

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CORRECTIONAL SERVICES	)	
CORPORATION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case Nos. 02-2966BID
	)	02-2967BID
DEPARTMENT OF JUVENILE JUSTICE,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
RAMSAY YOUTH SERVICES, INC.,	)	
	)	
Intervenor.	)	
_____	)	

RECOMMENDED ORDER

Upon due notice, William R. Cave, an Administrative Law Judge for the Division of Administrative Hearings, held a formal hearing in this matter on August 29-30, 2002, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

Are the intended contract awards by the Department of Juvenile Justice (Department) to Intervenor, Ramsay Youth Services, Inc. (Ramsay) under Request for Proposal (RFP) Numbers J5G01 and J5G02 contrary to the Department's governing statutes, applicable rules or policies, or the specifications of the RFPs?

PRELIMINARY STATEMENT

On July 8, 2002, Correctional Services Corporation, (CSC) filed Petitions for Formal Administrative Hearing (Petitions) challenging the Department's notice of intent to award contracts to Ramsay pursuant to RFP Nos. J5G01 and J5G02. The Department then forwarded the Petitions to the Division of Administrative Hearings (Division) for the assignment of an Administrative Law Judge and for the conduct of a formal hearing.

By an Order of Consolidation dated July 30, 2002, Case Nos. 02-2966BID and 02-2967BID were consolidated. By an Order Granting Intervention dated July 30, 2002, Ramsay's Unopposed Petition to Intervene was granted. The consolidated cases were scheduled for hearing on August 23, 2002.

By stipulation of all parties, the consolidated proceeding was continued and rescheduled for final hearing on August 29-30, 2002, with the understanding that any time constraints imposed under Section 120.57(3)(e), Florida Statutes (2001), were waived.

By Order dated August 27, 2002, Petitioner's Motion for Summary Order was denied.

On August 28, 2002, the parties filed a Joint Prehearing Stipulation.

At the hearing, CSC presented the testimony of Marvin Floyd, Paul Donnelly, Larry Ochalek, Jacqueline Foster and David Scharoun. CSC's Exhibits 1 through 6 were admitted in evidence. CSC's attempt to have the depositions of Marvin Floyd and Larry Ochalek admitted in evidence was rejected. CSC then made a proffer of the depositions of Marvin Floyd and Larry Ochalek. Ramsay presented the testimony of Jorge Rico. Ramsay's Exhibits 7 through 10 were admitted in evidence. The Department presented the testimony of Mary Mills, but did not present any documentary evidence. The Department presented

the deposition of Mary Mills for impeachment purposes. Joint Exhibits 1 through 18 were admitted in evidence.

A Transcript of this proceeding was filed with the Division on September 17, 2002. As agreed at the close of the hearing, the parties timely filed their Proposed Recommended Orders on October 4, 2002.

#### FINDINGS OF FACT

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

#### Background

1. On March 29, 2002, the Department issued RFP No. J5G01 for the operation of a 350-bed residential commitment program for high-risk males in Polk City, Florida (Polk Program).

2. On April 5, 2002, the Department issued RFP No. J5G02 for the operation of a 74-bed, multi-level residential commitment program in Homeland, Florida (Bartow Program).

3. CSC is the incumbent provider for both the Polk and Bartow Programs.

4. On or about April 25, 2002, two proposals were submitted in response to the RFP for the Polk Program, one from CSC and one from Ramsay.

5. On or about May 3, 2002, four separate proposals were submitted by CSC, Ramsay, Sescuricor New Century (Securicor), and Lighthouse Care Center (Lighthouse) in response to the RFP for the Bartow Program.

6. On June 25, 2002, the Department posted separate notices of its intent to award contracts for the Polk and Bartow Programs to Ramsay.

7. The Notice of Intended Contract Award for the Polk Program (RFP No. J5G01) lists Ramsay as the highest-ranked bidder with 655.3 average points, and CSC as the second-ranked bidder with 537 average points.

8. The Notice of Intended Contract Award for the Bartow Program (RFP No. J5G02) lists Ramsay as the highest-ranked bidder with 590.3 points, followed by Securicor with 542.7 average points, CSC with 535.7 points, and Lighthouse with 233.3 points.

