

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BLUE CROSS AND BLUE SHIELD OF )  
FLORIDA, INC., )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 95-3635BID  
 )  
AGENCY FOR HEALTH CARE )  
ADMINISTRATION, )  
 )  
Respondent, )  
 )  
UNISYS CORPORATION, )  
 )  
Intervenor. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Mary Clark, held a formal hearing in the above-styled case on August 3-4 and 7-9, 1995, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Michael J. Glazer, Esquire  
Stephen C. Emmanuel, Esquire  
Steven P. Seymoe, Esquire  
MACFARLANE, AUSLEY, FERGUSON & MCMULLEN  
227 South Calhoun Street  
Tallahassee, Florida 32302

For Respondent: Paul Martin, Esquire  
Office of the Attorney General  
2020 Capital Circle, Southeast  
Ervin Building, Suite 102  
Tallahassee, Florida 32301  
and  
James H. Peterson, Esquire  
Steven A. Grigas, Esquire  
Agency for Health Care Administration  
Fort Knox Executive Center  
2728 Mahan Drive, Room 3403A  
Tallahassee, Florida 32308

For Intervenor: M. Stephen Turner, Esquire  
David K. Miller, Esquire  
BROAD & CASSEL  
First Florida Bank Tower, Suite 400  
215 South Monroe Street  
Tallahassee, Florida 32301

#### STATEMENT OF THE ISSUES

Petitioner, Blue Cross and Blue Shield of Florida, Inc. (BCBS), has challenged the Agency for Health Care Administration's (AHCA) proposed award of contract pursuant to Request for Proposals No. SHP 95-002 to Unisys Corporation (Unisys). The ultimate issue in this proceeding is whether that proposed award is fraudulent, dishonest, arbitrary or illegal. In their pleadings and presentations the parties have framed these subsidiary issues:

1. Whether the Unisys bid was responsive to and met the mandatory requirements of the RFP;
2. Whether the allocation of scoring weights was arbitrary and capricious and likely to result in the state's expenditure of excessive funds for health care in favor of much smaller savings in administrative costs;
3. Whether the scores assigned by the proposals' evaluators were unreliable and biased;
4. Whether the evaluation of proposals illegally failed to apply "present-value methodology" required by section 287.0572, Florida Statutes; and
5. Whether the award is illegal because AHCA is unconstitutionally structured in violation of Article IV, Section 6, Florida Constitution.

Although all parties concede that determination of the constitutional issue is beyond the jurisdiction of the hearing officer, BCBS claims that the issue is "preserved" for judicial determination and AHCA and Unisys argue the issue has been waived.

#### PRELIMINARY STATEMENT

On July 19, 1995, this case was referred to the Division of Administrative Hearings after BCBS filed its formal written protest and petition for formal administrative hearing. The hearing was scheduled within the deadlines provided in section 120.53(3), Florida Statutes. Preliminary discovery matters were disposed of in a telephone hearing on July 24, 1995. Other issues were argued in a prehearing conference on August 2, 1995 and disposition of those issues was deferred until the formal evidentiary hearing. Unisys' motion to intervene was granted.

At the formal hearing BCBS presented the following witnesses: Rick Lutz, Kate Morgan, V. Sheffield (Chip) Kenyon, Robert W. Nay, Suzanne Gelber Rinaldo, Ph.D., Judy Hefren, Elton Scott, Ph.D. and James T. McClave, Ph.D. BCBS exhibits Number 1-6, 8-22 and 24-28 were received in evidence. Exhibit Number 7 was rejected, and ruling on admissibility of exhibit Number 23 was reserved. Exhibit Number 23 is now rejected as irrelevant, as addressed in the conclusions of law, below.

AHCA presented the testimony of Rick Lutz and Mark Johnson, Ph.D. AHCA's exhibits Number 1-8 were received into evidence.

Unisys presented the following witnesses: Doreen Corwin, Carol Lockwood, and Erwin Bodo, Ph.D. Unisys exhibits Number 1-15 and 17-19 were admitted. Exhibit Number 16 was marked for identification and rejected.

BCBS motion filed on September 11, 1995, to strike portions of intervenor's memorandum of law and portions of intervenor's appendix of unpublished authorities is DENIED. The arguments in the motion and in Unisys' response have been considered in weighing the authorities' relevance in this proceeding.

The hearing transcript was filed and the parties provided thorough proposed recommended orders and memoranda. These have been considered and the specific findings of fact proposed by each have been incorporated or rejected as described in the attached appendix.

#### FINDINGS OF FACT

##### The Parties

1. The Agency for Health Care Administration (AHCA or agency), as provided in section 110.123(3)(b), Florida Statutes, is responsible for all aspects of the purchase of health care for state employees under the state group health insurance plan and the health maintenance organization plans. The responsibilities include the development of requests for proposals for state employee health services, the determination of benefits to be provided and negotiation of contracts for health care and health care administrative services.

2. Blue Cross and Blue Shield of Florida, Inc. (BCBS) is a large managed care company providing a wide range of health care services including a full array of insured products, traditional indemnity products and preferred provider organization (PPO) products to large and small groups. It has provided health services to state employees since the 1940's. In 1978, when the state switched from offering a fully insured product to a self-insured product, BCBS became the administrator of the self-insured program and has remained the administrator since that time.

3. Unisys Corporation (Unisys) is a publicly held corporation, incorporated in the State of Delaware. It has been actively engaged in the health information services and technology market since 1976, and its health information management group, headquartered in Reston, Virginia, has experience in all facets of health care claims processing.

##### The Request for Proposals (RFP)

4. The state group health insurance plan (plan) is self-insured, which means that payment for services rendered by health care providers to covered recipients is paid by the state from a trust fund established for this purpose. The plan currently covers approximately 235,000 persons, including employees and their dependents and retired persons. BCBS' contract to administer the plan expires on December 31, 1995.

5. In July, 1994 AHCA began to develop an RFP for the new contract to run for four years, commencing January 1, 1996, with four one-year extensions, at

the state's option. Previous RFP's for state employees' health services had been prepared by the Department of Management Services (DMS) or its predecessor agency, and this is the first time AHCA has had the responsibility.

