STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PUBLIC CONSULTING GROUP, INC.,	)	
Petitioner,	)	
vs.	)	
AGENCY FOR HEALTH CARE ADMINISTRATION,	)	Case No. 01-2858BID
Respondent,	)	
and	)	
HEALTH MANAGEMENT SYSTEMS, INC.,	)	
Intervenor.	)	

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Tallahassee, Florida, on August 22-24, 2001.

APPEARANCES

For Petitioner: David C. Ashburn
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For Respondent: Kelly A. Bennett
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STATEMENT OF THE ISSUE

The issue is whether Respondent's tentative award of a contract to Intervenor for Medicaid third party liability services was consistent with the applicable statutes, rule, and policies "that govern the award of government contracts," and the request for proposals.

PRELIMINARY STATEMENT

By Formal Written Protest and Petition for Administrative Hearing dated June 28, 2001, Petitioner sought an order withdrawing Respondent's intention to award a contract to Intervenor and granting the contract to Petitioner.

The formal written protest asserts that Respondent selected an offeror whose conflicts of interest prevent it from fulfilling its obligations under the contract, Respondent's evaluators lacked the knowledge and experience required by law, Respondent's evaluators used undisclosed and arbitrary criteria to evaluate the proposals, and Respondent's evaluators assigned arbitrary scores to the proposals.

The formal written protest claims that the conflicts of interest to which Intervenor is subject disqualify its proposal as nonresponsive and disqualify it as not a responsible offeror.

The formal written protest states that Intervenor failed to disclose the subcontractors that Intervenor intended to use, if awarded the contract, and that the legal subcontractor selected by Intervenor has substantial conflicts of interest with Respondent and Petitioner, its former client. The formal written protest alleges that Sections 60.2.a, 60.4.e, 80.2.a, and 80.4.e of the request for proposals require identification of subcontractors. The formal written protest notes that the disqualification of Intervenor's proposal would leave Intervenor's proposal as the highest remaining responsive proposal from a responsible offeror.

The formal written protest identifies several areas of alleged conflicts. The legal subcontractor identified by Intervenor allegedly has two conflicts. First, the legal subcontractor allegedly represented Petitioner under the 1996 third party Medicaid recovery contract with Respondent. The formal written protest claims that, during the course of this representation, the legal subcontractor gained access to Petitioner's proprietary business information.

Second, the legal subcontractor allegedly has represented Respondent, the largest nursing-home company in the United States, and other health-care providers, including those against whom Respondent and its contractor will seek third party liability recoveries.

Intervenor allegedly has a conflict of interest because a number of Florida hospitals pay it to bill and recover fees from Medicaid. If Intervenor were to obtain the subject contract, its responsibilities toward one set of clients, which have obtained Intervenor's assistance to maximize payments from the Medicaid program and Respondent, would allegedly conflict with Intervenor's responsibilities toward Respondent, which would be obtaining Intervenor's assistance, under the subject contract, to maximize recoveries from third parties liable to the Medicaid program.

The formal written protest alleges that the request for proposals contained over 90 undisclosed review criteria, whose application by the evaluators resulted in the assignment of clearly erroneous and arbitrary scores.

The formal written protest alleges that the evaluators were unqualified to score the proposals because the team consisted of individuals who lacked knowledge and experience of the third party liability recoveries that were the subject of the request for proposals.

The formal written protest alleges that the evaluators committed numerous scoring errors and failed to contact the key references provided in the proposals.

At the hearing, Petitioner called five witnesses and offered into evidence 21 exhibits: Petitioner Exhibits 22,

25-28, 32-33, 35, and 41-53. Respondent called one witness and offered into evidence 19 exhibits: Respondent Exhibits 1-19. Intervenor called four witnesses and offered into evidence five exhibits: Intervenor Exhibits 2, 5, 7, and 11-12. All exhibits were admitted.

The court reporter filed the transcript on August 31, 2001. The parties filed their proposed recommended orders on September 10, 2001.

FINDINGS OF FACT

1. On March 30, 2001, Respondent issued the Request for Proposals for Medicaid Third Party Recovery Services, Proposal No. RFP TPR 01-01 (RFP). Predicated on the principle that Medicaid is the health-care payer of last resort, third party recoveries effected by Respondent or its contractor, to reimburse Medicaid expenditures, arise from three types of claims: casualty recoveries from persons responsible for medical expenditures on behalf of Medicaid recipients, estate recoveries from or through the estates of Medicaid recipients, and Medicare and other recoveries from sources such as CHAMPUS, commercial insurers, and health maintenance organizations. These are the third party liability (TPL) services that Respondent seeks in the RFP.

