STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRIDGEWAY CENTER, INC., and FOSTER AMERICA, INC., d/b/a MANAGED FAMILY SERVICES,	)	
Petitioner,	)	
vs.	)	
DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	)	Case No. 00-4162BID
Respondent,	)	
and	)	
LAKEVIEW CENTER, INC.,	)	
Intervenor.	)	

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Pensacola, Florida, on December 19 and 20, 2000, and January 29, 2001.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues are whether Respondent's decision to disqualify Petitioner's response to an invitation to negotiate was clearly erroneous, contrary to competition, arbitrary, or capricious and whether Respondent's decision not to disqualify Intervenor's response to the same invitation to negotiate was clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

By Petition for Formal Administrative Hearing filed September 15, 2000, Petitioner alleged that, on August 21, 2000, it submitted a response to Respondent's Invitation to Negotiate ITN-00-AJ01. The petition alleges that Respondent informed Petitioner by letter dated September 6, 2000, that Respondent was rejecting Petitioner's response for several grounds.

The September 6 letter disqualifies Petitioner's response because it omitted several items identified in three criteria contained in Appendix II, Domain A. The September 6 letter cites seven "mandatory elements from Section 6 that were referenced in Criteria [sic] 8," but Respondent later cited only three omissions under Criterion 8:

- 6.6, B.2: only the 1998-1999 fiscal year audited financial statement was included.
- 6.6, B.5: Family Safety Program contract corrective action plans were not included.
- 6.6, B.7: a three year staff retention study was not included.

Relying on Criteria 18 and 21, respectively, the September 6 letter cites the following grounds for disqualification of Petitioner's response:

> Only two years of financial statements were included, but three were required.
>
> Incomplete documentation was provided. No evidence of compliance with the Family Services Program was found in the proposal.

The petition requests a final order that Petitioner's response responded to all mandatory items; Respondent's decision to reject Petitioner's response was clearly erroneous, contrary to competition, arbitrary, and capricious; and Respondent must evaluate Petitioner's response "along with all other responsive bids." The petition also seeks

attorneys' fees and costs, pursuant to Section 120.595, Florida Statutes.

Two weeks prior to the hearing, Petitioner moved to amend its petition to challenge Respondent's decision not to disqualify Intervenor's response. The Administrative Law Judge reserved ruling on the motion at the hearing and grants the motion at this time.

At the hearing, Petitioner called seven witnesses and offered into evidence ten exhibits: Petitioner Exhibits 1-10. Respondent called three witnesses and offered into evidence three exhibits: Respondent Exhibits 1-3. Intervenor called two witnesses and offered into evidence no exhibits. The parties jointly offered into evidence 19 exhibits: Joint Exhibits 1-17 and 19-20. All exhibits were admitted except Respondent Exhibit 2.

The court reporter filed the Transcript on February 1, 2001.

FINDINGS OF FACT

1. On May 26, 2000, Respondent's Office of the District Administrator, District 1, issued Invitation to Negotiate ITN-00-AJ01 (ITN). The ITN is for a contract under which the successful applicant would become the "community-based lead agency for foster care and related services in Escambia County."

2. Section 1 of the ITN is the Introduction. Section 1.1 of the ITN states that Section 409.1671, Florida Statutes, "directs [Respondent] to identify and contract with highly qualified community based organizations that are interested in serving as the lead agency for an integrated system of foster care and appropriate related services." In response to this legislative mandate, District 1 "is planning a system redesign in which community-based organizations will assume the service provision role currently held by the state."

3. Section 1.2 of the ITN states that the purpose of the ITN is to solicit the community-based agency that will serve as the lead agency in Escambia County for the integrated provision of foster care and related services. Foster care and related services include "protective services, family preservation, independent living, emergency shelter, residential group care, foster care, therapeutic foster care, intensive residential treatment, foster care supervision, case management, post-placement supervision, and family reunification." Section 1.2 notes that state-employed protective investigators will continue to receive and investigate complaints of child abuse.

4. Section 1.2.A of the ITN describes this project as one of "major scope" and cautions that "[i]t will take a significant period of time for the selected lead agency to fully develop and implement a community-based system of care

for this population." Within the framework of existing laws, the selected agency "will be encouraged to develop innovative child focused intervention protocols and program components."

5. Section 1.2.A identifies the "minimal design elements" that must be included in any contract, regardless how the selected lead agency structures the project. These elements include:

> •The selected lead agency will be responsible for all aspects of the delivery of foster care and related services.
>
> •Within the scope of their expertise and resources, the lead agency can directly supply needed services to children and their families. A network of sub-providers will be developed by the lead agency to assure access to services not available through the lead agency. Capacity and financial risk issues will be managed by the lead agency.
>
> •An automated system will be put in place by the district in collaboration with the selected lead agency that will allow for real-time communication as well as data transfer between [Respondent], the lead agency and the judicial system. This mechanism will allow judges to be quickly apprised of the progress of children and families under the supervision of the court.
>
> •A comprehensive quality improvement system must be established by the lead agency. The lead agency and provider network will be accredited in accordance with department policy. In addition, the lead agency will identify and meet the training and job skill development needs of all employees of the system. . . .

6. Section 1.2.C of the ITN describes the relationship between District 1 of Respondent and the lead agency. This ITN starts the process by which Respondent will be relieved of responsibility for foster care and related services in Escambia County. Section 1.2.C notes: "The district will shift from performing to technical assistance and quality assurance."

7. Section 1.2.E of the ITN describes the start-up process. Section 1.2.E states that the most important part of this process of the privatization of foster care and related services is "[m]oving forward in a planned and deliberate manner." Section 1.2.E warns: "Transitioning from a broad concept to a carefully implemented system of community-based care requires a period of concurrent planning between the district, the alliance [a community group initially comprising the District 1 Health and Human Services Board and the Circuit Court Chief Judge's Children's Council] and the selected lead agency."

