

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

NATIONWIDE CREDIT, INC, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 99-1192BID  
 )  
 STATE OF FLORIDA, DEPARTMENT )  
 OF EDUCATION, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Upon due notice, William R. Cave, an Administrative Law Judge for the Division of Administrative Hearings, held a formal hearing in this matter on April 15, 1999, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Martha Harrell Chumbler, Esquire  
Michael P. Donaldson, Esquire  
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Smith, and Culter, P.A.  
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For Respondent: H. Richard Bisbee, Esquire  
Theresa M. Bender, Esquire  
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STATEMENT OF THE ISSUES

1. Was the Department of Education's (Department) refusal to review and evaluate Nationwide Credit, Inc.'s (Nationwide) response to the Department's Request for Proposal, Collection

Services for Defaulted Florida Guaranteed Student Loans and Delinquent Florida Teacher Scholarships Loans, No. 99-06 (RFP) contrary to governing statutes and rules, clearly erroneous, contrary to competition, arbitrary, or capricious?

2. Was the Department's failure to consider the reason for Nationwide's untimely delivery of its response to the RFP contrary to governing statutes and rules?

PRELIMINARY STATEMENT

This cause is a challenge to the Department's refusal to review and evaluate Nationwide's response to the Department's RFP. The RFP was issued by the Department on October 9, 1998.

Nationwide filed a Formal Written Protest and Petition for Administrative Hearing (Petition) on February 26, 1999. On March 11, 1999, an informal meeting was held which proved to be unsuccessful. The Petition was then forwarded to the Division of Administrative Hearings (Division) by the Department for the assignment of an Administrative Law Judge and for the conduct of a hearing. The undersigned Administrative Law Judge was assigned to hear this matter and a hearing was scheduled for April 15, 1999.

At the hearing, Nationwide presented the testimony of David Lubets. Nationwide's Exhibits Numbered 1A-1C and 2 were received as evidence. The Department presented the testimonies of Henry C. Bergmann (incorrectly spelled in trial Transcript as "Burgmann") and Ashley Roseborough. Department's Exhibits

Numbered 1 and 2 were received as evidence. Joint Exhibits Numbered 1-6 were received as evidence. Chapter 287, Florida Statutes; Rules 60A-1.001 and 60A-1.002, Florida Administrative Code; and Form PUR 7033 Revised 6/1/98, Request for Proposal were officially recognized. On May 4, 1999, subsequent to the filing of the Transcript but prior to the filing of the parties' proposed recommended orders, Nationwide filed a Request for Judicial Notice and Motion to Supplement the Record which shall be treated as a request for official recognition. After consideration of it, the request was granted and the Department of Education's Motion to Relinquish Jurisdiction and Remand to Agency, in Collection Technology, Inc, vs. Department of Education, Case No. 99-1901BID and the Department's same motion in NCO Financial Inc. vs. Department of Education, Case No. 99-1902BID , were officially recognized.

A Transcript of this proceeding was filed with the Division on April 29, 1999. The parties filed their Proposed Recommended Orders.

#### FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

1. Nationwide is a foreign corporation authorized to do business in the State of Florida. Nationwide is in the business of collecting defaulted student loans and has worked with the

State of Florida, and specifically the Department, for approximately nine years.

2. On October 9, 1998, the Department issued RFP No.99-06, which solicited proposals for the provision of collection services for defaulted student loans. The technical requirements and requests found in the RFP were prepared by the Office of Student Financial Affairs (OSFA) which was the section within the Department requesting the services and the section which ultimately performed the review and evaluation of the responses to the RFP.

3. The initial deadline for receipt of responses to the RFP was 3:00 p.m. Eastern Standard Time (EST) on December 3, 1998. The responses were to be delivered to the Department's Office of Purchasing for initial inspection and distribution to OSFA.

4. The Department, through four separate RFP addenda, received and accepted by Nationwide, revised and postponed the response deadline until January 20, 1999, at 3:00 p.m. EST. The postponement was caused by the delay of the Department responding to questions posed by prospective vendors during the question and answer portion of the RFP procurement process.

5. Nationwide had been prepared to submit its proposal to the Department on the date of the previous deadlines.

6. The Department scheduled the deadline for receipt of proposals at 3:00 p.m. to accommodate those prospective vendors who used third-party delivery services.

7. The response review process as established by the RFP consisted of the following: (a) a review of the technical components to be completed by February 3, 1999; (b) a cost proposal evaluation to be completed by February 9, 1999; and (c) a posting of intended award by February 16, 1999. In accordance with the RFP, multiple contracts were to be entered into based on the highest ranked responses. The actual signing of these contracts was not to occur until March 1999, after approval of the awards by the State Board of Education.

8. Nationwide has previously provided the Department with the same services called for by the RFP. It was Nationwide's wish that it continue to provide those services and accordingly, its employees expended between 50 and 70 hours preparing Nationwide's response.

9. On January 19, 1999, Nationwide, from its office in Marietta, Georgia, utilized a third party, Federal Express, to deliver Nationwide's response to the Department's RFP. Nationwide's general business practice is to use Federal Express and there has never been a problem with late delivery. Nationwide does not have an office in Tallahassee, Florida. Nationwide's only Florida office is in south Florida.

10. Nationwide directed Federal Express to ship its response to the RFP by Priority Overnight Service and further directed Federal Express to deliver Nationwide's response to the RFP to the Department by 10:00 a.m. EST on January 20, 1999.

