STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BAY POINT SCHOOLS, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-1540BID
	)	
DEPARTMENT OF JUVENILE JUSTICE,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Miami, Florida, on June 29-30, 2005.

APPEARANCES

For Petitioner: Joseph Klock, Jr.
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STATEMENT OF THE ISSUE

The issue is whether Petitioner has proved that the challenged provisions in a Request for Proposal for an 88-slot conditional-release program in Circuit 11 are clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

By letter dated March 8, 2005, to Respondent, Petitioner filed a notice of protest, pursuant to Section 120.57(3), Florida Statutes, to various provisions of Respondent's Request for Proposal #K7K01 and Addendum #1. The letter states that a number of provisions of the Request for Proposal vest "unbridled discretion" in Respondent by allowing it to apply "hidden conditions and arbitrarily award the contract with little or no regard for the requirements of the bid specifications." These provisions allegedly include Attachment A--Paragraph 10 and related provisions that allow Respondent, after opening the proposals, to decide whether the offeror must propose a facility; Attachment A--Paragraph 10, Attachment B--Section V, and related provisions that allow Respondent, after opening the proposals, to decide what provisions of the Request for Proposal are material; the definition of "Provider" in Attachment B--Section VI and other provisions in Attachment B--Section XVIII that arbitrarily and capriciously allow an offeror to gain

a scoring advantage, based on its Dun & Bradstreet Supplier Evaluation Report score, without regard to the offeror's ability to perform its obligations, if it were awarded a contract; the definition of "Provider" in Attachment B--Section VI and other provisions in Attachment B--Section XVIII that arbitrarily and capriciously allow an offeror to gain a scoring advantage, based on its Dun & Bradstreet Supplier Evaluation Report score, with respect to its ability to pay its bills, without regard to the possibility that other offerors, with lower net worths, may pay bills later because they rely on checks from the State of Florida; Attachment B--Section VII that reserves the right of Respondent to disqualify any offeror that engaged in any unauthorized contact without a clear explanation of the meaning of unauthorized contact; Attachment B--Section XVII that reserves to Respondent the "unbridled discretion" to decide, after opening bids, which bids conform to the instructions and will be evaluated; the omission of various services and quality-of-service requirements applicable to previous procurements, so as to favor one offeror over the other offerors; the omission of a provision that fully accounts for all children currently participating in the present contract, so as to avoid subjecting these children to significant risk; the omission of points for community support, financial and volunteer service contributions from non-contract sources, and

services provided for children and families for which money is not provided in the contract; the omission of any acknowledgement that Petitioner's residential program is integrated with a specially designed aftercare program that serves 100-200 students.

By Amended Petition for Formal Administrative Hearing and Formal Written Protest of Contract Specifications for RFP #K7K01 and the Proposal Addendum #1 to RFP #K7K01, Petitioner filed a formal written protest to certain provisions of Request for Proposal #K7K01 and Addendum #1. In general, Petitioner alleges that the Request for Proposal and Addendum are contrary to Respondent's rules, designed to favor a particular offeror, vest "unbridled" discretion in Respondent, and are otherwise clearly erroneous, contrary to competition, arbitrary, or capricious.

The formal written protest alleges that, in 2004, Respondent released an earlier request for proposal for the same services--RFP #K5K03. Petitioner alleged that it is capable of performing under the requirements of this request for proposal and that it has provided conditional-release programs in Circuit 11 for over six years. Petitioner alleged that, on August 23, 2004, Respondent improperly proposed to award a contract to another provider. After Petitioner challenged the award, Respondent allegedly withdrew the request for proposal and issued the subject Request for Proposal. While settling the

dispute that arose after the issuance of the earlier request for proposal, Respondent allegedly informed Petitioner that the subject Request for Proposal would address the inter-relationship between Petitioner's conditional release program and its residential program. Consequently, Respondent also allegedly withdrew a request for proposal for a residential program, shortly after it canceled the request for proposal for a conditional release program.