8. Section 1.2.E anticipates a "start-up contract" for a term of six to nine months, during which time Section 1.2.E identifies several deliverables that Respondent will require from the lead agency. Among these deliverables is: "The lead agency will develop a plan for the maximization of Medicaid dollars and all other federal funding streams associated with child protective services."

9. Section 1.2.E states that, during the start-up period, Respondent will continue to assure the safety of children, while the lead agency submits the deliverables. The end of the start-up contract occurs when the lead agency "demonstrates readiness to assume the management of the sub-provider network and the actual delivery of foster care and related services." Section 1.2.E states that, at this point, Respondent and the lead agency will negotiate a "service contract," which will "systematically stage the transfer of foster care, protective supervision, adoptions and all related functions from the department to the lead agency." Section 1.2.E contemplates that the parties will sign the service contract by July 6, 2001.

10. Section 1.3 of the ITN restates that Respondent will enter into a "start-up contract" with the applicant that Respondent chooses as the lead agency. Conflicting somewhat with Section 1.2.E as to the term of the start-up contract, Section 1.3 states that the term may be six to twelve months. More importantly, Section 1.3 restates the purpose of the start-up contract: "At the conclusion of this contract, [Respondent] will make a determination of the readiness of the provider for a service contract. This determination will be made on the basis of a review of the deliverables required

under the start-up contract . . ..” The resulting service contract will be for a three-year term.

11. Section 1.4.A of the ITN defines “[a]pplicant” as: “A not for profit community-based agency that successfully submits an application for consideration under this [ITN].” Section 1.4.R defines “[s]elected applicant” as: “The applicant selected for negotiation under the terms and conditions of this [ITN].” Section 1.4.M defines “[l]ead agency” as: “The not for profit community-based provider responsible for coordinating, integrating and managing a local system of supports and services for children who have been abused, abandoned or neglected and their families. The lead agency is also referred in any contract awarded from this [ITN] as the ‘Provider.’”

12. Section 2 of the ITN is the Invitation to Negotiate Information. Section 2.2 of the ITN warns:

> Failure to have performed any contractual obligations with [Respondent] in a manner satisfactory to [Respondent] will be a sufficient cause for termination. To be disqualified as an applicant under this provision, the applicant must have: 1) previously failed to satisfactorily perform in a contract with [Respondent], been notified by [Respondent] of the unsatisfactory performance, and failed to correct the unsatisfactory performance to the satisfaction of [Respondent] or, 2) had a contract terminated by [Respondent] for cause.

13. Section 2.6 of the ITN states: "Attendance at the applicant's conference is a prerequisite for acceptance of applications from individuals or firms."

14. Section 2.9 of the ITN sets a deadline for submitting all applications by 5:00 p.m. local time on August 24, 2000. This section adds: "[Respondent] reserves the right to reject any and all applications or to waive minor irregularities when to do so would be in the best interest of the State of Florida. Minor irregularities are defined as variations from this [ITN] terms and terms and conditions which does [sic] not effect [sic] the price of the application, or give the prospective applicant an advantage or benefit not enjoyed by other prospective applicants, or does not adversely impact the interest of [Respondent]."

15. Section 2.13 of the ITN provides that any person who is adversely affected by Respondent's decision concerning a procurement solicitation or contract award may file a protest, pursuant to Section 120.57(3), Florida Statutes.

16. Section 2.14 of the ITN sets forth the evaluation procedures. Section 2.14.A states: "Before the district initiates a negotiation with any potential provider, **all applications received will be ranked according to the evaluation criteria and score sheet contained in Appendix II of this [ITN].** . . ." Section 2.14.B states: **[The evaluation]**

team will utilize the methods described in Section 7 and the criteria listed in Appendix II of this [ITN] to rank each application received by the district. . . .." Section 2.14.C adds: "At the conclusion of the evaluation process, the District Administrator will designate a Lead Negotiator and four additional persons to enter into negotiations with the highest ranked applicant for selection of a lead agency. This negotiation for a start-up contract will begin with the highest ranked applicant and continue through the rankings until an award is made. . . .."

17. Section 3 of the ITN identifies the Minimum Program Requirements. Section 3.1 of the ITN describes Respondent's expectations of the services to be delivered by the "selected applicant." Section 3.2 of the ITN adds that the "selected applicant" shall be knowledgeable of all relevant state and federal laws and shall ask Respondent for assistance when necessary. Section 3.2 notes that, at a minimum, the "selected applicant" will be conversant with nine groups of federal and state laws. Among these requirements is Section 3.2.D, which states: "The selected applicant shall ensure compliance with Title IV-B of the Social Security Act, Title IV-E of the Social Security Act, Social Services Block Grant (SSBG), Title XIX (Medicaid), and Temporary Assistance for Needy Families (TANF) requirements."

18. Section 3.3 of the ITN states: "The purpose and intent of any contract awarded from this [ITN] is to meet the following departmental goals and the principles outlined in Section 1.1 of this [ITN] . . .." What follows are 13 specific goals to assure the safety and welfare of the children served by the lead agency.

19. Section 3.8 of the ITN states: "District 1 intends to enter into the start-up contract referenced above. **The objective of this start-up contract is to prepare the selected lead agency to perform the tasks listed in this section.** Written evidence of an organization's capacity, prior experience and potential to ultimately perform tasks of this scope will be given considerable emphasis and weight when [Respondent] determines with which applicant to enter into negotiations." Section 3.8.A then details numerous requirements to be imposed by the "selected applicant," including the submittal, for prior approval, of any new procedures or policies that may affect the State Plan regarding Title IV-E claims or other sources of federal funds.

