a selection authority is required to "use the factors established in the solicitation . . . consider any rankings and ratings, and if requested, any recommendations prepared by

evaluation and advisory groups" and to provide supporting documentation . . . showing the relative differences.

Where cost is secondary to technical considerations under [a solicitation] evaluation scheme . . . selection of a lower priced proposal over a proposal with higher technical [ratings] requires adequate justification, i.e., some showing the [selection authority] reasonably concluded that, notwithstanding the point differential between the two proposals, they were essentially equal. [citation omitted] When a source selection authority's documentation contains an inadequate rationale to support "a decision to make an award to a lower priced offeror with a lower technical ranking," the selection authority's decision can be said to have no rational basis. 19 F.3rd at 1360, 1361 (Emphasis added).

89. In this case, the only technical evaluation performed demonstrated that Deloitte's proposal scored 20 percent higher than that of Unisys. Although Secretary Towey was told informally by HRS personnel, who had neither evaluated nor scored the proposals, that both proposers could perform the work, there was no factual basis from which HRS could have determined that the two proposals were technically equal. In fact, the only credible evidence in the record demonstrated that Deloitte's technical proposal was significantly superior to that of Unisys.

90. The Court in Latecoere perhaps best summarized the general standards that must apply to competitive solicitations:

An executive agency shall evaluate sealed bids and competitive proposals based solely on the factors specified in the solicitation. [citation omitted] Agencies do not have the discretion to announce in the solicitation that they will use one evaluation plan, and then follow another; once offerors are informed of the criteria against which their proposals will be evaluated, the agency must adhere to those criteria . . . 19 F.3rd at 1359.

91. In this case, HRS exercised its discretion when selecting the evaluation criteria to be included in the RFP. In determining that 60 percent of the overall scores would be assigned for technical capabilities and 40 percent for costs, HRS recognized the importance of technical qualifications over cost savings. HRS cannot again exercise its discretion, after the fact, to change those criteria.

92. In light of Deloitte's score with regard to technical superiority and the absence of any discretion to change the scoring criteria for the cost proposals, Deloitte's total score entitled it to award of the contract under the terms of the RFP.

93. In reaching his decision to award the contract to Unisys, Secretary Towey specifically stated that he was doing so because the Unisys proposal was the "most advantageous to the State of Florida." Based on scoring criteria contained in the RFP, the only way he could reach that determination was if the cost savings of the Unisys proposal were so great as to overcome the technical superiority of Deloitte's proposal as set forth in the Evaluation Committee's Final Report. The record clearly reflects, however, that selection of the Unisys' proposal results in either an insignificant cost savings to the State or no savings at all.

94. In this case, HRS acted in an illegal, arbitrary and capricious manner in proposing to award the contract for the RFP to Unisys. The evaluation and scoring criteria of the RFP were clear, the Evaluation Committee performed the only fair and adequate analysis of the proposals, and the Secretary of HRS was not free to alter the relative weight of the scoring criteria in making his final decision to award the contract.

95. As established by the proof presented in this proceeding, Respondent's determination of an intended award to Unisys is legally flawed and clearly arbitrary.

RECOMMENDATION

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

RECOMMENDED that a final order be entered which declines the award to Unisys and takes into account the foregoing findings of fact and conclusions of law when deciding the future course of contracting for the services sought by the RFP.

DONE and ENTERED this 12th day of May, 1995.

DON W. DAVIS, 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 12th day of May, 1995.

APPENDIX

In accordance with provisions of Section 120.59, Florida Statutes, the following rulings are made with regard to purposed findings of fact submitted by the parties.

Intervenor's Proposed Findings:

1. Adopted.
2. Adopted as to 1st sentence. Remainder not relevant with exception of last sentence which is adopted.
3. Rejected, subordinate to HO findings.
4. Accepted.
5. Rejected, subordinate to HO findings.
- 6.-7. Rejected, cumulative.
8. Accepted.
- 9.-10. Rejected, subordinate to HO findings.
11. Accepted.
12. Rejected, subordinate to HO findings.
13. Accepted.
14. Rejected, cumulative.
- 15.-17. Rejected, subordinate.
- 18.-20. Rejected, relevance.
- 21.-22. Accepted.
23. Rejected, subordinate to HO findings.
- 24.-25. Accepted.
- 26.-29. Rejected, subordinate to HO findings.
30. Accepted.
- 31.-36. Rejected, subordinate.
37. Rejected, weight of the evidence.
38. Rejected, opinion, weight of the evidence.
- 39.-41. Rejected, subordinate.

