

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ASSESSMENT SYSTEMS, INC., )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 98-1867BID  
 )  
 DEPARTMENT OF BUSINESS AND )  
 PROFESSIONAL REGULATION, )  
 )  
 Respondent, )  
 )  
 and )  
 )  
 PSYCHOLOGICAL SERVICES, INC., )  
 )  
 Intervenor. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, William J. Kendrick, held a formal hearing in the above-styled case on May 20 and 21, 1998, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Paul R. Ezatoff, Esquire  
Katz, Kutter, Haigler, Alderman,  
Bryant & Yon, P.A.  
Highpoint Center, Suite 1200  
106 East College Avenue  
Tallahassee, Florida 32301

For Respondent: R. Beth Atchison, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

For Intervenor: Martha Harrell Chumbler, Esquire  
Carlton, Fields, Ward, Emmanuel,

Smith & Cutler, P.A.  
Post Office Drawer 190  
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

At issue in this proceeding is whether the decision of Respondent, Department of Business and Professional Regulation (Department), to award the subject bid to Intervenor, Psychological Services, Inc. (PSI), comported with the essential requirements of law.

PRELIMINARY STATEMENT

This case arose as a result of a request for proposal (RFP) issued by the Department for the provision of computer based testing services.

Following the Department's review of the responses to the RFP, it proposed to award the contract to PSI. Petitioner, Assessment Systems, Inc. (ASI), as the second ranked bidder, timely protested that decision, and charged, inter alia, that the Department (in rating the vendors) improperly imposed a format penalty against its proposal, which deprived it of the award. The Department referred the matter to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a formal hearing pursuant to Section 120.57, Florida Statutes. By order of April 27, 1998, PSI, as the apparent successful bidder, was granted leave to intervene.

On May 18, 1998, consistent with a prehearing order rendered April 23, 1998, the parties filed a prehearing stipulation. That

stipulation included, inter alia, certain factual stipulations, which have been included in this recommended order.

At hearing, ASI called Jeannie Evans, Fae Hartsfield Millichamp, Faye Mayberry, Connie Shivers, and Anne Pombrekas, as witnesses, and its Exhibits 1 through 3, 4A, 4B, 5, 8 through 9, 10A through 10F, 11 through 17, 20, 21, and 31 were received into evidence. The Department called Alex Girst, Mary Stimmel, Hans Meyer, Edward Broyles, and Fae Hartsfield Mellichamp, as witnesses, but offered no additional proof. PSI called Jeannie Evans as a witness, but offered no additional proof.

The transcript of hearing was filed June 8, 1998, and the parties were accorded ten days from that date to file proposed recommended orders. The parties elected to file such proposals, and they have been duly considered.

#### FINDINGS OF FACT

##### The bid process

1. On October 3, 1997, Respondent, Department of Business and Professional Regulation (Department), issued a request for proposal (RFP), proposal number RFP 97/98-002, for computer based testing services for various professional examinations administered by the Department. The RFP was amended December 18, 1997, by Addendum 1 to the RFP, and January 15, 1998, by Addendum 2 to the RFP. Assessment Systems, Inc. (ASI), Psychological Services, Inc. (PST), Computer Adaptive Technologies, Inc. (CAT), and Sylvan Learning Systems, Inc. (Sylvan), filed timely responses to the RFP.

2. Pertinent to this case, the RFP as amended (hereinafter

the "RFP"), provided that proposals be evaluated as follows:

## VII. EVALUATION OF PROPOSALS

A. Evaluation of Proposals: The proposals shall be evaluated using the evaluation criteria in Appendix 6 by at least six (6) individuals of whom one shall be designated as the lead evaluator.

1. The evaluators shall be appointed by the Department. The evaluators shall attend an evaluator standardization session conducted by the Department. The purpose of the standardization session is to discuss the evaluation process.

2. After the standardization session, the proposals shall be evaluated by each evaluator independently, except for the criteria pertaining to the costs and the Vendor's past performance. In awarding points for each evaluation criterion, the evaluators shall compare the materials presented in the proposals pertaining to that criterion and award points for each proposal before moving on to another criterion. Thus the evaluators shall use a "comparative" evaluation process in awarding points. Each evaluator will submit his/her completed evaluations to the lead evaluator.

3. The evaluation criteria under "Vendor Qualifications - References" shall be evaluated by two Department employees who are not also serving as proposal evaluators. A sample of at least five (5) of the Vendor's examination clients, during the past three (3) years, shall be contacted by telephone for evaluating the clients' satisfaction with the Vendor's services. If the Vendor had five or less examination clients within the last three (3) years, all clients shall be interviewed. The areas to be covered in the interview will be security, timeliness, accuracy, responsiveness, fiscal responsibility, and whether or not the client would use the Vendor again. If the Vendor had any examination

contracts with any state agencies within the last three (3) years, these agencies may be given preference in the selection of clients to be interviewed. Based upon the telephone interviews with the Vendor's clients, the Department shall award points for the Vendor for its past performance.