9. All parties stipulated to the Department's scoring of the past performance portion of both CSC proposals.

10. With the exception of Item C-3.7, all parties stipulated to the Department's scoring of the past performance portion of both Ramsay proposals. With regard to Item C-3.7, the parties stipulated the Department's scoring for Ramsay should have reflected 60 additional points because Ramsay's Manatee Adolescent Treatment Services program (Department's

Contract No. F7027) met or exceeded the approved Performance Based Budgeting performance measure for recidivism for the past two years.

11. In light of the corrections for Item C-3.7, Ramsay's total average score for the Polk Program should have been 715.3 (i.e., 655.3+60), compared to CSC's score of 537. Likewise, for the Bartow Program, Ramsay's total average score should have been 650.3 (i.e., 590.3 + 60), compared to CSC's score of 535.7.

#### The Process

12. Since at least the end of 2001, the Department has utilized two procurement methods: one provides for the scoring of costs; the other does not because the RFP specifies a fixed maximum contract price. When the fixed price method is used and costs are not scored the Department conducts a so-called "negotiation phase" after issuing notice of intent to award the contract.

13. During the so-called "negotiation phase," the Department and offeror determine such things as the unfilled bed rate and maintenance rate, but the Department does not negotiate material terms of the technical proposal or allow the selected offeror to modify its proposal. The Department does not allow the selected offeror to increase the cost or price included in its proposal. However, if an error is

discovered in the selected offeror's budget, the budget can be adjusted to redistribute expenses from one line item to another, so long as the proposed services are provided and the proposed cost or price is not exceeded.

14. If the Department is unable to complete execution of the contract because the selected offeror is unable to provide the program services within the contract set forth in its proposal, the Department moves on to negotiate with the next offeror.

15. Use of the "fixed price" procurement method has enabled the Department to reduce procurement process from 180 to less than 120 days on average, and often as low as 60 days. Speeding up the procurement process helps to ensure that services will continue to be provided and that legislatively appropriated funds do not go unused and, as a result, become subject to forfeiture. This is important because the State has a "waiting list" of committed youth who require program services. The "fixed price" method also allows the Department to place its principal emphasis on the quality of programs offered.

16. In this case, the RFPs for both programs contemplate fixed priced contracts. Each RFP specifies a maximum contract dollar amount that the Department will award for each contract. The dollar amount is a "fatal criterion," meaning

that any proposal with a cost exceeding that amount would be rejected.

17. Both RFPs required each offer to submit a technical proposal (Volume I) setting forth an introductory statement and specific sections describing the offeror's management capability, the offeror's past performance, and the program services being offered.

18. Both RFP's required offerors to submit financial data (Volume II) including, among other things, a total cost or price for the program and an itemized budget. The total costs submitted by Ramsay and CSC did not differ significantly; the difference was less than one dollar for the Polk Program and only two dollars for the Bartow Program.

19. Both RFP's provided that zero points would be assigned for costs or price, indicating that costs or price would not be scored. Instead, the primary scoring criteria are "program services" and "past performance." Together, these criteria reflect 700 out of the 1000s total points available.

20. Nothing in the RFPs requires the Department to evaluate budget details in conjunction with its review of the technical proposals prior to the notice of intended award. The Department uses the budget information primarily as a baseline to assist it in moving through the "negotiation



phase." It enables the Department to determine if specific costs would not be incurred or not allowable. It enables the Department to negotiate the unfilled bed rate, which allows the Department to reduce the contract rate to account for costs that would not be incurred for beds that are not occupied. It also forces offerors to determine whether they can provide the required services within the maximum price before they submit proposals.

21. Based on a Department document entitled "Briefing for SSET Team Members and Advisors," CSC claims that the "RFP Process" requires the Department to evaluate proposed costs for realism, reasonableness, and completeness. The "Briefing" document does state that "the contract administrator is responsible for evaluating the cost proposals of each offeror for completeness, reasonableness, and reality using the COST [PRICE] PROPOSAL EVALUATING form. However, the "Briefing" document is not a part of the RFP's and does not reflect official Department policy. The "Briefing" document is merely a guideline.

