STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TRANSPORTATION MANAGEMENT SERVICES OF BROWARD, INC.,	)	
Petitioner,	)	
vs.	)	Case No. 05-0920BID
COMMISSION FOR THE TRANSPORTATION DISADVANTAGED,	)	
Respondent,	)	
and	)	
LOGISTICARE SOLUTIONS, LLC,	)	
Intervenor.	)	

RECOMMENDED ORDER

A formal hearing was held before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings in Tallahassee, Florida, on April 4 and 5, 2005.

APPEARANCES

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For Intervenor: Geoffrey D. Smith, Esquire
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STATEMENT OF THE ISSUES

Whether the Notice of Intent issued by the Commission for the Transportation Disadvantaged (Respondent) to award a contract for Medicaid Non-Emergency Transportation Services (Medicaid NET Services) to Medicaid beneficiaries in Broward County to LogistiCare Solutions, LLC (Intervenor) is contrary to Respondent's governing statutes, rules, or policies;

Whether the bid or proposal specifications relating to the receipt and evaluation of the Responses to the Requests for Proposals RFP-DOT-04/05-9021-LG (RFP) was clearly erroneous, contrary to competition, arbitrary, or capricious;

Whether an evaluator was improperly biased or legally unqualified to render a fair and impartial evaluation; and

Whether the provisions of the RFP, Federal law, Chapters 286 and 287, Florida Statutes (2004), or agency policy were violated by the proposed award to Respondent concerning the provision of Medicaid NET Services in Broward County.

PRELIMINARY STATEMENT

This is an administrative proceeding involving a contract procurement protest filed by Transportation Management Services

of Broward, Inc. (Petitioner), as it relates to the proposed decision of Respondent to award a contract to Intervenor to provide non-emergency transportation services to Medicaid recipients in Broward County. Respondent, for purposes of administration, is attached to the Florida Department of Transportation (FDOT).

On January 24, 2005, FDOT posted its Notice of Intent to award a contract for Broward County to Intervenor. On January 25, 2005, Petitioner timely submitted its Notice of Intent to Protest to FDOT and filed its Petition for Formal Administrative Hearing with FDOT on February 3, 2005. Upon the failure of mediation to resolve this matter, FDOT referred this matter to the Division of Administrative Hearings (DOAH) on March 10, 2005.

Upon motion, an Order Granting Intervention to Logisticare, Inc., was entered on March 11, 2005, and expedited discovery ensued.

On April 4, 2005, Intervenor filed a Motion to Amend its Petition for Leave to Intervene based on a scrivener's error, which was considered at the commencement of the formal hearing on April 4, 2005. The Motion to Amend alleged that Intervenor mistakenly filed its Petition for Leave to Intervene under the name Logisticare, Inc., instead of Logisticare Solutions, LLC.

It is found that Logisticare, Inc., is the parent company to Logisticare Solutions, LLC, which is a 100-percent wholly-owned subsidiary of Logisticare, Inc. The Petition for Leave to Intervene clearly states that "Logisticare's substantial interest will be affected by the outcome of this proceeding because it has been awarded the contract through the process being disputed." It was clear from the petition itself that Logisticare Solutions, LLC, was meant to be the intervening party. The fact that Logisticare, Inc.'s, name was on the Petition for Leave to Intervene, rather than Logisticare Solutions, LLC's, name, was a simple error.

On April 4, 2005, at the commencement of the hearing, Petitioner brought an oral Motion to Dismiss Due to Lack of Standing before this tribunal. Petitioner argued that Logisticare, Inc.'s, substantial interests were not at stake in this proceeding, since they were not the real party in interest. The Administrative Law Judge reserved ruling on both of the motions and allowed Intervenor to participate in the hearing.

Upon the evidence, it is clear that the Motion to Amend should be granted and the Motion to Dismiss denied. Craig v. East Pasco Medical Center, Inc., 650 So. 2d 179 (Fla. 2d DCA 1995); Bill Williams Air Conditioning & Heating, Inc. v. Haymarket Cooperative Bank, 592 So. 2d 302 (Fla. 1st DCA 1991).

