

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MAD DADS OF GREATER OCALA, )  
INC., )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 03-3670BID  
 )  
DEPARTMENT OF JUVENILE JUSTICE, )  
 )  
Respondent, )  
 )  
and )  
 )  
BAY AREA YOUTH SERVICES, INC., )  
 )  
Intervenor. )  
 )  
----- )  
JUVENILE SERVICES PROGRAM, )  
INC., )  
 )  
Petitioner, )  
 )  
vs. ) Case Nos. 03-3671BID  
 ) 03-3672BID  
DEPARTMENT OF JUVENILE JUSTICE, ) 03-3673BID  
 )  
Respondent, )  
 )  
and )  
 )  
BAY AREA YOUTH SERVICES, INC., )  
 )  
Intervenor. )  
----- )

RECOMMENDED ORDER

On November 13, 2003, an administrative hearing in this cause was held in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of

Administrative Hearings. Immediately prior to the hearing, the Petitioner in Case No. 03-3670BID withdrew its challenge to the award of the bid and made no appearance at the hearing.

Appearances in Case Nos. 03-3671BID, 03-3672BID, and 03-3673BID are as follows:

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in these cases is whether the Department of Juvenile Justice's (Department) proposed award of certain contracts to Bay Area Youth Services, Inc. (BAYS), based on evaluations of proposals submitted in response to a Request for Proposals is clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

The Department seeks to contract with providers of Intensive Delinquency Diversion Services (IDDS) in twenty judicial circuits. On September 8, 2003, Juvenile Services Program, Inc. (JSP), filed Petitions for Formal Hearings challenging the proposed award of contracts in Circuits 5, 6, and 20. The Petitions were forwarded to the Division of Administrative Hearings, which consolidated the cases, and scheduled and noticed the proceeding. BAYS filed a Petition to Intervene in the consolidated cases that was granted without opposition.

Immediately prior to the hearing, the Petitioner in Case No. 03-3670BID withdrew the bid protest and made no appearance at the hearing.

On November 12, 2003, BAYS filed a Motion to Dismiss asserting that the cases should be dismissed based on the alleged failure of JSP to timely post a bond in the correct amount. At the commencement of the hearing on November 13, ruling on the Motion was reserved, and the parties were invited to respond to the Motion as part of the post-hearing submittals. As set forth herein, the Motion to Dismiss is granted.

At the hearing, JSP presented the testimony of five witnesses. BAYS presented the testimony of one witness. Joint

Exhibits numbered 1, 3 through 6, 8, and 10 through 20 were admitted into evidence.

The one-volume Transcript of the hearing was filed on December 3, 2003. By agreement of the parties, the deposition testimony of six additional witnesses was filed by JSP on December 9, 2003. The Department, BAYS, and JSP filed Proposed Recommended Orders on December 12, 2003.

#### FINDINGS OF FACT

1. On July 2, 2003, the Department issued Request for Proposal (RFP) No. V6P01 for operation of IDDS programs in Judicial Circuits 1 through 20. The Department issued a single RFP and anticipated entering into 20 separate contracts, one for each circuit. Each contract was for a three-year period with the possibility of a renewal for an additional three-year period.

2. The RFP was prepared based on a "contract initiation memo" generated within the Department and upon which the scope of services set forth in the RFP was based. The Department assigned one contract administrator to handle the procurement process.

3. An addendum dated July 18, 2003, was issued to the RFP. As amended by the addendum, the RFP required submission of information in a tabbed format of three volumes. Volume I was the technical proposal. Volume II was the financial proposal.

Volume III addressed past performance by the vendor. The addendum also allowed providers to submit some information in electronic format.

4. The addendum requested, but did not require, that it be signed and returned with the submission. BAYS did not return a signed copy of the addendum in its proposal. Failure to sign and return the addendum was not fatal to the consideration of a proposal.

5. The RFP set forth only two criteria for which noncompliance would be deemed "fatal" to a proposal. Failure to comply with a fatal criterion would have resulted in automatic elimination of a provider's response; otherwise, all responses submitted were evaluated.

6. The proposals were opened on July 31, 2003. The contract administrator and staff reviewed the bids to ascertain whether required items were included, and noted the proposed costs on bid tabulation sheets.

7. The first fatal criterion was failing to submit a properly executed "Attachment A" form to a submission. Attachment A is a bidder acknowledgment form. Both BAYS and JSP included a completed Attachment A in the responses at issue in this proceeding.

8. The second fatal criterion was exceeding the Maximum Contract Dollar Amount. RFP Attachment B, Section XIII, provides in relevant part as follows:

The Maximum Contract Dollar Amount will be the Annual Maximum Contract Dollar Amount multiplied by the number of years in the initial term of the Contract . . . .  
EXCEEDING THE ANNUAL MAXIMUM CONTRACT DOLLAR AMOUNT IS A FATAL CRITERION. ANY PROPOSAL WITH A COST EXCEEDING THE ANNUAL MAXIMUM CONTRACT DOLLAR AMOUNT WILL BE REJECTED.