On February 17, 2005, the formal written protest states that Respondent released the subject Request for Proposal, #K7K01. Instead of addressing the inter-relationship between Petitioner's residential and conditional-release programs, the Request for Proposal allegedly contains modifications to the earlier request for proposal that disguise the previously identified deficiencies in the bid process, give Respondent "unbridled" discretion to arbitrarily award the contract to any offeror that Respondent wishes, and eliminate any opportunity for fair competition by tailoring the remaining criteria to the offeror that Respondent had selected in the previous request for proposal. On March 3, 2005, Respondent added Addendum #1, which allegedly demonstrates that it is trying to vest in itself "unbridled" discretion as to whether a proposal meets Respondent's standards regarding a structure.

More particularly, the formal written protest alleges that Request for Proposal #K7K01 and Addendum #1 contain terms, conditions, or specifications that were crafted in bad faith to allow an award to a predetermined offeror by deleting from the earlier request for proposal the requirements of minimum experience levels and certain facilities; that contain several hidden or springing conditions that Respondent may use to support an arbitrary award; that fail to address the need for an inter-relationship between Petitioner's residential and conditional-release programs; and that fail to include appropriate credit for contributions of services and program features that are in excess of those provided by Respondent and important to the integrated conditional-release program operated by Petitioner.

Specific issues of material fact include whether Request for Proposal #K7K01 and Addendum #1 allow Respondent to act arbitrarily and capriciously, thus contravening fair competition and determining scoring criteria after the opening of proposals by reliance on vague, undefined, or springing scoring conditions; whether the Request for Proposal and Addendum erroneously, arbitrarily, capriciously, or in a manner that is contrary to competition allow an offeror to gain a scoring advantage by the credit of its parent or affiliates, even though the parent or affiliates will not incur a corresponding

obligation; whether the Request for Proposal and Addendum erroneously, arbitrarily, capriciously, or in a manner that is contrary to competition allow an offeror to gain a scoring advantage by consideration of a financial/credit profile that bears no relationship to any real credit evaluation; whether the Request for Proposal and Addendum erroneously, arbitrarily, capriciously, or in a manner that is contrary to competition allow an offeror to gain a scoring advantage--as to ten percent of the total available points--by Respondent's reliance on a contractor's evaluation criteria, of which Respondent is without knowledge; whether the failure of the Request for Proposal and Addendum to specify whether a proposal must include a facility is contrary to competition, arbitrary, or capricious because the omission provides an unfair monetary advantage to offerors whose proposals lack a facility and thus require a smaller budget; whether the elimination of various service and quality of service requirements in the Request for Proposal and Addendum is improper, erroneous, arbitrary, capricious, contrary to agency practice or rules, contrary to competition, or designed to give an unfair advantage to predetermined offerors; whether the elimination of various service and quality of service requirements or statements of policy in the Request for Proposal and Addendum are unpromulgated rules that require rulemaking; and whether the Request for Proposal and Addendum violate the

settlement agreement between Petitioner and Respondent that called for an independent inspection and evaluation of Petitioner's program and the inter-relationship between its conditional-release and residential programs.

At the hearing, Petitioner called two witnesses and offered into evidence ten exhibits: Petitioner Exhibits 1-2, 7-8, and 10-15. Respondent called three witnesses and offered into evidence two exhibits: Respondent Exhibits 1-2. All exhibits were admitted.

The court reporter filed the transcript by August 4, 2005. The parties filed proposed recommended orders by August 22, 2005.

FINDINGS OF FACT

1. Since 1995, Petitioner has operated a moderate-risk residential program in Miami for juveniles who have been adjudicated delinquent by a juvenile court. Modeled after a typical boarding school, Petitioner maintains 178 beds at three locations in South Florida and provides full educational and athletic programs for boys aged 13-18 years. The typical student remains in Petitioner's residential program for eight to ten months, at which time he is conditionally released into the community. If he completes the conditional-release period successfully, the releasee is no longer subject to supervision.

2. In addition to, and as part of, the educational and athletic programs, Petitioner provides a behavioral modification program to teach the students how to live as productive members of society and avoid further problems with the juvenile- or criminal-justice system. Using principles of positive reinforcement, the behavior modification program helps each student earn self-esteem by providing a multi-step reward system within the school. By demonstrating good behavior and positive attitudes, each student works his way up to positions of increasing responsibility within the school, such as serving as a tutor or mentor to newer students or eventually serving in student government. Some students may earn the right to represent the school in the community, such as presenting dropout prevention talks to local high schools or civic groups.

