STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JUST FOR KIDS, INC.,)
)
Petitioner,)
)
vs.) Case No. 03-2168BID
)
PALM BEACH COUNTY SCHOOL)
BOARD,)
)
Respondent.)
_____________________________)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case in West Palm Beach, Florida, on August 19 and 20, 2003, before Administrative Law Judge Michael Parrish of the Division of Administrative Hearings

APPEARANCES

For Petitioner: Paul A. Turk, Esquire
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For Respondent: Stephen L. Shochet, Esquire
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STATEMENT OF THE ISSUES

The issues in this case concern whether Respondent's action in awarding a contract to two proposers under Request for Proposal No.: 03-C014B; Nursing Services, is contrary to the

agency's governing statutes, the agency's rules or policies, or the solicitation specifications, as well as whether such award was clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

On or about April 16, 2003, a recommendation was sent by the Purchasing Department of the School District of Palm Beach County, Florida, to the School Board of Palm Beach County, Florida (Respondent or School Board), recommending that a contract for nursing services for Exceptional Student Education students be awarded to both Maxim Healthcare Services, Inc. (Maxim), and Private Care, Inc. (Private Care).

Petitioner herein, Just For Kids, Inc. (Just for Kids), timely filed its informal and formal bid protests and otherwise fully complied with all requirements to have its protest heard before the Division of Administrative Hearings (DOAH).

At the final hearing, Petitioner presented the testimony of all four members of the evaluation committee, Janice Miller, Kathleen Leith, Pamela Buchanan, and Dr. John Sargeant, as well as the Purchasing Agent who acted as facilitator for the committee, Karen Brazier, and the Director of Purchasing, Sharon Swan. In addition, Petitioner presented the testimony of its administrator, Felisa Robinson, and its Clinical Director of

Services, Kathi Deakyne. Respondent did not call any additional witnesses.

Petitioner's Exhibits 1 through 27 were admitted into evidence without objection. Respondent did not offer any exhibits. The transcript of the formal hearing was filed with DOAH on September 3, 2003. The parties' Proposed Recommended Orders were timely submitted and have been carefully considered during the preparation of this Recommended Order. All citations to the Florida Statutes are to the current version, unless otherwise indicated.

FINDINGS OF FACT

Findings admitted by all parties:

1. On February 28, 2003, a request for proposal, Request for Proposal No.: 03-C014B; Nursing Services (the "RFP"), was issued by the Purchasing Department for the School District of Palm Beach County.

2. The purpose of the RFP was to establish a contract which would provide the School Board, with nursing services to individual students, whose Individual Education Plan indicated medical needs so severe as to require a nurse during the school day. The nursing services were to be provided by Registered Nurses ("RNs"), Licensed Practical Nurses ("LPNs"), and Certified Nurse Assistances ("CNAs").

3. The nursing services under the RFP were to also include training in procedures for care of Exceptional Student Education ("ESE") students who needed services such as tube feeding, catherization, seizure precautions, etc.

4. The contract period for the nursing services was from July 1, 2003, through June 30, 2005, with an estimated budget of $3,000,000.

5. The proposal return date for the RFP was April 2, 2003.

6. The evaluation committee met to discuss the proposals on April 9, 2003.

7. The Purchasing Department solicited proposals from 12 companies regarding the RFP.

8. Only three (3) companies actually responded to the Purchasing Department's solicitation: Just for Kids, Maxim, and Private Care.

9. The RFP designated four areas of criteria to be evaluated in relation to the RFP: Experience and Qualifications of Firm and Staff (40 possible points), Scope of Service (20 possible points), Cost of Services (30 possible points), and Minority/Woman Business Participation (10 possible points).

10. The RFP did not request or require that a proposer state how long it had been in business or state that a proposer would receive additional points the longer it had been in business.

11. Section 10 of the RFP, Scope of Services, required among other things, that all the proposer's RNs, LPNs, and CNAs be professionally licensed, and that the proposer become a Medicaid provider for the District by the contract date.

12. The Scope of Services section of the RFP required a proposer to agree to design and implement a minimum of three in-service programs designated for the District for non-medical staff in procedures and care of students.

13. In Section 12.8, Cost of Services, of the RFP proposers were only instructed to state the hourly rate for RNs, LPNs, and CNAs.

14. Nothing in the RFP indicated how the committee would evaluate the costs of services.

15. Section 12.9, Minority/Woman Business Participation, of the RFP stated that a proposer could sub-contract minority business participation and receive participation points.

16. Nothing in the RFP indicated how Minority/Woman Business Participation points would be awarded.

17. The members of the evaluation committee were Kathleen Leith, Janice Miller, Pamela Buchanan, and John Sargeant.

18. Dr. Sargeant was elected as the chairperson of the committee.

19. Ms. Buchanan was selected to take minutes of the meeting and Ms. Leith was chosen to total the score sheets.

20. The committee awarded points for Experience and Qualifications of Firm and Staff as follows: Just for Kids 35 points; Maxim 40 points; and Private Care 36 points.

