

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CONSULTECH OF JACKSONVILLE, )  
INC., )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 03-0129BID  
 )  
DEPARTMENT OF HEALTH, )  
 )  
Respondent, )  
 )  
and )  
 )  
INFORMATION SYSTEMS OF FLORIDA, )  
INC., )  
 )  
Intervenor. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Upon due notice, this cause came on for final hearing on February 7, 2003, in Tallahassee, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Albert E. Ford, II, Esquire  
994 Lake Destiny Road, Suite 102  
Altamonte Springs, Florida 32714

For Respondent: Gary L. Asbell, Esquire  
Department of Health  
4052 Bald Cypress Way, Bin A02  
Tallahassee, Florida 32399-1701

For Intervenor: Timothy G. Schoenwalder, Esquire  
Gary V. Perko, Esquire  
Hopping Green & Sams, P.A.  
123 South Calhoun Street  
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STATEMENT OF THE ISSUE

Whether the Department of Health's (DOH's) notice of intent to award the contract for RFP DOH02-021 was clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

This case concerns a protest filed by Consultech of Jacksonville, Inc. (Consultech), in response to DOH's notice of intent to award a contract for continuing education unit tracking systems development to the highest ranked proposer, Information Systems of Florida, Inc. (ISF), as a result of RFP DOH02-021 issued October 4, 2002.

Consultech submitted to DOH a document styled, "RE: Formal PROTEST to Department of Health # DOH02-021 bid Award," within the time frame for filing a bid protest. Consultech subsequently filed an Amended Protest, and the case was referred to the Division of Administrative Hearings on January 15, 2003. ISF was granted intervenor status.

Originally, there were time-filing issues raised by DOH and ISF, which issues have since been abandoned.

Upon the Division's receipt of the file, the final hearing date was scheduled for February 7, 2003, which was seven days

short of the last permissible date for the merits hearing within the mandatory statutory time frame. Petitioner's counsel at the time requested the date of February 7, 2003, and rejected February 14, 2003, the last possible date. All parties declined to waive the statutory time frame. An expedited discovery schedule was established by a pre-hearing order.

Numerous discovery motions were ruled upon and more motions were ruled upon in connection with the withdrawal and substitution of up to three of the five attorneys who have represented Petitioner in this case. Some, but not all, of the rulings were committed to written orders. Some, but not all, of the rulings are recorded by transcripts of telephonic conference calls filed with the Division. Repetitive motions for continuance, made by successive attorneys for Petitioner, were denied because, under the circumstances presented, neither legal grounds nor agreement existed for altering the previously agreed hearing date. The record adequately reflects these matters.

DOH's first Requests for Admission were deemed admitted, pursuant to rule, and Consultech did not move to set them aside.

At the commencement of hearing, ISF's Motion in Limine and to Strike was granted in part and denied in part (TR-12-21). As a result, Consultech was precluded from asserting arguments that directly or indirectly challenged specifications of the RFP, because there had been no timely challenge to the RFP's

specifications as required by Section 120.57(3), Florida Statutes.<sup>1/</sup> Consultech was further precluded from introducing evidence on standard deviations statistics, because such evidence could not legally demonstrate that DOH's notice of intent to award was clearly erroneous, contrary to competition, arbitrary, or capricious.<sup>2/</sup>

Petitioner presented the oral testimony of Nanneta Upchurch, Bob Ford, Thomas Solans, and Jan Simmons, and had Petitioner's Exhibits 1, 5, 8, 10, and 12, admitted in evidence. The deposition of Scott Futrell was admitted as Petitioner's Exhibit 5. Ruling on Exhibit P-11 was reserved for this Recommended Order (TR-209). Exhibit P-11 is not admitted because it is a combination of protected settlement negotiations and immaterial communications. By agreement, Joint Exhibits 1 through 4 were admitted in evidence. Neither Respondent nor Intervenor presented any witnesses. At the close of hearing, the parties waived the statutory periods for filing of Proposed Recommended Orders and this Recommended Order.

A Transcript of the merits hearing was filed on February 24, 2003. All parties timely filed Proposed Recommended Orders on March 11, 2003. These proposals have been considered in preparation of this Recommended Order.