4. The cost proposals will be opened by the purchasing officer or designee, who will calculate the points to be awarded to each proposal. The proposal with lowest cost per category shall be awarded the maximum points per category. Points will be awarded for all other proposals as a proportion of the maximum points. As the cost proposals increase, the points awarded would decrease. For example, if three (3) Vendors were to submit bids of \$10, \$12, and \$14 cost per hour to provide basic services, the Vendor who submitted a proposed cost of \$10 per hour would receive the maximum points allowed for that category which is 44 points. The Vendor who submitted \$12 per hour would receive a portion of the maximum points which in this case would be 36.7 points. The Vendor who submitted \$14 per hour would receive 31.4 points. See formula below. (Please note that no points will be awarded for the contingency allowance category because it is a set amount required by the RFP.)

$$\frac{(\text{Lowest Vendor cost per category})(\text{Total points available for category})}{(\text{Vendor cost per category})} = \text{Points Awarded}$$

5. The results from the past performance evaluation and the points from the cost proposal worksheets will be given to the lead evaluator only after all other criteria have been evaluated. The points awarded from the past performance and cost proposal worksheets shall be added to each evaluator's total points for the proposal. The points awarded to each Vendor will then be

averaged to arrive at the total points for that Vendor. If applicable, CMBE preference points will then be calculated and added to each proposal's total. The results will be combined into a report showing the total points received by each



Vendor. The report will recommended that the Vendor with the most points be awarded the contract.

B. Evaluation Criteria: Proposals shall be evaluated based on the criteria shown in Appendix 6. Meeting the minimum qualifications specified in the RFP does not assure that the bidder will receive the maximum number of points for any of the evaluation criteria. The major evaluation categories and weights are listed below:

- 1. Scope of services .....200 points (40%)
- 2. Documents required
  - a. Scope of Services Plan ....5 points (1%)
  - b. Proposed Schedule of Activities .....5 points (1%)
  - c. Plan of Assurances to Protect Candidate Fees .....5 points (1%)
  - d. Electronic Data Processing Capabilities .....5 points (1%)
  - e. Security Procedures .....10 points (2%)
  - f. Ownership of Items .....5 points (1%)
  - g. Vendor qualifications ...90 points (18%)
  - h. Cost Proposal .....175 points (35%)
  
- TOTAL POINTS (excluding CMBE preference points) ....500 points (100%)
  
- 3. CMBE preference points .....up to 15% of total points awarded (as shown above)

\* \* \*

c. If a non-CMBE primary Vendor subcontracts to one Certified Minority Business Enterprise an amount equal to 20% of the contract value, the Department will add points equal to 10% of the total points awarded to the primary Vendor provided that the Vendor also submits a CMBE Subcontract Plan (Section VI, paragraph P).

3. The Department appointed six employees to serve as proposal evaluators, to-wit: Fae Hartsfield (now Fae Hartsfield

Mellichamp), Hans Meyer, Faye Mayberry, Alex Grist, Mary Stimmel, and Edward Broyles. Fae Hartsfield was appointed as lead evaluator. Two other Department employees, Ken Chambers and Roger Auger, were appointed to evaluate proposer references. Jeannie Evans, the Department's purchasing director, was selected to evaluate the cost proposals, and was also designated to evaluate CMBE proposals.

4. On January 30, 1998, the Department conducted the standardization session contemplated by the RFP. Those present included all of the evaluators, as well as Jeannie Evans. Among the directions given during the course of the session were the following:

a. The only part of the RFP the evaluators had to be concerned with was the evaluation criteria in Appendix 6 beginning on Page 67 of the coded RFP they were given.

b. Each evaluator was to work independently of the others, rate the proposals independently, and not discuss their ratings with other evaluators. Any questions the evaluators may have had about the process or proposals were to be asked of Beth Atchison of the Office of General Counsel. Fae Hartsfield's duty as lead evaluator was only to make uniform mail or fax transmissions to evaluators to answer questions on technical issues so they would each get identical communications. Evaluators were not supposed to speak with Fae Hartsfield directly.

5. Following the standardization session, the technical proposals submitted by the four vendors were distributed to the evaluators for review. Their analysis was completed and their

evaluation guides (score sheets) were submitted to Fae Hartsfield by March 13, 1998. The evaluators awarded the following points for each proposal:

	Fae Hartsfield	Hansel Meyer	Faye Mayberry	Edward Broyles	Alex Grist	Mary Stimmel	Average
ASI	199.00	237.0	229.0	220.0	172.10	251.95	218.175
PSI	277.0	259.0	252.0	275.0	259.0	280.0	267.0
CAT	147.0	213.0	168.5	165.0	93.25	163.5	158.375
Sylvan	212.5	252.0	215.0	252.0	149.0	264.0	224.08

6. By March 13, 1998, the evaluation of proposer references had also been completed, and the score sheets of Roger Auger and Ken Chambers had been submitted to Fae Hartsfield. These evaluators awarded the following points for each proposal:

	Roger Auger	Ken Chambers	Average
ASI	40.1	39.5	39.8
PSI	39.2	40.0	39.6
CAT	41.6	41.5	41.55
Sylvan	40.2	39.5	39.85

7. On March 16, 1998, the cost proposals were opened and the price bid of each vendor was announced by the Department's purchasing director, Jeannie Evans. Lead evaluator, Fae Hartsfield, as well as evaluators Faye Mayberry, Hans Meyer, and Mary Stimmel, attended the opening and announcement. ASI proposed the lowest cost (\$13.00 per hour), followed by PSI (\$14.50 per hour), CAT (\$20.00 per hour), and Sylvan (\$22.00 per hour).