3. Petitioner also uses positive reinforcement by allowing students to earn the right to visit their homes on weekends, prior to their release from the residential program. Because of their adjudicated status, the students are not free to come and go as they please. However, consistent with Petitioner's reliance on inducing internal change, rather than coercing external change, the school lacks bars, locked doors, shackled students on off-campus trips, or solitary or punishment cells, which are common features of other schools, boot camps, or lockdown facilities that serve adjudicated juveniles of similar

risk, but apply the correctional, rather than educational, philosophy. Very few of Petitioner's students choose to "escape" from their campus; students are generally deterred from leaving due to the pressure of more senior peers, who have learned to appreciate and value the responsibilities that Petitioner imposes upon them and have, thus, taken a first step toward modifying their behavior in a positive direction.

4. Petitioner's program has generated considerable contributions from the local community. Petitioner receives $700,000 to $800,000 annually from private donations. Entering into partnerships with local businesses, Petitioner provides its students with three-month apprenticeships in local industries, such as hospitality and homebuilding.

5. In 1998, Respondent requested Petitioner to provide an after-care or conditional-release program for students who had finished the residential program. Petitioner agreed to take all boys from Dade and Broward counties who had completed residential programs. Rejecting the traditional after-care program, which is based on classroom contact that requires the releasee to visit the provider's counselor, Petitioner essentially advanced the commencement of family intervention, family therapy, and parenting classes, so that these supportive programs began while the student was still in the residential placement and continued after release--with Petitioner's

counselors visiting the releasee at his home, school or workplace.

6. Petitioner assigns each student in the residential program a conditional-release counselor 60-90 days prior to the student's anticipated release date. The student's conditional-release counselor works in close cooperation with the student's onsite counselor, who works with the student at the school while the student is in the residential program. The student's onsite counselor, teachers, coaches, drug counselors, and mental health counselors give the conditional-release counselor all academic, behavioral, and academic data on the student. The conditional-release counselor also coordinates with the student's juvenile probation officer.

7. Prior to the release of the student, the conditional-release counselor establishes and maintains contact with each student's family by visiting the home and counseling how they can help the student avoid a return to the behavior that caused him to be adjudicated. The conditional-release counselor takes a student home and counsels the family about such things as peer pressure and the proper selection of friends. During these visits, the counselor helps the family set up an acceptable performance plan with academic and behavioral requirements, such as minimum grades to be earned at school and a curfew.

8. After the student is released from the residential program, the conditional-release counselor makes unannounced visits to the student's home, workplace, and school. For the first month following release, the conditional-release counselor meets four times weekly with the parent or guardian and once weekly with the student. For the next five months, the rate of contact is decreased, until it is once weekly with the parent or guardian and once weekly with the student, although the frequency of contact is increased if the student is performing less than satisfactorily. For this six-month period following release from the residential program, if the student is performing satisfactorily, the student's juvenile probation officer, who would normally be required to devote considerable time to the student's case, merely monitors the releasee's progress by reading the reports of the conditional-release counselor.

9. The work of the conditional-release counselor integrates Petitioner's residential and conditional-release programs. Investing considerable time with each student, who typically has not had the benefit of consistency in his support system, the conditional-release counselor earns the trust of each student, usually over a period of three or four months. Because of its good record at retaining counselors, Petitioner ensures that the same counselor is personally involved with a

student for a substantial period of time prior to his release, as well as after his release, and, by this means, Petitioner raises the likelihood of a successful release.

10. Petitioner's program has been successful, largely due to the integration of the residential and conditional-release programs, but also due to Petitioner's resourcefulness. Receiving no state money for substance abuse treatment, even though 85-90 percent of the students enter residential placement with a drug problem, Petitioner provides the necessary resources to the students who need them. Relying on private contributions, Petitioner has also expanded its residential capacity from the 65 slots (roughly equivalent to beds) funded by Respondent under the present contract to 120 slots.

11. In 2004, Petitioner addressed the problem of students who, although eligible for release from residential placement, had nowhere to go. Petitioner started a nonresidential independent living program at fourth campus, also in South Florida. This program is funded privately and is not under Respondent's jurisdiction.

12. However, just prior to the re-location of the independent living program to a new building, one of Respondent's auditors, assigned to audit Petitioner's residential program, instead audited the independent living program and found deficiencies in the facility, for which

Respondent may have had partial responsibility. Based on this audit, Respondent canceled Petitioner's conditional-release contract, but eventually reinstated it, and it remains in effect until the resolution of this dispute and the successful letting of a new contract.