2. The RFP describes in some detail the nature of the services sought by Respondent. The RFP notes that Respondent

operates a Bureau of Third Party Liability within the Division of Medicaid (Bureau). Florida and federal law authorize Respondent to recover Medicaid expenditures from liable third parties.

3. The RFP describes the scope of the Medicaid program in Florida. On average, the Florida Medicaid program serves 1.7 million persons. State and federal agencies transmit eligibility data to the Florida Medicaid program through a state data system, known as the FLORIDA system, and a federal-state data system, known as SDX files.

4. The RFP states that its purpose is to request proposals from qualified organizations to recover for the Medicaid program payments from liable third parties. The RFP anticipates a contract for a three-year period commencing July 1, 2001, with three annual renewals, at the option of Respondent.

5. RFP Section 10.6 provides that an organization seeking to submit a proposal "must meet all legal requirements for doing business in the State of Florida." The RFP requires that organizations certify that they hold the appropriate licenses and certifications.

6. The nomenclature in the RFP consistently distinguishes between an "offeror" and a "contractor." As used in the RFP, an "offeror" is an organization submitting a proposal, and a

"contractor" is the offeror whose proposal has been accepted by Respondent.

7. RFP Section 20.19 authorizes Respondent, "in its sole discretion, to waive minor irregularities in offeror proposals." The RFP explains:

> A minor irregularity is a variation from the RFP specifications which does not affect an offeror's proposed price, give one offeror an advantage or benefit not enjoyed by other offerors, or adversely impact the interests of the State of Florida. Waivers, when granted, shall in no way modify the RFP requirements or excuse an offeror from full compliance with the RFP specifications and other requirements.

8. RFP Section 20.21 states that Respondent will reject proposals that do not conform to the requirements of the RFP. This section lists ten reasons for which Respondent will reject an RFP. RFP Section 20.21.h authorizes rejection because "the proposal is incomplete, or contains irregularities which make the proposal indefinite or ambiguous and which cannot be waived in accordance with Subsection 20.19, Acceptance of Proposals." RFP Section 20.21.i authorizes rejection because "the offeror's proposal contains false of misleading statements or provides references which do not support an attribute, capability, assertion, or condition claimed by the offeror." RFP Section 20.21.j authorizes rejection because "the proposal does not offer to provide all services required by this RFP."

9. RFP Section 30 addresses mostly contractor issues and thus generally applies to the offeror whose proposal Respondent has selected RFP Section 30.5 requires the contractor to "perform its obligations under a contract . . . in accordance with all applicable federal, state and local laws, rules and regulations now or hereafter in effect."

10. RFP Section 30.6 addresses conflicts of interest. This section requires that all offerors disclose any officers, directors, agents, or certain owners who are employees of the State of Florida. Section 30.6 adds:

> The contractor covenants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of its services under the contract. The contractor further covenants that in the performance of the contract no person having any such known interests shall be employed.

11. RFP Section 30.18 addresses "subcontracts," which, like other key terms, is not expressly defined by the RFP. The RFP states:

> The contractor shall not enter into any subcontracts for services to be provided under the contract without the express written consent of the Agency. In all instances, the contractor shall remain fully responsible for all work to be performed under the contract. Each approved subcontract shall be subject to the same terms and conditions as the contract.

12. RFP Section 30.29 requires the contractor to treat as privileged and confidential all personally identifiable information concerning Medicaid recipients.

13. RFP Sections 30.35 through 30.38 mark instances in which the RFP does not designate as a "contractor" the offeror whose proposal has been selected. However, for the certifications required by RFP Sections 30.37 and 30.38, the RFP properly refers to "offeror" because, until the offeror signs these certifications, it has not gained "contractor" status.

14. RFP Section 30.40 acknowledges the prohibition, as set forth in Section 287.017, Florida Statutes, against persons or affiliates on the convicted vendor list from doing business with any public entity for a specified period.