21. The breakdown of the proposers' scores was as follows:

Criteria	Just for Kids	Maxim	Private
Experience (40 total)	35	40	36
Scope of Service (20 total)	17	20	15
Cost (30 total)	28	26	30
Minority (10 total)	4	0	10
Total	84	86	91

22. Ms. Buchanan's hand-written minutes regarding the committee meeting were given to Dr. Sargeant. These minutes cannot be located. The Respondent asserts that typed minutes were made of those handwritten minutes.

23. On or about April 16, 2003, a recommendation was sent by the Purchasing Department to the School Board recommending that the contract be awarded to Private Care and Maxim.

24. Within 72 hours of the posting of the recommendation to award the RFP to Maxim and Private Care, Just for Kids filed its notice of protest and posted the required bond.

25. On May 12, 2003, Just for Kids met with the School District staff in an attempt to informally resolve the issues set forth in Just for Kids' Petition.

Facts established by evidence at hearing

26. Services were to be provided to approximately 1300 students including approximately 11 who would need private duty, or one-to-one nursing care. The contract period for the nursing services was from July 1, 2003 through June 30, 2005, with an estimated budget of $3,000,000.

27. The second paragraph of a Memorandum provided to the committee members stated that "The following procedures will be used to evaluate the proposals and award contract(s)." The Memorandum, in paragraph numbered 6, also instructed the committee members that the committee chairperson must provide a written recommendation containing various information, to the purchasing agent, signed by the chairperson and the Director of ESE no later that 1:00 p.m. on Monday, April 14, 2003. Information that was to be included in the written recommendation was the "[r]ecommendation of acceptable proposal(s) with an explanation for the basis of selection and non-selection." (Emphasis added).

28. The School Board, through its Policy 6.14, established the Purchasing Department to perform the District's purchasing

functions in compliance with applicable Florida Statutes and applicable rules of the State Board of Education.

29. The Purchasing Department is a support department "dedicated to providing professional and efficient procurement services and supports the activities of the School District, which includes: education, financial responsibility, and community service, through contracting for all commodities and services; by maintaining procedures which foster fair and open competition, inspiring public confidence that all contracts are awarded equitably and economically; and by acquiring the greatest possible value and quality in services and products, with timely delivery."

30. The Purchasing Department adopted procedures applicable to all District personnel involved in the requisitions, receiving, transferring, and replacement of supplies, material, equipment and services. "The purpose of [the] manual is to point out District Policy and Procedure in respect to purchasing and to serve as a general framework within which consistent sound business decisions can be made."

31. Chapter 16 of the Purchasing Department Manual sets forth the procedures regarding requests for proposals. Section 16-4(F) of the Purchasing Manual requires that committee member's evaluations of proposals "must be done in accordance with the criteria contained in the RFP." Section 16-4(H) states

that "[W]hen the committee completes its evaluation, it will submit a recommendation through the Principal/Department Head to the Purchasing Agent. A copy of the committee minutes will accompany the recommendation." Further, Enclosure 16-1 to Chapter 16, RFP Evaluation Memorandum, states that the "committee must provide a written recommendation to the Purchasing Agent signed by the Committee Chairperson and the Principal/Department Head."

32. Section 16-5(B) requires that members of the evaluation committee "shall not have any financial interest in or <u>any personal relationship with any of the proposing firms</u>." (Emphasis added). Section 16-5(D) states that "[p]roposals shall ONLY be evaluated by using the criteria listed in the EVALUATION CRITERIA section of the RFP. Initial evaluation must be based solely on the proposal submitted, no other additional information is to be used."

33. Section 16-5(C) requires that each "member of the evaluation committee must receive a complete copy of each proposal, a copy of the original RFP including all addenda, and an evaluation committee Scoring Sheet for each proposal. . . . Each committee member should have a preliminary score entered for each proposal prior to the first committee evaluation meeting." Section 16-5(F) states that "[a]fter discussions and

reports, each member will review their scoring sheets and pass them to the Chairperson for tabulation."

34. Section 16-5(H) requires that "[o]nce the finalists have been rated the committee should review the process and reach a consensus on the ratings and on a recommendation for award to the first ranked proposer(s)." And enclosure 16-1 goes on to provide that "[t]he committee must [then] provide a written recommendation to the Purchasing Agent signed by the Committee Chairperson and the Principal/Departmental Head."

35. Section 16-5(I) mandates that the District may only negotiate and recommend the award to the next highest rated proposer if an agreement cannot be reached with the highest rated proposer. According to Section 16-5(B), the purchasing agent who issued the RFP, in this case Ms. Brazier, is a non-voting member of the evaluation committee and acts in an advisory role.

36. The facilitator for the Purchasing Committee, who had no vote, was Ms. Brazier.

37. The members of the evaluation committee collectively had the requisite experience and knowledge in the program areas and service requirements for which the subject nursing services were being sought. Each of the panel members was directly and intimately involved with ESE students on an almost daily basis. The Chairperson, Dr. Sargeant, and committee member Ms. Leith,

are both Managers in the ESE Department. Ms. Miller is ESE Team Leader for the School District's Area 2 office and Ms. Buchanan is a principal of an elementary school with a high concentration of medically complex students. Each of the committee members has an advanced degree in education.