13. Petitioner's record in preparing its students for life after release, without future problems with the law, has been very good, as compared to the record of other providers of residential placements for adjudicated juveniles. The record is not exceptionally well developed on this point, however.

14. Not long after the short-lived termination of Petitioner's conditional-release program, Respondent issued Request for Proposal #K5K03 (First RFP), which sought a provider for a stand-alone conditional-release program. Previously, Respondent had not solicited bids for the conditional-release services that Petitioner had been providing, probably because Petitioner had originally provided these services on a pilot basis and as an adjunct to its residential program.

15. The First RFP required an offeror to identify a specific facility, to produce a minimum success rate of 85 percent of the releasees remaining crime-free for one year after release, and to participate in the "Going Home Grant Re-entry Project." Respondent proposed to award the contract to Eckerd Youth, even though it had failed to meet these three

requirements--most baldly, as for the 85 percent success criterion, Eckerd Youth proposed only 79 percent. Eckerd Youth outscored Petitioner on the First RFP solely due to its higher Dun & Bradstreet score--a factor that is discussed in more detail below, in connection with the present Request for Proposal and Addendum.

16. Petitioner protested the proposed award to Eckerd Youth. In discovery, Petitioner found an earlier draft of the First RFP, which had specified a success rate of 79 percent. The inference is inescapable that the early inclusion of a success rate of 79 percent was to allow Eckerd Youth to compete for the contract. However, the inference is not inescapable that Eckerd Youth representatives communicated their success rate to Respondent's employees while they were drafting the First RFP; it is equally likely that Eckerd Youth's success rate was already known to them. Respondent withdrew the proposed award to Eckerd Youth prior to hearing.

17. On February 17, 2005, Respondent issued Request for Proposal #K7K01, which, as amended by various addenda, is the subject of this case (Second RFP). Although procuring the same conditional-release services sought in the First RFP, the Second RFP omits each of the three above-described requirements of the First RFP.

18. At hearing, Respondent's witnesses persuasively explained that the previous requirements of a facility and participation in a specific grant program had unduly limited the number of potential offerors. This explanation makes sense, given that no offeror is required to use a specific physical location for any purpose besides storing records. Likewise, the Second RFP did not sacrifice anything by not requiring offerors to be participants in the Going Home Grant Re-entry Project at the time of submitting the proposal; the Second RFP allows an offeror to become a participant within 30 days of contract execution.

19. However, Respondent's witnesses could not explain the omission of the 85 percent success criterion or the failure to identify another quantifiable success criterion in its place. The specific language stating the success criterion in the First RFP occurs in the form contract attached to the two requests for proposal.

20. Exhibit 1, Section VIII.C, of the contract attached to the First RFP requires the provider to

> document evidence of compliance with outcome measures as stated below:
>
> 1. A minimum of 100% of all youth shall be developed [sic; based on the language of the form contract attached to the Second RFP, this probably should read "shall have an Individualized Supervision Plan developed"]

> upon admission and reevaluated as the youth progresses through the program.
>
> 2. A minimum of 95% of all youth shall participate in the appropriate educational/academic program, pre-employment and employment skills training, technical or vocational program, individual group and family counseling[,] behavior management systems, and recreational and leisure activities.
>
> 3. A minimum of 85% of the youth admitted to the conditional release program shall successfully complete the program by direct discharge.
>
> 4. A minimum of 85% of the youth placed in the conditional release program shall remain crime free during their supervision.
>
> 5. A minimum of 85% of youth released from the conditional release program shall remain crime free for one year after release.

21. Exhibit 1, Section VIII.B, of the contract attached to the Second RFP is identical (or identical after corrections) as to paragraphs 1, 2, and 3 of the contract attached to the First RFP. The contract attached to the Second RFP omits paragraphs 4 and 5 of the First RFP's contract and adds two new paragraphs, which due to re-numbering are as follows:

> 2. 100% of the youth shall have a face-to-face contact with his/her assigned Case Manager within 24 hours (excluding weekends and legal holidays) of the youth's return home from the commitment program.
>
> 5. 100% of the youth files shall document that the Case Manager reviews the supervision plans with the youth every 14

calendar days and with the youth and parent/guardian every 30 calendar days.