20. Section 3.9 of the ITN states:

> Applicants shall include in their application the proposed staffing for technical, administrative, and clerical support. The successful applicant shall maintain an adequate administrative organizational structure and support staff sufficient to discharge its contractual

> responsibilities. The selected applicant and any subcontractors shall meet, at a minimum, the staff ratios found in Chapter 65C-14, F.A.C., for residential group care.

21. Section 3.10 of the ITN requires the "selected applicant" to ensure that its staff and the staff of its subcontractors meet the qualification requirements of Chapters 65C-14 and 65C-15, F.A.C.; the background screening requirements of Section 435.04, Florida Statutes; and the training and certification requirements of CFOP 175-78, Certification Procedure for Professional Child Protection Employees.

22. Section 3.20 of the ITN identifies the performance measures to be applied to the evaluation of the services provided by the lead agency. Section 3.20.A lists outcomes such as 95 percent of the children served will not be the victims of verified reports of abuse or neglect while receiving services, 85 percent of the children in foster care for less than one year will have had less than two placements, and 100 percent of all judicial reviews will be completed within the statutory deadlines. Section 3.20.B identifies other outcomes whose percentage of achievement will be established in the future; samples of these are the percentage of children who have been in shelter for more than three days who have a family-safety plan upon their release from the shelter and the

percentage of children who are placed in out-of-home care and who are later reunited with their families.

23. Section 3.21.C of the ITN warns: "Upon execution of the contract resulting from this [ITN], the successful applicant must meet the standards set forth in Section 3.20 . . .."

24. Section 3.23 of the ITN provides that the "selected applicant will agree" to coordinate with various other agencies in providing foster care and related services.

25. Section 4 of the ITN covers Financial Specifications. Section 4.2 of the ITN requires the "selected applicant" to submit a "cost allocation plan" that it has been developed in accordance with the Office of Management and Budget (OMB) Circular A-122. The cost allocation plan "must describe the allocation methodologies used by the selected applicant to claim expenditures for reimbursement under any service contract awarded from this [ITN]." Section 4.4 of the ITN requires the "selected applicant" to submit a "financial and service plan" that assures that, among other things, "[s]tate funds in the contract must be spent on child protection activities in ways that allows the state to maximize federal funding."

26. Section 5 of the ITN addresses Standard Contract Provisions. Section 5.1 of the ITN incorporates the appendix

containing model contract provisions to be incorporated into any contract resulting from the ITN.

27. Section 6 of the ITN contains Instructions to Prospective Applicants to the ITN. The flush language under this section states that Respondent "will not . . . consider. . ." applications submitted after the deadline and that applicants must submit one original and nine copies of their applications. Also, an officer of the "selected applicant agency" must sign at least one copy of the application. Another provision covers the typographical presentation of application material. The last sentence of the flush language states: "Each application must follow the document structure listed in Sections 6.1 through 6.9 of this [ITN]."

28. Section 6.1 of the ITN requires the execution of a standard acknowledgement form. Section 6.2 requires that the second page of the application consist of a title page with such information as the ITN number and name of the applicant. Section 6.3 requires a one-page executive summary of the application. Section 6.4 requires a table of contents following the executive summary and, after the table of contents, a cross-reference table covering all of the responses required by Section 6 of the ITN. Section 6.5 requires a demonstration of the applicant's "comprehensive understanding

of the scope of the issues associated with the delivery of child protection services in Escambia County" and a presentation of the applicant's "perspective regarding community[-]based . . . care with foster care and related services. . . ."

29. Section 6.6 of the ITN is entitled, "Description of Organizational Capacity." The flush language in Section 6.6 states: "In this section the applicant will, at a minimum[,] address the following factors . . .."

30. Section 6.6.A is headed, "Description and Qualifications of the Organization." Section 6.6.A requires 13 items, including articles of incorporation, services currently provided, and formal and informal connections to Escambia County.

31. Section 6.6.B is headed, "Administrative/Fiscal: The applicant must supply the following information . . .." Section 6.6.B requires the following nine items:

> 1. The organization's annual budget.
> 2. A three-year history of audited financial statements.
> 3. An estimate of advance payments (if needed) to support this project.
> 4. The most recent audit reports complete with the management response.
> 5. Evidence of compliance with previous correction action plans proposed by [Respondent] through any contract.
> 6. A documented history of maximizing Medicaid revenues.
> 7. Provide a discussion of the organization's system of staff recruitment,

screening, pre-service training, in-service training, staff development and employee evaluation. Include a three-year staff retention study.
8. A copy of the organization's disaster readiness plan(s).
9. [Deleted from ITN]
10. A copy of minority business enterprise certificate issued by the Department of Management Services, if applicable.

32. Section 6.6.C is headed, "Scope of the Organization: The applicant must address the following capacity issues . . .." Section 6.6.C requires eight items, including Section 6.6.C.2, which states: "Evidence of an infrastructure that includes automated communication and record keeping systems that can be linked to the judicial system and the department."

33. Section 6.6.D is headed, "Clinical Capacity: The application must address each of the following items . . .." Section 6.6.D lists six items.

34. Section 6.6.E is headed, "Quality Improvement: The application must address each of the following items . . .." Section 6.6.E lists seven items, including Section 6.6.E.3, which states: "The ability of the organization and the structure through which the standards found in Section 3.20 of this document will be met."

35. Section 6.7 of the ITN is entitled, "Proposed Statement of Work." The flush language explains that the statement of work is "to be general and increase in specification during the period of time covered by a start-up

contract." Section 6.7.G states: "Explain how the applicant will provide for integrated generic and specialized case management."