15. Noting that, by law, the Medicaid program is the "payer of last resort," RFP Section 50.1 states that Section 409.910, Florida Statutes, requires Respondent to collect all amounts determined available from liable third parties. The casualty component of the services sought by the RFP requires "follow-up collection services for casualty cases." The RFP states that the contractor for this component will be paid a "contingency fee on all amounts collected," and the current contractor receives 10.5 percent of all such collections. Section 50.1 states that the casualty recovery services generally include "identification of relevant claims, filing of

appropriate documents to recover Medicaid's lawful share of any claim payment, receiving funds, and closing the case file when appropriate."

16. The succeeding subsections of Section 50 detail the requirements of casualty recovery services. These sections address in detail case handling, the preparation and filing of liens, processing challenges to liens, processing requests for reductions of liens, contractor contact with attorneys, returning cases to Respondent, handling subpoenas, settling accounts, and monthly reporting to Respondent.

17. Section 60.0 requires that a proposal demonstrate an understanding of Respondent's goals for the contract, especially the goal to "maximize the collections to reimburse Medicaid for amounts paid where third party resources are determined to be available." Section 60 contains the "minimum requirements the bidder must meet in order to be considered." Explaining that Respondent will evaluate the technical information before evaluating the bid price, Section 60.0 warns, "Offerors not meeting the minimum requirements will not be considered."

18. Section 70.1 states that federal law requires the Medicaid program administrator to recover assets from the probate estates of certain deceased Medicaid recipients. Section 70.1 explains that Respondent must calculate the amount

of any claim and file its claim with the appropriate probate court.

19. The succeeding subsections of Section 70.1 detail the sources of operating guidelines, 31 specific services, settlement guidelines, reporting requirements, and requirements for the representation of Respondent in litigation.

20. Section 90.1 states that Respondent pursues payments from Medicare for claims paid by Medicaid. Section 90.1 notes that limitations in the present database require the maintenance of a separate database for all eligible Medicaid recipients and any related Medicare information.

21. The succeeding subsections of Section 90 describe specific responsibilities in pursuing institutional and medical claims, updating Respondent with information concerning non-Medicaid payers, invoicing carriers, and monthly reporting.

22. The RFP requires each offeror to sign a Certificate of Compliance, which is reprinted at RFP Appendix D. RFP Appendix D.3 provides:

> We understand and agree that we have read the state's specifications provided in the RFP and that this proposal is made in accordance with the provisions of such specifications. By our written signature on this proposal, we guarantee and certify that all items included in this proposal shall meet or exceed any and all such state specifications. We further agree, if awarded a contract, to deliver services that

> meet or exceed specifications provided in the RFP.

23. The RFP requires each offeror to sign a Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion Contracts/Subcontracts, which is reprinted at RFP Appendix F. RFP Appendix F.5 provides:

> The provider agrees by submitting this certification that, it shall not knowingly enter into any subcontract with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this contract/subcontract unless authorized by the Federal Government.

24. In scoring each of the two components, Respondent converted the highest raw score to an absolute number--2000 for technical and 1000 for cost. For the technical score, Respondent then assigned each of the remaining proposals a score derived by multiplying the absolute number by a fraction whose numerator was the average raw score of the subject proposal and whose denominator was the average raw score of the best proposal. Respondent scored the cost proposals on a similar proportional basis. Respondent scored the technical and cost components of five offerors.

25. For the technical component, the highest score was earned by First Coast Service Options, Inc. (First Coast), whose average raw score of 7.666 earned 2000 points. Petitioner's

average raw score of 7.567 earned 1974 points, and Intervenor's average raw score of 7.469 earned 1948 points.

26. Scoring of the cost component was straightforward. Pursuant to provisions contained in the RFP, Respondent calculated a weighted average of the percentage contingency fees contained in each proposal for casualty recovery, estate recovery, and Medicare and other recovery. For the cost component, the highest score was earned by Intervenor, whose weighted average contingency fee of 6.17 percent earned 1000 points. Respondent's Bureau of Third Party Liability, which had performed many TPL services prior to the RFP contract start-up date, also submitted a proposal and earned 960 points for a weighted average contingency fee of 6.43 percent. Petitioner earned 869 points for a weighted average contingency fee of 7.10 percent, and First Coast earned 666 points for a weighted average contingency fee of 9.27 percent.

27. The two highest totals were: Intervenor--2948 points and Petitioner--2843 points. On the basis of these scores, Respondent proposed the selection of Intervenor's proposal, and Intervenor timely filed a notice of protest and formal written protest.