Respondent's Proposed Findings:

- 1.-3. Adopted, not verbatim.
- 1.-6. Adopted by reference.
7. Rejected, relevance.
- 8.-9. Rejected, cumulative, unnecessary.
- 10.-12. Accepted.
13. Rejected, cumulative.
- 14.-16. Accepted.
17. Rejected, weight of the evidence.
18. Rejected, relevance.
19. Rejected, weight of the evidence.
- 20.-21. Rejected, argument.
- 22.-23. Rejected, subordinate to HO findings.
24. Rejected, argument.
- 25.-27. Rejected, subordinate, weight of the evidence.
- 28.-29. Rejected, relevance.
- 30.-31. Rejected, subordinate.
32. Rejected, weight of the evidence.
33. Rejected, subordinate, weight of the evidence.
34. Rejected, relevance.
- 35.-36. Rejected, cumulative.
37. Rejected, weight of the evidence.
38. Accepted.
39. Rejected, argument, weight of the evidence.
40. Rejected, relevance, argument.
- 41.-42. Rejected, argument.
43. Rejected, subordinate.
44. Rejected, 20 percent difference, improper characterization.

- 45. Rejected, relevance, argument.
- 46. Rejected, argument, subordinate.
- 47. Rejected, redundant, subordinate.
- 48. Rejected, legal conclusion.
- 49. Rejected, relevance, argument, lack of credible evidence.
- 50. Rejected, weight of the evidence.
- 51. Rejected, subordinate.
- 52. Rejected, weight of the evidence.
- 53. Rejected, relevance.
- 54. Rejected, argumentative, legal conclusion.
- 55. Rejected, legal conclusion, argument.
- 56. Rejected, legal conclusion.

Petitioner's Proposed Findings Of Fact:

- 1.-43. Accepted, though not verbatim in some instances.
- 44. Subordinate to HO findings.
- 45.-48. Accepted.
- 49. Subordinate.
- 50. Accepted.
- 51. Subordinate.
- 52.-70. Accepted.

COPIES FURNISHED:

William E. Williams, Esq.
Red D. Ware, Esq.
Huey, Guilday & Tucker, P.A.
106 E. College Ave., Ste. 900
Tallahassee, FL 32301

William A. Frieder, Esq.
Department of Health and
Rehabilitative Services
1323 Winewood Blvd.
Tallahassee, FL 32399-0700

W. Robert Vezina, III
Cummings, Lawrence & Vezina, P.A.
1004 DeSoto Park Dr.
Tallahassee, FL 32302

Steven A. Blaske
Unisys Corporation
4151 Ashford Dunwoody Rd.
Atlanta, GA 30319

Robert L. Powell, Agency Clerk
Department of Health and
Rehabilitative Services
1323 Winewood Blvd.
Tallahassee, FL 32399-0700

Kim Tucker, Esq.
Department of Health and
Rehabilitative Services
1323 Winewood Blvd.
Tallahassee, FL 32399-0700

NOTICE OF RIGHT TO SUBMIT EXCEPTION

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.

=====

AGENCY FINAL ORDER

=====

STATE OF FLORIDA
DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

DELOITTE & TOUCHE LLP,

Petitioner,

HRS Case No.
DOAH Case No. 95-727-BID

v.
STATE OF FLORIDA, DEPARTMENT
OF HEALTH AND REHABILITATIVE
SERVICES,

Respondent,

v.

UNISYS CORPORATION,

Intervenor.

_____ /

FINAL ORDER

This cause came on before me for the purpose of determining final agency action in the above styled cause. After referral to the Division of Administrative Hearings, a Recommended Order was issued by the Honorable Don Davis on May 12, 1995.

The undersigned was appointed by Governor Lawton Chiles on May 24, 1995, as substitute Secretary of the Department of Health and Rehabilitative Services pursuant to Section 120.71, Florida Statutes. That appointment is evidenced by a certification by Secretary of State Sandra Mortham attached as Appendix "A".