At the final hearing, the parties stipulated to the admission of Joint Exhibits 1 through 12, 14 through 27, 28-A through C, 29-A, and 29-B. Petitioner presented the oral testimony of Lisa Bacot, Robert Siedlecki, and Lillian Graham in its case-in-chief. Petitioner's Impeachment Exhibit 1 was also admitted into evidence as part of Petitioner's case-in-chief. Respondent presented no oral testimony or exhibits, but participated in the hearing. During its case-in-chief, Intervenor presented the oral testimony of Kirk Gonzalez, but offered no additional exhibits. At the conclusion of the hearing, the parties requested and were granted 20 days from the filing of the transcript in which to file proposed recommended orders.

The three-volume Transcript of the hearing was filed April 9, 2005. Petitioner and Intervenor timely filed Proposed Recommended Orders on April 29, 2005. Respondent has not filed separate proposals as of the date of this Order. The parties' proposals have been carefully considered in preparation of this Recommended Order.

FINDINGS OF FACT

A. Background

1. Respondent is an independent commission of the State of Florida created pursuant to Section 427.012, Florida Statutes (2004), and housed administratively and fiscally within FDOT.

Respondent's address is 605 Suwannee Street, Mail Station 49, Tallahassee, Florida 32399-0450. The stated purpose of the Commission is "to accomplish the coordination of transportation services provided to the transportation disadvantaged." § 427.013, Fla. Stat. (2004). Respondent helps to provide quality, efficient transportation services for people who are transportation disadvantaged, including the elderly, disabled and those on low income. It provides transportation to doctors' offices, hospitals, and other kinds of health care services for people who cannot afford to purchase transportation or cannot drive, for whatever reason.

2. In order to accomplish its purpose, Respondent obtained federal dollars from the United States Department of Health and Human Services to pay for the services described in the RFP.

3. Respondent, through FDOT, issued an RFP for qualified Proposers to provide Medicaid NET Services to Medicaid beneficiaries in Broward County and other counties in Florida.

4. Respondent is required to comply with FDOT's procurement rules, policies, and procedures. FDOT administered the procurement process for Respondent by issuing the solicitation and, otherwise, administratively handling the procurement for Respondent.

5. The Notice of Solicitation for bids was issued, and responses were due on January 4, 2005.

6. Neither party filed a challenge to the terms of the RFP within the 72-hour period after the posting pursuant to Subsection 120.57(3)(b), Florida Statutes (2004).

7. Two entities timely submitted proposals in response to the RFP. Petitioner submitted a proposal in response to the RFP and is a corporation authorized to do business in Florida. Petitioner's business address is 16117 U.S. 19, Clearwater, Florida 33764. Intervenor submitted a proposal in response to the RFP and is a foreign, limited liability, for-profit corporation registered to do business in the State of Florida. Intervenor's principal business address is 1640 Phoenix Boulevard, Suite 200, College Park, Georgia 30349.

8. Oral presentations took place on January 19, 2005, in Tallahassee.

9. On January 25, 2005, FDOT, on behalf of Respondent, posted a Notice of Intent to Award Contract for Medicaid NET Services for Broward County to Intervenor.

10. On January 25, 2005, Petitioner submitted to FDOT a notice indicating its intent to protest the proposed award and filed its timely Petition for Formal Administrative Hearing with FDOT on February 3, 2005. Following mediation, FDOT referred the matter to DOAH on March 10, 2005.

B. The RFP

11. FDOT assisted Respondent administratively in the procurement of Medicaid NET Services described in the RFP. FDOT policies and Chapter 287, Florida Statutes (2004), require written justification when an agency elects to use an RFP as a procurement method, rather than an Invitation to Bid (ITB).

12. Respondent, however, failed to document the need for an RFP, rather than an ITB. However, no challenge was made as to the use of an RFP, rather than an ITB, within 72 hours of the release of the Notice of Solicitation.

13. Respondent, nevertheless, requested written proposals from qualified Proposers to provide Medicaid NET Services to Medicaid beneficiaries in Broward County.