8. Immediately following the opening, Ms. Evans and Fae Hartsfield, although it was not her function, calculated the scores for each vendor's cost proposal in accordance with the mathematical formula set forth in the RFP. ASI, as the lowest

proposer, received the maximum score of 175 points, followed by PSI with 156.91 points, CAT with 113.75 points, and Sylvan with 103.41 points.

9. Given the foregoing information, by March 20, 1998, if not sooner, Fae Hartsfield prepared draft spreadsheets for each vendor which revealed (based on the scores awarded for the proposal evaluation, proposer references, and cost proposal) the total points awarded to each vendor, excepting Certified Minority Business Enterprise (CMBE) preference points. Based on that scoring, PSI had the most points (463.51), followed by ASI (432.975), Sylvan (367.3433), and CAT (313.675).

10. The final step in the evaluation process, according to the RFP, was to resolve whether CMBE preference points should be awarded to any of the vendors. Here, ASI was the only vendor to submit a CMBE subcontract plan as part of its proposal.

11. ASI's CMBE subcontract plan was evaluated by Jeannie Evans, who consulted with the Office of General Counsel (R. Beth Atchison), as well as Fae Hartsfield (although it was not her function to resolve whether a vendor qualified for CMBE preference points). Ms. Evans sought clarification of ASI's proposal by letter of March 18, 1998, and received ASI's letter of clarification on March 20, 1998.

12. As of Monday, March 23, 1998, the decision had been made that ASI qualified for CMBE preference points. Consequently, consistent with Section VII.B.3.c. of the RFP,

Fae Hartsfield calculated an award of 43.23 preference points for ASI.<sup>1</sup>

13. Under the provisions of Section VII.A.5. of the RFP, the final step in the award process was for Fae Hartsfield, as lead evaluator, to combine the results "into a report showing the total points received by each Vendor . . . [and] recommend that the Vendor with the most points be awarded the contract." Had that step been taken, ASI, with 43.23 CMBE preference points, would have been ranked first with 476.205 total points; however, on March 25, 1998, Fae Hartsfield inexplicably urged the imposition of a "format penalty" under the provisions of Section I.F. of the RFP.

14. Pertinent to the format issue, Section I.F., of the RFP provided:

Format of Response: The entire proposal shall be bound into one document. The format and the order of the response must match the format and order of this RFP. If the above requirements are not met, points may be deducted up to 5% of total for non-compliance during the evaluation of the proposal. . . .

Notably, by the time Fae Hartsfield urged the imposition of the format penalty, the award process (which included evaluation of the proposals, evaluation of proposer references, opening of the cost proposals, and award of CMBE preference points) was complete, she knew the ranking of the vendors, she knew that only ASI and CAT (the only vendors who failed to follow the format) would be affected by the penalty (and only ASI adversely), and she knew the format penalty would reduce ASI to second place. Nevertheless, she was allowed to proceed.

15. According to Fae Hartsfield, on March 25, 1998, "it occurred to me that there was this format penalty clause that we had not imposed and that they had clearly violated our format; and I felt that since that clause was in there . . . it needed to be looked at."<sup>2</sup> (Transcript, page 156). Consequently, according to Fae Hartsfield, she brought the matter to the attention of the Office of General Counsel (R. Beth Atchison), and they resolved to poll the evaluators to see whether they had already penalized ASI and CAT or, if not, whether they thought a penalty should be imposed. Notably, at this time Fae Hartsfield knew she had not penalized the vendors, and knew or suspected that it was unlikely the other evaluators had penalized the vendors since the evaluation guide did not include a provision for imposition of such a penalty.

16. On March 25, 1998, following her conversation with counsel, Fae Hartsfield spoke separately, either in person or by telephone, with each of the other five evaluators and inquired whether they had penalized any proposal during the evaluation process for failing to follow the format requirement of Section I.F. When they each replied in the negative, they were asked if a penalty should be imposed on any vendor that failed to follow the format. At the time, it was either stated or understood that only two vendors, ASI and CAT, would be penalized. Each vendor was of the opinion that a penalty should be imposed and, when asked how much, suggested a maximum or



5 percent penalty. At the time they were surveyed, each evaluator had already indicated their preference for PSI by rating it as the superior vendor, and some had attended the cost proposal opening and knew ASI was the lowest cost bidder. Based on such information, and the timing of Fae Hartsfield's survey, it is reasonable to presume most, if not all, evaluators knew or suspected that imposing a format penalty on ASI could affect the bid award.

17. Based on the responses received, Fae Hartsfield calculated a format penalty of 5 percent of the maximum points available (500), excluding CMBE preference points. As a consequence, 25 points were deducted from ASI's score, leaving it with an adjusted score of 451.205 and lowering it from first to second place.

18. By memorandum of March 27, 1998, Fae Hartsfield advised the Secretary and Deputy Secretary of the Department of Business and Professional Regulation of the final scores and recommended that PSI be awarded the contract. The final scores were as follows:

Psychological Services, Inc.	463.51
Assessment Systems, Inc.	451.21
Sylvan Learning Systems, Inc.	367.34
Computer Adaptive Technologies, Inc.	288.68

19. Based on the foregoing, the Department posted its Bid/Proposal Tabulation on Friday, April 3, 1998, in which it indicated its intention to award the contract to PSI. ASI timely protested the proposed award.