22. Disclosing that the mission of Respondent is to reduce juvenile crime, one of Respondent's witnesses, Genanne Wilson, Operations and Management Consultant Manager, admitted the superiority of the measurement of outputs rather than inputs when applying performance measures. Another of Respondent's witnesses, Perry Anderson, who is Regional Director South of Juvenile Probation and Community Services, was left the task of harmonizing the role of performance measures in achieving Respondent's mission with the removal of any quantifiable success criterion from the Second RFP.

23. Mr. Perry provided a working definition of recidivism as the ability of a releasee to remain free of any conviction or adjudication of any misdemeanor or felony committed during the first year after release. However, he tried to justify the omission of a quantifiable success criterion, such as 85 percent of the releasees remaining crime free for one year after release, by citing the difficulty of obtaining good data concerning a releasee's subsequent criminal record. Later in his testimony, Mr. Perry backed off this claim and conceded that Respondent has started to look at evidence-based outcomes.

24. Toward the end of his testimony, Mr. Perry revealed why Petitioner has fallen into disfavor among certain of

Respondent's employees. A conditional-release provider in Florida City is 35 percent below capacity because Petitioner, relying on private donations, serves more students than Respondent pays it to serve. Pressed to explain the importance of bringing the Florida City program up to capacity, Mr. Perry testified that the Florida City program is closer to the homes of some conditional releasees now served by Petitioner. However, Mr. Perry failed to credit the fact that Petitioner's location is irrelevant to these releasees because, unlike the situation in a conventional program, Petitioner's counselors travel to the releasees--the releasees do not travel to Petitioner's counselors.

25. Confronted with the fact that the inclusion of remote releasees in Petitioner's conditional-release program might be a hardship to Petitioner's conditional-release counselors, but would not be a hardship to the releasees, Mr. Perry added a couple more reasons why it was important for Petitioner to share its slots with other conditional-release providers. First, he claimed that Respondent's needs are unmet by the integration of a conditional-release program with a residential program. This point does not address why it is necessary to spread around the conditional-release business. Second, Mr. Perry claimed that, by serving double the number of students for which it is paid, Petitioner may not be able to serve its students appropriately.

This point, which, if true, would justify spreading around the conditional-release business, lacks support in the present record.

26. In evaluating the Second RFP in terms of its imposition of any measurable success criterion, other provisions require consideration. Section VII.AB.1 and 2 of the contract attached to the Second RFP provides, in identical language to that found in the contract attached to the First RFP (at Section VII.AA.1 and 2), that:

> AB. Quality Assurance Standards
>
> 1. The Department will evaluate the Provider's program, in accordance with section 985.412, Florida Statutes, to determine if the Provider is meeting minimum thresholds of performance pursuant to quality assurance standards.
>
> 2. The [P]rovider shall achieve and maintain at least an overall performance rating in the "minimal" range for applicable quality assurance standards. Failure to achieve at least an overall performance rating in the "minimal" range shall cause the Department to conduct a second quality assurance review, within six (6) months. Such failure shall cause the Department to cancel the [P]rovider's contract unless the [P]rovider achieves compliance with minimum thresholds within six (6) months or unless there are documented extenuating circumstances. In addition, the Department may not contract with the same [P]rovider for the canceled service for a period of twelve (12) months.

27. An obvious shortcoming of the provisions cited in the preceding paragraph is that they promise a future undertaking by Respondent to establish performance standards for the conditional-release contract. However, these paragraphs imply--correctly--that Respondent is choosing not to identify the performance standard prior to entering into the contract, risking instead a disruption in the delivery of services if the provider that wins this contract is unable to meet Respondent's performance standards.

28. Section IV.B of the contract attached to the Second RFP, as well as Section IV.B of the contract attached to the First RFP, provides that Respondent may terminate the contract, "without cause [and] for its convenience" on 30 days' notice. Given the specificity of the contract language cited in Section VII.AB.1 and 2, its explicit focus on provider nonperformance, and its provision for a cure period, it is unlikely that Respondent may rely on Section IV.B to terminate a provider for a failure to meet performance standards.