6. The principal authors of the RFP were Rick Lutz, AHCA's Director of the Division of State Health Purchasing, and Kate Morgan, Chief of the Bureau of State Employee Health Insurance. Ms. Morgan reports directly to Mr. Lutz. Both individuals had prior experience in the state's Medicaid program and both had supervised or directly developed RFP's for health services-related procurements.

7. The RFP requested interested offerors to submit proposals to provide services in one or more of three categories of services: 1) third party administrative services (TPA); 2) use of a preferred provider organization network (PPO); and 3) utilization review and case management services (UR). A single offeror could submit a proposal in one, two or all three categories. A single offeror could also submit a proposal to provide services in all three categories, but utilizing subcontractors.

8. The RFP was divided into sections as follows:

- (a) Section 10 - introductory information.
- (b) Section 20 - description of the RFP process.
- (c) Section 30 - contract terms and conditions.
- (d) Section 40 - State's obligations.
- (e) Section 50 - specifications for third party administration (TPA) services, including claims examination and payment, participant relations, and coordination of benefits.
- (f) Section 60 - questions and requests for information on the offeror's ability to perform TPA services.
- (g) Section 70 - specifications for preferred provider organization (PPO) services, including recruiting and maintaining a network of qualified providers to perform health care services under pre-negotiated fee schedules.
- (h) Section 80 - questions eliciting information on the offeror's ability to perform the PPO services.
- (i) Section 90 - specifications for utilization review and care management (UR) services to determine the medical efficacy and necessity of requested services as a cost-saving and quality enhancing measure.
- (j) Section 100 - questions eliciting information on the offeror's ability to perform the UR services.
- (k) Section 110 - the cost proposal, or the amount the offeror would charge to provide the TPA, PPO and UR services.
- (l) Section 120 - evaluation procedure.

RFP Sections 50, 70 and 90 contained the specifications; Sections 60, 80 and 100 contained the scoring elements describing the offeror's capability and prospects for performance.

9. The RFP sought administrative services only. It did not solicit offerors to provide direct medical services to participants, and the amounts to

be paid to health care providers for medical services to participants were not determined or covered by the contract.

10. The RFP directed offerors to submit their proposals in two parts. In the technical part, the offeror certified that it would comply with the specifications and responded to the questions to be scored. The cost part contained the offeror's price to perform the TPA, PPO and UR services for the contract term, calculated at present value according to a provided formula.

11. Before proposals were submitted, potential offerors were informed that the cost proposal was assigned 4000 points, and the technical proposal was assigned 6000 points, consisting of 2400 points for TPA services, 2400 points for PPO network services, and 1200 points for UR services. Potential offerors also knew the individual scoring questions relating to TPA, PPO and UR services, but did not know the preassigned internal weights of these individual questions. These weights were ascribed in advance by the RFP administrators, Mr. Lutz and Ms. Morgan, but were sealed and locked away in order to assure that both offerors and scorers would deal diligently with every question and would not concentrate on heavily weighted questions.

12. The RFP was issued on March 3, 1995. The RFP specifically provided that potential offerors could protest the contents of the RFP itself. On March 16, 1995, BCBS filed a protest challenging numerous provisions of the RFP. This protest was resolved by a settlement agreement on March 31, 1995, in which the agency modified some provisions and BCBS abandoned all other issues that were raised or might have been raised in the protest.

13. The RFP provided potential offerors an extended opportunity to pose questions to clarify the specifications and evaluation criteria. BCBS posed numerous questions, including questions concerning how the agency would weight and score criteria concerning PPO networks. AHCA responded in a general manner without disclosing the weights that would be assigned to various questions. Other potential offerors also posed questions. All responses by AHCA were incorporated as addenda to the RFP.

14. Four integrated proposals and two component proposals (less than all three categories) were submitted. Only integrated proposals were evaluated because the component proposals, considered together, failed to comprise a complete package of all three services.

#### The Proposals and Their Scoring

15. The four proposals were by Health Plan Services (later disqualified after the cost proposals were opened), by Humana, by Unisys and by BCBS. The technical proposals were opened on May 18, 1995.

16. The BCBS proposal offered to provide all three components, TPA, PPO and UR. The Unisys proposal described Unisys as the prime contractor and TPA, with Beech Street, a separate company, providing the PPO component and Cost Care, another company, providing the UR component.

17. Rick Lutz selected 24 staff personnel to score the technical merits of the responses to Sections 60, 80, and 100. They were selected based on their experience in areas involving finance and accounting, management information, claims processing, customer relations, reporting, network development, and utilization review. Half of the scorers were from offices supervised by Mr. Lutz, and half were from other offices within AHCA. In his twenty-five years of

experience Mr. Lutz was familiar with the backgrounds and abilities of the individuals. He attempted to recruit other scorers from the Department of Management Services (DMS) but was informed that DMS' workload precluded such participation.

18. The scorers were assigned questions to score in the same area as their functional backgrounds. They were also given a one-half day training session and a workbook containing specific guidance on factors to consider in scoring each assigned question. The scorers were directed to consider all relevant information contained in the proposal in scoring each question. They were allowed to ask written questions concerning the scoring, and written answers were provided. The RFP schedule provided one month scoring the proposals.

19. The scorers were to score each assigned question on a 0-10 scale and to record (in the workbooks) their reasons for each score given. Three scorers were assigned to score each question; however, each scorer was instructed to form an independent judgement as to the appropriate score and to not discuss the score given with anyone else.

20. The instructions provided for a debriefing session in which scorers whose scores were more than three points apart on a particular question could confer to ensure that each scorer had considered all information relevant to that question. Scorers were allowed to change their scores on the basis of information that they had previously overlooked or they were allowed to leave them unchanged.

21. The three raw scores for each question were averaged, and the averaged score was multiplied by the predetermined weight to produce a raw score for each question. Scores were then added and adjusted to the 6000 point scale.