28. Assuming that the scores of the other offerors remained unchanged, Petitioner would have to raise its average raw score from 7.567 to 7.997 to obtain sufficient points on the

technical component to earn the highest point score. This would represent an average increase of 0.43 raw points over the 73 items scored by each of the five evaluators, although Respondent dropped items for which evaluators entered no score (as opposed to a zero).

29. Petitioner objects to the scoring of several items due to the evaluators' use of items to "consider." These items were prepared by Respondent's issuing officer, Connie Ruggles, who was supervising the procurement. After the RFP had been published, Ms. Ruggles prepared these items to consider for the purpose of helping the evaluators focus on issues that they might address in evaluating the responses. However, these items were never disclosed to the offerors prior to their submittal of proposals.

30. Petitioner objects to the scoring of RFP Section 60.2.a, which states: "Describe the organization and its history, legal structure, ownership, affiliations and related parties. Provide this same information for any subcontractor(s)."

31. The undisclosed items to consider when scoring Section 60.2.a are:

> * The extent to which the offeror's description of its background and experience provides assurance of its capability to provide casualty recovery services and systems.

* The resources available to the organization due to its ownership, affiliations and related parties.

* Whether the offeror's expertise, capabilities, and experience are comparable and compatible with the services required by the RFP.

* The longevity and stability of the organization.

* History of providing casualty recovery services for other organizations.

32. RFP Section 80.2.a and its items to consider contain identical provisions, except for estate recovery services. RFP Section 100.2.a and its items to consider contain identical provisions, except for Medicare and other third party recovery services.

33. Petitioner objects to the scoring of RFP Section 60.4.e, which states:

> Provide a full description of subcontractor assignments in fulfilling the contract requirements.

34. The undisclosed items to consider when scoring Section 60.4.e are:

* Subcontractors are not prohibited but must be approved by the Agency.

* Whether any subcontractors meet requirements for participation in contract.

35. RFP Section 80.4.e and its items to consider contain identical provisions for estate recovery services, and RFP

Section 100.4.e and its items to consider contain identical provisions for Medicare and other third party recovery services.

36. The items to consider under RFP Section 60.2.a raise issues of relevant experience in casualty recovery services that are not fairly stated in Section 60.2.a itself. However, the presence of these items to consider does not appear to have differentially affected the scoring of the proposals of Petitioner and Intervenor.

37. Kay Newman gave both proposals a 9 for Section 60.2.a, limiting herself, according to her notes, to the material requested in Section 60.2.a itself. Jerome Todd gave Petitioner's proposal an 8 and Intervenor's proposal a 7 for Section 60.2.a, and he also appears to have limited himself to Section 60.2.a itself. Jake McWilliams gave both proposals an 8 for Section 60.2.a. He considered the relevant experience added by the items to consider, but found that both offerors had such experience. Qi Zhou gave Petitioner's proposal an 8 and Intervenor's proposal a 7 for Section 60.2.a; she gave Petitioner the higher score based on relevant experience, which is contained only in the undisclosed items to consider. Theresa Mock gave both proposals an 8 for Section 60.2.a, noting Intervenor's relevant experience, but not making any notes regarding Petitioner. If anything, the undisclosed item to consider for Section 60.2.a helped Petitioner. The scoring,

apparent reasoning, and effects are similar for RFP Sections 80.2.a and 100.2.a.

38. The items to consider under RFP Sections 60.4.e, 80.4.e, and 100.4.e do not add anything that is not already raised under the disclosed requirements.

39. Petitioner has thus failed to prove that the evaluators' use of undisclosed items to consider was clearly erroneous, contrary to competition, arbitrary, or capricious (Clearly Erroneous).

40. Petitioner objects to the practice of evaluators' assigning no score to certain items and Respondent's omission of these unscored items from the total items scored when compiling average raw scores. This practice was most marked as to RFP Sections 60.4.e, 80.4.e, and 100.4.d.

41. For RFP Section 60.4.e, for instance, the evaluators gave Petitioner, which supplied the names of two law firms as subcontractors, scores of "na," 8, 10, 8, and 8. However, the evaluators gave Intervenor, which did not supply the names of its law firms as subcontractors, all "na's" except for one 10, even though the evaluator scoring a 10 notes that Intervenor has no subcontractors. These scoring patterns applied to RFP Sections 80.4.e and 100.4.d.