A copy of the Hearing Officer's Recommended Order is also attached hereto as Appendix "B". The Hearing Officer made extensive Findings of Fact, which are accepted and made a part of this Final Order as if specifically stated herein. Additionally, the Recommended Order contains several conclusions of law which, according to the Hearing Officer, result in a finding that Secretary Towey acted in an illegal, dishonest, fraudulent, arbitrary and/or capricious manner by awarding the contract at issue here to Unisys. The conclusions of law relied on by the hearing officer to reach that result are specifically rejected, and this order is entered determining that the award to Unisys is within that measure of discretion allowed to the Agency Secretary.

FACTUAL SETTING

In November of 1994, the Department of Health and Rehabilitative Services, ("HRS"), distributed an RFP entitled "FLORIDA System-- Applications Programming Services." On December 12, 1994, HRS conducted a bidders conference at which representatives of Deloitte & Touche and Unisys were present. In early January of 1995, Deloitte & Touche and Unisys submitted the only two proposals in response to the RFP. HRS considered both to be responsive to the RFP. An evaluation Committee was selected and trained to analyze the proposals. The members of that team individually evaluated the proposals and scored Deloitte & Touche higher than Unisys. The weighted technical scores submitted by the evaluation team were: Deloitte & Touche- 600; Unisys- 499. Cost scores were evaluated separately and resulted in the following scores: Deloitte & Touche- 375.67; Unisys-392.2. The combined, (technical and cost) scores: Deloitte & Touche- 976; Unisys- 891. Of the five members of the evaluation team, four recommended award to Deloitte & Touche and one recommended that the decision be left to Secretary Towey.

Assessment of Vendors

Secretary Towey called a meeting of his top managers to discuss the recommendations from the evaluation team. That meeting was recorded and a transcript was available at the hearing held before DOAH. The discussion of the relative merits of the two proposals first involved questions regarding the capability of each vendor to perform the contract. The Secretary asked questions of his managers respecting the point difference between the two vendors. At one point he specifically asked if the differential was similar to the distinction between a Cadillac and a Corolla, "both can get you from point A to point B, so the issue is the technical competence and meritoriousness." (See: Exhibit 19, page 10). After much discussion, the managers at HRS responded that both vendors could do the job.

Present Value Assessment

The discussion then turned to other factors including the transition that would be required if a contractor other than the incumbent was picked, the start-up costs associated with the proposals, and finally, the present value of both proposals over the three year contract and the expected renewal of one year. Such a present value analysis was provided and it showed that the State would save approximately \$500,000 if Unisys was selected.

The Hearing Officer considered testimony at the hearing from an expert in present value analysis who drew different conclusions, primarily because he drew different assumptions from which his present value analysis was provided. 1/ The expert admitted that the HRS present value analysis, drawn from the assumptions made by HRS, showed a substantial savings to the state if Unisys was awarded the contract. 2/ Secretary Towey decided to award the contract to Unisys. A timely protest was filed by Deloitte & Touche, and Unisys was allowed intervenor status.

LEGAL DETERMINATIONS

Florida Statutes provide guidance respecting the evaluation and award of contractual proposals through the RFP process. Section 287.057(2), Florida Statutes, states:

(2) When an agency determines in writing that the use of competitive sealed bidding is not practicable, commodities or contractual services shall be procured by competitive sealed proposals.

If the agency contemplates renewal of the commodities or contractual services contract, it shall be so stated in the request for proposals. The proposal shall include the price for each year for which the contract may be renewed. Evaluation of proposals shall include consideration of the total cost for each year as quoted by the offeror.

The award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state, taking into consideration the price and the other criteria set forth in the request for proposals.

Additionally, the Secretary's determination of cost had to be based on a present value analysis. Section 287.0572, Florida Statutes, provides:

(1) The cost of bids or proposals for state contracts which require the payment of money for more than 1 year and which include provisions for unequal payment streams or unequal time payment periods shall be evaluated using present-value methodology.

Thus, the Secretary was compelled to look at cost for the three year contract including the cost provisions for the one year extension and was also compelled to analyze those costs using a present value methodology. Both parties were required by law and by the RFP to provide cost information for the three year contract and the one year renewal. (See: Finding of Fact #44 in the Recommended Order.) Both proposals were found to be responsive to the RFP.