36. Section 6.8 of the ITN is entitled, "Proposed Implementation Plan." This section requires the "applicant's proposed time-lines for sequencing of all the activities that will lead to full implementation of the items in Section 3."

37. Section 6.9 of the ITN is entitled, "Mandatory Certifications, Assurances and Statements." This section lists several executed documents that the application must include.

38. Section 7 of the ITN is entitled, "Application Evaluation Criteria and Rating Sheet." Section 7.A states that the score sheets "for evaluating the [ITN responses]" are in Appendix II. Section 7.A warns: "The score sheet is the instrument used to assess the degree to which the applicant's response meets the criteria of this [ITN]."

39. Appendix II of the ITN is entitled, "Evaluation Criteria and Scoring Sheet." The first section of Appendix II is the "Evaluation Methodology," which states in its entirety:

> The evaluation team will score the application using the criteria and scoring procedures found in each domain of this appendix. The score for each criteria will be established by consensus of the evaluation team. The scores assigned to each criteria [sic] will be added to determine the final score for each domain. The scores from each domain will be summed to determine the final score for the

application and annotated on the attached score sheet.

Domain A (Disqualifying Criterion) contains fatal items that must be present if the application is to be scored. With no disqualification resulting from the review of **Domain A**, **Domains B though E** will be scored based on the procedures and standards listed.

40. Appendix II, Domain A is entitled, "Disqualifying Criteria." The first section under Domain A is "Scoring Procedure," which states: "**Score each criteria [sic] as present or absent. If any of these criteria are scored as absent, the applicant is disqualified.**"

41. The second section under Domain B is "Criteria," which lists 23 items. The 23 items are:

1. Application was received at the time and date specified in **Section 2.9** of this [ITN].

2. **One original and 9 copies** of the application were received by the department in the manner and location specified in Section 2.9 of this [ITN].

3. The application included a signed and original **State of Florida Invitation to Negotiation Contractual Services Acknowledgement Form, PUR 7105. (See Appendix IX)**

4. The application included an original signed **Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion Contracts/Subcontracts. (See Appendix X)**

5. The application included an original signed **Acceptance of Contract Terms and Conditions** indicating that the applicant agrees to all department requirements, terms and conditions in the [ITN] and in the department's Standard Contract. **(See Appendix XI)**

6. The application included an original signed **Statement of No Involvement form. (See Appendix XII)**

7. The application included an original signed **District 1 Statement of Assurances (See Appendix XIII)**

8. The application followed the document structure listed in **Section 6.1-6.9** of this [ITN].

9. All forms submitted included an **original signature from an individual authorized to bind the applicant** to the terms and conditions of this [ITN].

10. The application contains the title page, the abstract, the table of contents and cross reference table as required in **Sections 6.2-6.4** of this [ITN].

11. **Articles of Incorporation**.

12. [deleted from ITN]

13. **Certificate of Good Standing** from the Secretary of State.

14. Documentation from the U.S. Internal Revenue Service of the organization's **Section 501(c)(3) status**.

15. Evidence that the applicant provides for and supports a **Drug-free Workplace**.

16. Evidence that the applicant is willing to comply with the **Environmental Tobacco Smoke Restrictions**.

17. Evidence the applicant **does not employee unauthorized aliens**.

18. **Three history of financial statements**.

19. A **disclosure of any financial difficulties** and extraordinary obligations.

20. An **estimate of advanced payments** if needed to support this project.

21. **Documentation of compliance** with past departmental or Florida state contracts.

22. **Most recent financial audit reports** complete with management response including **evidence of sound credit rating**.

23. A copy of the **Application Guarantee**.

24. Attendance at all **applicant conferences** is a pre-requisite for acceptance of applications from individuals or firms.

25. [deleted from the ITN]

42. Appendix II, Domains B through E are score sheets. Domain B covers Section 6.5, Domain C covers Section 6.6, Domain D covers Section 6.7, and Domain E covers Section 6.8.

43. Domain C, Factor B, Item 2 covers Section 6.6.B.2. This item states:

2. Analysis of the three year audited financial statements. **(See Section 6.6B.2)**

Points	**Standard**
0	Poor
1	Average
2	Above Average
3	Excellent

NOTE: The analysis of the financial statements by the department will at a minimum include:

Calculation of selected financial ratios

Review of accounting policies

A review of credit history will be included in this analysis

44. No items in Domains B through E cover Section 6.6.B.3 through 6.6.B.5.

45. Domain C, Factor B, Item 3 covers Section 6.6.B.6. This item states:

> 3. History of maximization of Medicaid revenues. **(See Section 6.6B.6)**
>
> | **Points** | **Standard** |
> |---|---|
> | 0 | No history |
> | 1 | Some experience |
> | 2 | Experienced |
> | 3 | Well documented history |

46. Domain C, Factor B, Item 4 covers Section 6.6.B.7. This item states:

> 4. Organization’s system of staff recruitment, training, evaluation and retention. **(See Section 6.6B.7)**
>
> | **Points** | **Standard** |
> |---|---|
> | 0 | No system |
> | 1 | Incomplete system |
> | 2 | System in place |
> | 3 | Well developed / comprehensive system |

47. Domain C, Factor C, Item 2 covers Section 6.6.C.2. This item states:

2. Automated communication and record keeping systems. **(See Section 6.6C.2)**

Points	**Standard**
0	No automated systems
1	Limited automation, internal only
2	Currently automated, limited external applications
3	Comprehensive systems

48. Petitioner and Intervenor attended the applicant's conference, which was held on June 23, 2000. Respondent duly answered all questions of Petitioner and Intervenor.

49. Petitioner timely submitted a response to the ITN on August 22, 2000, and Intervenor timely submitted a response to the ITN on August 24, 2000. These were the only responses to the ITN.