These instructions to Federal Express were clearly reflected on the Airbill. Federal Express picked up Nationwide's proposal at 1:20 p.m. EST on January 19, 1999. Due to an error in the Federal Express distribution process, Nationwide's response to the RFP was not delivered to the Department until January 21, 1999, at 10:41 a.m. EST.

11. Nationwide did not contact the Department on January 20, 1999, after 10:00 a.m. EST (the time Federal Express was to deliver Nationwide's proposal) to determine if its proposal had been delivered timely by Federal Express.

12. There was sufficient time between 10:00 a.m. and 3:00 p.m. on January 20, 1999, for Nationwide to hand deliver its proposal to the Department had Nationwide been aware that its proposal had not been delivered by Federal Express as requested by Nationwide.

13. Eighteen responses were submitted to the Department's Office of Purchasing prior to 3:00 p.m. EST on January 20, 1999. In order to ensure that no vendor had access to another vendor's proposal, the proposals were locked in a secured room. At 3:01 p.m. EST on January 20, 1999, the Office of Purchasing physically opened the 18 responses that were timely submitted and in its possession. The Office of Purchasing then conducted an initial review which included a tabulation of the responses to ensure that all responses satisfied procedural requirements. The timely proposals were also inspected to ensure that the

appropriate transmittal letter was enclosed. The Office of Purchasing did not open the technical or price components of the responses.

14. Once the initial review was completed by the Office of Purchasing, the proposals were sent to OSFA for purposes of conducting the detailed technical review contemplated by the RFP. The initial review by the Office of Purchasing took two days, and the proposals were not forwarded to OSFA until around January 25, 1999.

15. At the time Nationwide's proposal was received by the Department, the Office of Purchasing was still in the process of completing its initial review. None of the timely proposals had been forwarded to OSFA for detailed review at this time.

16. By letter dated January 27, 1999, the Department advised Nationwide that its proposal had been received after the deadline and that its proposal must be "retrieved no later than February 15, 1999." At this time, the evaluation of the technical and costs proposals by OSFA had not been completed. The Department similarly advised another vendor whose proposal had been received 30 minutes after the deadline. Nationwide did not retrieve its proposal, and it still remains in an unopened state with the Department.

17. The Department rejected Nationwide's proposal without any consideration being given to the circumstances surrounding the untimeliness of Nationwide's proposal. At the time

Nationwide's proposal was rejected, the Office of Purchasing had knowledge of the fact that Nationwide had submitted its proposal to Federal Express in advance of the due date and in sufficient time to be delivered timely to the Department.

18. On February 8, 1999, after contacting the Office of Purchasing to determine the reasons for the rejection of its proposal, Nationwide provided the Department with a written explanation from Federal Express explaining why Nationwide's proposal was untimely. Nationwide then requested the Department to consider the circumstances and use its discretion to waive the late filing and review the proposal.

19. By letter dated February 12, 1999, the Department advised Nationwide that it was unable to consider Nationwide's untimely proposal. It is the Department's policy that, under the purchasing rules of the State of Florida, it should never consider or review a proposal received from a vendor after the date and time specified in the RFP regardless of the reason for the untimeliness. However, the Department did indicate that it may waive that policy where the untimeliness is due to an "act of God," such as a tornado or hurricane, which prevented timely delivery or resulted in the Department's office being unable to accept delivery in a timely fashion.

20. General Conditions, Paragraph 3, of Form PUR-7033, revised 6/1/98, provides in relevant part as follows:

PROPOSAL OPENING: Shall be public, on the date, location, and the time specified on the



acknowledgement form. It is the proposer's responsibility to assure that this proposal is delivered at the proper time and place of the proposal opening. Proposals which for any reason are not so delivered, will not be considered. (Emphasis furnished.)

21. Section 40.16 of the RFP provides as follows:

40.16 PUBLIC OPENING OF PROPOSALS

Each proposal will be dated, time-marked, and logged by the department as received. Each will also be examined to verify that it is properly addressed and sealed. Any proposal received after the specified date and time for receipt of proposals will be rejected and returned unopened to the contractor. (Emphasis furnished.)

22. Section 40.17 of the RFP provides as follows:

40.17 REJECTION OF PROPOSALS

Proposals which do not conform to the requirements of this Request for Proposal may be rejected by the department. Proposals may be rejected for reasons which include, but are not limited to, the following:

\* \* \*

The proposal is received late. (Emphasis furnished.)

23. Section 40.15 of the RFP provides as follows:

40.15 ACCEPTANCE OF PROPOSALS

\* \* \*

The department also reserves the right, in its sole discretion, to waive minor irregularities in proposals. A minor irregularity is a variation from the Request for Proposal which does not affect the price of the proposal, or give the contractor an advantage or benefit not enjoyed by other contractors, or adversely impact the interest of the department. (Emphasis furnished.)

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Section 120.57(1), Florida Statutes.

25. Section 120.57(3)(f), Florida Statutes, provides as follows:

(f) In a competitive-procurement protest, no submissions made after the bid or proposal shall be considered. Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. 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. . . . (Emphasis furnished.)

26. Clearly, Nationwide has failed to establish facts to show that the Department's proposed action is contrary to its governing statutes, rules or policies, or proposal specifications. While the Department may have the discretion to accept and review an untimely proposal, it has always been its policy not to exercise that discretion, except possibly in situation where the untimeliness is caused by an "act of God."

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

RECOMMENDED that the Department enter a final order  
dismissing Nationwide's protest.

DONE AND ENTERED this 14th day of June, 1999, in  
Tallahassee, Leon County, Florida.

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WILLIAM R. CAVE  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 14th of June, 1999.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit 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.