42. The ten points assigned to Intervenor's proposal by one evaluator for RFP Sections 60.4.e, 80.4.e, and 100.4.d,

despite the absence of subcontractors, is odd. The evaluator's reasoning seems to be that Intervenor's refusal to rely on subcontractors means that subcontractors cannot be a problem.

43. Petitioner also objects to Respondent's failure to treat na's as zeros when scoring the proposals. RFP Sections 60, 80, and 100 all state: "An offeror who fails to answer a question shall receive no evaluation points for that question."

44. However, nothing in the RFP informs offerors that, if they do not propose an optional item, such as a subcontractor, they will receive zeros, which will reduce their average raw score.

45. The impact of three tens assigned by one evaluator to Intervenor's proposal at RFP Sections 60.4.e, 80.4.e, and 100.4.d is negligible, even if it is supported by little reasoning. Given the lack of materiality to the impact of these three 10s, in light of the gap that Petitioner is trying to close, Petitioner has thus failed to prove that one evaluator's assigning of three tens or the omission of the "na's" from the average raw scores was Clearly Erroneous.

46. Petitioner challenges the qualifications of the evaluators. Ms. Ruggles is employed by Respondent as a Senior Management Analyst II in the Office of the Deputy Secretary for Medicaid. She has been employed by Respondent since 1993.

47. Ms. Ruggles prepared the RFP, selected the evaluators, and supervised the evaluation process. After issuing the RFP, Respondent received no challenges to the specifications.

48. Ms. Ruggles selected five persons as evaluators. Because Respondent's Bureau of Third Party Liability was allowed to submit a proposal, Ms. Ruggles excluded from the pool of potential evaluators those persons who were employed at the Bureau or had been employed at the Bureau within the past year. Mr. Ruggles declined to ask other states for evaluators because she knew that Florida would not be able to reciprocate.

49. Respondent received five complete proposals and a proposal for one component of the three components covered by the RFP. Respondent rejected the partial proposal. Ms. Ruggles and another Medicaid employee checked the proposals for the mandatory items. She had other Medicaid employees check the references supplied by the offerors. Although the record suggests that the reference checks may not have been performed thoroughly, the record does not support an inference that this omission was material as to Intervenor.

50. The evaluators scored the five proposals in an assigned conference room over two weeks. Ms. Ruggles directed them not to discuss their scoring and gave them the proposals in different orders, so that two evaluators would not likely be scoring the same proposal at the same time. The evaluators

could speak to each other concerning matters not directly related to scoring, such as program requirements. When they had a scoring question, they had to address it to Ms. Ruggles.

51. Petitioner contends that the evaluators were unqualified. The backgrounds of the five evaluators varied. Mr. Todd had the most direct relevant experience because he had been the Chief of the Bureau of Third Party Liability for two and one-half years, ending in 1996. As was the case with another Chief of the Bureau, Mr. Todd had no third party liability experience when he first assumed the responsibility.

52. Ms. Newman is an Other Personnel Services employee working as a Senior Management Analyst for Respondent's Medicaid Director. She is a certified public accountant with considerable experience auditing private and public entities. She has also evaluated a third party liability refund process.

53. Ms. Mock is a Senior Human Services Program Specialist employed by Respondent (and its predecessor) since 1984. Assigned to the Medicaid Program Integrity Bureau, Ms. Mock has investigated fraud and abuse since 1992 and assisted in the recovery of Medicaid funds.

54. Mr. McWilliams is a Database Administrator in Respondent's Bureau of Information Technology. He earned a bachelor's degree with majors in computer science and business administration. Creating and maintaining Respondent's

databases, Mr. McWilliams sometimes helps maintain the database of the Bureau of Third Party Liability. Mr. McWilliams also helped create and maintain the EAGLE system, which is a data processing and case management system for third party liability recovery services.

55. Ms. Zhou was a Senior Systems Project Administrator with Respondent, although she terminated her employment on August 6, 2001. She worked on computer networking and database maintenance for the six years that she was employed by Respondent. Ms. Zhou also worked with the EAGLE system.