### The protest

20. Here, ASI contends the imposition of a format penalty was improper or, if proper, was miscalculated, and that were its proposal properly considered it would have received the most points and the contract award.<sup>3</sup> Not unexpectedly, PSI supports the Department's decision and further contends that, even if the penalty provision was improperly invoked or calculated, ASI's proposal would still be the lower ranked because the Department erred in awarding ASI preference points for CMBE participation.

### The propriety of imposing a format penalty

21. Considering the provisions of the RFP regarding evaluation procedure (RFP Section VII.A.), evaluation criteria (RFP Section VII.B.), and the format penalty provision (RFP Section I.F.), noted supra, it should not be subject to serious debate that imposition of a format penalty, as well as imposition of a penalty at the juncture of the award process it was imposed, was contrary to the terms of the RFP and the essential requirements of law.

22. In reaching such conclusion, it is first observed that RFP Section VII.A. establishes the procedure for evaluation of vendor's proposals. The procedure established contemplates that (except for the criteria pertaining to a vendor's past performance (references), the cost proposal, and CMBE preference) the proposals would be evaluated by each evaluator independently and the results of their evaluations submitted to the lead

evaluator. The results of the past performance evaluation and the points from the cost proposal worksheet were to be given to the lead evaluator "only after all other criteria have been evaluated." At that point in the award process, the points awarded for past performance and cost proposals were to be added to each evaluators' total points for the proposal, and the points averaged to arrive at the total points for each vendor. The point award process concludes with the award, if applicable, of CMBE preference points. Thereupon, the RFP prescribes that "[t]he results will be combined into a report showing the total points received by each [v]endor. . . [and] will recommend that the [v]endor with the most points be awarded the contract." Clearly, under the procedure established, the role of the evaluators was complete when the results of their evaluation were submitted to the lead evaluator, and consideration of or assessment of a penalty, particularly at the juncture of the award process it was imposed, offends the evaluation procedure established by the RFP, which includes inherent safeguards to discourage manipulation of the award process.

23. It is also observed that imposition of a format penalty by the evaluators was also outside the scope of their duties, as established by the evaluation criteria (RFP Section VII.B.). In so concluding, it is observed that RFP Section VII.B. provides an overview of the major evaluation categories and weights, and directs that "[p]roposals shall be evaluated based on the

criteria shown in Appendix 6." Notably, the criteria and the evaluation guides developed from it, do not include an opportunity for an evaluator to consider or impose a format penalty. To the contrary, the RFP, as well as the evaluation guide, expressly provide that, with regard to RFP Section I (the section which contains the format penalty provision), there are "[n]o criteria to be evaluated." Consequently, consideration of or assessment of a format penalty by the evaluators was beyond the scope of the evaluators' authority and offensive to the terms of the RFP.<sup>4</sup>

24. It is further observed that, imposition of a penalty, as imposed in this case, cannot be harmonized with the format penalty provision (RFP Section I.F.) itself. In so concluding, it is noted that the penalty provision provides that "points may be deducted up to 5% of the total for non-compliance during the evaluation of the proposal." Clearly, imposition of a penalty is discretionary, and the provision contemplates that a penalty would be considered and assessed, if at all, when the proposals were evaluated; however, the RFP made no provision for an evaluator to consider or impose a penalty. Consequently, under the terms of the RFP, as written, it was not possible to impose a format penalty consistent with the penalty provisions and it was an abuse of the Department's discretion to do so.

25. Finally, it is observed that imposition of the penalty, as imposed in this case, cannot be harmonized with the purpose

and object of the competitive bidding process, discussed infra, which is designed, inter alia, "to protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expenses; [and,] to close all avenues to favoritism and fraud in various forms." Wester v. Belote, 103 Fla. 976, 138 So. 721, 723-24 (Fla. 1931). Here, imposition of a penalty, at the juncture it was imposed, was a transparent manipulation of the competitive bidding process, and was contrary to the fundamental requirements of law.

### Calculation of the format penalty

26. In addition to improvidently imposing a format penalty, the Department also erred in calculating the amount of the penalty.

27. Pertinent to calculating the amount of the penalty, the penalty provision provides that "points may be deducted up to 5% of total for non-compliance during the evaluation of the proposal;" however, "5% of total" is not further defined by the RFP. Consequently, the penalty provision is ambiguous, and requires interpretation to resolve what "total" was intended to guide the assessment of the penalty.

28. Here, the Department chose to interpret "total" to mean the maximum possible points (500), and calculated a format penalty of 25 points. The Department's interpretation was not, however, reasonable, and the penalty it derived was not appropriate.

29. In considering the appropriate interpretation to be accorded the word "total" in the penalty provision, it is first observed that no proof was offered that anyone possessed any special insight as to what was intended by the word choice, and that resolution of the question must be found solely within the four corners of the RFP.

30. In examining the terms of the RFP, it is noted that the Department has adopted various "totals" on which to base other penalties or awards. For example, RFP Section VI provides for a

penalty of "up to 5% of the maximum points possible," for a failure to comply with the required documents provision of the RFP. In RFP Section VII.B.3.C., CMBE preference points are awarded in an amount "equal to 10% of the total points awarded to the . . . [v]endor." Total points may also be considered in relationship to the maximum points possible for the proposal evaluation (280 points), for past performance evaluation (45 points), and for the cost proposal (175 points), or the total points awarded each vendor for such categories.

