

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MAXIMUS INC.,)
)
 Petitioner,)
)
 vs.) Case No. 04-4609BID
)
 AGENCY FOR PERSONS WITH)
 DISABILITIES,)
)
 Respondent,)
)
 and)
)
 INNOVATIVE RESOURCE GROUP, LLC)
 d/b/a APS HEALTHCARE MIDWEST,)
)
 Intervenor.)
 _____)

RECOMMENDED ORDER

A formal hearing was held pursuant to notice, on February 2, 2005, in Tallahassee, Florida, before Barbara J. Staros, assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: David C. Ashburn, Esquire
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For Respondent: Mary Piccard Vance, Esquire
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For Intervenor: Karen D. Walker, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent's intended award of the contract arising out of Request for Proposal No. 09L04FP4 to Intervenor is clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

On November 12, 2004, the Agency for Persons with Disabilities (Agency) posted its Notice of Intended Award to award a contract to conduct additional reviews of prior service authorizations for individuals enrolled in the Developmental Disabilities Home and Community-Based Services waiver program pursuant to Request for Proposal No. 09L04FP4 (the RFP). The Notice referenced the scores attributable to the three proposals received. Intervenor, Innovative Resource Group, LLC, d/b/a APS Healthcare Midwest (APS)^{1/} was awarded the highest score and Petitioner, Maximus, Inc. (Maximus), received the second highest score. Petitioner timely filed a Petition for Formal Administrative Proceedings challenging the Agency's intended decision. The Petition for Formal Administrative Proceedings was forwarded to the Division of Administrative Hearings on or about December 27, 2004. By agreement of the parties to extend the timeframe as set forth

in Section 120.57(3), Florida Statutes, a formal hearing was scheduled for February 2 and 3, 2005.

On January 13, 2005, APS filed an unopposed Petition for Leave to Intervene, which was granted.

The parties filed a Prehearing Stipulation. The parties stipulated to the admission of Joint Exhibits numbered 1 through 9. At hearing, Petitioner presented the testimony of Richard Zelznak, Lorena Fulcher, and Linda Davis. Petitioner's Exhibits numbered 1 and 2 were admitted into evidence. Intervenor presented the testimony of David Hunsaker and the deposition testimony of Richard Zelznak. Intervenor's Exhibit numbered 1, Mr. Zelznak's deposition, was admitted into evidence. Respondent did not present witness testimony or exhibits.

A Transcript, consisting of two volumes, was filed on February 9, 2005. The parties timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order. All citations are to Florida Statutes (2004) unless otherwise indicated.

FINDINGS OF FACT

Stipulated Facts

1. In accordance with a 2001 legislative mandate, the Developmental Disabilities Program, formerly part of the Department of Children and Family Services and now within the

Agency, established a requirement for prior service authorization (PSA) reviews for individuals enrolled in the Developmental Disabilities Home and Community Based Services waiver (waiver).

2. Following a competitive procurement process, Maximus, Petitioner herein, was awarded a contract to provide PSA reviews for persons satisfying certain selection criteria, and related services.

3. These PSA reviews ensure that services for which reimbursement is provided under the waiver are based on medical necessity.

4. Currently only those cost plans that meet certain selection criteria are reviewed.

5. A 2004 legislative mandate required the Developmental Disabilities program to expand the PSA program to review all support and cost plans for the waiver, including those that do not meet the selection criteria that trigger a PSA review under the Agency's existing contract with Maximus.

6. On or about October 13, 2004, the Agency issued Request for Proposal No. 09L04FP4- Agency for Persons With Disabilities Prior Service Authorization Reviews (the APSAR contract).

7. The RFP sought a vendor to serve as the contracted provider to conduct the additional reviews required by the

2004 legislative mandate (the ASPAR Contractor). The RFP proposals were to include responses to inquiries concerning the qualifications and capabilities of each proposer, as well as the proposed's vendor's proposal for providing the requested services (the technical proposal) and a separate proposal setting forth the proposed vendor's costs for providing such services (the cost proposal).

8. Pursuant to the provisions of the RFP, the ASPAR Contractor will be responsible for reviewing these additional support plans and cost plans in order to ensure that individuals receiving waiver services receive medically necessary services to meet their identified needs.

9. Pursuant to the provisions of the RFP, the ASPAR Contractor will be responsible for determining whether the Developmental Disabilities program is the appropriate funding source for the service(s) identified and shall recommend alternative funding mechanisms.

10. The RFP set forth evaluation criteria and a scoring process in which a proposal could receive a maximum of 100 points, 25 of which are attributable to the cost proposal. The RFP states that "[t]he agency will attempt to contract with the prospective vendor attaining the highest total price."