The Nature of the RFP Process

Aside from the statutory list of requirements that the agency head must consider, are those considerations which the RFP process allows the agency head to consider within the discretion allowed a public officer. The RFP process is different from the Invitation to Bid process because it allows the agency head to use his or her common sense to determine which proposal is most advantageous

to the state. The Invitation for Bid process, on the other hand, is limited to an analysis of price. (See generally: System Development Corp. v. HRS, 423 So.2d 433 (Fla. 1st DCA 1982)). The RFP process seeks information respecting the offeror's employees, technical skill, reliability and cost. Those factors are then evaluated by a team consisting of employees who have the skill to analyze the technical criteria. The team submits a recommendation to the agency head. This method of procurement does not require the agency head to decide the best interest of the state in a vacuum. The Hearing Officer found that the agency head is limited to factors stated in the RFP and would therefore be bound to accept the proposal which scored the highest. That conclusion of law is in error.

Secretary Towey received an accounting degree with high honors. The RFP process does not require that he ignore his training and experience. With respect to the scoring process, it is axiomatic to statistical analysis that a proposal with a score 20 percent higher than another, may not be 20 percent better than the other.

Agency secretaries are public officers, commissioned by the Governor and subject to Senate confirmation. A public officer, by definition, is one who has the authority to exercise a portion of the sovereign power of the state. State ex rel. Holloway v. Sheats, 83 So. 508, 509 (Fla. 1919). That empowerment to decide what is in the best interest of the agency, or as here, most advantageous to the state, is at the heart of this case.

Petitioner's Burden of Proof

Petitioner was required to demonstrate that the Secretary, by awarding the contract to Unisys, participated in a process that was illegal, dishonest, fraudulent, arbitrary and/or capricious. Department of Transportation v. Groves-Watkins Constructors, 530 So.2d 912 (Fla. 1988). The conclusion of law found in the recommended order that the evidence demonstrated illegality, dishonesty, fraud, and arbitrary and/or capricious conduct, is in error. Wide discretion is allowed to the agency in the selection of proposals, and the exercise of discretion will be upheld even if it may appear erroneous or if reasonable persons may disagree. Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So.2d 505 (Fla. 1982). No dishonesty was found; no illegality or fraud was demonstrated. The evidence instead indicates a process where every factor was carefully considered and where the Secretary used his best judgment to find the proposal which was most advantageous to the state. No factual finding by the Hearing Officer indicates that the petitioner met the standard established by Groves-Watkins, sura.

Interpreting the Secretary's Duty to Assess the Proposal "Most Advantageous to the State"

There are no Florida cases which directly address the issue presented here. A case decided by the Comptroller General in In re Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976)(1976 WL 13172), however, provides guidance in a very similar situation. (The case has been attached as Appendix "C") Grey has been recognized as authoritative in several other decisions such as Delta Data Systems Corp v. Webster, 744 F.2d 197 (D.C. Cir. 1984), decided by then Judge Scalia. In Grey, the RFP in question established a 1000 point evaluation process, listing seven technical criteria and one criterion based on cost. The cost factor accounted for only five points of the 1000 total. After an evaluation panel considered the technical factors, the incumbent contractor Grey was the high scorer with 924.99 points. A second proposer, Bates, received

872.63 points. The panel recommended that the award go to Grey. The Navy Material Command, ("NAVMAT"), reviewed the recommendation and rejected it, determining that the two proposals were relatively equal technically and cost should be the determining factor. The Bates proposal offered substantial savings to the government. The Comptroller General upheld the award finding that NAVMAT may use its judgment and discretion to determine the significance of the difference in scores. There as here, cost became the deciding factor. Further, Grey stands for the principle that great deference is to be allowed to the agency when deciding which is the most advantageous proposal. The Comptroller General's reasoning fits squarely with the concept in this case that the process of awarding a contract pursuant to an RFP is flexible, and allows the Secretary to exercise judgment which will be given great deference on appeal.

