

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHILDREN'S HOME SOCIETY)
OF FLORIDA,)
)
 Petitioner,)
)
vs.) Case Nos. 01-1443BID
) 01-1444BID
DEPARTMENT OF CHILDREN)
AND FAMILY SERVICES,)
)
 Respondent,)
)
and)
)
THE DEVEREUX FOUNDATION, INC.,)
)
 Intervenor.)
_____)

RECOMMENDED ORDER

A hearing was held pursuant to notice, on May 16, 2001, by Barbara J. Staros, assigned Administrative Law Judge of the Division of Administrative Hearings, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Peter Antonacci, Esquire
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For Respondent: John R. Perry, Esquire
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For Intervenor: Michael J. Cherniga, Esquire
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STATEMENT OF THE ISSUE

Whether the decision of the Department of Children and Family Services to reject the proposals submitted by the Children's Home Society in response to ITN No. 01-FSD2A/01 and ITN No. 01-FSD2B/01 as non-responsive was contrary to the Agency's governing statutes, the Agency's rules or policies, or the specifications of the ITNs?

PRELIMINARY STATEMENT

On or about February 1, 2001, the Department of Children and Family Services (DCF) issued ITN No. 01-FSD2A/01 and No. 01-FSD2B/01 for the delivery of foster care licensure, retention and recruitment contracts in DCF's Districts 2A and 2B. Petitioner, Children's Home Society (CHS), responded to both ITNs.

On March 6, 2001, DCF informed CHS by letter that its responses to the ITNs were determined to be non-responsive.

On March 9, 2001, CHS filed a Notice of Protest of DCF's decision determining that CHS' responses to the ITNs were non-responsive.

On March 14, 2001, DCF posted the results of its evaluations of the ITN responses submitted by two other proposers or applicants, one of which was the Devereux Foundation, Inc.

On March 19, 2001, CHS filed two Formal Written Protests requesting a formal administrative hearing and protesting DCF's decision that CHS's responses to the ITNs were determined to be non-responsive and ineligible for further evaluation. CHS also filed a Motion for Consolidation of the two protests. The Devereux Foundation Inc. (Devereux) filed a Petition to Intervene in the Formal Written Protest involving ITN No. 01-FSD2B/01. Devereux alleged that CHS was ineligible to respond to the ITNs as a matter of law and should have been disqualified from the competitive procurement process.

CHS's Formal Written Protests were forwarded to the Division of Administrative Hearings on or about April 16, 2001. Devereux's Motion to Intervene in case No. 01-1444BID was granted. CHS's Motion for Consolidation was granted consolidating Case Nos. 01-1443BID and 01-1444BID and a formal hearing was scheduled for May 16, 2001.

Devereux filed a Motion for Summary Recommended Order of dismissal, which was denied.

The parties filed a Prehearing Stipulation. At hearing, the parties stipulated to the admission of Joint Exhibits 1 through 9. Petitioner presented the testimony of John Haines, William

Frieder and Dr. John Awad. Petitioner proffered the testimony of Professor Jeffrey Davis. Petitioner offered Exhibits 1-5. Petitioner's Exhibit 5 was admitted into evidence but Petitioner's Exhibits 1-4 were not admitted into evidence. Respondent presented the testimony of Terry DeCerchio and offered no exhibits into evidence. Petitioner requested official recognition of Chapter 99-168, Laws of Florida, and this request was granted. Intervenor presented no witnesses and offered one exhibit into evidence. Petitioner presented the testimony of Terry DeCerchio and Patricia Phillips in rebuttal.

A Transcript of the hearing, consisting of one volume, was filed on June 4, 2001. On July 5, 2001, the parties timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. On or about February 1, 2001, DCF issued ITN No. 01-FSD2A/01, and No. 01-FSD2B/01 for the delivery of foster care licensure, retention and recruitment contracts in both District 2A and District 2B of DCF.

2. Each ITN included a form entitled "Appendix M Statement of Assurances" with the ITN number clearly printed at the top of the page as well as this identifying language, "FOSTER CARE LICENSURE, RETENTION AND RECRUITMENT SERVICES." Appendix M consists of 7 paragraphs of requirements and conditions.