56. Obviously, the different expertise that each evaluator added to the scoring process is limited by the inability of the evaluators to discuss their scoring. However, each evaluator was experienced in important aspects of TPL, and the RFP provided detailed descriptions of the services sought by Respondent. Although Mr. Todd had the most relevant qualifications, he and another former Bureau Chief lacked any relevant experience before assuming their TPL responsibilities. TPL is not a highly technical or complex area, but instead represents a regulation-driven, large-scale collections process. A review of the scores reveals that the evaluators did not score important areas of the RFP irrationally.

57. Petitioner has thus failed to prove that the evaluators were so unqualified as to render their scoring Clearly Erroneous.

58. Petitioner argues that Intervenor has a conflict of interest because of the work of one of its subsidiaries for health-care providers. The subsidiary is known as HCM, which Intervenor is in the process of selling.

59. HCM provides decision-support software to HCA, a national hospital chain with over 40 hospitals in Florida. These services help hospitals account for their costs by identifying the costs of specific services to determine, among other things, if these services are properly priced.

60. Neither Intervenor nor any of its affiliates presently provide billing services for any health-care provider in Florida. From 1997-99, HCM provided underpayment recovery services. HCA recovered $12 million in underpayments. In one instance, HCM's software identified $40,000 in Medicaid-related payments.

61. Additionally, Intervenor has implemented a compliance program including separation of organizations (with no one below the level of the chief financial and operating officer responsible for more than one business segment), operating procedures, software, and employee monitoring.

62. Petitioner has thus failed to prove that Respondent's decision not to find Intervenor's proposal nonresponsive, or Intervenor not responsible, due to conflicts of interest between Intervenor and Respondent was Clearly Erroneous.

63. Petitioner contends that Intervenor's failure to disclose its legal subcontractor in its proposal renders its proposal nonresponsive. Intervenor intends to use Fowler White for legal services. Although it mentioned Fowler White in its proposal, Intervenor did not list Fowler White as a subcontractor.

64. The parties disagree as to the definition of a subcontract or subcontractor. RFP Section 30.18 states under the heading, "Subcontracts":

> The contractor shall not enter into any subcontracts for services to be provided under the contract without the express written consent of the Agency. In all instances, the contractor shall remain fully responsible for all work to be performed under the contract. Each approved subcontract shall be subject to the same terms and conditions as the contract.

65. Clearly, a subcontract would involve a contract between the contractor and a third party under which the latter agreed to provide the services under one of the three components: casualty, estate, and Medicare and other. However, the question remains as to the status of the third party, under the RFP, that enters into a contract to provide data services,

labor services, or, most importantly, legal services--all of which may involve more than one component and do not constitute the entirety of any single component.

66. The definition of "subcontractor" is important. RFP Section 30.26 requires the contractor to indemnify Respondent for various acts and omissions of the contractor's subcontractors. Section 30.18 refers to any agreement for services to be provided under the contract. Although there may be a de minimis exception here, attorneys provide critical services under this RFP. In one year, while representing Petitioner in third party liability work in Florida, Fowler White's legal billings to Petitioner exceeded Petitioner's contract payments from Respondent. Thus, Fowler White would qualify as a subcontractor under the RFP.

67. However, the fact that a law firm is a subcontractor under the RFP does not mean that an offeror must disclose this subcontractor in its proposal. Section 30.18 requires only that a "contractor" obtain Respondent's written approval before entering any service subcontracts. Sections 60.2.a and 60.4.e, as well as their counterparts, require the disclosure of certain information concerning subcontractors, but these provisions easily harmonize with the provisions of Section 30.18 by applying the requirements of Sections 60.2.a and 60.4.e only to

those subcontractors whom an offeror had already selected by the time that it was submitting its proposal.

68. The incentive to disclose subcontractors is not necessarily additional points, given the omission of "na's" from the scoring and one evaluator's decision to award ten points to a proposal without subcontractors. The incentive to disclose subcontractors is the knowledge, prior to the execution of a contract, that Respondent has approved a specific subcontractor. Free to decide whether to require disclosure of subcontractors prior to the selection of a proposal, Respondent chose not to require such disclosure, giving the prevailing offeror the option of seeking subcontractors after the proposed award of the contract.

69. Petitioner has thus failed to prove that Respondent's decision not to find Intervenor's proposal nonresponsive, or Intervenor not responsible, due to Intervenor's failure to identify Fowler White as its legal subcontractor was Clearly Erroneous.

70. Although Intervenor has mentioned elsewhere in its proposal the intent to use Fowler White, its failure to submit for Respondent's approval Fowler White as a subcontractor means that it is premature to consider in detail Fowler White's possible conflicts with Respondent and Petitioner. However, several points are relevant.