22. In this case, the Contract Administrator, Marvin Floyd, did not sign the "Briefing" document and did not score or perform an extensive analysis of the specifics of the proposed budgets for realism, reasonableness, and completeness. However, Marvin Floyd did review each cost

proposal to determine whether it included a total cost or price and whether the budget information in Attachment H was filled out. In that sense, Marvin Floyd did review the cost proposal for completeness. Similarly, Marvin Floyd also reviewed the proposed costs and price to determine whether it exceeded maximum contract dollar amount, which the Department had previously determined to be realistic and reasonable. In that sense, Marvin Floyd did review the costs or price for realism and reasonableness.

23. CSC failed to demonstrate that the evaluation process utilized by the Department provided a competitive advantage to Ramsay. To the contrary, the same evaluation process and guidelines were used for both CSC and Ramsay.

#### Ramsay's Proposed Budget

24. Based on isolated statements made in Ramsay's technical proposal and a review of Ramsay's budget, CSC's senior Vice President, Paul Donnelly, opined that Ramsay's proposal was somewhat "naïve" and a "virtual primer . . . for a novice[.]" However, Donnelly's opinions must be weighed in light of the fact that CSC received "minimal performance" and "noncompliance" ratings for both the Polk and Bartow Programs in the latest Department Quality Assurance reviews. Furthermore, Donnelly himself testified in deposition that Ramsay submitted an "impressive technical proposal." The

record demonstrated that Ramsay is an experienced provider that currently operates nine programs for the Department, including the Department's only contracted maximum-risk program.

25. CSC contends that the budget included in Volume II of Ramsay's proposal for the Polk Program is not realistic, reasonable, or complete because it did not include specific line items for certain direct expenses, including start-up costs, overtime, employee expenses, and taxes, as well as certain indirect expenses, such as insurance and corporate overhead. CSC failed to demonstrate that the RFP specifications or the Department policy requires such budgetary detail. Moreover, Ramsay's Chief Operating Office, Jorge Rico, explained that Ramsay's budget did address most of the costs identified by CSC in other, more general line items.

26. Whereas CSC's budget was more specific as to some items, Ramsay's budget was more specific as to others. For example, Ramsay included a specific line item for recruiting, but CSC addressed this expense in the general category of corporate overhead. Similarly, Ramsay included specific line items for nursing staff, whereas CSC addressed nursing staff in the general category of medical services.

27. CSC also faulted Ramsay for not including start-up or "transition" costs in its budget for the Polk Program. But

had such a line item been included, it would have been eliminated during the so-called "negotiation phase" because the Department does not allow start-up costs for existing programs. CSC's argument that Ramsay should have budgeted these costs amounts to a claim that CSC should be given a competitive advantage because, as the incumbent provider, CSC would not incur transitional costs and, therefore, would have no reason to budget them. Such an advantage would be contrary to competitive principles by favoring the incumbent provider over other offerors.

28. The primary indirect expense that CSC criticized Ramsay for not including in its budget is corporate overhead. As Rico explained, however, corporate overhead is a fixed cost that will not increase with the addition of a new program. Ramsay made a business decision to put whatever funds that might be allocated as corporate overhead into the program itself.

29. CSC claims that Ramsay cannot provide the services outlined in its proposal without incurring a loss. Rico acknowledged that Ramsay likely would incur losses for at least the first year of the programs, as is common when a new provider takes over an existing program. However, whether or not a provider makes a profit on a program is not the Department's concern and is not an award criterion. In fact,

when corporate overhead is allocated as CSC suggests Ramsay should have in its budget, CSC itself incurred losses on both Polk and Bartow Programs over the twelve-month period ending July 2002.

30. In its totality, the evidence indicates that the budgets submitted by Ramsay and CSC differ due to differences in management styles. Those differences do not render Ramsay's budget unrealistic, unreasonable, or incomplete. The differences in total costs proposed by CSC and Ramsay were negligible. In any event, budgets are estimates, actual expenses never match budget line items.