50. Respondent opened the responses on August 25, 2000. Respondent initially disqualified Petitioner's response by, letter dated August 29, 2000, on the erroneous ground that Petitioner had not attended the applicant's conference.

51. Withdrawing the August 29 letter, Respondent disqualified Petitioner's response on other grounds, as cited in a letter dated September 6, 2000. The September 6 letter disqualifies Petitioner's response because it omitted several items identified in three criteria contained in Appendix II, Domain A. The September 6 letter cites seven "mandatory

elements from Section 6 that were referenced in Criteria [sic] 8," but Respondent later cited only three omissions under Criterion 8:

> •6.6, B.2: only the 1998-1999 fiscal year audited financial statement was included.
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> •6.6, B.5: Family Safety Program contract corrective action plans were not included.
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> •6.6, B.7: a three year staff retention study was not included.

52. Relying on Criteria 18 and 21, respectively, the September 6 letter cites the following grounds for disqualification of Petitioner's response:

> Only two years of financial statements were included, but three were required.
>
> Incomplete documentation was provided. No evidence of compliance with the Family Services Program was found in the proposal.

53. Petitioner timely filed a protest and formal written protest of Respondent's disqualification of Petitioner's response. Petitioner contends that the disqualification of its response was clearly erroneous, contrary to competition, arbitrary, and capricious. In particular, Petitioner contends that Respondent applied more stringent standards in its examination of Petitioner's response than it did in its examination of Intervenor's response.

54. The introduction to Petitioner's response identifies Bridgeway Center, Inc., as the proposed lead agency, and Foster

America, Inc., as its presumably prime subcontractor, although Foster America, Inc., will do business in Florida under the name of Managed Family Services. The title page to Petitioner's response identifies Bridgeway Center, Inc., and Managed Family Services as the "applicant organization." Section 2.1.B of Petitioner's response details the substantial experience of Foster America, Inc., as "the first company established in the United States to address the issues pertaining specifically to the management of foster care." Considerable portions of the ensuing sections of Petitioner's response describe the capabilities of Foster America, Inc., to meet the requirements of the ITN.

55. Appendix 16 of Petitioner's response is entitled "Three-Years of Financial Statements." Appendix 16 consists of the following financial information for Bridgeway Center, Inc.: statements of financial position for fiscal years ending in 1996-99 and statements of activities for fiscal years ending in 1996-99. At the bottom of each of the four pages containing these statements is the declaration: "The accompanying notes are an integral part of these financial statements."

56. No notes accompany the financial statements contained in Appendix 16. Nothing in Petitioner's response indicates that these financial statements were audited. These financial statements do not include a statement of functional

expenses and statement of cash flows. The attached financial statements do not contain auditor's reports describing the scope of the opinion.

57. Appendix 18 of Petitioner's response is entitled, "Most Recent Audit Reports with Management Response Including Evidence of Sound Credit Rating." Pertaining to fiscal year ending 1999, this set of documents starts with an "independent auditor's report, stating, among other things, that the financial statements "present fairly, in all material respects, the financial position of Bridgeway Center, Inc. as of June 30, 1999 and the statement of activities and its cash flows for the year then ended in conformity with generally accepted accounting principles."

58. Following the main independent auditor's report, the 1999 financial statements comprise a statement of financial position, statement of activities, statement of functional expenses, and statement of cash flows. Following the four financial statements, twelve pages of notes explain in detail many of the individual items contained in the financial statements. Following a nonrequired schedule of revenues, a schedule of expenditures of federal awards and other contract and grant activity, with accompanying notes, responds to the requirements of OMB Circular A-133. Following these items is another independent auditor's report, also responding to the

requirements of OMB Circular A-133. Next is another independent auditor's report, responding to the state requirement that it opine as to management's assertion of its compliance with state law. The final document in this set is a management letter from the auditor identifying deficiencies in internal controls, making recommendations for improving operating efficiency, and recording management's response to each of these observations and recommendations.

59. Strictly speaking, Appendix 18 of Petitioner's response contains audited financial statements, including notes, only for the fiscal year ending in 1999. However, the statement of financial position and statement of cash flows contain the identical information for the fiscal years ending 1998 and 1999. The statement of activities contains nearly the same information for both years, adding for 1999 only a breakdown of which revenues are unrestricted and which are restricted. The statement of functional expenses contains considerably more detailed information for 1999.

60. The main independent auditor's report states: "Information for the year ended June 30, 1998, is presented for comparative purposes only and was extracted from the financial statements from that year, on which we presented an auditor's report dated [approximately one year earlier]."

61. Thus, Petitioner's response contains audited financial statements only for the fiscal year ending in 1999, but also contains considerable, but not all, information from the audited financial statements for the preceding fiscal year. Petitioner's response contains considerably less information for the fiscal year ending in 1997.

62. The adequacy of Petitioner's response, of course, depends on the determination of the specific requirements of the disqualification provisions. There is little agreement on these specific requirements.

63. Respondent and Intervenor erroneously contend that Criterion 8 of Domain A incorporates by reference all of the requirements of Sections 6.1 through 6.9. However, Criterion 8 requires only that the "application followed the document structure listed" in these sections. Nothing in the record casts much light upon the meaning of "document structure." At a minimum, though, the requirement that each application "follow" the "document structure" listed in Sections 6.1 through 6.9 would be an odd way of requiring that the application contain all of the items required in these sections.

64. In opposition to this contention of Respondent and Intervenor, Petitioner identifies several scoring matrices that assign zero points to responses showing no evidence in response

to a specific requirement within Sections 6.1 through 6.9. Petitioner reasons that the absence of evidence is tantamount to the omission of an item. Petitioner then concludes that it would make little sense if the absence of evidence, or omission of such an item, meant the disqualification of the application.