22. Unisys received the best raw scores for the TPA and the UR components. BCBS received the best raw scores for the PPO component. However, BCBS' advantage in the PPO component was sufficient to place it ahead in the aggregate raw score for the technical proposal, so it was awarded the maximum raw score of 6000 points.

23. On June 22, 1995, the agency opened and scored the cost proposals. Humana had the lowest cost proposal and was awarded the maximum cost score of 4000 points. The Unisys cost proposal was \$86,618,919 present value, and received a prorated score of 3,458.65 points. The BCBS cost proposal was the highest, \$102,200,263.22 present value, and received 2,931.35 points, the lowest prorated cost score. Scoring the cost proposals was a mechanical, non-subjective function.

24. Unisys had the highest combined score for the technical and cost proposals under the framework described in the RFP, as summarized in the following chart:

ELEMENT	UNISYS RAW SCORE	BCBS RAW SCORE	UNISYS ADJUSTED SCORE	BCBS ADJUSTED SCORE
TPA	1624.97	1602.33		
PPO	1274.63	1515.83	5744.97	6000.00
UR	751.28	694.78		
Cost			3458.65	2931.35
Total			9203.62	8931.35

25. The agency made a minor math error in its original calculation of the BCBS score for the technical proposal. When the BCBS score is corrected by adding 16 points, the effect narrows the gap, but does not materially affect the result.

26. Based on the results of the overall scoring, Mr. Lutz prepared a brief report summarizing the evaluation process and sent it to a steering committee comprised of four senior managerial level employees: Ms. Morgan, Tom Wallace, the agency's second-in-command; Dr. James Howell, and Mildred Seay of DMS.

27. The committee met with Mr. Lutz on June 26 for approximately two to three hours. There was general discussion regarding medical costs under a plan offered by BCBS, as opposed to Unisys' plan. The pricing analysis found in RFP section 80.10 was explained and discussed; and the committee discussed whether Unisys, through its subcontractor, Beech Street, could expand the provider network (PPO) to achieve utilization and prices comparable to those reported by BCBS. The committee unanimously approved the scorers' ranking and recommended the contract award to Unisys.

28. The recommendation was forwarded to Douglas Cook, Executive Director of AHCA and William Lindner, Secretary of DMS, in a brief memorandum. Notice of intent to award the contract to Unisys was posted by the agency on June 27, 1995.

Responsiveness of Unisys Proposal

29. In creating a mandatory requirement checklist in Section 120.2 of the RFP, Mr. Lutz sought a simplified process that would assure that proposals were evaluated on their merits. The agency desired an open competition process that would score the proposals on the adequacy of the responses, rather than a process that would eliminate proposals from the evaluation.

30. Mr. Lutz chose two AHCA employees who were not members of the evaluation team to check the proposals against the checklist and to verify whether the proposals contained a tabbed section corresponding to that item on the list. Mr. Lutz anticipated that if the response were wholly deficient, the evaluators would ascribe a zero score. None of the four proposals was rejected in this stage of the process.

A. Subcontractors' Certificates of Compliance and Public Entity Crime Forms Were Not Required

31. RFP Section 30.4 requires a Certificate of Compliance "from each offeror regardless of whether the offeror submits an integrated proposal or a

component proposal." Section 30.42 requires a Public Entity Crime form to be submitted by "a[n] offeror submitting a proposal." Section 120.2 contains a checklist of requirements including the following:

- d. Did the offeror submit a signed certificate of compliance?  
\* \* \*
- f. Is a completed Public Entity Crimes Statement included?  
(Joint Exhibit Number 1)

These requirements are expressly directed to the "offeror," and do not refer to subcontractors.

32. Unisys submitted an "integrated" proposal in which it was the sole offeror and prime contractor responsible for providing all services called for under the RFP. A Unisys representative signed the Certificate of Compliance and Public Entity Crime Form, which BCBS concedes was sufficient as to Unisys. The Unisys proposal specified that it would engage two subcontractors, Beech Street for the PPO component and Cost Care for the UR component. AHCA did not intend or expect subcontractors to submit the Certificate of Compliance and Public Entity Crime form.

33. RFP Section 30.19 reserved the agency's right to approve subcontractors, while confirming that the prime contractor is responsible for all contract performance.

34. The purpose of the Certificate of Compliance is to provide assurance similar to that in PUR 7033 that the offeror is bound to the specifications of the RFP. PUR 7033 is a form at the front of the RFP, a contractual services acknowledgment form required only from the "offeror" or prime contractor. The Certificate of Compliance expressly contemplates that subcontractors are included in the prime contractor's commitment.

35. The Public Entity Crime form sought assurance that the offeror or "its officers, directors, executives, partners, shareholders, employees, members or agents who are active in the management of the entity" (emphasis added) were not disqualified to contract as a result of a conviction of certain procurement crimes. The form also sought assurances that "affiliates" of the offeror entity, meaning its predecessor or successor, or an entity controlled by a natural person who is not active in the management of the offeror entity, were not disqualified. BCBS admits that Unisys was qualified and its form was sufficient as to Unisys itself. (Transcript, p. 769-70)

36. The form does not solicit any information with regard to subcontractors. None of the subcontractors identified in the Unisys proposal is active in the management of Unisys or is an affiliate of Unisys. Neither Unisys nor any of its subcontractors was on the published convicted vendors list established by section 287.133, Florida Statutes. There is no evidence to suggest that they are disqualified to contract.

37. At the time the RFP was issued, the controlling statute required contractors to sign this form only at the time the contract is executed. Section 287.133(3)(a), Florida Statutes (Supp. 1994). Submitting the form with the proposal was not essential to protect the state's interests, but was a



convenience. While the proposals were under review, this statutory provision was repealed to eliminate use of this form entirely. Chapter 95-196, Section 33, Laws of Florida, effective June 8, 1995.

38. This issue arose, in part, out of confusion related to RFP Section 20.14, which described a situation in which two or more offerors combined as a partnership, and directed that such a partnership designate one partner to act as the "prime contractor"; in effect, treating that situation like the Unisys proposal, which involved a prime contractor and subcontractors.