14. According to the RFP, Respondent sought to enter into a one-year contract with providers in Brevard, Broward, and Hillsborough counties for the delivery of transportation services to the transportation disadvantaged.

15. The contract price sheet states that "[t]his is a set price contract for each county, and price proposals are not required."

16. No entity submitting a proposal for provision of Medicaid NET Services in Hillsborough, Brevard, or Broward Counties submitted any price other than the signed price page in each of their proposals. No Proposer filed any protest

regarding the "set" price in the solicitation, and no challenges were made with regard to the contract price until the day of the hearing.

17. The form contract, attached to and incorporated in the RFP, explicitly states that "[r]enewal of the contract shall be in writing and shall be subject to the same terms and conditions set forth in the initial contract."

18. Respondent expected that the original contract would run for a one-year period and that the renewal period would not exceed an additional three years. The RFP further stated that the contract would be renewable "for up to 3 years or the term of the contract, whichever [was] longer."

19. Respondent did not expect Proposers to submit renewal option prices.

20. No Proposer for Hillsborough, Brevard, or Broward Counties submitted any option renewal prices, and all accepted the fact that renewals would be under the same terms and conditions subject to annual appropriation.

21. No Proposer filed any protest regarding the lack of renewal option prices in the solicitation.

C. Proposals

22. The RFP anticipated that Proposers would submit written proposals in response to the request. The RFP defined "Proposer" as the "the prime vendor acting on their own behalf

and those individuals, partnerships, firms, or corporations comprising the Proposer team."

23. The Proposer team consisted of those persons and entities that were referenced in the proposal.

24. Petitioner's Proposer team included various individuals and affiliates with experience providing Medicaid NET Services in Florida. These affiliates included MMG Transportation, Inc., Transportation Management Services of Brevard, Inc., Transportation Contract Services, Inc., and Greater Pinellas Transportation Management Services. Petitioner's Proposer team had good management credentials and experience in the provision of Medicaid NET Services in various parts of Florida. As demonstrated in its proposal and the signed letters of intent contained therein, Petitioner's Proposer team also included subcontractors with experience in providing Medicaid NET Services in Broward County.

25. Intervenor's Proposer team included, among others, its parent company, Logisticare, Inc., and its proposed subcontractors, including AAA Wheelchair Wagon Service, Inc. ("AAA").

26. Intervenor claims it is the largest transportation management company in the United States and the first company to do transportation management brokerage services in association with the Georgia Medicaid Program in 1997. Intervenor operates

in 11 states, has five primary operation centers, approximately 28 to 29 field offices, employs roughly 500 people, and serves approximately six million individual members around the United States. Intervenor provides the full continuum of all potential levels of services that a Medicaid recipient might require from a non-emergency transportation service.

27. Intervenor was established to run transportation operations formerly run directly by Logisticare, Inc. Intervenor was formed as a limited liability company in 1998, as a function of capitalization of Logisticare, Inc. The direct corporate history of Intervenor can be traced back to 1989. The Logisticare companies have had the same management in place for over 15 years. Today, Intervenor is the only "Logisticare" company that has employees and is the sole operating entity.

28. Logisticare, Inc., managed identical Medicaid NET Services for the Broward County program from 1996 through 1999 and substantially similar services to Broward County as early as approximately 1991. Intervenor currently provides Medicaid NET Services for the Miami-Dade area that have taken them to and through Broward County.

29. When describing its past experience providing Medicaid NET Services, Intervenor's proposal simply referred to "Logisticare" and did not clearly distinguish which corporate entity, whether it be Logisticare, Inc., Logisticare Solutions

LLC, or the prior company, Automated Dispatch Systems, which had the prior experience. This is true even though the Broward County experience listed in Intervenor's proposal was gained before Intervenor ever legally existed. In fact, the services were actually performed by a different corporate entity. Intervenor had no direct experience in providing Medicaid NET Services in Broward County.

30. The financial documents in Intervenor's proposal were consolidated financials of several companies, not just the Proposer, but this distinction was not known to at least one of the evaluators because he did not read it.

31. As a result, Intervenor was given full credit for all of the experience and financial capabilities described in its proposal, while the same was not done for Petitioner.