11. The deadline for submission of proposals in response to the RFP was November 2, 2004.

12. The Agency received proposals from three prospective vendors: APS, Maximus, and First Health Services.

13. On November 12, 2004, the Agency posted its Notice of Intended Award of the APSAR contract to APS.

14. The Notice of Intended Award reflected the prospective vendors' scores as follows: APS, 86.45; Maximus, 82.06; and First Health, 71.52.

15. Of its total score of 86.75, APS received 25 points for its cost proposal as the prospective vendor with the lowest total price.

16. On November 16, 2004, Maximus timely filed a notice of intent to protest the Agency's intent to award the ASPAR contract to APS.

17. Maximus timely filed its formal written protest, a Petition for Administrative Proceedings, with an accompanying bond which satisfied the applicable statutory and RFP requirements.

Findings of Fact Based on the Evidence of the Record

18. APS has standing to intervene in this proceeding.

19. The APSAR contract being procured through the RFP is a fixed price contract.

20. Lorena Fulcher is the Agency's procurement manager for the RFP. When the proposals were received, the Agency screened each of them for compliance with a list of fatal criteria set forth in Section 6.3.1 of the RFP. According to Ms. Fulcher, the purpose of the initial screening was to determine whether the proposals should go to a formal evaluation process. No scoring or points were associated with whether a vendor met the fatal criteria. The Agency determined that all three vendors met the fatal criteria. Therefore, the three proposals were sent to an evaluation committee which was responsible for evaluating the technical aspects of the proposals.

Fatal Criteria

21. Petitioner asserts that Intervenor did not satisfy one of the mandatory requirements of the RFP and, therefore, its proposal should not have been forwarded for further review and scoring by the evaluation committee.

22. Section 5.4 of the RFP states that the mandatory requirements are described as "Fatal Criteria" on the RFP rating sheet and that failure to comply with all mandatory requirements will render a proposal non-responsive and ineligible for further evaluation.

23. Section 6.3.1 of the RFP is entitled, "Fatal Criteria." One criterion reads as follows: "Did the proposal

document and describe at least one year of experience in the developmental disabilities field and with Home and Community Based Services waivers?"

24. According to Ms. Fulcher, the Agency looked at each proposal in its entirety to determine that there was prior experience with the sort of review that the Agency was trying to procure with the RFP.

25. Ms. Fulcher referenced several pages of Intervenor's proposal relating to this criterion that the Agency reviewed in making its determination to send Intervenor's proposal to the evaluation committee.

26. One such reference is contained on page 9 of Intervenor's proposal. That page references Intervenor's experience with Georgia Medicaid since 1999. On page 84 of Intervenor's proposal, that experience is further described as "Prior authorization and Concurrent Review for all Medicaid services under the Rehabilitation Option to individuals with mental health disorders and/or developmental disabilities. Specialized projects include technical assistance to HCBS Waiver providers."

27. Intervenor was formed in the early 1990's and was acquired by APS Healthcare in 2002. Intervenor's proposal explains: "APS Midwest is a wholly owned subsidiary of APS

Healthcare Bethesda, Inc. APS Midwest, formerly known as Innovative Resource Group, was acquired by APS in 2002."

28. Petitioner argues that the Georgia experience should not have been counted because it was experience acquired prior to the 2002 acquisition of Intervenor. Specifically, Petitioner argues that since the Georgia project has been ongoing since 1999 and since Intervenor was not acquired by the APS parent company until 2002, that Intervenor could not have been the provider.

30. APS Healthcare, and its subsidiaries, including Intervenor, are managed as a single entity and many of their services and resources are integrated. The evidence established that the resources of the APS family of companies are available in the performance of the contract.

31. Moreover, the undersigned is not persuaded that Intervenor was prohibited in any way by the language of the RFP or otherwise, from referencing experience obtained by a parent or related corporate entity prior to the 2002 acquisition.

32. Intervenor's proposal contained references to other experience which the Agency considered in determining that Intervenor's proposal met the one-year experience fatal criterion at issue. These included experience obtained in Pennsylvania, Idaho, and other states in the developmental

disabilities field and with home and community based services waivers.

33. The Agency's determination that Intervenor met the "one-year" experience fatal criterion is supported by the evidence of record. The Agency's decision to forward Intervenor's proposal to the evaluation committee was appropriate. Any evaluation or scoring of the content of Intervenor's representations was left to the evaluation committee.