Legal Analysis of the Present-Value Evaluation Performed by HRS

The Petitioner produced evidence at the hearing in an attempt to prove that the present-value assessment used by HRS was incorrect. Petitioner's expert testified that certain assumptions made by HRS were improper, and provided his analysis which demonstrated different cost factors than those determined by HRS. The law does not require that the agency use set assumptions in a present value analysis. The Secretary and his managers can use their judgment to determine reasonable assumptions upon which that analysis will be conducted. If either vendor wished to be heard on the issue of present-value analysis, there was time for that to be discussed at the bidders conference. Neither proposer asked that their assumptions be drawn in any present value analysis to be done by HRS. They were on constructive notice of Section 287.052(1), Florida Statutes, which required such an evaluation. To challenge that analysis now is to second guess the agency when the time for clarification has passed. The Hearing Officer drew his own conclusions from the expert and determined that the HRS evaluation was not the "better" present-value assessment. The Hearing Officer may not substitute his judgment for that of the agency. Further, as a matter of law the Hearing Officer's assessment would not require the finding that the process was flawed. Under *Liberty County, supra*, the HRS assessment will be upheld even if it may appear erroneous or if reasonable people may disagree with the agency.

The Exceptions to the Recommended Order

Both HRS and Unisys filed numerous exceptions to the recommended order challenging the findings of fact and the conclusions of law drawn by the Hearing Officer. Findings of fact are cloaked with the presumption that they are correct absent a demonstration from the record that they are not based on substantial competent evidence. *Tuveson v. Florida Governor's Council on Indian Affairs*, 495 So.2d 790 (Fla. 1st DCA 1986). Those exceptions respecting the findings of fact found in the recommended order are hereby denied since the record contains evidence from which the findings could be drawn. The exceptions of the parties respecting the conclusions of law drawn by the hearing officer are hereby granted upon the grounds stated more particularly within this final order.

Unisys filed a Motion to Strike Petitioner's Memorandum of Law in Response to Exceptions and its Proposed Final Order filed with the substitute Secretary on June 12, 1995. That motion is denied. Petitioner's Memorandum was considered in the determination made within this final order.

CONCLUSION

The Department adopts the findings of fact found in the Recommended Order and rejects those conclusions of law which lead to the conclusion that the Department illegally, fraudulently, dishonestly, or in an arbitrary and/or capricious manner awarded Unisys the contract for RFP 95-142CM-FAP.

This order constitutes a final agency action. A party who is adversely affected by this Final Order is entitled to judicial review which must be instituted by filing one copy of a Notice of Appeal with the agency clerk of HRS and a second copy along with a filing fee as prescribed by law with the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides. Review proceedings will be conducted in accordance with the Florida appellate rule. The Notice of Appeal must be filed within thirty (30) days of rendition of the order to be reviewed.

ADJUDGED, that the award to Unisys is affirmed.

DONE and ORDERED this 10th day of August, 1995, in Tallahassee, Florida.

GREGORY C. SMITH
Substitute Secretary
Department of Health and
Rehabilitative Services

Filed with the Clerk of HRS on August 11, 1995.

ENDNOTES

1/ The testimony of Dr. Elton Scott was provided on the issue of present value analysis. Dr. Scott admitted that the present value calculation he provided was based on his own assumptions and that the present value analysis run by HRS was based on its assumptions.

2/ The hearing officer concluded, as a factual determination, that the expert's present value analysis was the better reasoned approach. That finding of fact has been accepted, as have all the factual determinations found in the recommended order. However, as will be demonstrated, the legal conclusion that the Hearing Officer may substitute his evaluation for that of the agency head, is rejected.

COPIES FURNISHED:

William E. Williams, Esquire
Rex D. Ware, Esquire
Huey, Guilday & Tucker, P.A.
106 East College Avenue, Suite 900
Tallahassee, Florida 32301

William A. Frieder, Esquire
Assistant General Counsel
Department of HRS
Building E, Suite 200
1323 Winewood Blvd.
Tallahassee, Florida 32399-0700

W. Robert Vezina, 111, Esquire
Mary M. Piccard, Esquire
Cummings, Lawrence & Vezina, P.A.
1004 DeSoto Park Drive
P. O. Box 589
Tallahassee, Florida 32302-0589

Steven A. Blaske, Esquire
Unisys Corporation
4151 Ashford Dunwoody Road
Atlanta, GA 30319

Hearing Officer Don W. Davis
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing FINAL ORDER has been furnished to each of the above-named persons by U.S. Mail or hand delivery this 11 day of August, 1995.

ROBERT L. POWELL, SR.
Agency Clerk
Department of Health and
Rehabilitative Services
Building E, Suite 200
1323 Winewood Blvd.
Tallahassee, Florida 32399-0700
(904) 488-2381
FAX: (904) 922-3947