39. In responding to offerors' questions, AHCA initially directed that each partner in a partnered proposal would be required to submit the forms as multiple contractors. However, in Addendum 4 of the RFP, the agency later clarified that only one prime contractor in each proposal was responsible for contractual issues:

This is to notify all potential offerors of a correction to an answer that was provided in Addendum Number 2. Specifically, the answer to Cost Care's first question is deleted...

When an integrated proposal is submitted in response to this RFP, one of the partners in the bid shall be designated in the proposal as the prime contractor. The other partners in the integrated proposal shall be subcontractors and any contract that may result with the state shall be between the state and the prime contractor. The state shall hold the prime contractor responsible for all contractual issues...

(Joint Exhibit Number 1)

40. AHCA intended Addendum 4 to mean that only the prime contractor was required to submit the forms in question and did not consider the absence of separate forms for subcontractors to be a defect.

#### B. Beech Street's Financial Statements

41. Each technical scoring component of the RFP requested the offeror to furnish two years' audited financial statements. AHCA did not intend this request to create a precondition for evaluating the proposal, and did not include these statements as part of the mandatory specifications in Sections 50, 70 and 90. Rather, the agency designed the RFP to treat the presentation of audited financial statements as a technical scoring issue.

42. In response to the request for financial statements in Question 80.2.g, Unisys presented a narrative statement explaining that Beech Street was a privately held corporation that kept its financial statements confidential; but that Beech Street's auditors, Arthur Anderson & Co., had issued unqualified "clean opinions" for the two preceding fiscal years, and that the operations had been profitable in each year, resulting in year end cash reserves exceeding \$4.2 million and \$5.2 million, respectively. The statement further advised that current year operations indicated even greater revenue and profit growth. The proposal also showed Beech Street's longevity and client base and retention rate, consistent with a financially stable operation.

43. Unisys provided full information available on its subcontractors, Beech Street and Cost Care. It was not requested to provide any information concerning Beech Street's subcontractors (who were sub-subcontractors of Unisys).

44. Judy Hefren, one of the three scorers who graded Question 80.2.g, is a CPA with several years' accounting experience. Although she reviewed enough financial information to satisfy herself concerning Beech Street's ability to perform as a subcontractor, Ms. Hefren strictly interpreted Question 80.2.g and gave Unisys a zero for that question.

45. Audited financial statements were not mandatory because other information could show capacity to perform. AHCA looks to the prime contractor to cover any deficiency in its subcontractors, and required the prime contractor to post a substantial performance and payment bond. The prime contractor's and surety's financial stability assures continuing performance of all obligations.

46. The PPO subcontractor is never in possession of any state funds, but simply is paid an access or rental fee for the term in which its network is used. BCBS presented no evidence that significant adverse consequences to the state would ensue from a hypothetical subcontractor bankruptcy, and Mr. Lutz's and Ms. Hefren's characterization of such a hypothetical event as an "inconvenience" is accepted.

#### C. Maternity Counseling Material Not Required

47. RFP Section 90.5.a stated that "The contractor shall provide educational materials to all pregnant plan participants to include information about the program, basic prenatal care and reference to specialty physicians and facilities." The agency considered this specification to be part of the UR services that the offeror certified it will perform.

48. RFP Question 100.7.b solicits information on how the offeror plans to meet this specification, including samples of educational materials to be furnished. Unisys responded that "Cost Care emphasizes direct communication with both mother and physician, in addition to the educational materials we provide." The response described direct contacts with the mother and physician. It offered to produce additional materials for plan participants generally for additional cost.

49. The RFP treated this as a scoring issue. Although the scorers gave Unisys relatively low scores for this response (4, 4 and 3), AHCA was satisfied that there was nothing wrong with this response and that specification 90.5.a would be met.

#### Whether the Agency's Allocation of Weights Among the Questions in the RFP Was Arbitrary and Illegal

50. RFP Question 80.10 required offerors to perform two historical "pricing analyses" based on data from the period July 1, 1993 to June 30, 1994, or 1.5 to 2.5 years before the new contract was to commence.

51. Part (a) of Question 80.10 required offerors to price physician costs for designated medical procedures in each of 19 counties. Offerors were permitted to report the price available from any physician with whom they had a negotiated fee schedule in that county; if the offeror had no negotiated fee with a physician serving that county, then it had to report a state average

charge for that procedure. BCBS reported the lowest aggregate price for physician services, and was awarded the maximum score of 10 points for Question 80.10(a). Unisys was awarded 9.92 points, reflecting less than one percent difference in the aggregate reported prices for physician services.

52. Part (b) of Question 80.10 required offerors to price 1,174 claims in 55 specified hospitals, as of specified dates in 1993-94. The hospitals selected were those that had provided the most services to state employees in fiscal year 1993-94. If an offeror had a contract with a specified hospital on the specified transaction date, then that offeror could report its negotiated fee with that hospital. If the offeror had no contract with that hospital on that date, then it had to report that hospital's full reported charge for services, even if a contract was subsequently negotiated. The question did not allow equivalent hospitals to be substituted.

53. The question favored the incumbent. BCBS was able to report low prices for the hospitals chosen because almost all of these hospitals were already in its network in 1993-94. BCBS received the maximum score of 10 points on Question 80.10(b); Unisys received 3.01 points.

54. Question 80.10 served a limited purpose to help illustrate previous network development. It was never intended to become a basis for measuring or comparing future medical costs per employee or medical cost savings to be realized from selection of a particular offeror, nor would it be accurate for this purpose.

55. Provider networks are "dynamic," changing over time in response to evolving client needs. A PPO administrator cannot effectively recruit providers or achieve favorable prices until it establishes a market share in the provider's market area. It was intended that during the six-month transition period the successful offeror would use the increased market share resulting from the contract award to expand and tailor its network to serve state employees.