9. The information reviewed as to each provider's cost proposal was set forth in Volume II, Tab 1, which included RFP Attachment J. RFP Attachment J is a cost sheet where providers were required to set forth proposal costs identified as the "Maximum Payment" under their proposal.

10. Attachment K to the RFP identifies the counties served in each circuit, number of available slots in each circuit, and the Annual Maximum Contract Dollar Amount for each circuit. JSP appears to have simply copied information from Attachment K onto Attachment J.

11. The Department's contract administrator was the sole person assigned to review Volume II of the responses. Volume II included the cost proposal, the supplier evaluation report (SER), and the certified minority business enterprise (CMBE) subcontracting utilization plan.

12. Neither BAYS nor JSP exceeded the Annual Maximum Contract Dollar Amount applicable to any circuit at issue in this proceeding. Both BAYS and JSP identified a Maximum Payment equal to the Annual Maximum Contract Dollar Amount as their proposal cost. Both BAYS and JSP received scores of 100 points for cost proposals in all responses at issue in this proceeding.

13. JSP asserts that the instructions as to identification of the Annual Maximum Contract Dollar Amount were confusing and that its actual cost proposal was less than that set forth as the "Maximum Payment" on Attachment J.

14. JSP asserts that it actually listed its cost proposal at the section identified on Attachment J as "renewal term dollar amount proposed." JSP asserts that the Department should have reviewed supporting budget information set forth in Attachment H to the RFP to determine JSP's cost proposal, and that the Department should have determined that JSP's actual cost proposal was less than that of BAYS.

15. The Department did not review the budget information in Attachment H, but based its cost evaluation of the proposals on the total figures set forth on Attachment J. Nothing in the RFP suggests that underlying information as to cost proposals would be reviewed or evaluated. The evidence fails to establish that the Department's reliance on the information set forth on Attachment J was unreasonable or erroneous. The evidence fails

to establish that the Department's scoring of the cost proposals was contrary to the RFP. The evidence fails to establish that JSP is entitled to have its cost proposal re-scored.

16. One of the requirements of the RFP was submission of a "Supplier Evaluation Report" (SER) from Dunn & Bradstreet. The submission of the SER was worth 90 points. Dunn & Bradstreet transmitted most of the SERs directly to the Department, and the Department properly credited the providers for whom such reports were transmitted.

17. The Department's contract administrator failed to examine BAYS submission for the SER, and BAYS did not receive credit for the SER included within its proposal. The failure to credit BAYS for the SERs was clearly erroneous. BAYS is entitled to additional credit as set forth herein.

18. The RFP sought utilization of a CMBE in a provider's proposal. BAYS proposal included utilization of The Nelco Company, an employee leasing operation. The Nelco Company is a properly credentialed CMBE.

19. Under the BAYS/Nelco arrangement, BAYS would retain responsibility for identification and recruitment of potential employees. BAYS performs the background screening and makes final employment decisions. BAYS retains the right to fire, transfer, and demote employees. The Nelco Company would process payroll and handle other fiscal human resource tasks including



insurance matters. The Nelco Company invoices BAYS on a per payroll basis, and BAYS pays based on the Nelco invoice.

20. JSP asserts that under the facts of this case, the participation of The Nelco Company fails to comply with the RFP's requirement for CMBE utilization. BAYS proposals also included utilization of other CMBEs. There is no credible evidence that BAYS utilization of The Nelco Company or of the other CMBEs included within the BAYS proposals fails to comply with the RFP's requirement for CMBE utilization.

21. The Department assigned the responsibility for service proposal evaluation to employees located within each circuit. The contract administrator and staff distributed appropriate portions of Volume I of each proposal to the evaluators.

22. The evidence establishes that the evaluators received the documents and evaluated the materials pursuant to written scoring instructions received from the Department. Some reviewers had more experience than others, but there is no evidence that a lack of experience resulted in an inappropriate review being performed.

23. In two cases, the evaluators worked apart from one another. In one circuit, the evaluators processed the materials in the same room, but did not discuss their reviews with each other at any time. There is no evidence that evaluators were directed to reach any specific result in the evaluative process.

24. JSP asserts that there was bias on the part of one evaluator who had knowledge of some unidentified incident related to JSP. The evidence fails to establish the facts of the incident and fails to establish that the incident, whatever it was, played any role in the evaluator's review of the JSP proposal. JSP also asserts that another evaluator had contact with JSP at some point prior to his evaluation of the RFP responses. There is no evidence that the contact was negative or was a factor either for or against JSP in the evaluation of the RFP responses.