The Cost Proposals

34. Section 4.4 of the RFP reads in pertinent part as follows:

The prospective vendor shall clearly present in the cost proposal the total cost for each deliverable as described in Section 3.6, Task List. A pricing schedule must be presented that indicates a unit cost for each task to be performed, with all task amounts added for a grand total cost for each deliverable.

The total cost of all deliverables will be presented as the proposed total contract amount. The cost proposal must be bound separately.

The vendor must submit as supporting documentation, a detailed line-item budget that delineates and constitutes all costs contained in the proposed total contract amount. The line-item budget shall delineate the number and type of positions that will be required to complete the work identified for each major task, and discrete associated expenses.

Further, Section 4.4 included a grid described as an "Example Format of the Pricing Schedule." The RFP does not state that a proposer must use the grid format provided in this section. The grid includes columns marked "Unit Cost," "Number of Units," "Amount for Year 1," "Amount for Year 2" and "Amount for Year 3." At the bottom of the grid, there is a line for a "Total per year" and there is a line for the "Grand Total."

35. APS used the grid format as shown in Section 4.4 of the RFP. Below the grid, APS included a notation that reads: "Please note that costs are adjusted for years two and three accordingly." Following this notation are four "bullets" one of which reads: "Unit cost for PSA reviews slightly increase to reflect a 1-2% growth rate in years two and three. However, if the number of reviews significantly increase more than this amount, pricing would have to be adjusted accordingly."

36. Petitioner argues that the language of the above referenced "bullet" constitutes a contingent price, as opposed to a fixed price as required by the RFP, and, therefore, Intervenor should have received a score of zero for its cost proposal.

37. Section 6.3.3. of the RFP provides in pertinent part: "Evaluating Cost Proposals--The prospective vendor with the lowest total price shall be awarded 25 points or 25% of

the maximum total score." Section 6.3.3 further provides that the other prospective vendors would be awarded points by dividing the lowest price by the prospective vendor's price and then dividing the resulting percentage by four.

38. The Agency scored the cost proposal by the grand total stated in each proposal. That is, the points assigned for the cost proposals were based solely on the total price proposed. According to Ms. Fulcher, the Agency ignored the bullets for purposes of scoring the cost proposals because the RFP was for a fixed price contract.

39. Petitioner Maximus submitted a total cost proposal in the amount of \$10,259,131. Intervenor APS submitted a total cost proposal in the amount of \$7,460,615.

40. Accordingly, the Agency awarded Intervenor 25 points for submitting the proposal with the lowest grand total cost of the three vendors, and awarded Petitioner 18 points for its grand total cost.

41. There is nothing in the referenced "bullet" in APS' proposal that implies that the grand total might increase. The "bullet" clearly references "unit costs" only. Moreover, Section 4.3 of the RFP states that payment method and pricing will be determined during negotiations. According to Ms. Fulcher, the cost information requested other than the

total cost was to be used only for purposes of negotiating and drafting the contract.

42. Petitioner argues that Intervenor's cost proposal contained mathematical errors that, if corrected, would increase the total cost proposed. The difference between the two proposals was \$2,798,516. The evidence does not establish that if the mathematical errors were corrected, Intervenor's actual cost would have been higher than Petitioner's proposed total cost. Further, Petitioner offered testimony speculating how Intervenor's actual costs might be higher than those reflected in Intervenor's proposal. Petitioner's speculation in this regard is of no consequence. Moreover, the contract is clearly a fixed fee contract. The proposers, including Intervenor, are bound by the fixed total cost reflected in the respective proposals.^{2/}

The Technical Proposals

43. Petitioner asserts that the Agency erroneously scored its technical proposal, thereby depriving Petitioner of points that would have resulted in an award of the contract to Petitioner.

44. The RFP required the vendors to submit sealed technical proposals separate from the cost proposals. In contrast to the cost proposals, the scoring formula for the technical proposals was not based on a ratio comparison of the

best proposal to the other proposals. Rather, the formula for scoring the technical proposals provided that the total score of each technical proposal would be divided by 48 to arrive at a total percentage of 100 that was then converted into points. Thus the formula for scoring technical proposals is not based on a comparison of one vendor's proposal to the others, but is based on how well each vendor did within a possible score of 36.

45. Section 6.3.4 of the RFP sets forth the formula for scoring the technical proposals:

The prospective vendor with the highest rating in this section (36 points) shall be awarded 75% (75 points) of the maximum possible score. Other prospective vendors are awarded points using the following formula: The rating is divided by 48 to determine the points awarded ($36/48=75\%$).

Section 6.3.4 of the RFP also provided three examples applying the formula for awarding points to technical proposals, with each example showing a vendor's points divided by 48.