32. Petitioner was a seven-week-old corporation at the time the proposals were evaluated. There was no evidence that Petitioner was a successor entity of any other company or that there was a continuous line of operation leading up to the creation of Petitioner. Petitioner listed some companies as being "in association with" and "affiliated with" them, but its meaning was not defined in its proposal or at the final hearing. No representative of Petitioner testified at the final hearing.

33. Petitioner did not have any prior experience providing Medicaid NET Services in Broward County, nor did it have any

prior experience in providing Medicaid NET Services in the State of Florida.

D. Letters of Intent

34. Both Petitioner and Intervenor listed several entities as potential subcontractors in their proposals through the inclusion of letters of intent to negotiate. Petitioner's proposal included letters of intent from Village Care Service, Inc. ("Village Care"), B&L Service, Inc. ("B&L Service"), and All Broward." Intervenor's proposal included letters of intent from AAA, Village Care, Allied Charter and Tours ("Allied"), and Handi-Van, Inc. ("Handi-Van").

35. The letters of intent state that the entities are interested in providing Medicaid NET Services under subcontract, but the letter of intent itself is not a subcontract. The letters only express intent to enter an agreement if rates and other accepted terms and conditions can be negotiated.

36. It is a common practice for entities that have signed letters of intent with a Proposer to, ultimately, not sign a subcontract with a company. It is also common practice for entities that have not signed letters of intent with a Proposer to subsequently negotiate and sign additional subcontracts for the provision of transportation services.

37. According to Respondent, letters of intent to negotiate could be changed.

38. When establishing Medicaid NET Services in a new area, Intervenor, as a general practice, goes into the existing marketplace of providers to obtain letters of intent from those providers so as to ensure continuity of service so that the Medicaid recipients will not miss a trip. AAA is an existing provider of Medicaid NET Services of Broward County.

39. The fact that AAA notified Intervenor after the Notice of Intent was issued that it will not participate in future provisions of Medicaid NET Services in Broward County and that its last day of providing such services will be May 16, 2005, is irrelevant to this proceeding.

E. Evaluation Committee

40. It was FDOT and Petitioner's intent to evaluate the proposals in a fair, open, and objective manner.

41. In addition, both the RFP and FDOT policies require evaluation committee members to provide fair, open, objective, and uniformly-rated evaluations using the criteria established in the RFP.

42. Respondent established an evaluation committee to review and evaluate the proposals submitted in response to the RFP. This committee consisted of Lisa Bacot, executive director of Respondent; Karen Somerset, assistant director of Programs Evaluation and Oversight of Respondent; and Robert Siedlecki, chairman of the Medicaid Committee of Respondent.

43. Bacot had been involved with one other evaluation of an RFP. Siedlecki had been an evaluator on hundreds of requests for proposals.

44. Siedlecki has been trained by the federal government as an investigator and evaluator of requests for proposals and grants and is a trainer of evaluators on a federal level. He has served on Respondent as a commissioner for nine years. He has served as the chair of the Fraud Prevention Committee and the Insurance Committee and is currently the chair of the Medicaid Committee.

45. Siedlecki has a long, close, extensive, and on-going relationship with Karen Caputo, the owner of AAA and one of the prospective subcontractors identified in Intervenor's proposal at the time he evaluated the proposals.

46. This relationship included:

a. A business association that extends back to 1978, and periods as manager/owner and contractor/subcontractor;

b. Siedlecki's use of free-storage space in a building owned by Caputo at the time of his evaluation;

c. Siedlecki holding a promissory note and receiving payments from Caputo at the time of his evaluation;

d. Co-ownership of a closely-held transportation services corporation, from which both received substantial compensation at the time of his evaluation;

e. Jointly serving as directors for a non-profit corporation;

f. Caputo's previous rentals and purchases of real property from Siedlecki worth hundreds of thousands of dollars; and

e. Siedlecki's sharing office space and fax lines, free of any charge or expense, with AAA at the time of his evaluation.