31. Having given the matter due consideration, it must be concluded that the appropriate interpretation to be accorded the word "total," as used in the penalty provision, is either the maximum points possible for the proposal evaluation (280 points) or the total points (averaged) awarded to the vendor for the proposal evaluation (in this case 218.175 points for ASI). In so concluding, it is observed that the purpose of the format penalty is to offer a compelling reason for vendors to conform their proposals to a common format and, therefore, simplify proposal evaluation. A penalty based on the maximum points possible for the proposal evaluation or the total points awarded the vendor for the proposal evaluation are the only interpretations which bear any reasonable relationship to the purpose of the penalty.

32. As between the two reasonable interpretations of the word, there is nothing in the record which would distinguish or prefer one choice over the other. Consequently, since the

language of the RFP was chosen by the Department, the term should be construed against it or, stated differently, the term should be interpreted to have the least impact on a vendor.<sup>5</sup> So considered, "total" is construed to mean the total points awarded the vendor for the proposal evaluation (here 218.175), which calculates a format penalty, if appropriate, of 10.91 points. Subtracting that penalty from ASI's total (476.205), leaves ASI with a final score of 465.315 points and, as such, the vendor with the most points.

The CMBE preference award

33. Pertinent to this case, the RFP provided for an award of preference (bonus) points to vendors that proposed to subcontract with a certified minority business enterprise (CMBE). Where, as here, a vendor proposed such a subcontract, RFP Section VI.P. required:

CMBE Subcontract Plan: If the Vendor decides to subcontract with a CMBE, the Vendor must submit a CMBE Subcontract Plan that specifies the procedures to be used to subcontract a specified percentage of the contract value. The CMBE Subcontract Plan must show how the Vendor determined the percentage of the contract value to subcontract to CMBE(s) and how the Vendor plans to maintain the percentage. Bonus points will be awarded to Vendors that subcontract to CMBE(s) based on the percentage of contract value that is subcontracted only if the Vendors submit a CMBE Subcontract Plan. If the Vendor does not submit a CMBE Subcontract Plan, no bonus points will be awarded even if the Vendor subcontracts a CMBE. . . .

34. Of all the vendors, only ASI submitted a CMBE



Subcontract Plan with its proposal. ASI's plan proposed:

ASI has a deep commitment to the active participation of minority owned businesses in the day-to-day operational functions required to meet our clients' needs. The benefits of this commitment are twofold: it not only provides the minority business with the opportunity for growth but it also provides ASI with a local experience base in our client state.

ASI will subcontract with Temporary Jobs, Inc. of Crystal River, Florida, a minority business enterprise (F592939174 001) to provide the staff for the five additional assessment centers in Florida which will be opened under the contract. A copy of the Letter of Commitment signed by Ms. Kathleen Warrington, the business owner, along with a copy of the Certified Minority Business Enterprise certificate are included directly following this section.

Temporary Jobs, Inc., will hire a minimum of 10 individuals to staff the five new assessment centers planned to expand our current network in Florida. The staff at each center will include a full-time supervisor and an assistant/proctor. Upon contract implementation, the facilities will operate Tuesday through Saturday with two sessions per day. ASI will provide the staff with the training and tools necessary to ensure that the high quality test administration and security standards for which we are noted are maintained at the new assessment centers. ASI's Regional Assessment Center Manager based in Tampa will conduct oversight of all the assessment centers.

ASI has determined that the percentage of the contract value to subcontract to Temporary Jobs, Inc., is 20% of the contract cost. The number of staff needed to support the assessment center operations dictated the subcontract value. Temporary Jobs, Inc., will receive an estimated \$365,000 over the life of the contract to staff the five

assessment centers. The estimated total contract value for ASI is \$1.4 million. Therefore, the subcontract value is conservatively estimated at 20% of the contract value. ASI will maintain the contract percentage by maintaining the five assessment centers to be staffed by Temporary Jobs, Inc., over the life of the contract. (Emphasis in original.)

35. When, during the award process, Jeannie Evans considered ASI's CMBE Subcontract Plan, she was unsure how ASI had calculated the dollar value of its CMBE participation. Ms. Evans' uncertainty arose when she derived a \$2.4 million value for the life of the contract (2 years) based on an assumed (estimated) number of real estate applicants (27,000), 3.5 hours for the real estate examination, and ASI's cost proposal of \$13 per hour. See RFP Section VI.N. and Appendix 2 (Computer Based Test Time Line). Consequently, by letter of March 18, 1998, Ms. Evans requested clarification from ASI. That letter provided, as follows:

In reference to your company's proposal submitted on Request for Proposal (RFP) 97/98-002, Computer Based Testing Services, the following written clarification is required:

Page 74, Section 6.17, CMBE Subcontract Plan

Under this section of your company's proposal, it states that "Temporary Jobs, Inc. will receive an estimated \$365,000 over the life of the contract." Please provide detailed clarification on the calculation of this estimated value and the time period covered by this estimated amount.

Under this section of your company's proposal, it states that the "estimated total

contract value for ASI is \$1.4 million." Please provide detailed clarification on the calculation of this estimated total contract value and the time period covered by this estimated amount.