25. The RFP required that each provider's proposal include letters of intent from "local service resources" indicating a willingness to work with the provider and a letter of support from the State Attorney in the judicial circuit where the provider's program would operate.

26. The RFP indicates that Volume I of a provider's response should contain five tabbed sections. The RFP provides that "information submitted in variance with these instructions may not be reviewed or evaluated." The RFP further provides that failure to provide information "shall result in no points being awarded for that element of the evaluation."

27. JSP included letters of support in Tab 5 of Volume I. BAYS included letters of support in a tabbed section identified as Tab 6 of Volume I.

28. JSP asserts that information included in Tab 6 of BAYS proposals should not have been evaluated and that no points should have been awarded based on the information included therein. The evidence fails to support the assertion. Based on the language of the RFP, submission of information in a format other than that prescribed is not fatal to a proposal. The Department reserved the authority to waive such defects and to evaluate the material. Here, the Department waived the variance as the RFP permitted, and reviewed the material submitted by BAYS.

29. JSP asserts that BAYS proposal breached client confidentiality by inclusion of information regarding an individual who has allegedly received services through BAYS. Records regarding assessment or treatment of juveniles through the Department are deemed confidential pursuant Section 985.04, Florida Statutes (2003). The evidence fails to establish that an alleged violation of Section 985.04, Florida Statutes (2003), requires rejection of the BAYS proposals. There is no evidence that the information was released outside of the Department prior to the bid protest forming the basis of this proceeding.

30. The evidence establishes that JSP misidentified the name of its contract manager in its transmittal letter. The evidence establishes that the misidentification was deemed

immaterial to the Department, which went on to evaluate the JSP proposals.

31. The results of the evaluations were returned to the contract administrator, who tabulated and posted the results of the process. On August 25, 2003, the Department posted a Notice of Intent to Award contracts based on the proposals submitted in response to the RFP.

32. Insofar as is relevant to this proceeding, the Department proposed to award the contracts for Circuits 5, 6, and 20 to BAYS.

33. The Department received four proposals from IDDS program providers in Circuit 5 (DOAH Case No. 03-3671BID). According to the Notice of Intended Contract Award, BAYS was the highest ranked bidder with 651.8 points. JSP was the second highest bidder with 642.6 points. White Foundation was the third highest bidder at 630.7 points, and MAD DADS was the fourth bidder at 442.8 points.

34. The evidence establishes that BAYS included its SER in its Circuit 5 proposal. The Department neglected to examine BAYS submission for the SER, and BAYS did not receive credit for its SER. BAYS should have received an additional 90 points, bringing its total points to 741.8.

35. The Department received two proposals from IDDS program providers in Circuit 6 (DOAH Case No. 03-3672BID).

According to the Notice of Intended Contract Award, BAYS was the highest ranked bidder with 649.0 points. JSP was the second highest bidder with 648.8 points.

36. The evidence establishes that BAYS included its SER in its Circuit 6 proposal. The Department neglected to examine BAYS submission for the SER, and BAYS did not receive credit for its SER. BAYS should have received an additional 90 points, bringing its total points to 739.0.

37. The Department received two proposals from IDDS program providers in Circuit 20 (DOAH Case No. 03-3673BID). According to the Notice of Intended Contract Award, BAYS was the highest ranked bidder with 644.2 points. JSP was the second highest bidder with 620.6 points.

38. The evidence establishes that BAYS included its SER in its Circuit 20 proposal. The Department neglected to examine BAYS submission for the SER, and BAYS did not receive credit for its SER. BAYS should have received an additional 90 points, bringing its total points to 734.2.

MOTION TO DISMISS

39. BAYS asserts that the Petitions for Hearing filed by JSP must be dismissed for failure to comply with Section 287.042(2)(c), Florida Statutes (2003), which requires that a protesting bidder post a bond or cash in an amount equal to one

percent of the estimated contract amount by the time a formal written bid protest is filed.

40. Item 8 of the RFP indicated that the bond or cash amount required was one percent of the total contract amount or \$5,000, whichever was less. However, RFP Attachment "B," Section IX, indicates that it replaces RFP Item 8, and provides that the required bond or cash amount is one percent of the estimated contract amount.

41. Pursuant to Section 120.57(3)(b), Florida Statutes (2003), JSP had 72 hours from the announcement of the bid award to file a Notice of Protest and an additional ten days to file a Formal Written Protest. The notice of intended bid award was posted on August 25, 2003. Accordingly, the written protest and appropriate deposits were due by September 8, 2003.

42. The Department's Notice of Intended Award referenced the bond requirement and stated that failure to post the bond would constitute a waiver of proceedings.