65. Petitioner makes a good point here. The scoring matrices for items for which an omission explicitly means disqualification, such as financial statements, do not assign zero points for the omission of such items. The scoring matrices assign zero points for the omission of an item only as to items that are not explicitly the subject of disqualification.

66. Petitioner relies upon the common definition of structure as, according to Webster's III New College Dictionary (1995): "Something made up of a number of parts held or put together in a specific way. The manner in which parts are arranged or combined to form a whole." This is a good definition of "structure" and helps define the meaning of the somewhat obscure phrase, "document structure."

67. It suffices for this case to determine that "document structure" does not mean each and every requirement contained in Sections 6.1 through 6.9. Most likely, "document structure" means only that each application has to contain documents corresponding to each of the requirements stated in

each of these sections: i.e., a standard acknowledgement, title page, executive summary, table of contents and cross-reference table, organizational perspective, description of organizational capacity, proposed statement of work, proposed implementation plan, and all of the specified mandatory certifications. Thus, an applicant could avoid disqualification under Criterion 8 by, as to Section 6.6, including a document describing its organizational capacity, even though the document may have omitted certain items required under Section 6.6, such as professional affiliations of the applicant.

68. Because "document structure" does not incorporate all of the Section 6 requirements into Criterion 8, Respondent has erroneously relied upon the first three, bulleted grounds for disqualification, which identify omissions of Section 6 requirements. Respondent and Intervenor have never contended that Petitioner's response fails to satisfy the narrower interpretation given "document structure" in this recommended order. Thus, Criteria 18 and 21 are the only grounds on which Respondent could disqualify Petitioner's response.

69. Criterion 18 requires a "three [sic] history of financial statements." This obvious typographical error did not obscure for Petitioner the intended meaning of this criterion: any application omitting three years of financial

statements would be disqualified. The key question is exactly what the ITN requires, as to financial statements, to avoid disqualification.

70. The failure of Criterion 6 to incorporate, among other provisions, the specific requirements of Sections 6.6.B.2 for a three-year history of "audited" financial statements is significant. Criterion 18 does not require "audited" financial statements, so, unless Criterion 18 incorporates Section 6.6.B.2 into the disqualifying criteria, the omission of audited financial statements, while possibly a scoring matter, is not a basis for disqualification.

71. The identification of a requirement in Domain A does not equate to the identification of a near counterpart to that requirement in Sections 6.1 through 6.9. For example, Criterion 19, which requires disclosure of "any financial difficulties and extraordinary obligations," has no counterpart in Section 6, or anywhere else in the ITN. Likewise, the portion of Criterion 22 requiring "evidence of sound credit rating" has no counterpart in Section 6, or anywhere else in the ITN.

72. By adding new requirements for disqualification purposes, Domain A does not serve merely as a collection of references to requirements contained in Section 6 or elsewhere in the ITN. This means that it is not possible to read into or

out a specific Domain-A requirement that resembles a specific Section-6 requirement those elements necessary to transform it into the Section-6 requirement.

73. Therefore, except for the uncontroversial correction of the obvious typographical error, Criterion 18 is a complete statement of the disqualification requirement concerning financial statements. And Criterion 18 obviously omits the requirement in Section 6.6.B.2 that the financial statements be "audited."

74. For a not-for-profit corporation, a set of financial statements comprises four financial statements: a statement of financial position, statement of activities, statement of functional expenses, and statement of cash flows.

75. Petitioner's response contains a full set of the four, audited financial statements applicable to not-for-profit corporations, but only for the fiscal year ending in 1999. These 1999 financial statements are accompanied by all required independent auditor's reports and notes.

76. Petitioner's response also contains the three prior years of two of the four financial statements--the statement of financial position (resembling what was traditionally known as the balance sheet for for-profit corporations) and the statement of activities (resembling what was traditionally known as the income statement for for-profit corporations).

However, these additional financial statements are unaccompanied by notes and independent auditor's reports.

77. Petitioner's response for 1997 and 1998 includes the two financial statements that provide the most information and for 1998 includes considerable information from one of the two missing financial statements. Criterion 18 does not explicitly require all of the financial statements that constitute a complete set of financial statements, so the omission of the information from the 1997 and 1998 financial statements is not necessarily disqualifying, at least if the information provided is substantially complete.

78. The omission of the notes for 1997 and 1998 merits careful consideration. Petitioner's auditor warns, on each financial statement, that the accompanying notes are an "integral" part of the financial statements. According to the American Heritage Dictionary (1981), "Integral" means: "Essential for completion; necessary to the whole constituent." In other words, the financial statements submitted by Petitioner are not whole or complete without the accompanying notes.

79. The notes accompanying the 1999 financial statements add explanatory material. Note 1 discloses that Bridgeway Center, Inc. is an accrual-basis taxpayer; values its inventory on the lower of cost or market basis on a last-in, first-out

basis; and capitalizes all equipment expenditures over $500 and depreciates its fixed assets over stated cost-recovery periods. Note 3 schedules the receivables owed Bridgeway Center, Inc. by payor and, in the case of Respondent, program. Note 6 details notes payable and lines of credit with terms, interest rates, and monthly payments. Note 7 describes a bond payable in the amount of nearly $2 million. Note 8 identifies real estate leases and rental payments for which Bridgeway Center, Inc. is obligated. Note 10 itemizes by program the sources of income from the State of Florida.

80. As explained in the Conclusions of Law, the determination of whether Petitioner's response contains three years of financial statements is governed by the less-deferential standard of a preponderance of the evidence, rather than the more-deferential evidentiary standard of clearly erroneous, contrary to competition, arbitrary, or capricious. Petitioner has proved by a preponderance of the evidence that the omission of two financial statements for 1997 and the omission of some information from the same two financial statements for 1998 does not necessarily preclude its satisfaction of the disqualification requirement of three years of financial statements.