31. The evidence does not support CSC's claim that Ramsay will need to make material changes to its budget in order to provide the program services at the cost or price set forth in its proposal. Ramsay is committed to providing the services described in its technical proposal at the cost set forth in its cost proposal.

#### Staffing Ratio

32. Based on a statement in Ramsay's technical proposal, CSC suggests that Ramsay would not meet the staffing ratios required for the Polk Program. However, Ramsay's technical proposal clearly states in bold lettering that Ramsay "will meet staffing requirements documented in the RFP (1:8 days and evening; 1:12 nights)." Moreover, Ramsay's budget includes

enough positions and dollars to meet the required staffing ratios. In fact, with regard to "youth workers," who provide the core of the program staff, Ramsay's budget includes considerably more positions (186 full time equivalent or "FTEs"), than does CSC's budget (120.9 FTEs).

#### Instructions to Evaluators

33. CSC failed to demonstrate that the Department failed to provide its evaluators with specific and legally sufficient instructions regarding the scoring of proposals. To the contrary, the scoring sheets provided to the evaluators contain specific and detailed instructions on how each scoring criterion was to be evaluated. For example, in evaluating "Programs Services," the scoring sheets advise the evaluators to assess "soundness of approach" and "compliance with requirements" as follows:

##### C.4.1 SOUNDNESS OF APPROACH:

(Does the proposal reasonably and logically identify the proposed approach to perform the services as specified and required by the RFP, Attachment G, Exhibit 1, Scope of Services?)

##### C.4.2 COMPLIANCE WITH REQUIREMENTS:

(The degree to which the proposal complies with the requirement specified and required by the RFP, Attachment G, Exhibit 1, Scope of Services)(Does the proposal comply with all requirements for all service components, as identified in Attachment G, Exhibit 1, Scope of services, of the RFP?)

The evaluators were then required to provide a numeric score ranging from 5 to zero. The scoring sheets provide specific criteria for determining the appropriate numeric score. For example, an "excellent" score of 5 would be appropriate if "[t]he proposal exceeds all technical specifications and requirements for all program components (and it) is innovative, comprehensive, and complete in every detail."

#### Other Issues

34. CSC failed to prove its allegations that the Departments' scorers evaluated and scored the proposals inconsistently or incorrectly or that the Department deviated from the RFP criteria in evaluating and scoring the proposals. CSC also failed to demonstrate that the Department's reduction in the number of beds for the Bartow Program from 74 to 50 beds after issuance of the RFP provided an unfair advantage to Ramsay or was otherwise contrary to competition.

#### CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Section 120.57(3), Florida Statutes.

36. Pursuant to Subsection 120.57(3)(f), Florida Statutes, CSC, as the party protesting the Department's proposed contract award, has the burden of proof. Subsection 120.57(3)(f) Florida Statutes, provides:

(f) In a competitive-procurement protest, no submissions made after the bid or proposal opening amending or supplementing the bid or proposal shall be considered. Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. (Emphasis furnished.)

37. In State Contracting and Engineering Corporation v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1st DCA 1998), the court opined on the role of the Administrative Law Judge in a bid protest proceeding and stated:

[T]he phase 'de novo hearing' is used to describe a form of intra-agency review. The 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. See Intercontinental Properties, Inc. v. State Department of Health and Rehabilitative Services, 606 So. 2d 380 (Fla. 3rd DCA 1992) (interpreting the phase 'de novo hearing' as it was used in bid protest proceedings before the 1996 revision of the Administrative Procedure Act.)

38. CSC claims that the evaluation process was "fundamentally flawed" because the Department failed to



follow the procurement requirements of Section 287.057, Florida Statutes. In support, CSC relies primarily on Department of Lottery v. GTECH Corporation, 816 So. 2d 648 (Fla. 1st DCA 2001), where the court held that the agency could not use the RFP process for ranking purposes only and then negotiate a contract with little or no concern for the original proposal of the preferred offeror. However, the GTECH court's holding was based on the agency's assertion that, once it identified a preferred offeror, it was free to negotiate "without limitation" revised terms of the contract. In this case, the Department makes no such assertion. To the contrary, the evidence demonstrates that the Department will not negotiate material terms of Ramsay's proposal or increase Ramsay's proposed cost or price. Thus the record does not support CSC's claim.