Jurisdiction having been reserved to address any pending discovery issues, an Order was entered February 19, 2003, by

which movants DOH and ISF were permitted to file updated speaking motions for monetary sanctions, reflecting the oral extensions of response time made during motions already heard by telephonic conference call and discovery events occurring subsequent to filing the pending motions to compel; and to file appropriate supporting cost and/or fee affidavits, provided same were filed on or before the twentieth day after the filing of the Transcript (March 18, 2003). By the same Order, Consultech was granted until the thirtieth day after the filing of the Transcript (March 26, 2003), to file responses in opposition to any updated motions and any rebuttal affidavits as to DOH's and ISF's fees and costs affidavits. Only ISF and Consultech have filed these items, and the Conclusions of Law of this Recommended Order will address those discovery issues, which are separate from the merits of this case and which also are not dependent upon which party(ies) prevail.

#### FINDINGS OF FACT

1. On or about October 4, 2002, DOH issued RFP DOH02-201 (RFP). Section 1.1 of the RFP, entitled "Statement of Need," provides in pertinent part:

Florida law (Chapter 456.025(7), Florida Statutes) requires the Department of Health, Division of Medical Quality Assurance (Department) to implement an electronic continuing education (CE) tracking system for each new biennial renewal cycle for which electronic renewals are implemented

and to integrate such system into the licensure and renewal system.

2. DOH issued the RFP to secure proposals for designing, implementing, and maintaining a new system for tracking continuing education units (CEU) which must be earned by the more than 470,000 health care professionals DOH regulates.

3. The RFP defined "Eligible Proposers" as "any company with CE tracking systems development background or other organization with demonstrated expertise in system development projects and experience with providing similar services."

4. Consultech, a company that appears to primarily provide computer training or education to employees of companies and governmental entities, timely submitted a proposal to DOH in response to the RFP.

5. ISF, a company that primarily develops, implements, and integrates software database systems for governmental entities, also timely submitted a proposal to DOH in response to the RFP.

6. Petitioner Consultech and Intervenor ISF were the only proposers. DOH did not disqualify either proposer as "non-responsive" or "not responsible." Because no evaluator testified, the procedure and scoring system for the RFP proposals can only be gleaned from the documents in evidence, but it appears that each proposal was evaluated by the same procedure.

7. A review panel of DOH employees evaluated the proposals submitted by Consultech and ISF. Consultech's proposal received a combined total of 298 points. ISF's proposal received a combined total of 573.5 points.

8. Section 2.10 of the RFP provides:

NOTICE OF CONTRACT AWARD

BASIS OF AWARD

The awards shall be made for the responsible Proposer whose proposal has scored the highest based on the evaluation criteria in Section 6, PROPOSAL EVALUATION CRITERIA AND RATING SHEET.

9. On or about November 7, 2002, DOH issued its notice of intent to award the contract ("CEU Tracking Systems Contract") to ISF, in accordance with the requirements imposed by Section 2.10 of the RFP.

10. On November 18, 2002, Consultech submitted to DOH a document of that same date, which contains the following reference: "RE: FORMAL PROTEST to Department of Health # DOH02-021 bid Award."

11. On or about December 16, 2002, Consultech filed an Amended Written Protest/Petition with DOH.

12. In its Amended Protest/Petition, Consultech mainly focused upon DOH's scoring of selected portions of the competing proposals of ISF and Consultech and upon whether or not DOH's notice of intent to award to ISF contravenes Section 456.003(5),

Florida Statutes. Consultech's pleadings did not contend that ISF's proposal was not responsive to the RFP or that ISF was not a responsible proposer.<sup>3/</sup>

13. Section 6.2 of the RFP, entitled "RFP RATING METHODOLOGY," provides in pertinent part: "Proposals which meet the minimum requirements will be reviewed by a panel of appropriate staff."

14. Consultech initially contended that DOH failed to assemble a review panel comprised of appropriate DOH employees. This argument is not, however, put forth in Consultech's post-hearing proposal, and the allegation must fail because there was no evidence presented to show that DOH's review panel included anyone who, in any manner, was not appropriate for such duty. Moreover, the resumes of the five DOH employees who served on the DOH review panel affirmatively demonstrated that the panel was, in fact, comprised of appropriate staff.