38. At the beginning of its deliberations, the committee members decided to award points by consensus rather than individually.

39. The RFP did not request or require that a proposer state how long it had been in business or state that a proposer would receive additional points the longer it had been in business.

40. Sections 4.6, 4.7, and 13.5 of the RFP read as follows:

> 4.6 The proposal with the highest number of points will be ranked first; <u>however, nothing herein will prevent the School Board of Palm Beach County, Florida, from making multiple awards and to deem all proposals responsive, and to assign work to any firm deemed responsive</u>. (Emphasis added
>
> 4.7 The District reserves the right to further negotiate any proposal, including price, with the highest rated proposer. If an agreement cannot be reached with the highest rated proposer, the District reserves the right to negotiate and recommend award to the next highest proposer or subsequent proposers until an agreement is reached.
>
> * * *

> 13.5 The Evaluation Committee reserves the right to negotiate further terms and conditions, including price with the highest ranked proposer. If the Evaluation Committee cannot reach a mutually beneficial agreement with the first selected proposer, the Committee reserves the right to enter into negotiations with the next highest ranked proposer and continue this process until agreement is reached.

41. The committee discussed the Experience and Qualifications of Firm and Staff of each of the three proposers. During the committee discussion, Ms. Miller and Ms. Buchanan indicated their preliminary intention to award Just for Kids higher points than were ultimately awarded to that company.

42. During the evaluation of Private Care's Experience and Qualifications, Ms. Leith advised the committee that she personally knew a Private Care employee, Sheryl Policastro, and advised the committee that she believed Ms. Policastro's experience as a parent of a child with a special need would allow Ms. Policastro to serve as true liaison between Private Care, the District, and the parents of the students requiring special nursing services. Ms. Leith stated that she wanted to give Private Care 38 points for its experience because of Ms. Leith's knowledge of Mrs. Policastro's skills and experiences. The comments of Ms. Leith notwithstanding, the ultimate score for Private Care was 36 points, rather than the 38 points preliminarily indicated by Ms. Leith. Ms. Leith was a

Child Find Specialist with the School District from 1982 to 2000. While working with Child Find, Ms. Leith identified Ms. Policastro's child as having special needs. According to Ms. Leith, Ms. Policastro's child was the most severely involved child that the School District ever had. Ms. Leith does not know Mrs. Policastro very well. Ms. Leith has seen Mrs. Policastro only about six times. Ms. Leith has never socialized with Mrs. Ploicastro. Ms. Leith's "best friend" became Mrs. Policastro's child's private duty nurse.

43. During the evaluation of Scope of Service, Dr. Sargeant stated that he did not see that Just for Kids was a Medicaid provider or that it could become one in time for the contract. This was immediately corrected by one of the other committee members.

44. Dr. Sargeant also questioned where in the proposal from Just for Kids was there information about providing training to non-medical District staff and about Just For Kids providing four RN supervisors as required by the specifications.

45. Nothing, however, in Just for Kids' proposal indicated that Just for Kids was only in business for three years. In fact, the documents attached to its proposal demonstrated unequivocally that Just for Kids had been in business since 1997. In addition, the RFP expressly stated for proposers to state "the experience your firm has had in the <u>past three years</u>

providing nursing services similar to those requested by the District." (Emphasis added). Just for Kids was not allowed to correct the evaluation committee's misapprehension as no comments were allowed to be made and, in fact, Ms. Brazier refused Ms. Deakyne's request to clear up any erroneous statements made at the meeting regarding Just for Kids.

46. The Committee considered and discussed points for M/WBE Ownership and Participation. Private Care received the full ten points because it was a minority-owned business certified by the School District. Just for Kids, as allowed by the RFP, sub-contracted with a minority owned business for 10% of its contract. During the discussion of Just For Kids, committee members discussed awarding from 2 points to 8 points. Ultimately, Just for Kids was awarded 4 participation points out of the possible 10 for its 10 percent sub-contracting with a minority owned business. The committee did not award any M/WBE points to Maxim because Maxim was not a minority-owned business and Maxim did not assert that it had sub-contracted with a minority-owned business for any portion of the work under the subject proposal.

47. At the end of the Evaluation Meeting, the committee had ranked Private Care first. They also discussed and left open the possibility that the contract could be jointly awarded to Private Care and to Maxim.

48. After the meeting, neither Ms. Miller, Ms. Leith, nor Ms. Buchanan had anything more to do with the RFP. After the evaluation committee meeting ended, Dr. Sargeant had meetings with Ms. Brazier and with his supervisor, Russell Feldman, who is the Director of the ESE Department. Mr. Feldman and Dr. Sargeant, in conjunction with Ms. Brazier, decided to recommend the contract be awarded to Maxim and Private Care. After the evaluation committee meeting, Dr. Sargeant and Ms. Brazier were not finished and Ms. Brazier participated in post-evaluation committee meetings with Dr. Sargeant and Mr. Feldman to make sure policies and procedures were followed and to act in an advisory position regarding the request for proposal. None of those meetings were open to the public, no notice was given of the meetings, and the meetings were not recorded.