56. Mr. Lutz commented on the agency's reasons for assigning limited weight to Question 80.10 as follows:

We certainly did assume that other proposers would be able to come in, develop a network, and in the process achieve discounts that would have been greater than the discounts that they might have had a year ago.

If we didn't believe that -- there is no sense in going through a competitive procurement to start with. If we wanted to start with the premise that the only entity that could establish a network and achieve discounts was the one that we had, then why bother? It seems to me that the conclusion is we don't want a competitive procurement, we simply want to issue a new contract.

(Transcript, p. 133)

57. All parties agreed that it is "very hard" or "impossible" to predict future network growth and its effect on health care prices. There is no specific formula available to compute the amount of future medical costs. RFP

Question 80.9 asked offerors to predict percentage changes in health care prices over the eight year potential contract term, and to provide assurances that the prediction would be accurate. Unisys predicted a percentage change for the first four years; BCBS referenced various indices for the first four years. Neither Unisys nor BCBS predicted anything beyond four years or guaranteed its prediction by sharing substantial risk if health care prices were to exceed their predicted levels. These responses help confirm that future health care prices are volatile and unpredictable.

58. Because the network development and other factors affecting the future cost of medical care are not easily quantified or predicted, the great majority of RFP questions concerned evaluations of the offeror's experience and expertise in developing and managing networks, its specific plans to implement the network contemplated by the RFP, and its provider credentialing, quality assurance and payment methodology, as well as performance of TPA and UR functions. All of these questions concern the offeror's capability to provide a satisfactory network and reflect its ability to control future medical costs. AHCA intended that the questions in Section 80 would collectively demonstrate the offeror's capability and prospects for developing a cost-effective PPO network.

59. BCBS, through its State Business Director and expert witness, Sheffield Kenyon, asserted that the agency should have increased the weight assigned to Question 80.10 from 240 points (10 percent of the PPO component weight) to 1000 points. Mr. Kenyon viewed the historical price analysis as the "single best proxy" for a future health care price prediction, and was surprised that the agency had not given it greater weight. His opinion was not based on any mathematical formula; nor did he identify any industry standard concerning the weight to be given such historical analysis. His opinion, competent though it was, was based on exactly what Mr. Lutz and Ms. Morgan brought to the process of ascribing weights: a rich, full, varied background and years of experience.

60. BCBS State Employee Market Director, Robert Nay, prepared medical cost projections which purported to show that the Unisys proposal could result in significantly larger expenditures by the state and its covered persons for medical care than would be the case with BCBS. He acknowledged that preparing projections was not a part of his normal work. His analysis was limited to two factors, network utilization rate and reported discount rate. Mr. Nay compared a projected savings for BCBS with three projected scenarios for Unisys/Beech Street.

61. The first scenario assumes the network available to Unisys and Beech Street will remain static from 1993-94. However, the testimony was unrefuted that network development is driven by the client base. It is unrealistic to assume that there has been, and would be, no development prior to contract implementation in January 1996. Even Mr. Nay agreed this was not likely to occur. (Transcript, p. 417). Scenario 2 also assumes that Unisys would be unable to achieve a network utilization rate in Florida comparable to BCBS', and is likewise speculative and unsupported by the weight of the evidence.

62. Scenarios 1 and 2 used Beech Street's 1994 national average discount rate as stated in Question 80.2 of the Unisys proposal, and scenario 3 assumed a slightly improved discount rate. However, there was no evidence to show that the 1994 national average discount rate would be applicable to the proposed Florida contract. The Unisys proposal in Section 80.2 reported that Beech Street's national savings averages may be understated, as most of its network hospitals are nonprofit hospitals which generally charge less than for-profit facilities.

63. In Section 80.9, Unisys and BCBS provided information showing rate changes the state should expect to experience. Unisys reported an actual 9 percent decrease in inpatient hospital rates, and a 13 percent decrease in outpatient rates for 1995. The Unisys proposal also projected that the state should experience a 4 percent decline in inpatient and outpatient hospital rates for 1996 and 2 percent or greater decline in those rates for 1997, 1998 and 1999. BCBS projected increases in these rates for the years 1996-99. These projections were not included in Mr. Nay's analysis.

64. Beech Street representatives, Doreen Corwin and Carol Lockwood, described successful efforts in adding provider groups to the Beech Street network. Beech Street has been received favorably in negotiations with providers. The final award of the contract should enable Beech Street to finalize its relationships with Unisys and with sub-subcontractors and providers.

65. The current Beech Street Florida network includes approximately 1.1 million covered lives. The addition of the state plan's approximately 240,000 covered lives will significantly add to Beech Street's bargaining power to negotiate prices in markets where participants live.

66. Although there is conflicting evidence of whether providers are more or less anxious now than in the past to negotiate discounted agreements with a PPO, it is reasonable to expect that most providers who currently have contracts with BCBS would be very likely to enter into similar arrangements with Beech Street to avoid losing patients. The plan encourages covered employees to utilize the less expensive network providers, so loss of network status would be detrimental to a provider who relies on that employee patient base.

67. Utilization review services can substantially affect cost of health care. Cost Care representative, Sandra O'Toole, described its independent utilization review services for state governments in Mississippi, Alabama, and Georgia, as well as for other clients around the country, based on a clinical model using board-certified physicians to review cases. The Cost Care average number of inpatient admissions per thousand plan participants is approximately 60. BCBS, which performs both PPO network and UR functions in-house, reports approximately 90 inpatient admissions per thousand in Florida, with a decrease from highs of approximately 109 in 1990 and 1991. (Joint Exhibit Number 5, exhibit to question Number 60.6.2.a, p. 15).

68. Cost savings or impact on costs to the trust fund and individual employees are thus reflected throughout the RFP, and not simply in Section 80.10, giving additional credence to the weights ascribed by the RFP framers.