This information must be faxed to the Purchasing Office at (904) 487-4796 or delivered/mailed to: Department of Business and Professional Regulation, Purchasing Office, 1940 North Monroe Street, Tallahassee, Florida 32399-0796 no later than March 20, 1998, 5:00 p.m. eastern standard time.

36. Despite the tight time-line, ASI filed a timely response to the Department's request for clarification on March 20, 1998. That response provided, as follows:

On behalf of . . . Assessment Systems, Inc., I am replying to your letter of March 18, 1998 requesting written clarification of our proposal of January 29, 1998. I have repeated your requirements and provided the information requested following each requirement:

Page 74, Section 6.17, CMBE Subcontract Plan  
Florida Requirement 1:

Under this section of your company's proposal, it states that "Temporary Jobs, Inc., will receive an estimated \$365,000. Over the life of the contract." Please provide detailed clarification on the calculation of this estimated value and the time period covered by this estimated amount.

Response:

ASI proposed to add five new assessment centers. We will use Temporary Jobs, Inc. to staff those new centers. The \$365,000.00 figure is for salaries for 10 staff members and represents an annual amount to be paid over the life of the contract.

Florida Requirement 2:

Under this section of your company's proposal, it states that the "estimated total contract value for ASI is \$1.4 million." Please provide detailed clarification on the calculation of this estimated total contract value and the time period covered by this estimated amount.

Response:

Since participation by the regulatory agencies is strictly voluntary we could only estimate the value. Therefore, we calculated our pricing proforma based on the candidate volumes based on the two largest programs - the Florida Real Estate and Florida Cosmetology programs. We assumed the following:

Real Estate:	27,000 annual candidates
Average test time	3.5 hours

Therefore:  $27,000 \times 3.5 \text{ hours} = 94,500$   
testing hours for Real Estate

Cosmetology: 5,500 annual candidates  
Average test time: 2.5 hours

Therefore:  $5,500 \times 2.5 = 13,750$  testing hours  
for Cosmetology

Total number of Real Estate and Cosmetology  
Candidates = 32,500

Total number of Real Estate and Cosmetology  
Testing Hours = 108,250

Therefore:  $108,250 \text{ hours} \times \$13.00/\text{testing}$   
hour = \$1,407,250.00

This figure represents ASI's minimum annual  
contract amount if these programs choose to  
participate.

We hope that this information clarifies how  
we arrived at the subcontractor value and  
ASI's estimated total annual contract value.

37. Based on ASI's response, Ms. Evans was satisfied that  
ASI's CMBE Subcontract Proposal would amount to at least 20  
percent of the contract value and, consequently, ASI was awarded  
43.23 CMBE preference points.

38. Here, PSI contends that:<sup>6</sup>

33. Through the March 20 letter . . . ASI  
effectively amended its proposal by changing  
what were purported to be "total contract" or  
"term of the contract" figures to annual  
figures. The letter also supplemented the  
information in ASI's original proposal, by  
including calculations that showed how ASI  
had determined the percentage of the contract  
value that it intends to subcontract to  
Temporary Jobs, Inc.

34. Based on the information included in  
ASI's March 20 letter, Ms. Evans determined  
that ASI should be awarded CMBE bonus points.  
Without the information contained in the

March 20 letter, ASI would not have received any CMBE points, since the information

contained in their CMBE Subcontract Plan did not establish twenty percent (20%) utilization of a CMBE subcontractor.

(PSI's Proposed Recommended Order, at pages 14 and 15).

Consequently, PSI concludes, the Department's award of CMBE preference points to ASI was contrary to the terms of the RFP, and was "clearly erroneous, arbitrary and capricious." PSI's argument is rejected as unpersuasive.

39. In reaching such conclusion, it is first observed that pursuant to RFP Section VII.D., the Department reserved the right to contact vendors in order to request written clarification of proposal contents. The RFP also reserved the right to waive any minor irregularity or technicality in proposals received.

40. Here, the RFP required that a CMBE Subcontract Plan address three items, to-wit: (1) "the procedure to be used to subcontract a specified percentage of the contract value"; (2) "how the Vendor determined the percentage of the contract value to subcontract to CMBE(s)"; and (3) "how the Vendor plans to maintain the percentage."

41. ASI's CMBE Subcontract plan was responsive to the RFP in that it proposed a procedure (to subcontract with a minority business enterprise to provide the staff for five additional assessment centers in Florida) which would be used to subcontract 20% of the contract value (Item 1); it detailed the method (the staffing cost needed to support the assessment center operations) used to determine the percentage of the contract value to be

subcontracted (Item 2); and it described how (by contracting with the minority business enterprise to staff the centers over the life of the contract) it planned to maintain the percentage (Item 3). That the number values ASI used in its plan were inadvertently stated as "life of the contract," as opposed to annual, does not (as contended by PSI) detract from the conclusion that ASI's proposal was responsive. Moreover, there was no showing that ASI's response to the request for clarification materially altered its proposal or accorded it an advantage not enjoyed by similarly situated vendors, or that the Department's request for clarification and acceptance of ASI's CMBE Subcontract Plan was anything other than an honest exercise of its discretion.<sup>7</sup>

#### CONCLUSIONS OF LAW

42. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Sections 120.57(3), Florida Statutes.