49. On April 9, 2003, Dr. Sargeant and Ms. Brazier met. At this time, Dr. Sargeant decided to recommend to his boss that the School Board award the contract to both Maxim and Private Care. On April 10, 2003, Ms. Brazier and Dr. Sargeant met with Private Care and then with Maxim. The companies were advised that they would both be recommended to the Board. On or about April 16, 2003, a recommendation was sent by the Purchasing Department to the School Board recommending that the contract be awarded to both Private Care and Maxim.

50. Dr. Sargeant never presented a written recommendation to Ms. Brazier, or anyone at the Purchasing Department, signed by him and the Director of ESE. Ultimately, the Purchasing Department prepared a written recommendation that, among other things, stated that it was the "recommendation of the committee" to award the contract to the two highest rated proposers, Private Care and Maxim.

51. At the conclusion of a meeting held on May 12, 2003, to attempt informal resolution of the matters at issue here, the School District advised Just for Kids that the award process was going to be stayed while it attempted to resolve the matter. On May 20, 2003, the School District advised Just for Kids that it was sending the Petition to the DOAH. At that time, unbeknown to Just for Kids and to Ms. Swan, legal counsel for the School Board, had already decided to present the recommendation to the School Board on its May 21, 2003, consent agenda as an emergency contract. No notice of the May 21, 2003, meeting was provided to Just for Kids. As a result of not receiving notification regarding the May 21, 2003, School Board Meeting, Just for Kids missed an opportunity to address the School Board regarding its protest to the proposed School Board action.

52. After the May 21, 2003, School Board meeting, the School Board's attorney advised Just for Kids' counsel that the School Board had made an emergency award of the contract to

Private Care and Maxim. On June 9, 2003, Just for Kids' Petition was sent to DOAH. An Order was entered on July 25, 2003, which allowed Just for Kids to amend its Petition. A final administrative hearing took place on August 19 and 20, 2003.

53. Just for Kids was founded in 1997 by Ms. Robinson, Ms. Deakyne, and Stuart Russell. Just for Kids provides private duty nursing care to critically ill children in Palm Beach County, Florida. Prior to Just for Kids submitting its proposal regarding the RFP, it provided private duty nursing services to over 200 children in Palm Beach County, Florida, including students who attended school in the Palm Beach County School District. Just for Kids also provided in-home pediatric nursing care as well as nursing services to a number of non-profit organizations in Palm Beach County. Just for Kids has approximately 287 nurses on its staff.

CONCLUSIONS OF LAW

54. The Division of Administrative Hearings has jurisdiction in this matter pursuant to Section 120.57.

55. Section 120.57(3)(f) 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, proposals, or replies, 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 solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

56. The basic principles governing the disposition of protests in cases involving agency invitations to bid or requests for proposals are described as follows by Administrative Law Judge Stuart M. Lerner in his Recommended Order in SBR Joint Venture vs. Miami-Dade County School Board, DOAH Case No. 03-1102BID (Recommended Order issued August 1, 2003):

> 70. Section 120.57(3), Florida Statutes, sets forth the "procedures applicable to protests to contract bidding or award[s]" by "agencies," such as the School Board, that are subject to the provisions of Chapter 120, Florida Statutes. See Sublett v. District School Board of Sumter County, 617 So. 2d 374, 377 (Fla. 5th DCA 1993)("A county school board is a state agency falling within Chapter 120 for purposes of quasi-judicial administrative orders."); Davis v. School Board of Gadsden County, 646 So. 2d 766, 768 (Fla. 1st DCA 1994)("[T]he Administrative Procedure Act of 1974, section 120.50 et seq., Florida Statutes (1993) [APA] governs school boards and other state agencies alike."); and Mitchell v. Leon County School Board, 591 So. 2d 1032, 1033 (Fla. 1st DCA 1991)("Petitioner is correct that the [Leon County School] Board is an agency for purposes of Florida's Administrative Procedure Act, chapter 120, Florida Statutes.").

* * *

73. The "de novo proceeding" that, pursuant to the mandate of Section 120.57(3), Florida Statutes, must be conducted by an Administrative Law Judge when an "adversely affected" person has filed a "competitive-procurement protest, other than [one involving] a rejection of all bids," and there are disputed issues of material fact, is "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" based upon the information that was available to the agency at the time it took such action. State Contracting and Engineering Corporation v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1st DCA 1998); Cf. Fairbanks North Star Borough School District v. Bowers Office Products, Inc., 851 P.2d 56, 60 (Alaska 1992)("The determination of whether the school district had a reasonable basis for its decision should be made based on the information the school district had at the time it awarded the contracts."). The standard of review the Administrative Law Judge is required to employ in evaluating the "protested" agency action is a deferential one. If the Administrative Law Judge concludes that the agency's procurement action had a reasonable basis in fact and law, the Judge may not recommend that the agency reverse its action, even if the Judge, had he or she been in the agency's position, would have taken a different course of action. Compare with Latecoere International, Inc. v. Department of the Navy, 19 F.3d 1342, 1355-56 (11th Cir. 1994)(" The APA provides in pertinent part: "The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be--(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." This standard requires a