47. Siedlecki saw and communicated with Caputo on an almost daily basis at the time of his evaluation. These communications included discussions about Caputo's intended actions concerning the services requested in the RFP. Other than Siedlecki, no other evaluator had such information or based their evaluation on such information outside of that described in the proposals and at the Oral Presentations. As a result, Siedlecki knew that AAA was performing approximately 50 percent of the Medicaid NET Services in Broward County when he evaluated the proposals from Petitioner and Intervenor.

48. Siedlecki actively considered these facts and information obtained outside of the RFP and the evaluation process when conducting his review of the submitted proposals.

49. In view of Siedlecki's relationship with Caputo and AAA, there was an appearance of a conflict of interest. He should have recused himself from the evaluation committee when this information became known to him.

F. Evaluation of Proposals

50. The RFP provided a point break-down and a maximum score of 200 points for the evaluation of the proposals.

51. The Technical Proposal points were divided into three categories. These categories were Executive Summary, worth 10 points; Management Plan, worth 60 points; and Technical Plan, worth 30 points.

52. The Oral Presentation points were divided into two categories. These categories were Presentation, worth 70 points, and Questions, worth 30 points.

53. In addition to the points outlined in the RFP, the evaluation committee, subsequently, added evaluation criteria and decided to assign various and previously undisclosed weights to sub-divide the Management Plan points into eight separate criteria which would be evaluated.

54. These newly-weighted criteria were not provided to the Proposers.

55. Nevertheless, the evaluators did not uniformly rate the Technical Proposals as some gave experience credit under the same criteria for all persons described in the Proposer team and others did not. More importantly, it is clear that Siedlecki applied the same criteria differently as to each proposal.

56. The activities of the evaluation committee were also not "open" as some evaluator discussions were not publicly noticed at all and others did not have the required minutes taken to comply with Florida's Sunshine Law requirements.

57. The same evaluation committee also evaluated the Oral Presentations. These evaluations were based on two general point categories as described in the RFP. No uniform or specific criteria were established for use in evaluating the Oral Presentations.

58. The Oral Presentation evaluations were based solely on the subjective criteria of each individual evaluator.

59. The RFP required the committee responsible for evaluating the proposals to "independently evaluate the oral presentations on the criteria established [in this section of the RFP] to assure that orals [were] uniformly rated."

60. Oral Presentations by Petitioner and Intervenor took place on January 19, 2005.

61. During its evaluation of the Oral Presentations, the evaluation committee did not ask the Proposers a uniform set of

questions or, otherwise, use uniform criteria in conducting their evaluations.

62. The evaluation committee did not consider cost as a criteria in the evaluation of the proposals submitted to perform Medicaid NET Services in Broward County, since the RFP called for a set price contract.

63. Siedlecki never read the entire RFP before conducting his evaluations. Specifically, Siedlecki was unaware of the definition of "Proposer" as contained in the RFP and did not apply such definition to his evaluation of Petitioner's proposal. Had Siedlecki known of the definition of "Proposer" in the RFP, by his own testimony, he would have given Petitioner a much higher score.

64. Siedlecki improperly performed the evaluation of Petitioner's and Intervenor's proposals. This resulted in an inconsistent application of the evaluation criteria.

65. Examples of his faulty evaluation include:

a. Failing to read the entire RFP before the evaluations;

b. Failing to read the entire Proposals while conducting his evaluation;

c. Incorrectly assuming Intervenor and Logisticare, Inc., were the same corporate entity;

d. Failing to inquire about the existing legal relationship between Logisticare, Inc., and Intervenor and, yet, granted Intervenor full credit for past work experience it did not actually possess;

e. Applying the same evaluation criteria differently to Petitioner and Intervenor as a result of his faulty assumptions and lack of inquiry; and

f. Failing to consistently apply the term "Proposer" as defined in the RFP, when evaluating the proposals submitted by Petitioner and Intervenor.

66. Siedlecki testified that because of the way that he evaluated Petitioner's proposal, he arrived at a lower score than Petitioner actually deserved.