81. However, Petitioner's omission of the notes for 1997 and 1998 precludes its satisfaction of this disqualification

criterion, even by a preponderance of the evidence. Petitioner's auditor describes the notes as "integral" to those selected financial statements that Petitioner submitted. Absent an integral part of the already-incomplete submission, Petitioner has failed to prove, even by the less deferential preponderance standard, that its response satisfies the requirement of Criterion 18 for three years of financial statements.

82. Criterion 21 requires "[d]ocumentation of compliance with past departmental or Florida state contracts." Appendix 19 of Petitioner's response contains, by program type, 171 schedules identifying compliance issues, corrective action plans, responsible persons, and completion dates.

83. Again, Respondent and Intervenor attempt to add elements from Section 6 to this disqualification criterion of documentation of compliance with past agency contracts. Both parties contend that Criterion 21 should be read in conjunction with Section 6.6.B.5, which requires: "Evidence of compliance with previous correction action plans proposed by [Respondent] through any contract."

85. For the reasons set forth above, it is impossible to engraft onto Criterion 21 the more demanding requirements of Section 6.6.B.5. In this instance, Respondent answered a question posed by Intervenor consistent with Respondent's

present interpretation of Criterion 21, but this answer--absent an accompanying amendment of the ITN--cannot override the clear disqualification requirement imposed by Criterion 21.

86. Petitioner's response omits corrective action plans related to contracts for the Family Services Program. This omission was inadvertent, occasioned by the death of the sole Bridgeway employee with knowledge of these matters.

87. As for Criterion 21, Petitioner has proved by a preponderance of the evidence that its response contains documentation of compliance with past agency contracts. Even if a substantiality requirement were inferred as to Criterion 21, Petitioner's substantive response would still, by a preponderance of the evidence, satisfy this disqualification requirement. Criterion 21 does not incorporate the comprehensiveness required by Section 6.6.B.5, which requires information concerning "any contract."

88. Petitioner raises numerous challenges to Intervenor's response. Partly, these challenges are intended to show how Respondent evaluated Petitioner's response more stringently. Partly, these challenges are intended to show that Intervenor's response should be disqualified, regardless of whether Petitioner prevails on its challenge to the disqualification of its response. The latter purpose of Petitioner's challenges depends upon a ruling allowing it to

amend its petition to raise the issue of whether Intervenor's response should also be disqualified.

88. In challenging Intervenor's response, however, Petitioner repeats the same mistaken assumptions made by Respondent and Intervenor about the relationship between Domain A and Section 6.

89. In fact, Petitioner extends these mistaken assumptions one level by faulting Intervenor's response for failing to satisfy non-Domain A provisions that are not even applicable to responses to the ITN. The ITN imposes very few requirements upon ITN responses outside Section 6 and Domains A through E of Appendix II. The two such requirements are Section 2.2, which disqualifies certain applicants with unsatisfactory histories with Respondent; Section 2.6, which requires attendance at the applicant's conference; Section 2.9, which sets the deadline for submitting responses; and Section 3.9 (first sentence), which requires that responses include proposed staffing for technical, administrative, and clerical support. Apart from some general background descriptions contained in the introductory sections of the ITN, the remainder of the ITN, apart from Section 6 and Domains A through E, deal with the start-up contract and the ultimate service contract. This orientation is amply revealed by frequent use in these provisions of the future tense and

descriptions of the non-agency party as the “successful applicant,” “lead agency,” or “selected applicant.”

90. In its proposed recommended order, Petitioner first challenges Intervenor’s response with respect to Criterion 22, which requires the most recent financial audit reports “complete with management response.”

91. Criterion 22 is in Domain A, so it is a disqualification requirement. However, Petitioner failed to prove by a preponderance of the evidence that such a response is required when, as here, Intervenor’s auditor uncovered no material weaknesses or disagreements to which Intervenor was obligated to respond.

92. In its proposed recommended order, Petitioner challenges Intervenor’s response with respect to Section 6.6.E.3, which addresses the ability of the applicant with respect to federal funding. This is not a Domain-A requirement. In fact, Petitioner’s contentions require application of ITN provisions apart from Section 6 and Domain A that involve the start-up process and are inapplicable to the present stage of this procurement.

93. The deficiency described in the preceding paragraph characterizes the remainder of Petitioner’s challenges to Intervenor’s response, such as with respect to a staff-retention study and demonstration of infrastructure capability.

It is thus unnecessary to consider the extent to which Intervenor's response addresses these items.

94. Based on these findings, Petitioner has failed to prove that Respondent's proposed determination disqualifying Petitioner's response is clearly erroneous, contrary to competition, arbitrary, or capricious.

95. Based on these findings, Petitioner has failed to prove that Respondent's proposed determination failing to disqualify Intervenor's response is clearly erroneous, contrary to competition, arbitrary, or capricious.

CONCLUSIONS OF LAW

96. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1) and (3), Florida Statutes. (All references to Sections are to Florida Statutes. All references to Rules are to the Florida Administrative Code.)

97. Section 120.57(3)(f) provides:

> . . . 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. In any bid-protest proceeding contesting an intended agency action to reject all bids, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

98. The presence in the statute of two standards of proof or review means that the standard of proof applied in cases in which an agency selects one bid or offer is less deferential than the standard of review applied in cases in which an agency rejects all bids or offers.