disappointed bidder to show 'either that (1) the procurement official's decisions on matters committed primarily to his own discretion had no rational basis, or (2) the procurement procedure involved a clear and prejudicial violation of applicable statutes or regulations.' This deferential standard reflects the respect that reviewing courts are required to accord to agencies in their evaluation of bids and in their interpretation and application of procurement regulations. 'While contracting officers may not opt to act illegally, they are entitled to exercise discretion upon a broad range of issues confronting them, including considerations of price, judgment, skill, ability, capacity, and integrity in the selection of businesses with whom the government will enter into contracts.' Accordingly, reviewing courts should be concerned with whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion. Proof that the award lacked a reasonable basis generally establishes arbitrary and capricious action. Thus, if a reviewing court finds a reasonable basis for the agency's action, the court should stay its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations. Only when the court concludes that there has been a clear violation of duty by the procurement officials should it intervene in the procurement process and proceed to a determination of the controversy on the merits.")(citations omitted); Cincom Systems, Inc. v. United States, 37 Fed. Cl. 663, 671-72 (1997)("Contracting officials may properly exercise wide discretion in their evaluation of bids and the application of procurement regulations. . . . It is well-settled that courts should respect acts of procuring officials when they exercise their discretionary functions. The court should

> not substitute its judgment for that of a procuring agency and should intervene only when it is clear that the agency's determinations were irrational or unreasonable. It is the burden of the aggrieved bidder to demonstrate that there is no rational basis for the agency's determination.")(citations omitted); and Herbert F. Darling, Inc. v. Beck, 442 F. Supp. 978, 981 (W.D. N.Y. 1977)("The question before the court on the defendants' motion for summary judgment is whether the Regional Administrator's decision disapproving the proposed award to Darling had a rational basis. This standard of review is designed to ensure that judicial deference is given to the well-reasoned decisions of E.P.A. officials in interpreting the agency's own procurement and contracting regulations. A court may not set aside agency action solely because it would have interpreted the bidding procedures or the regulations differently had it made the initial determination.")(citations omitted).

57. The Recommended Order in SBR Joint Venture also contains the following observations in endnotes 27 through 29:

> 27/ An agency's decision or intended decision will be found to be "clearly erroneous" if it is without rational support and, consequently, the Administrative Law Judge has a "definite and firm conviction that a mistake has been committed." U.S. v. U.S. Gypsum Co., 68 S. Ct. 525, 542 (1948); see also Pershing Industries, Inc. v. Department of Banking and Finance, 591 So. 2d 991, 993 (Fla. 1st DCA 1991)("It is axiomatic that an agency's construction of its governing statutes and rules will be upheld unless clearly erroneous. If an agency's interpretation is one of several permissible interpretations, it must be upheld despite the existence of reasonable alternatives.")(citations omitted); Motel 6,

Operating L.P. v. Department of Business Regulation, Division of Hotels and Restaurants, 560 So. 2d 1322, 1323 (Fla. 1st DCA 1990)("It is axiomatic that an agency's construction of its governing statutes and rules will be upheld unless clearly erroneous; if an agency's interpretation is one of several permissible interpretations, it must stand despite the existence of other reasonable alternatives."); and Hinton v. Judicial Retirement and Removal Commission, 854 S.W.2d 756, 758 (Ky. 1993)("The standard of review on appeals from the Judicial Retirement and Removal Commission is that the Supreme Court must accept the findings and conclusions of the commission unless they are clearly erroneous; that is to say, unreasonable.").

28/ An act is "contrary to competition" if it unreasonably interferes with the objectives of competitive bidding, which, it has been said, are:

> [T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids.

Wester v. Belote, 138 So. 721, 723-24 (Fla. 1931); and Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977).

29/An "arbitrary" action is "one not supported by facts or logic, or [is] despotic." A "capricious" action is "one

> which is taken without thought or reason or [is] irrational[]." Agrico Chemical Co. v. Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978); see also Board of Clinical Laboratory Personnel, v. Florida Association of Blood Banks, 721 So. 2d 317, 318 (Fla. 1st DCA 1998)("An 'arbitrary' decision is one not supported by facts or logic. A 'capricious' action is one taken irrationally, without thought or reason."); and Dravo Basic Materials Company, Inc. v. Department of Transportation, 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992)("If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is [not] arbitrary.").

58. The general nature of the evidence in this case as well as the general nature of the issues to be addressed in this case, are reminiscent of the evidence and issues presented in Optiplan, Inc. v. School Board of Broward County, Florida, DOAH Case No. 95-4560BID (Recommended Order issued December 22, 1995); reversed on other grounds, 710 So. 2d 569 (Fla. 4th DCA 1998). The Recommended Order in the Optiplan case included the following observations, which also seem to be relevant here:

> 107. There were some scores by some members of the Insurance Committee that, on the record in this case, appear to be what can best be described as unexplained aberrations. Because they are unexplained, the evidence is insufficient to establish that these apparent aberrations were based on arbitrary considerations. It is possible they were merely honest mistakes. It is possible there is some logical explanation for some or all of the apparent aberrations,

which explanation is not part of the record in this case because the members who made those scores were not called as witnesses or, if called, were not asked about those scores. Unexplained aberrations are an insufficient basis upon which to conclude that bidding process is arbitrary.