3. Section 6.4 of the ITNs reads as follows:

6.4 RESPONSE TO INVITATION TO NEGOTIATE
MANDATORY REQUIREMENTS

The mandatory requirements are described as FATAL CRITERIA on the Invitation to Negotiate Rating Sheet. Failure to comply with all mandatory requirements will render an application non-responsive and ineligible for further evaluation.

1. Was application received by the time and date specified in the Invitation to Negotiate?
2. Was one (1) original and seven (7) copies of application supplied?
3. Did the application include the signed State of Florida Invitation to Negotiate Contractual Services Acknowledgement Form, PUR 7105?
4. Did the application include a title page (section 6.2)?
5. Did the application include the signed Statement of No Involvement?
6. Did the application include the signed Acceptance of Contract Terms and Conditions form?
7. Did the application include a signed Statement of Assurances?
8. Did the application include a line budget with narrative justification of the included items? (emphasis in original)

4. Section 6.13 of the ITNs is entitled, "HOW TO SUBMIT AN APPLICATION" and includes the following language:

6.13 HOW TO SUBMIT AN APPLICATION

Faxed applications will not be accepted. All seven (7) copies of application packages must be delivered sealed and clearly marked on the outside of each of the packages: 'RESPONSE TO INVITATION TO NEGOTIATE' and contain the respondent's name and address. The applicant is free to use any means of delivery it wishes. The applicant is responsible for ensuring the Department receives all required material prior to the deadline, in the manner required, and at the place requested in this Invitation to Negotiate. Any untimely application will be rejected and returned unopened and unevaluated.

* * *

. . . A completed application consists of the following:

- 1) Cover Page (signed and dated PUR 7105 form indicating the total number of pages in the application, included in this document as Appendix B.)
- 2) Completed Title Page and Table.
- 3) Responses to each of the requirements of Sections 6.3 to 6.8.
- 4) Signed and dated Appendix M, Statement of Assurances. (emphasis supplied)
5. CHS submitted proposals to both ITNs.
6. The proposals submitted by CHS for both ITNs did not include the Statement of Assurances found in Appendix M of ITN Nos. 01-FSD2A/01 and 01-FSD2B/01. Instead, both proposals contained a different Statement of Assurances which CHS had previously used in a response to another ITN in a different

district of DCF. The statement of assurances which CHS attached contained 11 paragraphs of requirements and conditions.

7. By letters of March 6, 2001, the Department informed CHS that CHS's proposals to the two ITNs did not meet the mandatory requirements listed in the ITNs and that this failure to comply with all mandatory requirements renders their proposals non-responsive and ineligible for further evaluation.

8. The Department made the determination that CHS's proposals were non-responsive in both districts under the same legal and factual analysis.

9. Dr. John Awad, the District Administrator, made this decision on behalf of the Department after consulting staff and legal counsel.

10. The decision of the Department to determine CHS's applications to be non-responsive and ineligible for further evaluation resulted in five eligible applicants in District 2A, and two applicants in District 2B.

11. CHS's failure to include Appendix M, which was a mandatory requirement of the ITNs, and mistakenly including a Statement of Assurances from a different ITN, constitutes a major irregularity. The failure to sign and include this document, which was clearly and expressly required in Section 6.4 of the ITNs, is sufficient to support DCF's position to consider CHS's

proposals to be non-responsive and ineligible for further evaluation.

12. In further support of DCF's decision that CHS's proposals were non-responsive, there are significant differences between the Statement of Assurances contained in Appendix M and the Statement of Assurances which was submitted by CHS. The Statement of Assurances that was submitted by CHS expressly referenced services to be provided in Volusia and Flagler Counties which are not within the geographical boundaries of DCF's District Two.

13. Additionally, the Statement of Assurances supplied by CHS guarantees the provision of a plan by December 1, 2000, regarding how it will meet accreditation standards. Appendix M has no such provision.

14. Finally, Appendix M requires the applicant to assure that the applicant has the ability to provide directly, or through contract, all services described in "this Invitation to Negotiate and resulting contract" which are specified as foster care licensure, retention, and recruitment services. The Statement of Assurances which was submitted by CHS assured that it would provide "foster care and related services." This assurance constitutes a different scope of services than contemplated in the ITNs at issue here.

15. The ITNs define foster care recruitment as, "[t]he process of finding foster parent resources for waiting children, using either formal media-based campaigns, or informal procedures recognized as effective by the selected applicant agency."