15. At hearing, Consultech contended that its proposal should have received an unspecified higher number of points than the 298 points it was awarded by DOH and that ISF's proposal should have received an unspecified lower number of points than the 573.5 points that ISF was awarded by DOH. Consultech generally argued that DOH acted in an arbitrary and capricious manner because members of DOH's review panel (proposal evaluation team) had awarded Consultech's proposal different



(and generally higher) scores for their respective responses to certain RFP criteria, but this is like comparing apples and oranges. Unlike invitations to bid, requests for proposals, by their very nature, solicit proposals for different ways of addressing the same subject or which assemble different methods of achieving the same goal, and evaluators bring their own perspectives and expertise to the task of ranking the proposals. The applicable statutory and case law make it clear that the undersigned is not free to substitute her evaluation for that of the Agency's team, made up of technically competent evaluators.<sup>4/</sup> Because in this case, no evaluator testified, it is, in large part, unclear either why or how Consultech contends the unspecified points should be reallocated, even if some flaw in the scoring could be detected, which it was not. (See Findings of Fact 17-26.) Overall, Consultech failed to offer any evidence to show that the different scores that Consultech's proposal received from the evaluators require a finding that DOH's proposed award of the CEU Contract to ISF was irrational, erroneous, arbitrary, capricious, or contrary to competition. See, infra.

16. Consultech did not present any evidence to show that members of the DOH review panel were given instructions for reviewing the proposals which were inconsistent with the RFP's specifications.

17. Consultech did not allege that a mathematical error occurred in DOH's tabulation of the total number of points that the respective members of DOH's review panel awarded to either Consultech or ISF. At most, Consultech has argued that Consultech should have received at least one "automatic" point for each reference provided in its proposal, per language contained at pages 24-25 of the RFP. Assuming arguendo, but not ruling, that this were a correct interpretation of the RFP, even these additional points for Consultech's nine named supportive references would not be sufficient to result in award of the contract to Consultech.<sup>5/</sup>

18. In fact, the RFP required proposers to submit at least two supportive references. It did not obligate DOH to contact anyone identified in a letter of reference or in a list of references submitted by a proposer.

19. ISF's proposal included letters of reference from eleven individuals who described in detail their satisfaction with ISF's provision of large-scale software development and integration services to one private and ten governmental entities. ISF's letters of reference were obtained from representatives of private and governmental entities who had contracted with ISF for the development, implementation, and integration of large-scale software database systems, some of

which utilize ISF's proprietary continuing education system known as "CE Broker."

20. By comparison, Consultech's proposal provided a list that identified nine individuals as references, along with addresses for each, but Consultech's proposal did not include letters of reference from those named.

21. It would not be erroneous, irrational, arbitrary, capricious, or contrary to competition if one or more evaluators had been more favorably impressed with comprehensive letters of reference than with mere names and addresses.

22. Consultech named as one of its nine references Scott Futrell, who has been serving as the chief information officer for Gwinnett County Schools in Georgia since the fall of 2002. Prior to holding that position, Mr. Futrell had been employed as the chief information officer of the Duval County School System. Acting on behalf of the Duval County School System, Mr. Futrell had purchased software development and integration services from ISF, and had purchased employee computer training services from Consultech. He expressed knowledge of Consultech's training network staff and deployment of support and design of Windows 2000 and Enterprise networks. Mr. Futrell was complimentary of the quality of some of Consultech's staff members, but he was "uncomfortable" expressing an opinion that Consultech could deliver the services that DOH sought through its RFP. On the

other hand, Mr. Futrell testified clearly that he believed that ISF has a strong capability for developing software and the ability to partner with an organization, while understanding that organization's functions. Since Mr. Futrell was the supervisor of two of the other individuals Consultech's proposal named as references, it may be inferred that Consultech named at least three references who lacked knowledge of Consultech's ability to succeed in providing services similar to those sought by the RFP.

23. A proposer could receive up to eleven points from an evaluator for demonstrating in its proposal "successful experience" providing services similar to those sought by DOH.