* * *

131. While it is possible that some of the scoring decisions about which Optiplan complains may have been arbitrary, there is no persuasive competent substantial evidence in the record of this case to establish that such is the case. Further, on the record in this case there is no way in which the impact of any such possible arbitrary scoring can be quantified. Absent quantification it cannot be shown that any such possible arbitrary scoring resulted in any substantial injury to the Petitioner's interests.

132. A great deal of the Petitioner's argument appears to be based on the notion that an unexplained deviation from an expected scoring result constitutes proof that the unexpected result was the result of some arbitrary action by one or more Committee members. Such is not the case. Deviations from expectations can result from any number of different reasons. In order to demonstrate entitlement to relief from unexpected results, the Petitioner must present evidence of the reason from the results and must prove that the reason constituted an arbitrary, illegal, fraudulent, or dishonest act. Absent such proof, relief must be denied.

* * *

135. In brief conclusion, the evidence in this case is an insufficient basis for granting the relief sought by the Petitioner. The few instances of mistaken

> scoring that were actually proved were too few in number to have any material impact on the average scores. Unexplained aberrations are an insufficient basis upon which to conclude that a bidding process is arbitrary. Accordingly, the Petition and Formal Protest should be dismissed and all relief requested in the Petition should be denied.

59. Turning first to Petitioner's contention that the make-up of the evaluation committee did not comply with Section 287.057(17), Florida Statutes, Petitioner asserts that the members did not have sufficient experience and knowledge in the program areas and service requirements for the ESE recipients of the nursing services being procured through the RFP. As noted in the Findings of Fact, above, the greater weight of the evidence is otherwise. Inasmuch as the committee members were sufficiently qualified, there was no deviation from the requirements of Section 287.057(17), Florida Statutes.

60. Petitioner also argues that the contract award process was defective and should be set aside because of certain statements made by Dr. Sargeant during the committee's discussion of the "Scope of Service" component of the proposals. Specifically, Petitioner points to Dr. Sargeant’s statements to the effect that he did not see that Just for Kids was a Medicaid provider or that it could become one in time for the contract. However, Dr. Sargeant's oversights reflected in his comments were immediately corrected by one of the other committee

members. Dr. Sargeant also questioned where in the proposal from Just for Kids there was information about providing training to non-medical District staff and where in that proposal there was information about providing four RN supervisors as required by the specifications. Petitioner argues that the comments by Dr. Sargeant discussed above were erroneous and that the comments adversely affected the consensus score given to Just for Kids. Petitioner's arguments get bogged down in the trivia and fail to address the questions that might lead to answers that would resolve the real issue at hand. It is obvious from the evidence in this case that Dr. Sargent believed that Just for Kids was entitled to only 17 of the 20 points available for "scope of service," and that he successfully persuaded the other three members of the evaluation committee to agree with his view of the matter. What is not obvious, and what cannot be determined from the record in this case, is whether Dr. Sargent's conclusion that 17 was the proper score was a wise or wonderful determination or an irrational or unreasonable determination. As we learn from the SBR Joint Venture case quoted at length, above, "[I]t is the burden of the aggrieved bidder to demonstrate that there is no rational basis for the Agency's determination." Where the evidence is insufficient to prove that an agency determination was

irrational or unreasonable, there is no basis upon which to set aside the agency decision.

61. In this regard, it should also be noted that there is no requirement that the proceedings of an evaluation committee be error free. See, e.g., Gibbons & Company v. State of Florida, State of Florida Board of Regents, et al., DOAH Case No. 99-0697BID (September 17, 1999), where the Administrative Law Judge stated:

> Even if there were minor errors made during this lengthy procurement process, it has not been demonstrated that any error was made that impaired either the fairness of the process or the correctness of [the selector's] ultimate decision.

Gibbons & Company, at p.77.

62. The evaluation committee did not violate applicable law, regulation, or policy by utilizing consensus voting for awarding points. As noted in the Findings of Fact above, the evaluation committee met on April 9, 2003, in an open meeting fully in accordance with Florida's Sunshine Law, Section 287.011, Florida Statutes. See Silver Express Co. v. District Board of Lower Tribunal of Miami-Dade Community College, 691 So. 2d 1099 (Fla. 3d DCA 1997). At the April 9 meeting, the members of the committee decided to award points by consensus rather than individually. Although the use of consensus voting may not be the best approach for evaluating proposals, there is nothing

about the use of consensus voting that per se runs afoul of the statutes, rules, and decisional law that regulate the competitive procurement process. Further, consensus voting is not prohibited by the subject RFP specifications.

63. Petitioner argues that in evaluating the proposals, the evaluation committee failed to consider the stated evaluation criteria. The greater weight of the evidence is otherwise. The committee considered, discussed, and awarded points for each of the proposers in each of the categories set forth in the Request for Proposals. During the course of the committee's discussions there may have been an occasional minor comment suggesting an oversight of one or more criteria, but there is nothing in the evidence sufficient to support a conclusion that any such oversight gave an advantage to any proposer or worked an injustice on any proposer.