67. At the conclusion of the flawed evaluation process and out of a possible 200 points to be awarded, the evaluation committee arrived at the following scores for Petitioner and Intervenor:

a. Ms. Bacot: Petitioner - 184 Intervenor - 171

b. Ms. Somerset: Petitioner - 170 Intervenor - 174

c. Mr. Siedlecki: Petitioner - 111 Intervenor - 200

CONCLUSIONS OF LAW

68. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to

Section 120.569 and Subsection 120.57(3), Florida Statutes (2004).

Burden of Proof

69. Subsection 120.57(3)(f), Florida Statutes (2004), reads in relevant 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. . . .

70. The protestor has the burden of proving by a preponderance of the evidence that Respondent's proposed agency action is invalid under the standards set forth in Subsection 120.57(3)(f), Florida Statutes (2004). See § 120.57(1)(j), Fla. Stat. (2004) ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized.") See also State Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

Standing

71. Petitioner has challenged the fundamental fairness of Respondent's procurement process and was "adversely affected" by the alleged flawed process that led to Respondent's proposed agency action and, thus, has standing to file this protest. § 120.57(3), Fla. Stat. (2004).

72. Intervenor, the first-rank bidder, has standing to intervene in this proceeding because its substantial interests will be determined by the challenge to Respondent's intended action, which is to award the contract to Intervenor.

De Novo Proceeding

73. The requirement that the Administrative Law Judge conduct a de novo hearing has been interpreted by the First District Court of Appeal. The court described a de novo hearing in the context of a bid protest as "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. [citations omitted.]" State Contracting and Engineering Corp., 709 So. 2d at 609.

74. As outlined in Subsection 120.57(3)(f), Florida Statutes (2004), the ultimate issue in this proceeding is "whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or

the solicitation specifications." See, e.g., R.N. Expertise, Inc. v. Miami-Dade County School Board, Case No. 01-2663BID (DOAH February 4, 2002) (Final Order March 14, 2002, adopting Recommended Order), where the Administrative Law Judge stated:

> By framing the ultimate issue as being "whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications," it is probable that the legislature, rather than describing a standard of review, intended to establish a standard of conduct for the agency. The standard is: In soliciting and accepting bids or proposals, the agency must obey its governing statutes, rules, and the project specifications. If the agency breaches this standard of conduct, its proposed action is subject to (recommended) reversal by the administrative law judge in a protest proceeding.

Id. at 39.

75. In addition to proving that Respondent breached this statutory standard of conduct, a protester additionally must establish that Respondent's violation was either clearly erroneous, contrary to competition, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat. (2004).

76. Each of these phrases has been construed by Florida's appellate courts. See, e.g., Colbert v. Department of Health, 890 So. 2d 1165 (Fla. 1st DCA 2004) ("[O]ur review standard . . . is that of clearly erroneous, meaning the interpretation will be upheld if the agency's construction falls within the

permissible range of interpretations. [citation omitted.] If, however, the agency's interpretation conflicts with the plain and ordinary intent of the law, judicial deference need not be given to it." [citation omitted.]) Id. at 1166. Agrico Chemical Co. v. State Department of Environmental Regulation, 365 So. 2d 759 (Fla. 1st DCA 1978), cert. denied, 376 So. 2d 74 (Fla. 1979) (A capricious action is one which is taken without thought or reason, or irrationally. An arbitrary decision is one not supported by facts or logic.) Id. at 763.

77. The purpose of competitive bidding requirements for the award of public contracts is to ensure fairness to prospective vendors and to secure the best value at the lowest possible price to the public. The Florida Supreme Court established this as the first paradigm of public procurement in Wester v. Belote, 138 So. 721, 722 (Fla. 1938), where it explained that:

> The object and purpose of competitive bidding statutes is to 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 its various forms; to secure the best values at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the public authorities, by providing an opportunity for an exact comparison of bids.

78. Since federal dollars from the U.S. Health and Human Services Department are funding this procurement, we must also look at relevant federal regulations. Those regulations also require "to the maximum extent practical, open and free competition." 45 C.F.R. § 74.43.

79. Additionally, federal law provides:

> No employee, officer or agent [of the recipient of federal funds] shall participate in the selection, award or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved.