24. ISF identified in its proposal several projects for similar large-scale web-based services that it had developed, implemented, and integrated. Those projects include, but are not limited to, the following:

a. Florida Department of Insurance (FDOI), Bureau of Agent & Agency Licensing - ISF, using its proprietary CE Broker system, developed, implemented and integrated the continuing education unit tracking system that FDOI currently uses for the various agents it licenses;

b. Florida Building Commission (FBC) - ISF developed, implemented and integrated the FBC's Building Code Information System, which tracks users, maintains searchable records of training providers and course attendees, provides searchable continuing education courses by name, date and

location, and provides real-time license validation and processing of attendee continuing education course credit to the Department of Business and Professional Regulation.

c. The Schultz Center for Teaching and Leadership (Schultz Center) - ISF, again using its proprietary CE Broker system, developed, implemented and integrated for the Schultz Center a system that, inter alia, helps teachers search for available courses and access their continuing education points (both traditional and non-traditional points), and sends in-service continuing education points electronically to participating districts.

25. Consultech protested that its staff (proposed project team) was more highly qualified and certified than ISF's proposed project team and should have been ranked higher by DOH's evaluators than ISF's proposed project team. However, it would not be erroneous, irrational, arbitrary, capricious, or contrary to competition if DOH's evaluators had decided that ISF's proposed project team, comprised of individuals who had served on one or more of the foregoing significant similar projects possessed the specific knowledge, skills, and experience required for DOH's project.

26. In its proposal to DOH, Consultech did not describe or identify a single project in which it had developed, implemented, and integrated a CEU tracking system program or a single large-scale software development, implementation, and integration project it had successfully completed. Therefore,

it would seem that only ISF submitted a proposal that affirmatively demonstrated to the evaluators both that it was an eligible proposer (RFP 1. 2. 3, page 6) and that it possessed "successful experience" providing services similar to those sought by DOH. (RFP 6.1, pages 24-25)

27. Consultech's staff's qualifications to develop and maintain a new system were attested-to by Ms. Upchurch, its President, and by Mr. Ward, an Executive Account Manager for Microsoft. Both witnesses put great emphasis on Microsoft certifications over any other computer training or experience. ISF's existing proprietary system, "CE Broker," was not addressed by their testimony. Consultech's President's computer qualifications were impressive. A majority of Consultech's existing staff are certified Microsoft Systems Engineers and two hold even higher Microsoft certifications. In Mr. Ward's opinion, Consultech's proposal demonstrated that its staff would be qualified to enter into the project Consultech had proposed to DOH, but he could not say he knew the project solution presented in Consultech's proposal would work, because it was outside his area of expertise. Mr. Ward had never "completely" read the RFP and could not rank the two proposals. No evaluator testified.

28. The major thrust of Consultech's case was to the effect that lower cost should be the sole criterion utilized in

DOH's award. When Consultech was well into its case-in-chief, an attempt was made to offer a new legal theory of "fraud," but no compelling evidence to that effect was presented.<sup>6/</sup>

29. Under RFP DOH02-021, a proposer's price proposal was significant only insofar as its business plan demonstrated the adequacy of private funding and a minimal dependency upon limited available state funds. The RFP did not contain any provision which either required or permitted DOH to award a proposer a certain number of points based on that proposer's price proposal methodology. (See Finding of Fact 15.)

30. The RFP required each proposal to demonstrate how the proposer would generate revenues from third parties, e.g., the CEU course providers and/or the more than 470,000 health care professionals who must obtain CEU credits, during respective two-year cycles, in order to maintain their specific professional licenses.

31. It is noted that Ms. Upchurch understood that \$100,000 was all DOH had available to invest in the project. Consultech's business plan was dependent upon receipt of \$100,000 "up front," as it were, from DOH, and upon revenues being paid by the licensed health care professionals. Money received from the licensed health care professionals would be generated back into Consultech's profit-sharing plan with DOH. ISF's proposal was completely funded through private sources,

such as ISF's own capital, bank loans, and revenues from the credit unit charges paid by the licensed health care professionals. ISF had secured a \$2,000,000 performance bond to back its obligation to perform the DOH contract, and ISF's business plan did not require or propose to use any of the limited available state funds.

32. Depending upon one's concept of whether or not making a profit should be a government goal, DOH's award to fully-funded ISF instead of "profit-sharing" with Consultech may be "good" or "bad," but it would not be erroneous, irrational, arbitrary, capricious, or contrary to competition if the DOH evaluators saw it as advantageous to the agency to retain its \$100,000 for other projects and let ISF front all the money and take all the risks.