29. As Petitioner objects to these three items that the Second RFP omits or changes, when compared to the First RFP, so does Petitioner object to an item that the Second RFP carries forward from the First RFP--the Dun & Bradstreet (D&B) Supplier Qualification Report (SQR) score. Section XVIII.D.2 of

Attachment B of the Second RFP instructs the offerors as follows:

> Supplier Qualification Report (SQR) . . .
>
> a. The Department will assign evaluation points on the prospective Provider's financial capability to perform the services outlined in this RFP. **The Department requires submission of the prospective Provider's Supplier Qualifier Report (SQR) prepared by Dun & Bradstreet (D&B).** The Supplier Qualifier Report is a standard report detailing financial and operational capability. . . .
>
> * * *

30. As in the First RFP, Attachment D of the Second RFP states that the SQR score accounts for 100 of the 1000 points available for most offerors. Attachment D explains that an SQR score of 1, which is the lowest risk, earns 100 points. For each point of higher risk, the offeror loses 10 points, except that the offeror receives no points if its score is 9, which is the highest risk.

31. The SQR score is a matter of considerable importance to Petitioner. It is the only measure of financial responsibility of an offeror and counts equally with an offeror's price. (As did the First RFP, the Second RFP presents a maximum contract price--for the Second RFP, this price is $934,370.80. The proposal offering the lowest price receives 100 points, and the remaining proposals receive points in

indirect proportion to their variance from the lowest price.) In the award process for the First RFP, Petitioner lost to Eckerd Youth only due to the latter's superior score on the SQR, which was the only item for which Eckerd Youth received a higher score than Petitioner.

32. A D&B sales manager, Michael Kohrt, testified about the SQR, but only in generalities because D&B protects the confidentiality of the proprietary formula that it uses to produce an SQR. Mr. Kohrt could testify only that the SQR measures how long an entity has been in business, its timeliness in paying its bills, as well as unspecified other factors, and applies them in a formula that he was not at liberty to describe. Mr. Kohrt testified that the SQR does not rely on the size of an entity, the amount of its revenue, or the financial resources of its parent corporation. However, on cross-examination, Mr. Kohrt had to admit that, if a better-capitalized entity chose to pay its payables out of capital, rather than from receivables that it had not yet collected, this entity would receive a higher SQR score than the entity that lacked the assets to do so, but instead had to wait until it had collected sufficient receivables to pay the payable.

33. Ms. Wilson offered two reasons for using D&B's SQR for evaluating the financial responsibility of an offeror--one good and one not good. The legitimate reason is that Respondent may

not have employees with the necessary competence to read and understand financial statements; this explanation justifies why Respondent has elected not to perform this task with its employees. However, Ms. Wilson testified that outside certified public accountants were not generally available due to conflicts; this explanation is unsupported by the record.

34. Despite its good intentions, Respondent may not delegate ten percent of the points to be awarded in this procurement to an outside contractor that declines to identify the factors that generate a score. In such a case, potential offerors cannot inform themselves of how they can better arrange their financial affairs so as to earn more points, nor can they make informed decisions as to whether to expend the funds to prepare proposals. Hidden criteria, even though applied by a reputable entity like D&B, impedes the procurement process, whether the criteria apply to the financial section or the technical section of a request for proposal.

35. On the other hand, little merit attaches to one basis of Petitioner's challenge to Respondent's use of the SQR or, by inference, any other measure of the timeliness with which an offeror pays its bills. Petitioner incorrectly contends that measuring the timeliness of payment is of no value for an entity, such as Petitioner, that pays its payables as it receives its receivables--essentially, all from the State of

Florida. This argument ignores the possibility--not applicable to Petitioner, of course--that a State vendor might divert some of its receivables from their proper destination--the vendor's creditors.

36. Petitioner objects to other provisions in the Second RFP. Three of these reserve the right to Respondent to waive any "minor irregularity" (Attachment A.15), to modify "non-material terms of the RFP" (Attachment B.IV.E), or to "seek clarifications or request any information deemed necessary for proper evaluation of submissions" (Attachment A.14). These objections are to provisions whose potential to influence the award process, in such a way as to confer a competitive advantage upon one offeror over another, is nil, pursuant to case law.

37. More substantive objections of Petitioner are to the Second RFP's procurement of conditional-release services distinct from the procurement of residential services. The record amply demonstrates that the integration of these programs has been an important part of Petitioner's success, but nothing in the record precludes Respondent, in the exercise of its discretion in procuring these services, to separate these programs. The other "omissions" of which Petitioner complains, such as the failure to credit experience or community contributions, also fall within Respondent's discretion.