Foster care retention is defined in the ITNs as, "[t]he act of maintaining a base of licensed family foster homes."

16. "Related services" as defined in Section 409.1671(1)(a), Florida Statutes (2000), means "family preservation, independent living, emergency shelter, residential group care, therapeutic foster care, intensive residential treatment, foster care supervision, case management, postplacement supervision, permanent foster care, and family reunification."

17. Moreover, the phrase "foster care and related services" is not defined in the ITNs at issue here and it cannot be inferred that this general phrase encompasses the specific services in the ITNs to which a proposer or an applicant must assure that it will provide.

18. CHS's failure to sign and include Appendix M, the Statement of Assurances attached to the ITNs at issue, resulted in a failure to meet the mandatory requirement in Section 6.4 of the ITNs. CHS's use of a form associated with a different invitation to negotiate which specified a different scope of services for a different geographic area than contemplated by the

ITNs at issue does not satisfy the mandatory requirement in Section 6.4.

19. Appendix N, which explains the scoring criteria and procedure of the ITNs further referenced the Statement of Assurances as one of the "FATAL CRITERIA" and emphasized in bold type that, if not met, the response could not be considered further.

20. CHS's failure to meet this mandatory requirement constitutes a material deviation from the ITNs.

Needs Assessment

21. Prior to the development of the ITNs at issue here, DCF asked CHS to provide a needs assessment and plan related to the need for services relating to foster care licensure, relicensure, recruitment, training and retention in District Two, Subdistrict 2B. Intervenor Devereux asserts that CHS should have been declared ineligible to submit proposals to the ITNs because of this needs assessment in which it participated.

22. On May 26, 2000, DCF awarded a purchase order to CHS to conduct a needs assessment and develop a plan for recruitment and retention of foster parents. Initially, the purchase order was for \$20,000.00. However, this purchase order was amended in August 2000 by reducing the scope of the agreement and reducing the amount to be paid to CHS to approximately \$10,000.00. The amended purchase order still called for CHS to develop a needs

assessment, but no longer called for the development of a plan. CHS did not develop a plan as contemplated by the original agreement nor was it paid for anything more than the needs assessment.

23. The original purchase order between DCF and CHS did not reference procurement of a feasibility study. The weight of the evidence does not support Intervenor's assertion that the plan contemplated by the original purchase order signed May 26, 2000, necessarily would have constituted a feasibility study. Moreover, the plan contemplated by the original purchase order was never created and CHS was never compensated for anything beyond the needs assessment.

24. The needs assessment produced by CHS was attached to the ITN for District 2B. Thus, all prospective applicants were provided with the needs assessment.

25. DCF held a prospective applicants conference on February 16, 2001. At this conference, Intervenor asked whether the provider who participated in the preparation of the needs assessment would be ineligible to submit a proposal in response to the ITNs. DCF replied that the provider who participated in the preparation of the needs assessment is not excluded from submitting a proposal and noted that the information that was gathered and the results were included in the ITNs.

26. CHS completed, signed, and attached to its proposal to ITN#01-FSD2B/01 a Statement of No Involvement which assured that neither CHS nor any member of that firm had been awarded a contract by DCF on a noncompetitive basis to develop the ITN; perform a feasibility study concerning the scope of work contained in this ITN; or develop a program similar to what is contained in the ITN.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case pursuant to Sections 120.569, 120.57(1), and 120.57(3), Florida Statutes.

28. The burden of proof on the issue of DCF's proposed agency action of determining that CHS's proposal is non-responsive resides with the Petitioner. See Section 120.57(3)(f), Florida Statutes. The burden of proof on the issue of whether CHS is ineligible to contract with DCF because of the prior purchase order resides with Intervenor Devereux.

29. The underlying findings of fact in this case are based on a preponderance of the evidence. Section 120.57(1)(j), Florida Statutes. The standard of proof is whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

30. The de novo proceeding in this case was conducted to examine DCF's proposed action in an attempt to determine whether that action is contrary to the agency's governing rules or policies, or the ITN specifications. See Section 120.57(3)(f), Florida Statutes, and State Contracting and Engineering Corporation v. Department of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1998).