33. Also, because no Agency funds are involved in an award to ISF, Consultech has failed to affirmatively demonstrate that DOH's intent to award to ISF in any way offended Section 456.003(5), Florida Statutes, which requires DOH to promulgate policies which are cost-effective. See the Conclusions of Law.

34. Consultech has apparently garnered considerable support among health care professionals and their professional associations' lobbyists by stressing Consultech's proposal's allegedly lesser out-of-pocket expense to health care professionals because Consultech's fees are based upon



"transactions" instead of upon the "unit cost of CEUs." ISF's proposal is based upon "the unit cost of CEUs." Ms. Simmons, a licensed Physician's Assistant who testified on this issue, testified that with the \$1.60 per CEU cost that ISF projected in its proposal, her licensing fee based on 100-130 CEUs per year would increase dramatically, and any increase in licensing fees would deter licensees from taking more CEUs than the minimum required. However, Ms. Simmons believed her current fees were already excessive and, as nearly as can be determined from her testimony, she had never read both proposals for comparison.<sup>7/</sup>

35. Ms. Upchurch testified that Consultech's proposed system reduces or minimizes costs by running its "help desk" entirely internally, with existing Consultech staff, and by assuming that its "help desk" will eventually only have to deal with one in-coming phone call each day from a licensee inquiring why a particular CEU provider has not posted that licensee's CEU credits to the internet system (website) created by Consultech. Basically, under Consultech's plan, all licensees will be expected to first go to the website, which will then create an e-mail inquiry to the appropriate provider or DOH staff member, and if the matter is not resolved within 48 hours, only then will Consultech's staff place an out-going telephone call to assist or advise the inquiring licensee. It is hard to imagine that the foregoing would be the only kind of inquiry whereby a

licensee would wish to contact a live person. It seems likely that some licensees would want to submit inquiries of other kinds. It further seems likely that CEU providers or employers of health care providers also might want to submit a variety of inquiries or reach a live person. The RFP specifically requires that DOH staff would need to make inquiries. Ms. Upchurch also testified that another way of keeping costs down in Consultech's proposal was to assume that all a licensee's CEU credits could be posted simultaneously, or perhaps simultaneously per year, in each two-year cycle, so that each licensee would be paying only \$5.00 per "transaction" for a maximum of two "transactions" (or multiple CEU unit postings) in each two-year licensing cycle. This assumption includes the further assumption that each licensee earns all necessary CEUs from the same provider in no more than two educational sessions per year, an assumption that seems to have no back-up statistics in Consultech's proposal and which suggests a higher number of "transactions" could occur for those licensees who earn CEUs in small increments from several different providers over the two-year cycle. Even if one assumes Ms. Upchurch meant this testimony to include references to direct fees from providers and licensees as set out in Consultech's proposal, it appears that more than Consultech's estimated number of CEU providers might require monitoring and/or might have to be contacted by the proposer upon more

frequent inquiries from licensees. However, not a single witness testified as to how effective for DOH's registration of CEU providers and monitoring purposes Consultech's system would be, how healthcare professionals would react to Consultech's delayed response system, or how Consultech's proposed system compared with ISF's proposal other than on costs. Therefore, none of the foregoing testimony is helpful in comparing the two proposals in the context of this bid protest. On the other hand, Ms. Upchurch's testimony does create a valid doubt that Consultech's projected costs to licensees and providers, as described in its business plan, would be accurate in practice for all categories of licensed health care professionals.

36. The DOH evaluators did not have Ms. Upchurch's foregoing testimony to consider. They could only compare the two written proposals. In so doing, they could have, and without error, irrationality, arbitrariness, capriciousness, or acting contrary to competition, have preferred ISF's "help desk" component. ISF proposed a "help desk" manned by four highly trained persons with the goal to resolve all aspects of any inquiry during a single in-coming phone call, without referring the caller to successive personnel. The evaluators could reasonably have considered this a factor of superior technical excellence in ISF's proposal.

37. ISF's cost projection is based, in part, on a detailed analysis of projected CEU units required by all, or at least many, of the existing health care professional categories over a two-year period. (J-3, Section 8a, pages 3-5) This detailed calculation was not refuted by Consultech.