71. The determination of a conflict of interest involving an attorney is fact-driven and, at times, complex. It is a determination that focuses on an attorney's ethical obligations and is not intended to serve in assessing the validity of contracts between nonattorneys, such as Respondent and the successful offeror.

72. The introduction to the Rules of Professional Conduct governing attorneys warns:

> Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty.

73. Rule of Professional Conduct 4-1.7(a), (b), and (c) provides:

> (a) Representing Adverse Interests. A lawyer shall not represent a client if the representation of that client will be

directly adverse to the interests of another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and

(2) each client consents after consultation.

(b) Duty to Avoid Limitation on Independent Professional Judgment. A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

74. Rule of Professional Conduct 4-1.8(b) provides:

Using Information to Disadvantage of Client. A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by rule 4-1.6.

75. Rule of Professional Conduct 4-1.9 provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
>
> (b) use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client or when the information has become generally known.

76. Petitioner contends that Fowler White has two conflicts arising out of its former representation of Petitioner. First, when Fowler White was first retained by Intervenor, Fowler White was still litigating a case for Petitioner. However, a comment to Rule 4-1.7 notes that a lawyer may, without client consent, represent clients whose interests are only "generally adverse," such as "competing economic enterprises." On the other hand, Fowler White did not undertake the representation in this case of Intervenor, whose interest is directly opposed to Petitioner, because Fowler White still was litigating a case for Petitioner.

77. Second, Petitioner objects to a conflict that arises from Fowler White's access to Petitioner's proprietary information during the course of that representation. There is no reason to doubt that Fowler White would respect its ethical

obligation to protect client confidences. There is little more reason in the record to infer that much proprietary information concerning TPL is in the hands of Petitioner or Intervenor, and not the other. Fowler White's representation of Petitioner in TPL work ended in 1997 and does not pose a conflict, if Fowler White now represents Intervenor in TPL work. Both of these situations are covered by Rule 4-1.9, and nothing in that rule suggests that Fowler White would have a conflict representing Intervenor now.

78. Petitioner also objects to Fowler White's conflicts with Respondent. First, Petitioner notes RFP Section 30.6, which requires the contractor to covenant that it has no conflicts with Respondent. Although this provision will apply to subcontractors, pursuant to Section 30.18, the determination of any such disqualifying conflicts concerning Fowler White awaits the formal designation of Fowler White as a legal subcontractor.

79. Petitioner argues that Fowler White represents two broad categories of clients whose interests directly conflict with those of Respondent: licensed health care providers subject to disciplinary proceedings and health care providers in their ordinary operations.

80. The record does not demonstrate the nature of the conflict between the interests of Respondent, in maximizing TPL

recoveries, and the interests of health-care licensees, in successfully defending licensing cases brought against them by Respondent or other agencies. Obviously, the prosecuting attorneys in disciplinary cases work in different divisions of Respondent from those persons in Medicaid TPL with whom Fowler White would be dealing.

81. The record does demonstrate cause for concern as to potential conflicts between health care providers, in their ordinary operations, and Respondent as to TPL work. The prospect of conflicts in estate recoveries is low because Fowler White does not typically represent the personal representatives of estates whose decedents qualified for Medicaid coverage. However, the same is not true for the other two components.

82. In 1997, the Fowler White partner in charge of compliance stated in a letter to Petitioner that Fowler White had to discontinue its representation of Petitioner due to continuing "conflicts of interest with our existing clients in the health care industry." At present, one Fowler White lawyer has at least one active file in which Fowler White is representing health care providers against allegations of overbilling.

83. However, the nature of these potential conflicts will emerge only as Intervenor assigns Fowler White litigation matters. At that time, Fowler White can determine whether a

conflict exists and, if so, whether it may ethically undertake the representation with the consent of one or both clients, as required under Rule 4-1.7(a) and (b).

84. Petitioner has thus failed to prove that Respondent's decision not to find Intervenor's proposal nonresponsive, or Intervenor not responsible, due to conflicts of interest between Fowler White, on the one hand, and Intervenor or Respondent, on the other hand, was Clearly Erroneous.

85. Petitioner also contends that Intervenor inadequately disclosed the services of its chosen law firm in obtaining the subject contract. Petitioner argues that Intervenor's proposal is nonresponsive due to its failure to certify that it used no lobbyists in obtaining the subject contract.