31. The language of Sections 6.4, 6.13, and Appendix N of the ITNs is clear and unambiguous. Section 6.4 and Appendix N identify the statement of assurances as a mandatory requirement and one of the fatal criteria. Section 6.13 instructs all proposers how to submit an application and enumerates four elements necessary for an application to be complete. One of the elements expressly references a signed-and-dated Appendix M, Statement of Assurances.

32. DCF's determination that CHS's proposal was non-responsive was consistent with the clear, express language of the ITNs which informed proposers of mandatory requirements and that proposals found to be non-responsive would not be further evaluated.

33. CHS argues that it attached a Statement of Assurances, albeit from the wrong ITN, and that its failure to attach the correct statement of assurances constitutes a minor irregularity that should have been waived by DCF.

34. In situations in which a state agency seeks to procure a provider of services and/or commodities through a competitive process, the agency in question has the right to waive minor irregularities in an otherwise valid bid or proposal or offer to negotiate. Variations which are not minor cannot be waived. Rule 60A-1.002(10), Florida Administrative Code.

35. The ITNs defined a minor irregularity as a variation from the ITN terms and conditions that does not affect 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 interests of DCF. See also Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190, 1193 (Fla. 2nd DCA 1977).

36. A "responsive offeror" is a person who has submitted a proposal which conforms in all material respects to an invitation to bid or a request for proposals. Section 287.012(17), Florida Statutes (2000).

37. The term "responsive bid" means a bid which is submitted on the correct forms and contains all required information. Intercontinental Properties, Inc. v. Department of Health and Rehabilitative Services, 606 So. 2d 380, 381 (Fla. 3d DCA 1992).^{1/}

38. The Statements of Assurances submitted by CHS were not on the required form. Further, they did not contain the correct information, and did not guarantee the ability to perform the services set forth in the ITNs.

39. DCF's determination that CHS's proposal was non-responsive was consistent with the clear, express language of the ITNs which informed proposers of mandatory requirements and that proposals found to be non-responsive would not be further evaluated. CHS failed to meet its burden to show that DCF's proposed action is clearly erroneous, contrary to competition, arbitrary or capricious.

40. An agency action is capricious if the agency takes the action without thought or reason or irrationally. An agency decision is arbitrary if it is not supported by facts or logic. Agrico Chemical Co. v. State Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

41. CHS failed to prove by a preponderance of the evidence that DCF acted arbitrarily or capriciously. DCF's actions were consistent with the plain meaning of the language contained in the ITNs. Further, actions taken by DCF administration were taken after careful consideration and were in no way arbitrary or capricious.

42. CHS also failed to meet its burden that DCF's decision was contrary to competition. DCF acted in a manner which secured fair competition to all applicants by ensuring an exact comparison of proposals. The CHS proposals were not entitled to further review since they materially deviated from a mandatory requirement of the ITN. To have conducted a comparison and analysis of the incorrect Statement of Assurances submitted by CHS would have given CHS a competitive advantage not afforded to other proposers. See Harry Pepper & Associates v. City of Cape Coral, supra.

43. Section 287.057(16), Florida Statutes, provides that no person who receives a contract non-competitively to perform a feasibility study or the potential implementation of a subsequent contract, or participated in the drafting of an invitation to bid or request for proposal, or developed a program for future implementation shall be eligible to contract with the agency for any other contracts dealing with that specific subject matter.

44. Intervenor has not met its burden of proving that DCF should have disqualified CHS from the ITN process. Intervenor has not proven that DCF's determination that CHS was not disqualified from participating in the ITN process was clearly erroneous, contrary to competition, arbitrary, or capricious. The evidence does not support Intervenor's proposition that the needs assessment constituted any kind of feasibility study or

that the plan contemplated by the original purchase order necessarily would have constituted a feasibility study or that it constituted any act which might reasonably be construed as development of a program for future implementation of such a contract. Further, there is no evidence that CHS was involved in preparing the ITNs.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Department of Children and Families enter a final order dismissing the bid protest filed by Children's Home Society.

DONE AND ENTERED this 25th day of July, 2001, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of July, 2001.

ENDNOTE

1. It is reasonable to extend this definition to a responsive proposal in response to an Invitation to Negotiate.

COPIES FURNISHED:

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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 should be filed with the agency that will issue the final order in this case.