38. Consultech's price proposal arguments are predicated, at best, upon conjecture and speculation, and thus must fail.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of this cause, pursuant to Section 120.57(1) and (3), Florida Statutes.

40. All parties have standing in this case.

41. The duty to go forward and prove its position by a preponderance of the evidence is upon Petitioner Consultech.

42. This is not a rejection of all bids, and therefore, the standard is not whether the Agency's intended action is illegal, dishonest, or fraudulent. Consultech hinted at fraud, but there is no affirmative evidence as to illegality, dishonesty, or fraud.

43. Section 120.57(3) provides, in pertinent part:

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 of 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.

44. An agency action is clearly "erroneous" if it results from substantial procedural error or a clear misapplication of the law or is contrary to the clear weight of the evidence. Black's Law Dictionary, page 228, (5th Ed. 1979).

45. "A capricious action is one which is taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic, or despotic." Agrico Chemical Co. vs. State Department of Environmental Regulation, 365 So. 2d 759. 763 (Fla. 1st DCA 1978), cert. den., 376 So. 2d 74 (Fla. 1979).

46. "Contrary to competition" is best understood by its plain and obvious meaning, i.e. against or in opposition to competition. "The purpose of the competitive bidding process is to secure fair competition on equal terms to all bidders by affording an opportunity for an exact comparison of bids." Harry Pepper and Associates, Inc. vs. City of Cape Coral, 352 So. 2d 1190 (Fla. 2nd DCA 1977)

47. There is no evidence of irrational scoring, and the evidence presented does not compare the two proposals in a way that permits a finding of error, arbitrariness, capriciousness,

or any act or omission that is contrary to competition either in the evaluation of the two proposals or in the notice of intent to award.

48. Consultech demonstrated no irregularity in the make-up of the proposal review panel or the instructions to the panel.

49. Consultech did not demonstrate that scores assigned to its proposal by the proposal review panel were erroneous to the extent that the error would raise Consultech's score to that of the winning proposer.

50. Consultech failed to offer any evidence to show that the different scores that Consultech's and ISF's respective proposals received require a determination of error, arbitrariness, capriciousness, or behavior contrary to competition by the evaluators or by the intent to award to ISF.

51. Consultech never alleged or proved that a mathematical error occurred in DOH's tabulation of the total number of points that the respective members of DOH's review panel awarded to either Consultech or ISF.

52. Based on a comparative review of the extent and quality of references in the competing proposals, only ISF submitted a proposal that demonstrated both that it is an "eligible proposer" and possesses "successful experience" providing services similar to those sought through the RFP.

53. Under the RFP, a proposer's price proposal was significant only insofar as its business plan demonstrated the adequacy of private funding and a minimal dependency upon limited available state funds. The RFP did not contain any provision which either required or permitted DOH to award a proposer certain points based on that proposer's price proposal methodology.

54. Consultech's other legal argument as to cost/price is based on Section 456.003(5), Florida Statutes, which provides:

Policies adopted by the department shall ensure that all expenditures are made in the most cost-effective manner to maximize competition, minimize licensure costs, and maximize public access to meetings conducted for the purpose of professional regulation. The long-range planning function for the department shall be implemented to facilitate effective operations and to eliminate inefficiencies.

55. Consultech contends that DOH will violate this statutory provision if it awards the CEU Tracking Systems Contract to ISF, but Consultech did not prove that the price proposal described in its business plan would be accurate in practice, or that ISF's price proposal was inaccurate. Consultech also did not demonstrate the overall superiority of its proposal, a factor that is highly relevant to an RFP in ways that do not apply to an invitation to bid. (See Finding of Fact 15).

56. Assuming arguendo, but not ruling, that Consultech's proposal was demonstrably less expensive for all licensed health care professionals, making price/cost the sole criterion at this stage would effectively revise the RFP after the fact, as it were, to include a criterion that converts the RFP into a de facto invitation to bid, wherein price would become the determining factor.