64. Petitioner contends that the committee evaluated the proposers, at least in part, by the use of criteria not included in the RFP. Specifically, Petitioner claims that:

> 1. Nothing in the RFP indicated how the committee would evaluate the Costs of Services.
> 2. Nothing in the RFP indicated how Minority/Woman Business Participation points would be awarded.

65. With regard to both of the issues identified in the immediately preceding paragraph, it is first noted that the

specified shortcomings in the RFP were obvious to anyone who read the RFP, and the most appropriate time and manner to address such matters is by challenge to the language of the RFP prior to the submission of bids. No one filed such a challenge, so all of the proposers must take the RFP as it was written. As noted in the appellate court opinion in Optiplan, Inc. v. School Board of Broward County, 710 So. 2d 569 (Fla. 4th DCA 1998):

> Finally, with respect to the constitutional challenge to the RFP's specifications because it awarded points tied to race-based classifications, we agree with the hearing officer that Optiplan waived its right to contest the School Board's use of the criteria by failing to formally challenge the criteria within 72 hours of the publication of the specifications in a bid solicitation protest. The purpose of such a protest is to allow an agency to correct or clarify plans and specifications prior to accepting bids in order to save expense to the bidders and to assure fair competition among them. See Capeletti Bros. Inc. v. Department of Transp., 499 So.2d 855, 857 (Fla. 1st DCA 1986). Having failed to file a bid specification protest, and having submitted a proposal based on the published criteria, Optiplan has waived its right to challenge the criteria.

66. In regard to the Costs of Services, Petitioner argues that the consideration and calculation of Cost of Services were flawed because the RFP, at paragraph 12.8, Cost of Services, required proposers to state only the hourly rate for the three categories of service providers, RNs, LPNs and CNAs and gave no

indication as to how the committee would evaluate the costs of services.

67. Even though the RFP fails to explain how the information requested at paragraph 12.8 would be evaluated, it was quite clear what information was requested. And once the information was received, the evaluation committee used the information in a reasonable way; perhaps not the best way, but at least in a reasonable way. Reasonable conduct by the evaluation committee is all that is required.

68. In regard to the consideration and scoring of the M/WBE portion of the RFP, Petitioner claims that the criteria of the RFP were flawed because paragraph 12.9 of the RFP stated that a proposer could sub-contract minority business participation and receive participation points, yet gave no indication as to how Minority/Woman Business Participation points would be awarded in such event.

69. Even though the RFP fails to explain how the information requested at paragraph 12.9 of the RFP would be evaluated, it was quite clear what information was being requested. And once the evaluation committee received the information, it was required to evaluate the information in some reasonable way. The maximum number of points available for M/WBE participation was 10. Maxim, which was not an M/WBE certified business and which did not propose to subcontract with

any M/WBE certified businesses, was awarded 0 points because it had 0 M/WBE participation. That seems reasonable. Private Care, which was itself a fully certified M/WBE, was awarded 10 points because it met 100 percent of the requirements and 10 points was 100 percent of the available points. That seems reasonable. Just for Kids was not an M/WBE certified business, but it had subcontracted 10 percent of the work contemplated by the RFP to a business that was certified as an M/WBE business, so it was awarded 4 points based on the subcontracting arrangement. Because there is no issue in this case as to whether Just For Kids received more points than it should, the four points awarded to Just for Kids will be deemed to be reasonable, too, although some might be inclined to think that under the circumstances presented here, 4 points was a bit too high. Where, as here, all of the points awarded in the M/WBE category were awarded on a reasonable basis, there is nothing more that needs to be said on this issue. Under circumstances like these, reasonable is good enough.

70. Petitioner has additional objections based upon the following contentions:

> 1. Respondent failed to follow the provisions governing this procurement in that:
> (a) The initial evaluation was not based solely on the proposal submitted, but permitted additional information to be used because a member of the Committee commented

> as to her personal knowledge about and relationship with an employee of one of the proposers.
>
> (b) The Committee considered and awarded points based upon whether the proposers were in business longer than 3 years, despite the fact that the RFP only asked for experience for the past 3 years.

Petitioner supports these positions based on several allegations, some of which share the common objection that the Respondent failed to follow the provisions of its Purchasing Manual.

71. Based on the foregoing, Petitioner argues that the evaluation committee violated Section 16-4(F) of the Purchasing Manual and Section 16-5(D) which mandate that "[p]roposals shall ONLY be evaluated by using the criteria listed in the EVALUATION CRITERIA section of the RFP. Initial evaluation must be based solely on the proposal submitted, no other additional information is to be used."

72. The language of the Purchasing Manual at Section 16-5(B), mandates that members of the evaluation committee "shall not have any financial interest in or any personal relationship with any of the proposing firms." Relying on this, Petitioner contends that the selection process was improper because of an alleged personal relationship between Kathleen Leith and Cheryl Policastro.