39. CSC also claims that the Department's procurement process violates Subsection 120.53(3)(f), Florida Statutes, which provides; "in a competitive procurement protest, no submissions made after the bid or proposal opening amending or supplementing the bid or proposal shall be considered." In essence, CSC claims that the Department will accept submissions after the proposal opening during the so-called "negotiation phase." By its terms, however, Subsection 120.57(3)(f), Florida Statutes, refers to post-bid-opening

submissions "in a competitive procurement protest," not after the protest has been completed. Moreover, even if Subsection 120.57(3)(f), Florida Statutes, applied after the protest, CSC's claims are speculative and premature at this time because there is no evidence that Ramsay has made or will make any such submissions.

40. CSC has failed to demonstrate that any governing statute, applicable rule or policy or the RFP specifications requires the Department to perform a detailed evaluation of the cost proposals (Volume II) when it scores the technical proposals (Volume I) prior to the notice of intended award.

41. The "Briefing" document that CSC claims requires such a detailed evaluation of the cost proposal is not an official agency policy. Moreover, if anything, the "Briefing document" suggests that the contract administrator--not the evaluators--should evaluate the costs proposals for realism, reasonableness, and completeness. Under Section 287.057(14), Florida Statutes, the contract administrator is responsible for maintaining the contract file and financial information, not for evaluating the substance of proposals. The limited review performed by Floyd, the contract administrator in this case, is consistent with the administrative role contemplated in the statute.

42. To the extent CSC now argues that the evaluators should have reviewed the cost proposals, that argument has been waived. The RFP clearly indicates that the cost or price information would not be scored. Subsection 120.57(3)(b), Florida Statutes, provides:

With respect to a protest of the specifications contained in an invitation to bid or in a request for proposals, the notice of protest shall be filed in writing within 72 hours after the receipt of notice of the project plans and specifications or intended project plans and specifications in an invitation to bid or request for proposals, and the formal written protest shall be filed within 10 days after the date the notice of protest is filed. Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceeding under this chapter. (Emphasis furnished.)

The policy underlying this requirement and the waiver provision is obvious: If a would-be offeror takes issue with the State's proposed method of procurement, it should challenge that method at the inception, so that any legal or other element of the State's request can be remedied in a timely fashion, rather than at the end of the process. A late challenge to the method of procurement in which an offeror has participated without objection cannot affect the validity of the procurement process nor the ultimate award. See Medimpact Healthcare Systems., Inc v Department of Management Services, Case Nos. 00-3553RU and 00-3900BID

(Final Order entered November 21, 2000); Humana Health Care Plan v. Department of Administration and Gulfstream Health Plan v, Department of Administration, Case Nos. 87-5526BID and 87-5543BID (Final Order entered April 28 1998); Capitol Group Health Services Of Florida, Inc. v. Department of Administration, Case No 87-5387BID (Final Order entered April 28, 1998.)

43. For the same reason discussed in Conclusion of Law No. 42 and in the Order Denying Petitioner's Motion for Summary Order dated August 27, 2002, CSC also waived any protest of the Department's alleged failure to make a written determination that use of competitive sealed bidding was not practicable in accordance with Subsection 287.057(2), Florida Statutes.

44. CSC has failed to demonstrate that the intended contract awards to Ramsay are arbitrary or capricious, contrary to competition, or clearly erroneous. Likewise, CSC has failed to demonstrate that the intended contract awards to Ramsay are contrary to the Department's governing statutes, applicable rules, or policies, or the specifications of the requests for proposals.

#### RECOMMENDATION

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

RECOMMENDED that the Department enter a final order dismissing CSC's protests and awarding the contracts to Ramsay pursuant to RFP Nos. J5G01 and J5G01 as originally proposed.

DONE AND ENTERED this 29th day of October, 2002.

Tallahassee, Leon County, Florida.

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Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of October, 2002.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit 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.