43. Pertinent to this case, Section 120.57(3), Florida Statutes, provides:

. . . in a competitive-procurement protest, other than a rejection of all bids, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. . . .



44. "A capricious action is one which is taken without thought or reason or irrationally. An arbitrary decision is one

not supported by facts or logic." Agrico Chemical Co. v. Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

45. A decision is "clearly erroneous" when unsupported by substantial evidence, or contrary to the clear weight of the evidence, or induced by an erroneous view of the law. Black's Law Dictionary, Fifth Edition (1979).

46. An act is "contrary to competition" when it offends the purpose of competitive bidding. That purpose has been stated on more than one occasion to be, as follows:

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

Wester v. Belote, 103 Fla. 976, 138 So. 721, 723-24, (Fla. 1931); Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190-92 (Fla. 2d DCA 1977). See also, Section 287.001, Florida Statutes. "A public body may not arbitrarily discriminate between bidders, or make the award on the basis of personal preference. The award must be made to the one submitting the lowest and best bid. . . ." Hotel China & Glass Co. v. Board of Public Instruction, 130 So. 2d 78, 81 (Fla. 1st DCA 1961).

47. Here, ASI contends the Department's decision to impose

a format penalty, as well as the method it adopted to calculate the format penalty, departed from the essential requirements of law and deprived it of the contract award. Conversely, PSI supports the Department's imposition of the penalty and further contends that, if the penalty provision was improperly invoked or calculated, ASI's proposal would still be the lower ranked because the Department erred in awarding ASI preference points for CMBE participation. ASI, as the protestant regarding the format penalty issues, has the burden of establishing, by a preponderance of the evidence, that the Department's actions or decisions regarding those issues departed from the essential requirements of law. In turn, PSI, as the challenger, bears the burden of establishing that the Department's decision to award CMBE preference points departed from the essential requirements of law. Department of Transportation v. J.W.C., Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977), ("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal.")

48. Here, ASI has demonstrated, with the requisite degree of certainty, that the Department's imposition of a format penalty was contrary to the proposal specifications, and that its decision was an abuse of discretion or, stated differently, clearly erroneous, contrary to competition, arbitrary, and

capricious.<sup>8</sup>

49. Although given the foregoing conclusion it is unnecessary to the result reached, ASI has also demonstrated that were a penalty appropriate, the Department erred in its calculation. Here, as noted in the findings of fact, were a penalty appropriate, it should be calculated as 5 percent of the total points awarded ASI for the proposal evaluation, and not 5 percent of the maximum possible points (500) that could be awarded. Vienneau v. Metropolitan Life Insurance Co., 548 So. 2d 856 (Fla. 4th DCA 1989) (Where language of contract is ambiguous or doubtful, it should be construed against the party who drew the contract.) Accord, Mayflower Corp. v. Davis, 655 So. 2d 1134 (Fla. 1st DCA 1994), and Finberg v. Herald Fire Insurance Co., 455 So. 2d 462 (Fla. 3d DCA 1984).

50. Finally, as noted in the Findings of Fact, PSI failed to sustain its burden to demonstrate that the Department departed from the essential requirements of law when it awarded ASI CMBE preference points. In so concluding, the provisions of Section 120.57(3)(e), Florida Statutes, which provide that "[i]n a competitive-procurement protest, no submissions made after the bid or proposal opening amending or supplementing the bid or proposal shall be considered," have not been overlooked. However, not all post-opening submittals or clarifications fall within the prohibition of Section 120.57(3)(e). Rather, such prohibition prohibits the agency from accepting late submissions

which would otherwise cure an unresponsive proposal, but does not prohibit the agency from seeking clarification on matters that do not affect the price of the proposal, give the vendor an advantage or benefit not enjoyed by similarly situated vendors, or adversely impact the interests of the agency. Here, there was no such irregularity and no sound reason shown why the Department's judgment, in this regard, should be disturbed. Indeed, "[t]here is no public interest, much less a substantial public interest, in disqualifying low bidders for technical deficiencies in form, where the low bidder did not derive any unfair competitive advantage by reason of the technical omission." Intercontinental Properties, Inc. v. Department of Health and Rehabilitative Services, 606 So. 2d 380, 386 (Fla. 3d DCA 1992).

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a Final Order be entered which sustains the bid protest filed by Petitioner, Assessment Systems, Inc., and which awards the subject contract to Assessment Systems, Inc.

DONE AND ENTERED this 14th day of July, 1998, in Tallahassee, Leon County, Florida.

---

WILLIAM J. KENDRICK  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building

1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847

Filed with the Clerk of the  
Division of Administrative Hearings  
this 14th day of July, 1998.

#### ENDNOTES

1/ Under the provisions of Section VII.B.3.c. of the RFP, ASI was entitled to preference points calculated as "10% of the total points awarded to [ASI]." ASI had been awarded 432.975 points and, therefore, was entitled to 43.30 preference points; however, inadvertently, ASI was only accorded 43.23 points. Such error was, however, de minimus, and of no relevance to these proceedings.

2/ What Fae Hartsfield's motive was to manipulate the bid award cannot be distilled from the record in this case. It may, however, be concluded that her motive in urging the format penalty was for reasons other than a strict application of the RFP provisions or a sense of fair play. Notably, the only penalty provision she urged was one that affected ASI. Further bias against ASI (or preference for PSI) may be found in Fae Hartsfield's advocacy for a penalty based on 5 percent of the maximum points available (500), excluding CMBE preference points, which, as discussed infra, had no rational support.