57. Consultech lost the opportunity to challenge the bid specifications when it missed that statutory window of opportunity prior to submitting its proposal. It is well-settled law that having failed to institute a timely challenge to the bid specifications, the protestant is now powerless to directly or indirectly attack or modify the terms of the RFP. R.N. Expertise vs. Miami-Dade Co. Sch. Bd., DOAH Case No. 01-2663BID, (RO 2/4/2002; FO 3/13/2002); Optiplan, Inc. vs. Sch. Bd. of Broward County, 710 So. 2d 569 (Fla. 4th DCA 1998); Accordia of South Florida, Inc. vs. Dept. of Management Services, (DOAH Case No. 94-6454 (RO 3/13/95; FO 4/21/95); Restat vs. Div. of State Employees Ins., DOAH Case No. 92-0337BID (RO 2/20/92; FO 4/13/92); Capeletti Bros. Inc. vs. Dept. of Transportation, 499 So. 2d 855 (Fla. 1st DCA 1987).

58. Finally, Section 456.003(5), Florida Statutes, on its face, is inapplicable to an evaluation of ISF's proposal or DOH's proposed award of the contract to ISF, because ISF's



proposal does not involve any DOH "expenditures" for "licensure costs."

59. The Amended Protest/Petition should be dismissed on the merits.

Attorneys Fees And Costs Issue

60. On March 14, 2003, Intervenor ISF filed an Affidavit in Support of Intervenor's Motion to Compel and for Sanctions, which Motion to Compel and for Sanctions had been pending since its filing on February 4, 2003. Also on March 14, 2003, Respondent DOH filed a Transcript of the two hearings on the pending Motion to Compel and for Sanctions. These two hearings took place on February 6, 2003. Intervenor's Attorney's Affidavit as to Costs and Fees seeks \$214.25 in costs and \$1,705.00 in attorney's fees, totaling \$1,919.25.

61. On March 18, 2003, Petitioner Consultech filed its Combined Response in Opposition (to the pending Motion) and Attorney's Affidavit as to Costs and Fees.

62. Neither Petitioner nor Intervenor has filed affidavits of other attorneys as to reasonableness, vel non, of the amounts claimed.

63. Petitioner's "request for immediate discovery," contained in its Response, to seek billing information concerning hours listed by Intervenor's counsel, Mr. Schoenwalder, for the 5.8 hours he claims for driving to

Jacksonville from Tallahassee, waiting there for Consultech's President to appear for her deposition, and driving back to Tallahassee when she did not appear, and concerning the 1.5 hours in fees claimed for work done by Jennifer Tschetter in connection with the non-appearance by Consultech's President, is denied.

64. Although the charges of the court reporter for the deposition which did not take place February 3, 2003, and for the transcripts of the telephonic hearings on the pending motions could be estimated, they are not adequately itemized in Intervenor's Affidavit. Moreover, the telephonic hearing transcripts were filed by Respondent, who presumably paid for them. There also is no evidence of Ms. Tschetter's involvement in this case or any explanation of the fees attributed to her. Therefore, these claims for costs and fees are denied.

65. However, any ordinarily prudent person knows that just ground travel time from Tallahassee to Jacksonville and back amounts to between five and six hours. Therefore, it is not necessary to permit Petitioner to explore by discovery (see Conclusion of Law 63), or by scheduling further hearings, whether Intervenor's counsel had any opportunity to do anything of a billable legal nature at ISF's offices instead of attending the deposition, as alleged in Consultech's Response.

66. Intervenor is entitled to a minimum of five hours in fees for Attorney Schoenwalder, at \$250 per hour or a total of \$1250 from Petitioner. Payment of same is hereby ordered.

RECOMMENDATION

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

RECOMMENDED that the Florida Department of Health enter a final order awarding its RFP DOH02-021 CEU Tracking Systems Contract to Intervenor Information Systems of Florida, Inc., and dismissing the Amended Protest/Petition of Consultech of Jacksonville, Inc.

DONE AND ENTERED this 29th day of April, 2003, in Tallahassee, Leon County, Florida.

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ELLA JANE P. DAVIS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of April, 2003.

## ENDNOTES

1/ See Conclusion of Law 57.

2/ See Blue Shield of Florida, Inc. vs. Agency for Health Care Admin., DOAH Case No. 95-3635BID (RO 9/27/95; FO 10/18/95).