69. BCBS speculates that the state and its plan participants will inevitably incur substantial extra health care expenses if AHCA's evaluation turns out to be wrong. However, even if the Unisys-Beech Street network fails to fully achieve comparable prices, there are safety net features in the contract. Participants can elect to use HMO's or private insurance in lieu of the plan, and the Legislature is considering additional options. The agency has reserved the right to carve out particular health care services for separate direct contracts with providers or to provide services through Community Health Purchasing Alliances (CHPA's) in lieu of the plan. The agency also has reserved the right to terminate the contract entirely for convenience, without obligation except to pay for services rendered. Finally, the agency will evaluate Unisys-Beech Street's implementation plan for expanding the PPO network to meet the

plan's needs within 30 days after the contract award and can seek remedies for any deviation from that plan.

70. The agency's weighting of the technical questions must be considered in light of all circumstances, including the known administrative costs reflected in the competing proposals. BCBS's evidence does not prove that the agency's weighting of the limited purpose historical price analysis in Question 80.10 produced an irrational evaluation of competing proposals, nor that any potential risk so clearly outweighs known administrative cost savings as to make the contract award to Unisys irrational. BCBS argued that additional weight should have been given to other questions of the RFP. However, BCBS presented no evidence that would indicate the subjective determinations of weighting calculated by BCBS are any better or worse than the determinations of weighting made by the agency. Reasonable persons can, and do (as in this case) differ. The evidence, as developed through the testimony of Mr. Lutz and Ms. Morgan, has shown that the agency's weighting scheme was a carefully designed, strict implementation of AHCA's goals and intent.

#### Statistical Analysis of the Scores

71. BCBS presented statistical analyses of the overall scoring through its expert, Dr. James T. McClave, along with charts and graphs prepared by Dr. McClave. The analyses prepared and presented by Dr. McClave included an analysis of inter-rater agreement, as well as several tests that Dr. McClave said showed a statistical bias in one of eight groups of evaluators.

72. In order to test inter-rater agreement, Dr. McClave applied a statistical model called the Kappa method. With this method, Dr. McClave compared the scores given by three evaluators for each of approximately 235 scored questions on the score sheets generated for BCBS, Unisys and Humana. Dr. McClave compared the scores on the 0-10 category scale, as well as a series of "collapsed" scales (i.e. a five-category scale based on 0, 1-3, 4-6, 7-9, 10), with one of the scales using as few as two categories (i.e., 0-5, 6-10).

73. In order to find an "agreement" between evaluators using the Kappa method for the 0-10 point scale, Dr. McClave defined agreement as "pure agreement," in other words, the scores had to be the same. To expect high agreement or exact agreement for the 0-10 scale was a tough standard from a statistical point of view and therefore he began to look at "collapsed" scales which, according to Dr. McClave, would be relatively easier to meet. For the other "collapsed" scales, the scores still needed to fall into the same category to be considered perfect agreement.

74. All of the Kappa tests presented by Dr. McClave had percentages of perfect agreement of less than 40 percent, which, according to the scale picked from the statistics text used by Dr. McClave, represented "poor" agreement. Based upon the Kappa method that he employed and the scale set forth in the text, Dr. McClave concluded that the level of inter-rater reliability was poor, and that the evaluation cannot be trusted. He conceded that there was no precise way to identify the reasons why the reliability was so low, but conjectured that a lack of training or amount of time allowed for the scoring could have been a cause.

75. Dr. McClave also described a statistical method which he referred to as the weighted Kappa. The weighted Kappa gives more weight to the level of agreement, for example, a four versus a three is higher than a one versus a

four. The unweighted Kappa method employed by Dr. McClave assigned the same "zero" agreement value for a score of four versus three as it did to a score of one versus four.

76. Dr. McClave did not use the weighted Kappa because in his "review of the literature the statistical theory behind the weighted Kappa has not been sufficiently developed to the point where one can use it in the case we have." (Transcript, p. 635) Weighted Kappa, in his view, compares two evaluators, one against the other. Dr. McClave admitted that unweighted Kappa was designed for nominal data, the most basic category of data. The scores in the evaluation were done in ordinal fashion and according to widely recognized authorities in the field, weighted Kappa is the appropriate statistical method for analyzing ordinal data.

77. Dr. McClave has no expertise in any of the substantive areas of the technical proposal (TPA, PPO or UR), or in the development, weighting or scoring of RFP's in these substantive areas. He admitted that he had no reason to believe that any of the scorers was not conscientious and diligent, or that they used any improper scoring method or standard. BCBS did not offer a single incident to show scoring was improper, nor any basis to claim that scorers were not motivated to be conscientious and fair.

78. Unisys presented Erwin Bodo, Ph.D., as its statistical expert witness. Dr. Bodo reviewed the circumstances in which the scoring was performed, i.e., use of 24 evaluators with diverse backgrounds and perspectives; use of questions involving the application of judgement and subjective standards; and use of the 0-10 scoring scale without any exact or true score for any questions. Under these circumstances, substantial disagreement is ordinarily expected. The difference between the highest and lowest scores was two points or less for 50 percent of the questions, and three points or less for 80 percent of the questions. This constitutes reasonably good agreement among scorers, according to Dr. Bodo.

79. The question of whether or not scorers on a particular question were consistent is irrelevant to whether the evaluation was valid. As long as each particular scorer was internally consistent, the overall scoring would be fair. The Kappa analysis proves nothing relative to the fairness or validity of the scoring, but simply reflects that the scorers saw the merits differently.

80. Dr. McClave's second statistical analysis separated the 24 scorers based on the offices in which they worked. He found that the aggregate mean scores of five scorers from the Bureau of State Employees Insurance (BSI) were more favorable to Unisys or less favorable to BCBS in a statistically significant degree from the aggregate mean scores from each of the other seven offices.

81. Dr. McClave used the term "statistical bias" to describe the differences between the five BSI scorers' aggregate scores and the other 19 scorers' aggregate scores, grouped by their respective offices. However, this analysis does not prove actual prejudice or unfairness because the statistical tests will not demonstrate such matters.