3/ ASI also argued that application of the penalty was fundamentally improper, and that its proposal did not fail to follow the proposed format or, if it did, such failure should be waived as a minor irregularity since it did not accord ASI an advantage over other bidders. As for ASI's argument regarding fundamental impropriety (i.e., the provision was vague, arbitrary, etc.), it must be concluded that since ASI did not protest the RFP provisions that it may not now complain as to the RFP's content. As for ASI's assertion that its bid did not deviate from the recommended format, that argument is rejected. As to whether the variation was material, that issue has already been resolved by the Department in ASI's favor, since it elected to accept ASI's bid for evaluation; however, whether the Department should exercise its discretion (as provided by the RFP) and impose a format penalty is a different issue.

4/ Fae Hartsfield testified that in her opinion the failure to include a penalty provision in the evaluation guide was merely an "oversight," and not a reflection that a penalty was not to be

imposed. Ms. Hartsfield's opinion was, however, not shown to be based on any unique insight into the formulation of the RFP and is rejected. As importantly, if an "oversight," unilaterally modifying the scoring criteria at this juncture was not an acceptable or proper approach. Rather, such changes should be prospective in operation and apply only to future RFPs.

5/ Adopting the interpretation with the least impact is also attractive in this case because there was not a consensus among the evaluations as to what "total" meant and, therefore, what penalty (amount) they intended to impose. For example, some thought the 5 percent penalty was against the score they had give the vendor, while others thought it was against the possible total. Here, it was Fae Hartsfield who resolved that "5% of total" should be of the maximum (500 points) and, consequently, it was Fae Hartsfield, and not the evaluators, who decided the number of points to deduct. Such result was contrary to the terms of the FRP format penalty provision, which contemplated that points, if they were to be deducted, would be deducted during evaluation of the proposal (by the evaluators).

6/ PSI also contended:

36. The propriety of awarding CMBE bonus points to ASI is further undermined by statements in ASI's proposal itself. Contrary to ASI's Subcontract Plan, section 2.5.5 of ASI's proposal states, in its description of its assessment center staff, that

[a]ll of ASI's assessment center staff are employees of ASI who are trained in operating procedures for only ASI programs. Unlike other vendors, ASI is the single point of contract and control for all programs operations including test administration. We do not subcontract or franchise the very essence of the service we are contracted to provide.

Joint 5 at 24 ([emphasis] in original). This statement is directly contrary to the assertion in ASI's CMBE Subcontract Plan that it plans to subcontract out the staffing of five assessment centers to Temporary Jobs, Inc. . . .

PSI's contention is not relevant since the provisions of the CMBE

Subcontract proposal are independent of the technical proposal and are, as provided by the RFP, evaluated independently. Moreover, the issue was not reasonably raised by PSI's petition to intervene or the prehearing stipulation. Finally, the terms of the CMBE Subcontract Plan and the description contained in the technical proposal are not necessarily repugnant or, stated differently, irreconcilable.

7/ Projecting dollar values for CMBE participation is, under the RFP, at best an exercise in estimating, since participation by regulatory agencies is strictly voluntary and, therefore, the actual number of candidates is subject to debate. Moreover, and further complicating the subcontracting of services, the RFP restricts subcontracting to not more than 25% of contract value. Therefore, periodic monitoring and, if necessary, adjustment of CMBE subcontract dollar participation over the course of the contract is likely. Consequently, the key ingredient to a CMBE Subcontract Plan would appear to be the commitment to at least 20 percent participation, and describing how that percentage will be accomplished and maintained; not its dollar value over the life of the contract.



8/ In soliciting and accepting competitive bids, an agency has wide discretion, and its decision, if based on an honest exercise of this discretion, will not be overturned. See D.O.T. v. Groves-Watkins Constructors, 530 So. 2d 912 (Fla. 1988); Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982). Its discretion, while broad, is not, however, unbridled. It must exercise its discretion in a manner that is not illegal, dishonest, fraudulent, arbitrary, or in any other way that would subvert the purpose of competitive bidding. See D.O.T. v. Groves-Watkins Constructors, *supra*; Caber Systems v. Department of General Services, 530 So. 2d 325 (Fla. 1st DCA 1988); Couch Construction Company, Inc. v. Department of Transportation, 361 So. 2d 172 (Fla. 1st DCA 1978); and Wood-Hopkins Contracting Company v. Roger J. Au & Sons, Inc., 354 So. 2d 446 (Fla. 1st DCA 1978).

COPIES FURNISHED:

Paul R. Ezatoff, Esquire  
Katz, Kutter, Haigler, Alderman,  
Bryant & Yon, P.A.  
Highpoint Center, Suite 1200  
106 East College Avenue  
Tallahassee, Florida 32301

R. Beth Atchison, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

Martha Harrell Chumbler, Esquire  
Carlton, Fields, Ward, Emmanuel,  
Smith & Cutler, P.A.  
Post Office Drawer 190  
Tallahassee, Florida 32302

Mary M. Piccard, Esquire  
Vezina, Lawrence & Piscitelli, P.A.  
318 North Calhoun Street  
Tallahassee, Florida 32301

Lynda L. Goodgame, General Counsel  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.