86. RFP Section 30.37 requires that each "offeror" shall be required to sign a Certification Regarding Lobbying, which is reprinted in RFP Appendix E, "as a condition of contract award." As already noted, this requirement actually applies to the selected offeror, not every offeror. To make the transition from "selected offeror" to "contractor"--i.e., to obtain a contract--the selected offeror will have to sign the lobbying certification, so there was no need for an offeror to provide a signed certificate with its proposal.

87. Also, the certification provides, for other than federal appropriate funds, that the entity signing the contract

disclose any lobbying in connection with a federal contract. Assuming that this is a federal contract, there is ample time for the disclosure of the agreement between Intervenor and Fowler White that Intervenor pay the law firm $30,000 for services in obtaining the subject contract.

88. Petitioner has thus failed to prove that Respondent's decision not to find Intervenor's proposal nonresponsive, or Intervenor not responsible, due to a failure to execute and deliver with the proposal the Certification Regarding Lobbying was Clearly Erroneous.

CONCLUSIONS OF LAW

89. 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.)

90. 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.

91. Section 120.57(3)(f) thus 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).

92. 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, such as whether the proposed award is contrary to statutes, rules, policies, or the RFP. Under Section 120.57(1)(j), the preponderance standard governs the determination of the basic facts, such as the contents of a proposal and statements made at an offerors' conference.

93. There are also ultimate questions of fact to which the Clearly Erroneous Standard applies. 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 RFP. In some

cases, the question arises whether a deviation in a bid or proposal is a material variance or a minor irregularity or whether a bid or proposal is responsive. These are ultimate questions of fact, and the Clearly Erroneous Standard requires the factfinder to defer to these policy-influenced determinations.

94. 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 RFP, and questions of fact requiring the application of technical expertise, such as whether a specific product offered qualitatively complies with the specifications.

95. 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.

96. 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.

97. 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."

98. In the subject case, then, the preponderance standard applies to all basic facts and the Clearly Erroneous Standard applies to the ultimate questions of fact, mixed questions of fact and law, subordinate questions of law, and questions of fact involving agency expertise. Based on the resulting

findings, the conclusions of law determine whether the proposed agency decision to award the contract to Intervenor is consistent with statutes, rules, policies, and the RFP.

99. Petitioner has failed to prove by the Clearly Erroneous Standard that Respondent's decision to select the proposal of Intervenor is inconsistent with statutes, rules, policies, or the RFP.

100. The use of undisclosed items to consider, three tens for an item addressing subcontractors when the proposal failed to name any, and omitting items scored "na" were immaterial. The evaluators' qualifications were sufficient for the task and did not approach the unfitness of the evaluators in Knauss Systems, Inc. of Florida v. Department of Children and Family Services, 1999 W.L. 1486544 (R.O. Fla. Div Admin. Hrgs. 1999), final order issued by Department of Children and Family Services, Order No. DCF-00-061-FO. In that case, evaluators wholly unsuited to assess the financial condition of an offeror badly misexecuted their responsibilities, as was plainly evident from the relevant financial statements.

101. No significant conflicts of interest appear to exist between Intervenor and Respondent. The failure to disclose Fowler White as Intervenor's legal subcontractor was irrelevant because the RFP did not require this disclosure. Also, the

record disclosed no significant conflicts between Petitioner and Fowler White.

102. It is possible that Fowler White will encounter conflicts between its representation of Respondent, as Intervenor's legal subcontractor, and its representation of various health care providers in their ordinary operations. However, this is no basis for overturning the proposed award. First, even actual conflicts may not justify Petitioner's attempted use of the ethical rule to induce Respondent to withdraw its proposed intent to award the contract to Intervenor. Second, the extent and frequency of these conflicts have yet to emerge, so it is premature to consider their effect, if any, upon the ability of Fowler White and, more importantly, Intervenor to service this contract.

RECOMMENDATION

It is

RECOMMENDED that the Agency for Health Care Administration enter a final order awarding to Health Management Systems, Inc., the subject contract under Request for Proposals for Medicaid Third Party Recovery Services, Proposal No. RFP TPL 01-01.

DONE AND ENTERED this 18th day of September, 2001, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
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Filed with the Clerk of the
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this 18th day of September, 2001.

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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.