See 45 C.F.R. § 74.42; Medco Behavioral Care Corporation v. State of Iowa Department of Human Services, 553 N.W.2d 556 (Iowa 1996) (holding appearance of conflict of interest sufficient under state and federal law to nullify proposed contract award).

Appearance of Conflict of Interest

80. The on-going business, personal, and professional relationship between Siedlecki (as evaluator) and Caputo (owner of AAA) clearly presents the appearance of a conflict of interest such that Siedlecki, on appearances, may not have been fair, neutral and objective in his evaluation. This results in violations of the specific terms of the RFP, 45 C.F.R. Section 74.42, and Section 287.001, Florida Statutes (2004) (which requires "fair and open competition" in order to "reduce the appearance and opportunity for favoritism and inspire public

confidence"), and the ideals expressed above in the Wester decision.

81. As a result of Siedlecki's extensive and on-going relationship with Caputo and AAA, there was, at a minimum, the appearance of conflict of interest that prohibited him from serving as a fair, neutral, and unbiased evaluator.

Faulty Evaluation Process

82. In addition, the evaluations conducted by Siedlecki were both arbitrary and capricious. First, he failed to even read the entire RFP or to properly apply the definition of "Proposer" contained in the RFP as it applied to Petitioner. As a result, he treated the two Proposers entirely different, while ostensibly applying the same evaluation criteria. Siedlecki gave full credit to Intervenor's Proposer team, but did not do so for Petitioner. He further admitted that had he known the definition of "Proposer" in the RFP and applied it to Petitioner, it would have substantially increased Petitioner's scores. This is true because he viewed Petitioner's Proposer team as being "excellent." A second major flaw in Siedlecki's evaluation process was that he failed to read or understand the financial information provided by Intervenor. He assumed it only related to the Proposer, which it did not.

83. These undisputed facts coupled with the findings of fact set out above, clearly demonstrate that the overall

evaluation process and scoring was tainted by these deficiencies. Given the otherwise close scoring by the other two evaluators, it appears that the overall award of the proposed contract was significantly impacted by these improper actions. See The Wachenhut Corporation v. FDOT, Case No. 94-3160BID (DOAH January 31, 1995).

84. The statutory requirement to place, in writing, the need to use an RFP process, rather than an ITB was not performed by Respondent. As such, the RFP process was improper. Additionally, Subsection 287.057(2)(a), Florida Statutes (2004), also requires that the RFP describe the evaluation criteria and their relative importance. Here, the relative importance of the points awarded for the Management Plan was not established in the RFP. The relative importance was subsequently established by the evaluation committee when score sheets were prepared and points were re-weighted. This also was improper.

85. The same statute further requires that price "shall" be considered in every RFP as one of the evaluation criteria. However, in this instance, the RFP provided for a set price. Therefore, this is not contrary to law. See § 287.057(2)(a) and (b), Fla. Stat. (2004).

86. The policy of the FDOT, the applicable federal regulations referenced above, and Sections 287.001 and 286.011, Florida Statutes (2004), all require the actions of the

evaluation committee to be in the "sunshine" or "open." Here, some of the evaluators' discussions concerning the RFP and their evaluation were not open or in the sunshine as required by law. Specifically, Subsection 286.011(2), Florida Statutes (2004), requires minutes of all evaluative sessions to be "recorded." No such recording occurred here, and as a result, the evaluation process was again improper.

87. Additionally, Siedlecki based his evaluation, in part, on his private discussions with Caputo and her intentions relating to continuation of providing services in Broward County. None of her comments were part of the proposals or the RFP, and, thus, should have been excluded from the evaluation process. All of these actions were, thus, improper.

RECOMMENDATION

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

RECOMMENDED that Respondent, Commission for the Transportation Disadvantaged, reject the award to Intervenor, direct that this matter be re-bid or re-procured through a properly drafted ITB or RFP, and exclude as evaluators all persons with real or apparent conflicts of interest.

DONE AND ENTERED this 20th day of May, 2005, in Tallahassee, Leon County, Florida.

S

DANIEL M. KILBRIDE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of May, 2005.

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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.