82. Dr. McClave acknowledged that the disagreement could be related to differences in scorers' backgrounds and perspectives. He had no knowledge of the scorers' backgrounds beyond what offices they worked in. He acknowledged that the questions were subjective, that the scorers applied the scale in different ways, and that there was no perfect answer because human judgement was

involved. Dr. McClave did not know which scores were right and which were wrong, and could not say that disagreement among scorers made either score wrong. He did not analyze individual questions to determine whether they were properly scored. He had no basis to assume that any BSI scorers were unfair. He nevertheless proposed disqualifying all BSI scorers and eliminating their scores, giving BCBS enough additional technical points to win the contract.

83. Dr. McClave's proposed disqualification would effectively eliminate ten questions that were scored by BSI scorers only. He admitted this was a problem. It would also reduce the scoring of other questions to one or two scorers, violating the RFP requirement that at least three persons score each question.

84. There were numerous questions in which BSI scorers gave BCBS a higher score than non-BSI scorers, or in which BSI scorers gave Unisys a lower score than non-BSI scorers. This evidence supports a finding that there was no systematic prejudice exhibited by the BSI scorers. Give the subjective nature of the technical proposal, the use of scorers with diverse backgrounds and perspectives enhanced the fairness of the process.

85. RFP Sections 120.3, 120.3.1 and 120.6 described how the scoring process would be conducted, resulting in the ranking of proposals by the total of scores awarded. There was no requirement for any supermajority or any particular statistical level of agreement among the scorers beyond that which results in a majority of the points, and BCBS did not challenge the absence of such a requirement when it challenged the RFP.

#### SUMMARY OF FINDINGS

86. The disputed issues in this case arise from the differing opinions of competent and articulate experts rather than from the underlying facts, which facts are generally uncontroverted.

87. Drawing on the experience of its staff and borrowing some guidance from its predecessor agency, AHCA developed its first RFP for state employee health services. The process was designed to enhance competition and the prospective offerors had ample opportunity for input. The questions they asked and answers provided by the agency were incorporated into the RFP document. The agency's preparation of the RFP, its interpretation of the document and its scoring of the parties' responses were careful, well-intended and fair.

88. Competent experts differ on the agency's interpretation of the RFP as applied to items not included in the Unisys responses; they differ on the weights assigned to segments of the RFP. But the agency's interpretation and weighting were not proven arbitrary or illegal.

89. Competent experts disagreed on whether the scores were statistically reliable or biased. Their evidence was informative, and even entertaining, but in the end had little practical application. None suggested that the scorers colluded, conspired or falsified their scores. Any explanation for near-random results (assuming that Dr. McClave's methodology was appropriate) is based on conjecture and not on any real evidence. The scorers were experienced, were trained and were afforded the time to accomplish their assignments. Statistical bias by one group is irrelevant in the absence of actual prejudice. The statistical bias, like the suggested inter-rater unreliability, can be made to



appear or to vanish with simple manipulation of methodology or realignment of the groups under scrutiny. Such evidence is too tenuous to establish the agency's misprision.

90. The agency's intended award is appropriate and fair, and not arbitrary or illegal.

#### CONCLUSIONS OF LAW

91. The Division of Administrative Hearings has jurisdiction in this matter pursuant to sections 120.53(5) and 120.57(1), Florida Statutes.

92. The Division of Administrative Hearings has no jurisdiction with regards to the alleged unconstitutionality of AHCA, and that issue will be determined in a proper judicial forum. If the agency is found to be unconstitutional, the court, and not the Division of Administrative Hearings, will determine whether prior actions of the agency are void or illegal. For that reason, the exhibit offered by BCBS, the declaratory judgement currently under appeal, from the Second Judicial Circuit, in and for Leon County, case Number 94-3128, is irrelevant.

93. In a bid protest such as this, the sole responsibility of the hearing officer is to ascertain whether the agency acted fraudulently, arbitrarily, illegally or dishonestly. *Department of Transportation v. Groves-Watkins Constructors*, 530 So2d 912 (Fla 1988). Citing *Liberty County v. Baxter's Asphalt and Concrete, Inc.*, 421 So2d 505 (Fla 1982) the Court reminds:

A public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court [or a hearing officer] even if it may appear erroneous and even if reasonable persons may disagree.

(emphasis in original, *Groves-Watkins*, p. 913)

94. There was not the slightest evidence of fraud or collusion in the development of the RFP, its weighting or the scoring of the responses. The evidence likewise falls short of establishing that the agency acted arbitrarily or illegally.

95. Section 287.0572, Florida Statutes, provides, in pertinent part:

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

96. As found above, the costs that are the subject of this RFP, that is the administrative costs, were evaluated using present-value methodology. The health care costs, both to the state's trust fund and individual employees, while affected by the RFP, are incalculable and unpredictable and cannot be evaluated using present-value methodology. See, *Capital Group Health Services of*

Florida, Inc. d/b/a Capital Health Plan v. Department of Administration, and Healthplan Southeast, Inc., DOAH Case Number 87-5387BID (recommended order 3/9/88, final order 4/28/88).

RECOMMENDATION

Based on the foregoing, it is hereby,

RECOMMENDED:

That the Agency for Health Care Administration issue its final order awarding the contract to Unisys, as intended.

DONE and ORDERED this 27th day of September, 1995, in Tallahassee, Florida.

---

MARY W. CLARK, 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 27th day of September, 1995.

APPENDIX

The following constitute specific rulings on the findings of fact proposed by the Petitioner. The findings proposed by the agency and Intervenor have been substantially adopted.

Petitioner's Proposed Findings

1. Adopted in paragraph 1.
- 2 & 3. Adopted in paragraph 4.
- 4 & 5. Adopted in substance in paragraph 2.
6. Rejected as unnecessary.
7. Adopted in paragraphs 4 and 12.
8. Adopted in paragraph 5.
9. Adopted in paragraph 6.
- 10 and 11. Adopted in substance in paragraph 7.
12. Rejected as unnecessary.
13. Adopted in paragraph 5.
14. Adopted in paragraph 10.
15. Adopted in part in paragraph 16. The characterization of the Unisys proposal as a "Unisys/Beech Street/Cost Care proposal" is rejected as misleading.
16. Adopted in paragraph 15.
17. Adopted in paragraph 29.
18. Adopted in substance in paragraph 30.
- 19 & 20. Rejected as unnecessary.
21. Adopted in substance in paragraph 30.