43. On September 8, 2003, JSP provided to the Department a cashier's check for \$2,159.70 in relation to its protest of the award for Circuit 5. The contract amount was \$647,910. One percent of the contract amount is \$6,479.10.

44. On September 8, 2003, JSP provided to the Department a cashier's check for \$3,414.52 in relation to its protest of the

award for Circuit 6. The contract amount was \$1,025,857.50. One percent of the contract amount is \$10,258.57.

45. On September 8, 2003, JSP provided to the Department a cashier's check for \$2,231.69 in relation to its protest of the award for Circuit 20. The contract amount was \$669,507. One percent of the contract amount is \$6,695.07.

46. In response to JSP's insufficient cashier's checks, the Department, by letter of September 12, 2003, advised JSP of the underpayment and permitted JSP an additional ten days to provide additional funds sufficient to meet the requirements of the statute. JSP, apparently still relying on the superceded language in the RFP, forwarded only an amount sufficient to bring the deposited funds to \$5,000 in each case.

47. By letter dated September 25, 2003, the Department again advised JSP that the deposited funds were insufficient and provided yet another opportunity to JSP to deposit additional funds. On September 29, 2003, JSP forwarded additional funds to provide the appropriate deposits.

#### CONCLUSIONS OF LAW

48. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.57(1) and 120.57(3), Fla. Stat. (2003).

49. Section 120.57(3)(f), Florida Statutes (2003), provides as follows:

In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered. In a protest to an invitation to negotiate procurement, no submissions made after the agency announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply shall be considered. Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, 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. In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

50. Otherwise stated, the Petitioner has the burden of establishing that the Department's proposed action was clearly erroneous, contrary to competition, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat. (2003). In this case, the burden has not been met.

51. The evidence fails to establish that BAYS' failure to include a signed copy of the RFP addendum in its proposal should



have resulted in a rejection of the BAYS submission. Inclusion of a signed copy was not required by the RFP or by the addendum.

52. The evidence fails to establish that the Department's reliance on the "maximum payment" information set forth on JSP's cost sheet was inappropriate. There is no requirement that the Department examine supporting documentation to determine whether a provider has correctly set forth its own cost proposal. JSP clearly identified a "maximum payment," and the Department properly relied on the information in scoring JSP's cost proposal.

53. There is no credible evidence that the CMBE proposal submitted by BAYS fails to comply with the requirements of the RFP or is otherwise inappropriate.

54. There is no credible evidence that the evaluations performed by the Department employees were improper or biased in any manner. The Department employees were aware of the RFP requirements, were aware of the scoring procedure, and performed their evaluations appropriately. The evidence fails to establish that it was a substantial error for the evaluators to consider the information set forth in Volume I, Tab 6, of BAYS proposal.

55. The evidence establishes that the Department failed to consider the SERs submitted by BAYS in its proposals. Such

failure was clearly erroneous; BAYS is entitled to an award of additional points as set forth herein.

MOTION TO DISMISS

56. As to the Motion to Dismiss filed by BAYS, Section 287.042(2)(c), Florida Statutes (2003), clearly provides that a deposit of one percent of the total contract amount is required by the date upon which the formal written protest is due.

57. Florida Administrative Code Rule 28-110.005(3) provides as follows:

When a bond is required, a notice of decision or intended decision shall contain this statement: "Failure to file a protest within the time prescribed in Section 120.57(3), Florida Statutes, or failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under Chapter 120, Florida Statutes." If the notice advises of the bond requirement but a bond or statutorily authorized alternate is not posted when required, the agency shall summarily dismiss the petition. (Emphasis supplied)

58. The notice of intended award clearly referenced the deposit requirement.

59. In the Department's letters to JSP extending the deadline for filing the deposit, the Department cites no legal authority supporting the extension. In the Proposed Recommended Order filed by the Department in this case, the Department acknowledges that there is no authority to waive or delay the

bond requirement and further acknowledges that JSP's petitions for hearing should have been dismissed. The Department has no legal authority to waive or delay the posting of a proper bond or cash amount. The cited Rule requires that the Department dismiss the cases. The Motion to Dismiss filed by BAYS is granted.

RECOMMENDATION

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

RECOMMENDED that the Department of Juvenile Justice enter a Final Order as follows:

1. Dismissing the Petition for Hearing filed by MAD DADS of Greater Ocala, Inc., in Case No. 03-3670BID based on the withdrawal of the Petition for Hearing.

2. Dismissing the Petitions for Hearing filed by JSP for failure to comply with Section 287.042(2)(c), Florida Statutes (2003), and for the other reasons set forth herein.

DONE AND ENTERED this 16th day of January, 2004, in  
Tallahassee, Leon County, Florida.

*William F. Quattlebaum*

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Filed with the Clerk of the  
Division of Administrative Hearings  
this 16th day of January, 2004.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.