99. However, the de novo hearing devised by the Legislature to apply to cases in which an agency selects one bid or offer is not necessarily as comprehensive as the de novo hearing applied to other administrative hearings. Even prior to the 1996 revisions, a de novo hearing typically has meant less in bid hearings than it means in other areas of administrative law. See, e.g., Intercontinental Properties, Inc. v. Department of Health and Rehabilitative Services, 606 So. 2d 380, 386 (Fla. 3d DCA 1992), in which the court stated:

> Although the hearing before the hearing officer was a de novo proceeding, that simply means that there was an evidentiary hearing during which each party had a full and fair opportunity to develop an evidentiary record for administrative review purposes. It does not mean, as the hearing officer apparently thought, that the hearing officer sits as a substitute for the Department and makes a determination whether to award the bid de

> novo. Instead, the hearing officer sits in a review capacity, and must determine whether the bid review criteria set forth in Baxter's Asphalt [i.e., agency has wide discretion to waive minor irregularity] have been satisfied.

100. Section 120.57(3)(f) states that the standard of proof in this case is whether the proposed agency action is clearly erroneous, contrary to competition, arbitrary, or capricious (Clearly Erroneous Standard).

101. Typically, a standard of proof governs the determination of the basic facts that underlie the determination of the ultimate facts, and the determination of the ultimate facts underlie the determination of the legal issues. However, the language of Section 120.57(3)(f) applies the Clearly Erroneous Standard only to the proposed agency action. Requiring the protestor to prove by the Clearly Erroneous Standard the ultimate issue--i.e., that the proposed award is contrary to statutes, rules, policies, or the ITN--may, with difficulty, be harmonized with the notion of a de novo hearing. However, requiring the protestor to prove by the Clearly Erroneous Standard the basic facts of the case--e.g., the contents of financial statements--is inconsistent with the notion of a de novo hearing. The law does not contemplate that the finding of basic facts will be governed by the review-like Clearly Erroneous Standard; instead, the law contemplates that the finding of basic facts will be

governed by the residual administrative standard of proof, a preponderance of the evidence.

102. There are ultimate questions of fact to which the Clearly Erroneous Standard may be applied. Ultimate questions of fact--express and implied--link the basic facts to the final legal conclusion, which is whether the proposed decision to award is contrary to statute, rule, policy, or the ITN. In some bid cases, the question arises whether a deviation in a bid is a material variance or a minor irregularity or whether a bid is responsive. These are ultimate questions of fact, and the Clearly Erroneous Standard defers to these policy-influenced determinations. However, the underlying factual determinations, such as how the deviation may or may not yield a financial advantage or the interpretation of the contents of a bid, are governed by the less deferential preponderance standard of proof.

103. The Clearly Erroneous Standard also applies to subordinate questions of law and mixed questions of fact and law, such as interpretations of an agency rule or ITN, and questions of fact requiring the application of technical expertise, such as whether a specific product offered qualitatively complies with the specifications.

104. This approach is consistent with State Contracting and Engineering Corporation v. Department of Transportation,

709 So. 2d 607 (Fla. 1st DCA 1998). In State Contracting, the court affirmed the agency's final order that rejected the recommendation of the administrative law judge to reject a bid on the ground that it was nonresponsive. The bid included the required disadvantaged business enterprise form, but, after hearing, the administrative law judge determined that the bidder could not meet the required level of participation by disadvantaged business enterprises. The agency believed that responsiveness demanded only that the form be facially sufficient and compliance would be a matter of enforcement. Rejecting the recommendation of the administrative law judge, the agency reasoned that the administrative law judge had failed to determine that the agency's interpretation of its rule was clearly erroneous.

105. In affirming the agency's final order, the State Contracting court quoted the provisions of Section 120.57(3)(f) for evaluating the proposed agency action against the four criteria and Clearly Erroneous Standard. Addressing the meaning of a de novo hearing in an award case, the court stated, at page 609:

> In this context, the phrase "de novo hearing" is used to describe a form of intra-agency review. The [administrative law judge] may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency.

106. Significantly, the State Contracting court did not apply the Clearly Erroneous Standard merely to the agency decision to award. The court concluded that the agency's interpretation of one of its rules and determination that the bid was responsive were not "clearly erroneous."

107. In the subject case, then, the Administrative Law Judge has applied the preponderance standard to all basic facts and the Clearly Erroneous Standard to the ultimate questions of fact, mixed questions of fact and law, subordinate questions of law, and questions of fact involving agency expertise. In the Conclusions of Law, the Administrative Law Judge takes the resulting findings and determines whether the proposed agency decision to award the contract to Intervenor is consistent with the statutes, rules, policies, and ITN. This three-step process effectuates the Legislative intent that the Administrative Law Judge defer less to the agency decision in an award case than in a case in which the agency rejects all bids or offers.

108. Nothing about an invitation to negotiate demands a different approach as compared to the more common invitation to bid or request for proposals. As defined by the Department of Management Services in Rule 60A-1.001(2), an invitation to negotiate as a “[c]ompetitive solicitation used when an Invitation to Bid or Request for Proposals is not practicable.”

Rule 60A-1.002 also contemplates the use of invitations to negotiate under procedures identical to those governing invitations to bid and requests for proposal.

109. In this case, Petitioner has failed to prove the underlying factual bases to its challenge to Respondent's determination to disqualify Petitioner's response or Respondent's determination not to disqualify Intervenor's response. Petitioner has thus failed to prove that these proposed agency actions are clearly erroneous, contrary to competition, arbitrary, or capricious and that the proposed agency actions are contrary to statute, rule or policy, or the ITN.

RECOMMENDATION

It is

RECOMMENDED that the Department of Children and Family Services enter a final order dismissing the protest of Petitioner to the disqualification of its response to the ITN and to the failure to disqualify Intervenor's response to the ITN.

DONE AND ENTERED this 2nd day of February, 2001, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this recommended order. Any exceptions to this recommended order must be filed with the agency that will issue the final order in this case.