22. Rejected as a conclusion contrary to the evidence. One proposal was disqualified in the second phase.
23. Adopted in substance in paragraph 17.
24. Adopted in substance in paragraph 8.
25. Adopted in part in paragraph 18. The lack of "formal training" or interviews is rejected as immaterial and misleading. The staff were trained and were amply instructed.
26. Adopted in summary in paragraph 19.
27. Adopted in paragraphs 11 and 21.
28. Adopted in paragraphs 9 and 23.
29. Adopted in substance in paragraph 23.
30. Adopted in paragraph 24.
- 31 & 32. Adopted in substance in paragraphs 26 and 27.
33. Adopted in paragraph 28.
34. Addressed in Preliminary Statement.
35. Rejected as contrary to the evidence (the conclusion of "arbitrary and capricious").
36. Rejected as misleading as the experience of both was found to be appropriate to the task.
37. Adopted in substance in paragraphs 50 - 52.
38. Adopted in part in paragraph 52; otherwise rejected as misleading argument.
39. Rejected as unnecessary.
- 40 - 42. Rejected as unnecessary and argument that is not supported by the weight of evidence.
- 43 & 44. Adopted in summary in paragraphs 51 and 53.
- 45 - 61. Rejected as irrelevant or argument that is not supported by the greater weight of evidence, which evidence did support the agency's contention that section 80.10 is only a piece of the financial outlook picture.
- 62 - 64. Rejected as unnecessary. The contract is not for direct medical services and the cost of those services over the term is incalculable.
- 65 - 66. Adopted in summary in paragraph 31.
- 67 - 77. Rejected as unnecessary or argument that is unsupported by the weight of evidence, which evidence supports the interpretation by the agency that the forms were not required from contractors, and Beech Street and Cost Care were subcontractors rather than "offerors".
78. Adopted in substance in paragraph 42.
- 79 - 82. Rejected as unnecessary. The evaluators did review the financial statements, but not as a mandatory item, and scored the responses based on the review. Although it is accepted that the audited financial statements are important, so also are other indicia of financial viability and stability.
83. Adopted in paragraph 47.
84. Adopted in paragraph 48.
85. Adopted in paragraph 71.
86. Adopted in paragraph 72.
- 87 - 91. Adopted in summary in paragraphs 72 through 76.
- 92 & 93. Adopted in part in paragraph 74, as to the results of Dr. McClave's statistical analysis; rejected as

to the conclusions that the agency's evaluation was unreliable or arbitrary and capricious, as the statistical analysis does not support that conclusion.

- 94. Adopted in paragraph 80.
- 95 - 98. Adopted in part in paragraphs 80 through 82; otherwise rejected as irrelevant.
- 99 - 103. Rejected as irrelevant. See Conclusion of Law Number 92.

COPIES FURNISHED:

Michael J. Glazer, Esquire  
Stephen C. Emmanuel, Esquire  
Steven P. Seymoe, Esquire  
MACFARLANE, AUSLEY, FERGUSON &  
MCMULLEN  
Post Office Box 391  
227 South Calhoun Street  
Tallahassee, Florida 32302

Paul Martin, Assistant Attorney General  
Office of the Attorney General  
PL-01, The Capitol  
Tallahassee, Florida 32399-1050

James H. Peterson, III  
Steven Grigas  
Agency for Health Care  
Administration  
2727 Mahan Drive, Suite 3400  
Tallahassee, Florida 32308

Stephen Turner, P.A.  
David K. Miller, P.A.  
BROAD & CASSEL  
215 South Monroe Street, Suite 400  
Post Office Box 11300  
Tallahassee, Florida 32302

Jerome W. Hoffman  
General Counsel  
Agency for Health Care  
Administration  
2727 Mahan Drive  
Tallahassee, Florida 32309

Mr. Sam Power, Agency Clerk  
Agency for Health Care  
Administration  
Building 3, Room 3431  
2727 Mahan Drive  
Tallahassee, Florida 32308

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BLUE CROSS AND BLUE SHIELD OF )  
FLORIDA, INC., )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 95-3635BID  
 )  
AGENCY FOR HEALTH CARE )  
ADMINISTRATION, )  
 )  
Respondent, )  
 )  
UNISYS CORPORATION, )  
 )  
Intervenor. )  
\_\_\_\_\_ )

NOTICE

The following notice was inadvertently omitted from the Recommended Order which was issued on September 27, 1995:

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to the 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 consult with the agency that will issue the Final Order in this case concerning their 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.

DONE and ORDERED this 2nd day of October, 1995, in Tallahassee, Florida.

\_\_\_\_\_  
MARY W. CLARK, 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  
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this 2nd day of October, 1995.

COPIES FURNISHED:

Michael J. Glazer, Esquire  
Stephen C. Emmanuel, Esquire  
Steven P. Seymoe, Esquire  
MACFARLANE, AUSLEY, FERGUSON &  
MCMULLEN  
Post Office Box 391  
227 South Calhoun Street  
Tallahassee, Florida 32302

Paul Martin, Assistant Attorney General  
Office of the Attorney General  
PL-01, The Capitol  
Tallahassee, Florida 32399-1050

James H. Peterson, III  
Steven Grigas  
Agency for Health Care  
Administration  
2727 Mahan Drive, Suite 3400  
Tallahassee, Florida 32308

Stephen Turner, P.A.  
David K. Miller, P.A.  
BROAD & CASSEL  
215 South Monroe Street, Suite 400  
Post Office Box 11300  
Tallahassee, Florida 32302

Jerome W. Hoffman  
General Counsel  
Agency for Health Care  
Administration  
2727 Mahan Drive  
Tallahassee, Florida 32309

Mr. Sam Power, Agency Clerk  
Agency for Health Care  
Administration  
Building 3, Room 3431  
2727 Mahan Drive  
Tallahassee, Florida 32308