CONCLUSIONS OF LAW

38. The Division of Administrative Hearings has jurisdiction over the subject matter. § 120.57(3)(e), Fla. Stat.(2005). Section 120.57(3)(b), Florida Statutes, provides for a potential offeror to challenge of provisions of a request for proposal, and Petitioner, in doing so, has met all of the applicable statutory deadlines.

39. Section 120.57(3)(f), Florida Statutes, provides:

> . . . 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. . . .

40. Petitioner has proved that the Second RFP is clearly erroneous and contrary to competition with respect to the omission of any success criterion, expressed as a percentage of releasees not convicted or adjudicated of any crime within a specified period, such as one year, after completion of the conditional-release program. Petitioner has also proved that the omission of any success criterion is contrary to Respondent's governing statutes.

41. Section 985.412, Florida Statutes, provides:

> (1) It is the intent of the Legislature that the department:
>
> (a) Ensure that information be provided to decisionmakers in a timely manner so that resources are allocated to programs of the department which achieve desired performance levels.
>
> (b) Provide information about the cost of such programs and their differential effectiveness so that the quality of such programs can be compared and improvements made continually.
>
> (c) Provide information to aid in developing related policy issues and concerns.
>
> (d) Provide information to the public about the effectiveness of such programs in meeting established goals and objectives.
>
> (e) Provide a basis for a system of accountability so that each client is afforded the best programs to meet his or her needs.
>
> (f) Improve service delivery to clients.
>
> (g) Modify or eliminate activities that are not effective.
>
> (2) As used in this section, the term:
>
> * * *
>
> (b) "Program component" means an aggregation of generally related objectives which, because of their special character, related workload, and interrelated output, can logically be considered an entity for purposes of organization, management, accounting, reporting, and budgeting.
>
> (c) "Program effectiveness" means the ability of the program to achieve desired client outcomes, goals, and objectives.
>
> * * *
>
> (5) The department shall:

(a) Establish a comprehensive quality assurance system for each program operated by the department or operated by a provider under contract with the department. Each contract entered into by the department must provide for quality assurance.

(b) Provide operational definitions of and criteria for quality assurance for each specific program component.

(c) Establish quality assurance goals and objectives for each specific program component.

(d) Establish the information and specific data elements required for the quality assurance program.

(e) Develop a quality assurance manual of specific, standardized terminology and procedures to be followed by each program.

(f) Evaluate each program operated by the department or a provider under a contract with the department and establish minimum thresholds for each program component. If a provider fails to meet the established minimum thresholds, such failure shall cause the department to cancel the provider's contract unless the provider achieves compliance with minimum thresholds within 6 months or unless there are documented extenuating circumstances. In addition, the department may not contract with the same provider for the canceled service for a period of 12 months. . . .

The department shall submit an annual report to the President of the Senate, the Speaker of the House of Representatives, the Minority Leader of each house of the Legislature, the appropriate substantive and fiscal committees of each house of the Legislature, and the Governor, no later than February 1 of each year. The annual report must contain, at a minimum, for each specific program component: a comprehensive description of the population served by the program; a specific description of the services provided by the program; cost; a comparison of expenditures to federal and state funding; immediate and long-range

> concerns; and recommendations to maintain, expand, improve, modify, or eliminate each program component so that changes in services lead to enhancement in program quality. The department shall ensure the reliability and validity of the information contained in the report.
>
> (6) The department shall collect and analyze available statistical data for the purpose of ongoing evaluation of all programs. The department shall provide the Legislature with necessary information and reports to enable the Legislature to make informed decisions regarding the effectiveness of, and any needed changes in, services, programs, policies, and laws.
>
> (7) No later than November 1, 2001, the department shall submit a proposal to the Legislature concerning funding incentives and disincentives for the department and for providers under contract with the department. The recommendations for funding incentives and disincentives shall be based upon both quality assurance performance and cost-effectiveness performance. The proposal should strive to achieve consistency in incentives and disincentives for both department-operated and contractor-provided programs. The department may include recommendations for the use of liquidated damages in the proposal; however, the department is not presently authorized to contract for liquidated damages in non-hardware-secure facilities until January 1, 2002.