73. Petitioner alleges the committee violated the Purchasing Manual's strictures when it considered committee member Kathleen Leith's comment that she personally knew a Private Care employee, Sheryl Policastro, who was the parent of a child with an exceptional need, a congenital anomaly of his brain. Petitioner's arguments regarding the Policastro issue fail for several reasons. As noted in the Findings of Fact, Ms. Leith and Mrs. Policastro did not know each other very well, had never socialized, and had seen each other only about six times. This is hardly the type of friendship the drafters of the Purchasing Manual had in mind when they used the term "personal relationship." In this regard it is also important to note that the subject prohibition in the Purchasing Manual is that members of evaluation committees "shall not have any . . . personal relationship with any of the proposing firms." (Emphasis added.) Mrs. Policastro is not one of the "proposing firms," she is an employee of such a firm. Further, the discussion about Mrs. Policastro did not arise from information outside the proposal submitted by Private Care. Rather, it arose for information included in Private Care's proposal regarding the skills and experience of its employee, Mrs. Policastro, whom it planned to use in an important role if it were to be awarded the contract.

74. Petitioner also alleges that the committee violated the restriction against using information outside of the proposal by considering whether the proposers were in business longer than three years, despite the fact that the RFP only asked for experience for the past three years. The evidence reflects that Petitioner has failed to meet its burden of proof as to these objections. There is no persuasive evidence that the consensus score given by the committee was affected by any consideration of whether the proposers had been in business for more than the 3 years required by the RFP. Although there apparently was some discussion about the length of experience, all of the committee members testified credibly that their final score was not, in any way based on more than the three-year information.

75. Petitioner contends that the recommendation to award the contract to both Private Care and Maxim was legally impermissible. In support of this contention, Petitioner points to the language at Section 16-5 of the Purchasing Manual which provides, at I:

> The District reserves the right to further negotiate any terms or conditions, including price, with the highest rated proposer. If an agreement cannot be reached with the highest rated proposer, the District reserves the right to negotiate and recommend award to the next highest rated proposer or subsequent proposers until an agreement is reached.

76. It is undisputed that there was no unsuccessful negotiation between the School District and the highest rated proposer, Private Care. Petitioner contends that, because of this, an award to anyone other than Private Care, including a dual award such as occurred here, is defective. In making this argument, Petitioner overlooks the following provisions of the RFP:

> 4.5 The District reserves the right to: (1) accept the proposal of any or all of the items it deems, at its sole discretion, to be in the best interest of the District; and (2) the District reserves the right to reject any and/or all items proposed or award to multiple proposers.
>
> 4.6 The proposals with the highest number of points will be ranked first; however, nothing herein will prevent the School Board of Palm Beach County, Florida, from making multiple awards and to deem all proposals responsive and to assign work to any firm deemed responsive. (Emphasis added.)

77. Notwithstanding the language of the RFP, quoted immediately above, Petitioner argues that, in order for the multiple award to be valid, it had to be at least contemplated and left available by the committee. Petitioner then contends no decision was ever made by the full committee to award the contract to both Private Care and Maxim. Here again, Petitioner falls short of proving its contention. The evidence presented made it clear that the possibility of multiple awards was discussed by the Committee with the decision left to

Dr. Sargeant, the Committee Chairperson, and his boss, the Executive Director of the ESE Department, Russell Feldman. This is supported by the notes of Petitioner's own Director of Nursing, Kathi Deakyne.

78. Petitioner contends that certain meetings between the representative of the Purchasing Department and Dr. Sargeant violated Florida's Sunshine Law, Section 286.011, Florida Statutes, thereby making the award void ab initio. Disputes about alleged violations of Section 286.011 are normally resolved in civil actions in the courts of this state. There does not appear to be any jurisdiction for the judges of the Division of Administrative Hearings to dispose of such disputes. Accordingly, the Petitioner must seek relief related to Section 286.11 in another forum.

79. The failure of the Chairman of the committee to provide a written recommendation does not require that the contract award be set aside. Attached to the packets of proposals provided to each of the committee members was a memorandum describing the proceedings. The memorandum, in relevant part, stated, "6. The committee chairperson must provide a written recommendation to the purchasing agent, signed by the chairperson and the Director of ESE. This is due no later than 1:00 p.m. Monday, April 14th, and must contain the following: . . . ."

80. There is no dispute that this written recommendation was not provided. The question is whether this failure so tainted the process that the award must be set aside. The answer is "no." First, beyond this memo prepared by the Purchasing Agent, Petitioner can point to no requirement in statute, policy, or even in the Purchasing Manual which mandates the subject written recommendation. The written recommendation was neither required by law, nor did its absence in any way adversely impact any of the proposers. Rather, it constituted, at worst, harmless error. E.g. Polk v. School Board of Polk County, 373 So.2d 960 (Fla 1st DCA 1979).

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is RECOMMENDED that the School Board of Palm Beach County, Florida issue a final order dismissing this Bid Protest and denying all relief requested by Petitioner.

DONE AND ENTERED this 7th day of November, 2003, at Tallahassee, Leon County, Florida.

S

MICHAEL M. PARRISH
Administrative Law Judge
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Filed with the Clerk of the
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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.