46. The numerator of the above formula was derived by taking the average of the total points assigned by each of the four evaluators, which was then divided by 48.

47. The average of the evaluators' scores for Petitioner's technical proposal was 30.75. The average of the evaluators' scores for the APS technical proposal was 29.5. Accordingly, when the formula was applied, Petitioner's

technical proposal score was 64.06 ($30.75/48=64.06\%$) and Intervenor's technical proposal score was 61.45 ($29.5/48=61.45\%$).

48. Petitioner argues that because it received the highest technical score of 30.75, it was entitled to 75 points for its technical proposal.

49. Petitioner, nor any other vendor, received a score of 36, the highest possible score for the technical proposal. Because no vendor received the maximum possible technical rating of 36 points, no vendor was awarded the maximum possible score of 75 points for the technical proposals. The agency applied the formula to the three vendors in a consistent manner.

50. While the wording of Section 6.3.4 is awkward, the Agency's interpretation of that section is a reasonable one that was applied equally to all vendors.

Petitioner's Proposal

51. Finally, Intervenor asserts that Petitioner's proposal was non-responsive because it is dependant upon Petitioner continuing to provide services under its existing contract with the Agency. Petitioner's proposal was prepared using a methodology that contemplated allocating some costs to its existing contract and some costs to the contract solicited by the RFP because Petitioner already has certain resources

that can be employed to provide services in the solicited contract.

52. There is no dispute that Petitioner holds a current related contract. The Agency's determination that Petitioner's proposal was responsive in this regard was reasonable. How the costs are to be allocated was subject to evaluation and scoring by the evaluation committee.

CONCLUSIONS OF LAW

53. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case pursuant to Sections 120.569, 120.57(1), and 120.57(3), Florida Statutes.

54. Petitioner has challenged the Department's proposed agency action to award the APSAR contract to APS.

55. The burden of proof resides with the Petitioner. The standard of proof in this proceeding is whether the agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat.

56. The underlying findings of fact in this case are based on a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

57. This de novo proceeding was conducted for the purpose of evaluating the action that was taken by the agency in an attempt to determine whether that action is contrary to

the agency's governing statutes, the agency's rules or policies, or the RFP specifications. See § 120.57(3)(f), Fla. Stat., and State Contracting and Engineering Corporation v. Department of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1998).

58. An agency action is capricious if the agency takes the action without thought or reason or irrationality. An agency decision is arbitrary if it is not supported by facts or logic. Agrico Chemical Co. v. State Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

59. Petitioner argues that the Agency's determination that Intervenor met the "one-year experience" criterion is arbitrary. However, the Agency's conclusion that Intervenor demonstrated one-year of the requested experience is supported by the facts as set forth above, and is not arbitrary.

60. Petitioner argues that the Agency's review of the cost proposals was arbitrary and capricious in that it only took into consideration the total costs opposed to a more detailed examination of the cost proposals. However, Section 6.3.3 of the RFP, quoted above, clearly states that the prospective vendor with the lowest total price shall be awarded 25 points or 25% of the maximum total score. Thus, the scoring of the cost proposal was not arbitrary or

capricious or contrary to the requirements of the RFP.

61. Petitioner argues that the Agency erroneously applied the formula set out in Section 6.3.4 in scoring its technical proposal. However, the RFP states that a score of 36 would receive 75 points. None of the prospective vendors scored 36. Thus, the Agency's action in calculating the score of the technical proposals was not contrary to the language of the RFP.

62. The formula set forth in Section 6.3.4 of the RFP was applied consistently to all three prospective vendor's scores of the technical proposals, and, therefore did not give a competitive advantage to any proposed vendor.

63. Petitioner has not shown that the Agency's proposed action is contrary to the Agency's governing statutes, rules, or policies, or that it is contrary to the RFP specifications.

64. Petitioner has not met its burden of proving by a preponderance of the evidence that the Agency's proposed action of awarding the contract to APS is clearly erroneous, arbitrary, capricious, or contrary to competition.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Agency for Persons with Disabilities enter a final order dismissing Petitioner's protest.

DONE AND ENTERED this 15th day of March, 2005, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of March, 2005.

ENDNOTES

^{1/} The Notice of Intended Award referred to simply APS Healthcare.

^{2/} At hearing, Petitioner also argued that Intervenor's cost proposal was defective in that the grid containing Intervenor's pricing schedule does not include the unit cost and number of units for years two and three of the contract. However, Petitioner, in its Proposed Recommended Order, appears to have abandoned that argument. In any event, the evidence does not establish that this was a requirement of the RFP.

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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.