42. Section 985.03(13), Florida Statutes, leaves no doubt as to the purpose of conditional-release programs in reducing recidivism:

> "Conditional release" means the care, treatment, help, and supervision provided to a juvenile released from a residential

> commitment program which is intended to promote rehabilitation and prevent recidivism. The purpose of conditional release is to protect the public, reduce recidivism, increase responsible productive behavior, and provide for a successful transition of the youth from the department to the family. Conditional release includes, but is not limited to, nonresidential community-based programs.

43. Section 985.404(10)(d), Florida Statutes, acknowledges the importance of enlisting the cooperation of providers in complying with quality assurance requirements and, evidently a separate issue, evaluating program outcomes:

> Each programmatic, residential, and service contract or agreement entered into by the department must include a cooperation clause for purposes of complying with the department's quality assurance requirements, cost-accounting requirements, and the program outcome evaluation requirements.

44. The Legislature has spoken and has not left the identification of enforceable performance measures, in procurement documents, to Respondent's discretion. The Second RFP disserves these clear Legislative directives by the omission of a success criterion based on recidivism. Section 985.412(2)(b), Florida Statutes, focuses on outputs, like success rates, not inputs, like the percentage of releasees who receive plans, have face-to-face contacts, participate in education or training programs, or even complete the program. The success criterion of interest to the law-abiding public,

which is a factor under Section 985.03(13), Florida Statutes, is one: recidivism, not how much effort a provider put into its program. Respondent's attempt to fold this performance criterion into some vague assurance of compliance with an as-yet-unstated quality-assurance criteria-set obscures the distinction, as recognized in Section 985.404(10)(d), Florida Statutes, between quality assurance and evaluative criteria and defies the mandate of Section 985.412(5), Florida Statutes, to establish clear performance standards now, so they can be incorporated into the contract and enforced by Respondent against the provider and the Legislative against Respondent. This statutory authority does not support the deferral of the identification of enforceable performance standards, when they can only be awkwardly superimposed on an existing contract.

45. For the same reasons, the omission of an enforceable success criterion is contrary to competition. The competition to which Section 120.57(3)(f), Florida Statutes, refers is not limited to the competition among offerors seeking to do business with the State of Florida, but it extends to the services that Respondent is procuring and the efficiency with which providers serve the releasees and, indirectly, the public. A request for proposal that restricts itself to measuring inputs, especially when data about outputs in the form of recidivism are so readily available, is contrary to competition.

46. Petitioner has proved that the Second RFP is clearly erroneous, contrary to competition, arbitrary, and capricious by delegating the scoring of the financial-responsibility section of the Second RFP to D&B, pursuant to an undisclosed formula with factors whose weight is unknown to Respondent or its offerors and insulated from meaningful review in a bid-protest proceeding. Florida law entitles parties participating in public procurement to challenge the specifications by which their proposals or bids will be evaluated--as has occurred in this case--or the application of these specifications in the evaluation of their proposals or bids. These important rights may not be abridged by Respondent's use of the proprietary SQR score, which essentially requires interested persons to trust that D&B has compiled a formula that fairly accounts for the financial-responsibility factors of legitimate interest in a particular procurement, to trust that D&B obtained accurate data on each offeror or bidder, to trust that D&B accurately applied the data to the formula, and to trust that D&B accurately conveyed the SQR scores to Respondent. Respondent's commendable desire to obtain an informed, disinterested evaluation of the relevant financial-responsibility characteristics of each offeror may be served by a variety of alternatives, such as by stating the factors and their weight in a request for proposal and informing the offerors that this part of the evaluation will

be scored by a certified public accounting or accounting firm or using a modified SQR formula, if D&B could prepare such a formula that it would subject to the rigorous scrutiny that attaches to public procurements in the State of Florida.

47. Petitioner has failed to prove that any other provisions of the Second RFP fail to comply with applicable law.

RECOMMENDATION

It is

RECOMMENDED that the Department of Juvenile Justice enter a final order sustaining the formal written protest to the Second RFP, but only as to its omission of any success criterion based on recidivism rates and its delegation of the scoring of the financial-responsibility section of the request for proposal to Dun & Bradstreet, based on an undisclosed formula using factors with undisclosed weights.

DONE AND ENTERED this 4th day of October, 2005, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
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this 4th day of October, 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 must be filed with the agency that will issue the final order in this case.