3/ At hearing, however, Ms. Upchurch was permitted to express "concerns" and conjectures that ISF could not do the job as well as Consultech because ISF's proposal involved hiring more staff and outsourcing some of the work, because some of ISF's staff had been trained in South America, and because some of ISF's staff did not hold the same, or in Ms. Upchurch's opinion, "as good," computer certifications as some of Consultech's staff. However, it was not demonstrated that any of these components was foreclosed by the terms of the RFP or explained precisely how they would preclude ISF fulfilling the DOH contract. In any case, ISF offered a performance bond to protect DOH. (See Finding of Fact 31.) See also discussion in Finding of Fact 15 and Endnote 6.

4/ The distinction between an RFP and an invitation for/to bid is set forth in Systems Development Corp. vs. Department of Health and Rehabilitative Services, 423 So. 2d 433 (Fla. 1st DCA 1982). In that case, the appellate court stated:

Implicit in the definition of an RFP is the underlying rationale that, in some types of competitive procurement, the agency may desire an ultimate goal but cannot specifically tell the offerors how to perform toward achieving that goal; thus, a ready distinction arises between an RFP and IFB. Typically, an IFB is rigid and identifies the solution to the problem. By definition, the invitation specifically defines the scope of the work required by soliciting bids responsive to the detailed plans and specifications set forth. On the contrary, an RFP is flexible, identifies the problem, and requests a solution. Consideration of a response to an IFB is controlled by cost, that is the lowest and best bid, whereas consideration of an offer to an RFP is controlled by technical excellence as well as cost.

5/ The RFP scoring system specifies that "both the presence and quality of the responses will be considered in assigning a score." The RFP also states it is worth "one (1) point per supportive references up to 9 points." If Consultech had received nine points from each of the five evaluators instead of the points they actually assigned it, this would only raise Consultech's score as follows:  $298 + 35 = 333$  points versus ISF's score of 573.5 points.

6/ "Fraud," "non-responsive proposer," and "not responsible proposer" are terms of art in the context of Section 120.57(3), Florida Statutes, and bid protests brought under that statute. They are not interchangeable concepts. (See TR 132-149.)

In any bid case, "fraud" generally embraces the concept of misbehavior by bidders or agency personnel or collusion of agency personnel with one or more bidders. The legislature also has gone so far as to make "fraud" a standard of proof in the relatively few cases where agencies have rejected all bids. Petitioner herein never alleged in its pleadings fraud, misrepresentation, collusion, or any other "buzz word" that would alert Respondent Agency to this concern. This also is not a situation in which all bids have been rejected.

"Non-responsive proposer" usually refers to an untimely proposal or a proposal which fails to supply a material component requested by the RFP. Petitioner herein never alleged in its pleadings anything in this category, either.

A proposer may be deemed "not responsible" if some component within its proposal is materially false or misrepresented. Petitioner herein never alleged in its pleadings anything of this nature, either.

Petitioner has never suggested that ISF hid costs, only that ISF's proposal charged too much to DOH and raised license fees. Petitioner's Proposed Recommended Order characterizes the exchange at TR-143-149, as Consultech's attempt to proffer evidence and not as an attempt to amend its protest. The Amended Protest/Petition and the Transcript are of record, and speak for themselves, but it may be noted here that the Amended Protest/Petition never mentioned "fraud" or even "misrepresentation;" the undersigned Administrative Law Judge acknowledged that fraud, if proven, is always contrary to competitive bidding; Petitioner declined to make a proffer of evidence of fraud unless ISF's CEO were ordered out of the hearing room over objection; and when ISF's CEO was not excluded

from the hearing room, only the speculation of fraud was proffered by Petitioner upon the conjecture that if a proposal in response to an RFP is complex and/or significantly higher than that of competing proposers it "must" constitute fraud. The attempt to amend the protest in the course of the hearing was denied for the reasons set out in Conclusion of Law 57.

7/ Consultech portrayed its proposal as being for \$1,300,000 over a period of 2-1/2 years with an annual profit of \$2,000,000 to be shared with DOH as well as all profits above \$2,000,000 to be returned to DOH, and portrayed ISF's proposal as being for \$13,600,000 for the same 2-1/2 year period with no mention of profit-sharing. These figures, in fact, appear in the respective proposals. Assuming, arguendo, but not ruling, that the foregoing portrayal were true, it still would not be controlling. The quality of each proposal must be weighed by the evaluation team. (See the discussion in Finding of Fact 15).

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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.